THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANTIGUA AND BARBUDA

ANUHCVAP2015/0026

BETWEEN:

CARL BAYNES

Appellant

and

ED MEYER

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mde. Gertel Thom — Justice of Appeal
The Hon. Mr. Paul Webster, QC — Justice of Appeal [Ag.]

On Written Submissions:

Mr. Hugh C. Marshall for the Appellant
Dr. David Dorsett for the Respondent

2016: May 30.

Interlocutory appeal – Breach of statutory duty – Whether breach of statutory duty which prescribes criminal sanction may additionally give rise to civil claim for damages in negligence for breach of statutory duty – Motor Vehicles Insurance (Third-Party Risks) Act – Default judgment – Setting aside of default judgment – Exceptional circumstances – What amounts to 'exceptional circumstances' for purpose of CPR 13.3(2) – Whether averments of vicarious liability sufficiently pleaded by appellant so as to sustain claim in negligence on basis of vicarious liability against respondent

The appellant, Mr. Baynes, applied for and obtained a default judgment on a personal injury claim which he had brought against the respondent, Mr. Meyer. Mr. Baynes had sought damages for personal injury and loss which he claimed he suffered as a result of the negligent driving by one Mr. Hernandez, as the servant of Mr. Meyer, of a motor vehicle said to be owned by Mr. Meyer. Mr. Baynes also averred in his statement of claim that Mr. Meyer owed all third parties, and in particular, him (Mr. Baynes), a duty of care to ensure that there was in place, a policy of insurance in respect of Mr. Hernandez which met the requirements of the Motor Vehicles Insurance (Third-Party Risks) Act ("the Act").[1] Section 3(1) of the Act provided that 'it shall not be lawful for any person to use, or cause

[1] Cap. 288, Revised Laws of Antigua and Barbuda 1992.

or permit any other person to use, a motor vehicle on a public road unless there is in force in relation to the user of the motor 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'. Subsection (2) of section 3 imposed a criminal sanction on any person who contravened section 3 of the Act. Although Mr. Baynes did not claim against Mr. Hernandez, he did aver particulars of negligence against him in respect of his negligent driving of the motor vehicle on the road. Mr. Baynes did not repeat in his statement of claim that Mr. Hernandez was driving the motor vehicle as the servant or agent of Mr. Meyer. He asserted, however, that as a result of Mr. Meyer's negligence and/or breach of statutory duty, he (Mr. Baynes) was unable to recover any of his losses as provided for under the Act. The particulars of Mr. Meyer's breach of statutory duty as set out by Mr. Baynes included that he had '[allowed] his uninsured vehicle to be used on a public road' and also that he had '[allowed] his uninsured vehicle to be used and operated by a person not covered by the policy of insurance applicable to said vehicle'.

Although Mr. Meyer acknowledged service of the claim on him, he failed to file and serve a defence within the time limit prescribed by the Rules. Mr. Baynes applied for and obtained judgment in default of defence on 4th July 2014 pursuant to CPR Part 12. Mr. Meyer applied to set aside the default judgment on 3rd October 2014. The application appeared to have been made pursuant to CPR 13.3(1) and CPR 13.3(2). CPR 13.3(1) contains three conditions, all of which must be satisfied in order to succeed in setting aside a default judgment while CPR 13.3(2) gives the court a discretion to set aside the default judgment if the defendant satisfies the court that there are 'exceptional circumstances'.

Mr. Meyer stated in his application that exceptional circumstances arose in this matter, which went to the bases of the claim. He stated that these circumstances were that the judgment obtained by Mr. Baynes is contrary to law because: a) it is 'one in which the civil law is being employed to enforce the criminal law' when 'the criminal law is best enforced directly by courts of criminal jurisdiction'; b) the appellant 'as a matter of law is not entitled to judgment as it is not the law that ipso facto the owner of a motor vehicle is responsible for all injury or damage done by a driver who is alleged to have driven the motor vehicle in a negligent manner' and '[i]n any event, the defendant was not at the material time the owner of the vehicle alleged to be involved in the accident'; c) '[t]he default judgment in essence is [based on an action in] negligence against the Defendant when the pleadings disclose that the negligent acts were committed by a non-party, namely, Luis Hernandez' and d) '[j]udgment has been granted in a case where there is no allegation that the alleged negligent driver was the servant or agent of the Defendant'.

The learned master found that Mr. Meyer only satisfied one of the conditions under CPR 13.3(1) and so could not succeed on that basis. However, in considering CPR 13.3(2), he concluded that Parliament had not intended that the breach of section 3 of the Act gave rise to an actionable private law claim and that '[t]here is nothing therein to suggest that Parliament intended enforcement of the section by any other means than the instituting of criminal charges and the imposition of the stated penalties for violating the terms thereof'. The learned master accordingly held that Mr. Baynes 'could not bring' the claim against Mr. Meyer. He further concluded that Mr. Baynes had made no averment in his claim to the effect that Mr. Hernandez, at the material time, was the servant or agent of Mr. Meyer

so as to ground a claim on the basis of vicarious liability. The learned master concluded that these matters were compelling reasons for permitting Mr. Meyer to defend the proceedings in which Mr. Baynes had obtained the default judgment and thus amounted to exceptional circumstances warranting the setting aside of the default judgment. The learned master opined that these matters went to the core of the action and 'may, in all likelihood, result in the dismissal of the claim'. Mr. Baynes appealed to this Court, arguing that the learned master had erred in law in reaching his decision.

Held: allowing the appeal and setting aside the learned master's order (save his order for costs) and restoring the default judgment entered for Mr. Baynes, and further ordering that Mr. Meyer bear the costs of this appeal fixed in the sum of $2,000.00, that:

1. The general rule is that where an Act creates an obligation, and enforces the performance of this obligation in a specified manner, that performance cannot be enforced in any other manner. However, where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence of failure to perform the statutory obligation or for contravening the statutory prohibition which the Act creates, there are two classes of exception to the general rule. The first is where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals. In this instance, there may be a private right of action since there is otherwise no method of securing the protection of the limited class of individuals, which the statute was intended to confer. The second exception is where statute creates a public right and a particular member of the public suffers what may be described as particular, direct and substantial damage, other and different from that which was common to all the rest of the public. In the present case, the object of the Motor Vehicles Insurance (Third-Party Risks) Act was to impose an obligation for the benefit or protection of a particular class of individuals, namely, third party users of the road who it could be reasonably foreseen were likely to suffer damage, injury or loss by the use of a motor vehicle on a public road and to ensure that in relation to such damage, injury or loss, such party could be assured of a fund to which he/she could look for compensation. Parliament imposed a criminal sanction for breach of this obligation because of the seriousness of the obligation. The learned master accordingly erred in his construction of section 3 of the Act, which led him to make the erroneous finding that Parliament had not intended that the breach of said section would give rise to an actionable private law claim.

   Lonrho Ltd. and Another v Shell Petroleum Co. Ltd. and Another (No. 2) [1982] AC 173 applied; X (Minors) v Bedfordshire County Council [1995] 2 AC 633 applied; Monk v Warbey and Others [1935] 1 KB 75 applied.

2. The errors made by the learned master in construing the Act led him into further error in holding that Mr. Baynes' claim was not actionable, thus making it an exceptional circumstance warranting the setting aside of the otherwise regularly obtained default judgment under CPR 13.3(2). Mr. Baynes' claim in relation to the Act was, in fact, properly maintainable. This error made by the learned master

was an error in principle which accordingly permits the Court of Appeal to interfere with the exercise of his discretion.

3. In circumstances where one may bring a private law claim for breach of a statutory duty to not permit one's motor vehicle to be used by a person who is not insured against third party risks, establishing impecuniosity on the part of the negligent uninsured driver of the motor vehicle is not a condition precedent to maintaining the claim. Further, the injured third party may sue the owner of the car directly for damages for breach of his statutory duty and need not first sue the uninsured driver of the vehicle.

   Bretton v Hancock [2005] EWCA Civ 404 applied.

4. Although Mr. Baynes did not repeat in his statement of claim that Mr. Hernandez was driving the motor vehicle as the servant or agent of Mr. Meyer, this does not justify a total disregard for the statements contained in the amended claim form itself, and permit the learned master to find that no averment had been made to the effect that Mr. Hernandez was driving at the material time as the servant or agent of Mr. Meyer. Mr. Meyer did in fact plead in the first paragraph of the amended claim that the claim was 'for personal injury and loss suffered arising from a motor vehicle accident on or about 25th July 2011 caused by the negligence of the Defendant's servant, one Luis Hernandez, whilst acting in the course of service to the Defendant'. The learned master accordingly fell into error in so holding and fell into further error in treating this factor as fatal to Mr. Baynes' claim, such as to amount to an exceptional circumstance warranting the setting aside of the default judgment. Mr. Baynes' claim on the basis of vicarious liability was also properly maintainable.

5. Proof of ownership of the vehicle or the allegation that Mr. Meyer was not the owner of the vehicle at the relevant time is not a factor which would amount to an exceptional circumstance and this is so even if the learned master had found that the evidence pointed to Mr. Meyer not being the owner. Such an averment could have only gone to a consideration of whether the defence may have been considered to have realistic prospects of success under CPR 13.3(1)(c).

6. What amounts to an exceptional circumstance is not defined by the Rules and must be decided on a case by case basis. Generally speaking however, an exceptional circumstance must be something more than simply showing that a defence put forward has a realistic prospect of success. CPR 13.3(2) is intended to be reserved for cases where the circumstances may be said to be truly exceptional, warranting a claimant being deprived of his judgment where an applicant has failed to satisfy rule 13.3(1). Examples include where it can be shown that the claim is not maintainable as a matter of law, or one which is bound to fail, or one with a high degree of certainty that the claim would fail, or the defence being put forward is certain to defeat the claim, or where the remedy

sought or granted was not one available to the claimant. This list is not meant to be exhaustive.

Elvis Wyre (Personal Legal Representative of the Estate of Arnold Wyre, Deceased) et al v Alvin G. Edwards et al ANUHCVAP2014/0008 (delivered 3rd September 2014, unreported) followed.

JUDGMENT

[1] PEREIRA, CJ: This interlocutory appeal raises the issue whether breach of a statutory duty which prescribes a criminal sanction may additionally give rise to a civil claim for damages in negligence for breach of that statutory duty. If the answer to that question is yes, then this Court must decide whether the learned master erred in setting aside a default judgment obtained by the appellant ("Mr. Baynes") against the respondent ("Mr. Meyer") on the basis that Mr. Meyer had established exceptional circumstances in reliance upon rule 13.3(2) of the Civil Procedure Rules 2000 ("CPR") warranting the setting aside of the judgment for damages to be assessed which had otherwise been regularly obtained.

The Background

[2] Mr. Baynes filed a claim against Mr. Meyer seeking damages for personal injury and loss suffered as a result of the negligent driving by one Mr. Hernandez, as the servant of Mr. Meyer, of a motor vehicle said to be owned by Mr. Meyer.[2] Mr. Baynes also averred in his statement of claim that Mr. Meyer owed all third parties, and in particular, Mr. Baynes (being the claimant), a duty of care to ensure that there was in place a policy of insurance in respect of Mr. Hernandez which met the requirements of the Motor Vehicles Insurance (Third-Party Risks) Act[3] ("the Act").

[3] Mr. Baynes averred particulars of negligence against Mr. Hernandez in respect of his negligent driving of the motor vehicle on the road but did not claim against

[2] See. para. 1 of the amended claim form.
[3] Cap. 288, Revised Laws of Antigua and Barbuda 1992.

Mr. Hernandez. Also, Mr. Baynes did not repeat in his statement of claim that Mr. Hernandez was driving the motor vehicle as the servant or agent of Mr. Meyer. He asserted however, as a result of Mr. Meyer's negligence and/or breach of statutory duty that he was unable to recover any of his losses as provided for under the Act. He gave particulars of Mr. Meyer's breach of statutory duty which included the following:

(i) allowing his uninsured vehicle to be used on a public road;

(ii) allowing his uninsured vehicle to be used and operated by a person not covered by the policy of insurance applicable to said vehicle.

[4] Mr. Baynes also particularised his injuries which need not be set out for the purposes of this appeal.

[5] Mr. Meyer, after acknowledging service of the claim on him, failed to file and serve a defence to the claim within the time limited for so doing. As a result, Mr. Baynes obtained judgment in default of defence on 4th July 2014 under Part 12 of CPR. Mr. Meyer, it seems, became aware of the default judgment on 18th July 2014 when the process server attempted to serve it upon him which he apparently refused. The process server sought to serve him again with the default judgment on 4th August 2014 and although refusing to receive the document from the hand of the process server, it was left with him on his desk at his office.

[6] It was not until 3rd October 2014 that Mr. Meyer applied to set aside the default judgment. His application, though not expressed, appears to have been mounted on the twin pillars of CPR 13.3(1) and 13.3(2). CPR 13.3(1) says in effect that the court may set aside a judgment obtained in default:

> "… only if the defendant –
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> (a) applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
>
> (b) gives a good explanation for the failure to file … a defence … ; and
>
> (c) has a real prospect of successfully defending the claim."

It is well established by the case law of this Court as to be considered trite, that these three conditions are cumulative. In short, all three must be satisfied.

[7] The learned master held that Mr. Meyer had failed to satisfy conditions (a) and (b) above but was of the view that Mr. Meyer's defence was 'quite formidable and stands a real chance of succeeding'.[4] He felt constrained to rule, however, that the application must fail under sub rule (1) as all three conditions had not been satisfied. He therefore turned to consider the application under sub rule (2) of CPR 13.3 which says: 'In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances'.

[8] I should now set out, the basis which Mr. Meyer asserted in his application amounted to exceptional circumstances which is the focus of this appeal. He stated that:

> "Exceptional circumstances arise in and attend to the matter, circumstances that go to the bases of the claim, namely, the judgment obtained is contrary to law in that:
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> a. The default judgment is one in which the civil law is being employed to enforce the criminal law, when it is the case that the criminal law is best enforced directly by courts of criminal jurisdiction;
> b. The Claimant as a matter of law is not entitled to judgment as it is not the law that ipso facto the owner of a motor vehicle is responsible for all injury or damage done by a driver who is alleged to have driven the motor vehicle in a negligent manner. In any event, the defendant was not at the material time the owner of the vehicle alleged to be involved in the accident.
> c. The default judgment in essence is of that of negligence against the Defendant when the pleadings disclose that the negligent acts were committed by a non-party, namely, Luis Hernandez;
> d. Judgment has been granted in a case where there is no allegation that the alleged negligent driver was the servant or agent of the Defendant ...."

[4] See para. 24 of the learned master's written decision.

[9] The learned master concluded in effect that:

(i) Parliament had not intended that the breach of section 3 of the Act gave rise to an actionable private law claim. He thus concluded at paragraph 29 of his decision that Mr. Baynes 'could not bring this action'.

(ii) Mr. Baynes had made no averment in his claim to the effect that Mr. Hernandez, at the material time, was the servant or agent of Mr. Meyer so as to ground a claim on the basis of vicarious liability.

[10] The learned master then considered the case law from this jurisdiction providing guidance as to what may be considered as amounting to exceptional circumstances warranting the setting aside of a default judgment and in particular the observation of Bannister J, approved by Court of Appeal, in Sylmord Trade Inc. v Inteco Beteiligungs AG[5] in which he stated: 'For an exceptional circumstance to fall within sub-rule 13.3(2) it must, in my judgment, be one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained'[6]. The learned master concluded, based on his conclusion as to the non-viability of the claim on the two primary bases identified at paragraph 9 above, that these matters were compelling reasons for permitting Mr. Meyer to defend the proceedings in which Mr. Baynes had obtained the default judgment and thus amounted to exceptional circumstances warranting the setting aside of the default judgment. He opined that these matters 'go [sic] the core of this action and may, in all likelihood, result in the dismissal of the claim'[7].

The Appeal

[11] Counsel, Mr. Marshall, has advanced four grounds of appeal in alleging errors of law made by the learned master. They may be encapsulated into the single

[5] BVIHCMAP2013/0003 (delivered 24th March 2014, unreported).
[6] At para. 31 of the judgment of the lower court – claim no. BVIHCM(COM)2012/0120 (delivered 9th May 2013).
[7] See para. 42 of the learned master's written judgment.

question whether the learned master erred in principle in concluding: (a) that Mr. Baynes' claim, based on a breach of statutory duty of the Act, was not maintainable as a claim in tort, and (b) whether averments of vicarious liability had been sufficiently pleaded so as to sustain a claim in negligence on the basis of vicarious liability against Mr. Meyer.

The Act

[12] Although the learned master stated that Mr. Baynes had not made mention of section 3 of the Act, it would seem that he overlooked the amended claim form which expressly stated at paragraph 2, that in the alternative to the claim based on vicarious lability, he was claiming damages for breach of statutory duty under section 3 of the Act. In my view, it cannot be fairly said that no specific reference was made to section 3 in respect of the claim albeit that he did not repeat the specific reference to section 3 in his statement of claim. Section 3 of the Act states:

> "3. (1) Subject to the provisions of this Act, it shall not be lawful for any person to use, or cause or permit any other person to use, a motor vehicle on a public road unless there is in force in relation to the user of the motor 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 a person acts in contravention of this section, he shall be liable to a fine not exceeding three thousand dollars or to imprisonment for a term not exceeding three months or to both such fine and imprisonment …"

The Principles

(a) The exercise of a discretion

[13] It is trite law that 'an appellate court should not interfere with a decision of a lower court which has applied the correct principles and which has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the appellate court is satisfied that the decision is so plainly

wrong that it must be regarded as outside the generous ambit of the discretion which has been entrusted to the court'.[8] There is common ground between the parties on these principles.

(b) Section 3 of the Act – Did Parliament intend that the only remedy for breach lay in the criminal sanction expressly imposed and thus excluded the bringing of a private law claim for breach?

[14] The learned master, in my view rightly, referred to the dicta of Lord Diplock and Lord Browne-Wilkinson in Lonrho Ltd. and Another v Shell Petroleum Co. Ltd. and Another (No. 2)[9] and X (Minors) v Bedfordshire County Council[10] respectively, in considering the circumstances in which a breach of statutory duty may give rise to a private law cause of action. To that extent I repeat in part the dicta of Lord Diplock in Lonrho and set out in paragraph 27 of the learned master's decision:

> "[T]he question whether legislation which makes the doing or omitting to do a particular act a criminal offence renders the person guilty of such offence liable also in a civil action for damages at the suit of any person who thereby suffers loss or damage, is a question of construction of the legislation.
>
> …
>
> "'[W]here an Act creates an obligation, and enforces the performance in a specified manner ... that performance cannot be enforced in any other manner' ... . Where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence of failure to perform the statutory obligation or for contravening the statutory prohibition which the Act creates, there are two classes of exception to this general rule.
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> "The first is where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals …. As Lord Kinnear put it in *Butler (or Black)* v. *Fife Coal Co. Ltd.* [1912] A.C. 149, 165, in the case of such a statute:

[8] Nilon Limited and Another v Royal Westminster Investments S.A. and Others [2015] UKPC 2; Dufour and Others v Helenair Corporation Ltd and Others (1996) 52 WIR 188.
[9] [1982] AC 173.
[10] [1995] 2 AC 633.

> 'There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute ... We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons there arises at common law a correlative right in those persons who may be injured by its contravention.[']
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> "The second exception is where the statute creates a public right (i.e. a right to be enjoyed by all those of Her Majesty's subjects who wish to avail themselves of it) and a particular member of the public suffers what Brett J. in *Benjamin* v. *Storr* (1874) L.R. 9 C.P. 400, 407, described as 'particular, direct, and substantial' damage 'other and different from that which was common to all the rest of the public.'"[11]

[15] It is also useful to cite the dictum of Lord Browne-Wilkinson in X (Minors), to which the learned master gave particular emphasis in paragraph 28 of his decision:

> "The basic proposition is that in the ordinary case a breach of statutory duty does not, by itself, give rise to any private law cause of action. However a private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty. There is no general rule by reference to which it can be decided whether a statute does create such a right of action but there are a number of indicators. If the statute provides no other remedy for its breach and the Parliamentary intention to protect a limited class is shown, that indicates that there may be a private right of action since otherwise there is no method of securing the protection the statute was intended to confer. If the statute does provide some other means of enforcing the duty that will normally indicate that the statutory right was intended to be enforceable by those means and not by private right of action: *Cutler v. Wandsworth Stadium Ltd.* [1949] A.C. 398 and *Lonrho Ltd. v. Shell Petroleum Co. Ltd. (No. 2)* [1982] A.C. 173. However, the mere existence of some other statutory remedy is not necessarily decisive. It is still possible to show that on the true construction of the statute the protected class was intended by Parliament to have a private remedy. Thus the specific duties imposed on employers in relation to factory premises are enforceable by an action for damages,

[11] At pp. 183-185.

notwithstanding the imposition by the statutes of criminal penalties for any breach: see *Groves v. Wimborne (Lord)* [1898] 2 Q.B. 402."[12] (The learned master's emphasis in bold).

Discussion

[16] With these clear observations I find it curious, to say the least, that the learned master was able to conclude, as he did at paragraph 28, that '[a] perusal of section 3 does not suggest … that *"Parliament intended that breach of the relevant statutory duty should be actionable by an individual harmed by that breach*"[9][*Clerk and Lindsell on Torts, 12th edition, paragraph 9-13.*]' and to simply conclude that section 3 'imposes obligations on the motoring public in general to obtain and maintain valid policies of insurance over vehicles used by themselves or others' and that '[t]he section also attaches severe penalties for any breaches of the said obligations' and to go on further to say '[t]here is nothing therein to suggest that Parliament intended enforcement of the section by any other means than the instituting of criminal charges and the imposition of the stated penalties for violating the terms thereof'.

[17] That the Act imposes an obligation on the motoring public to hold polices of insurance covering third party risks and imposes a criminal sanction for breach, cannot be doubted. That is expressly what it says. But that, in my judgment, does not complete the construction exercise required of the learned master in respect of the legislation. In his construction exercise, the learned master, to my mind, failed to ask himself the critical question 'why'. Why did Parliament deem it necessary to impose a duty on owners of motor vehicles to have in place a policy of insurance covering third party risks? For whose benefit was such a policy of insurance? What was the purpose of requiring the provision of a fund to which third parties may have resort in the event of loss suffered by a third party resulting from the use of a motor vehicle on a road? Why did Parliament consider this obligation of such

[12] At p. 731.

sufficient seriousness as to impose a criminal sanction for breach of it? By what course of action does a third party obtain the benefit of such an insurance fund?

[18] In my judgment, had the learned master adverted his mind to the above questions he would have in all probability concluded that the object of the Act was to impose an obligation for the benefit or protection of a particular class of individuals, namely, third party users of the road who it could reasonably be foreseen were likely to suffer damage, injury or loss by the use of a motor vehicle on a public road and to ensure that in relation to such damage, injury or loss, such party could be assured of a fund to which he/she could look for compensation. It is even more so where the person using the vehicle and causing the damage is a man of straw. Parliament clearly intended some protection to third parties. Indeed, the entire purpose of the Act is to provide some protection to third parties who would also be lawful users of the road, to protect such parties against the risk of suffering damage while so doing by a person of straw and being unable to recover any compensation in such event. Further, Parliament viewed this obligation as such a serious one that it imposed a criminal sanction for breach of it. But it could not thereby be that this must be seen as the sole remedy available particularly in light of the object and purpose of the Act. Why couldn't a harmed party seek to recover from the wrongdoer compensation in an amount which the wrongdoer, by his breach of the Act, has made unavailable to the harmed party in frustration of the very object of the Act? To my mind there could be no reason for this, either as a matter of policy or principle having regard to clear scope and purpose of the Act. Had the learned master given proper consideration to the true construction of the Act, he would have been bound to conclude that the Act fell squarely within the first exception to the general rule explained by Lord Diplock in Lonrho and the dictum of Lord Browne-Wilkinson in X (Minors), which I adopt. Here, it is clear to me that a parliamentary intention to protect a limited class is shown. They are the third party users of the road as distinct from the public at large. Apart from the criminal sanction the Act provided no other remedy for the breach. These are

strong indicators that a private right exists since otherwise there is no method of securing the protection the Act intended to confer namely a compensation fund for an injured third party.

[19] Were I to entertain any doubt about the view I hold as to the purport of the Act, such is allayed by the decision in the vintage 1935 decision of Monk v Warbey and Others.[13] Monk is a decision of the English Court of Appeal which was decided with reference to Road Traffic Act in England and which in section 35 contained a provision substantively similar to section 3 of the Act. The court held that the owner of a motor car who, in contravention of section 35(1) of the Road Traffic Act, 1930, permits his car to be used by a person who is not insured against third party risks, is liable in damages to a third party who has been injured by the negligent driving of the uninsured person. In such a case, the object and purview of the Act show that the penalties prescribed by section 35(2) were not intended to be the sole remedy for a breach of the owner's statutory duty. Where a person uninsured against third party risks is permitted by the owner to use a car, and injury is caused by his negligent driving to a third party, the latter may, where the uninsured person is without means, sue the owner of the car directly for damages for breach of his statutory duty and need not first sue the uninsured person.

[20] I do not accept, as counsel for Mr. Meyer appears to contend, that for a Monk v Warbey claim to succeed it must be shown that Mr. Hernandez, 'the person primarily liable is in such a financial position that nothing is obtainable from him'[14]. The decision in Monk is not authority for such a proposition and the observation made therein by Greer LJ did not form part of the ratio decidendi of the case. It merely points out that you need not ***first*** sue the uninsured person or the person alleged to be primarily liable in negligence as distinct from establishing a breach of a statutory duty on the part of the owner to insure. I find the observation of Otton

[13] [1935] 1 KB 75.
[14] See para. 14 of the respondent's submissions.

LJ in Norman v Aziz,[15] cited by Lord Justice Rix in Bretton v Hancock,[16] to be much more persuasive where he stated that 'if impecuniosity is a necessary ingredient of a Monk v. Warbey claim, then it suggests that the owner and driver are separate tortfeasors liable in respect of different damage' and then went on to suggest that the 'correct analysis is that the owner and driver are separate tortfeasors liable in respect of the same damage and their rights between themselves are governed by' the laws relating to contribution in respect of civil liability (my emphasis in quotations). To my mind this must be the correct approach. I can see no good reason for limiting the claim for breach of such statutory duty under the Act in such a way. The Act makes plain in section 4(1)(b) that the third party insurance cover required must be one which insures such person 'in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle on a public road'. It is therefore not in contemplation of where the driver may be impecunious but so too the owner who may also be. However, merely because impecuniosity may be contemplated is not in my judgment sufficient reason for requiring as a condition precedent proof of impecuniosity on the part of the driver. That to my mind places the focus incorrectly on the mechanics of the remedy rather than on the breach of the statutory duty imposed. Accordingly, I would hold that establishing impecuniosity on the part of the driver is not a condition precedent for maintaining a Monk v Warbey claim.

[21] Counsel Mr. Marshall complains that the learned master failed to take account of the settled law as expressed in the Monk decision. There is no reference to Monk in the decision of the learned master. From the record produced I am unable to say whether the learned master's attention was drawn to Monk. Had it been drawn to his attention it would be most unusual for him not to have referred to it, having regard to the close similarities between Monk and this present case.

[15] [2000] PIQR 72.
[16] [2005] EWCA Civ 404 at para. 40.

[22] The Monk[17] decision accords with my view of the Act in this case and I would apply it in concluding that the learned master erred in construing the Act and that this error led him into further error in holding that the claim was not actionable thus making it an exceptional circumstance warranting the setting aside of the default judgment. This was an error in principle which permits this court to interfere with the exercise of his discretion. This, to my mind, is sufficient to allow this appeal and set aside the learned master's decision. For the sake of completeness however, I would make a short observation on the averment of vicarious liability which the learned master found to be lacking and thus fatal to the claim in negligence based on the vicarious liability of Mr. Meyer.

The negligence claim based on vicarious liability

[23] Earlier, I alluded to the fact that the learned master appears to have not paid regard to the amended claim. Had he done so, he would not have been able to conclude as he did at paragraph 37 of his decision that there were no averments of any sort on the statement of claim that at the material time, Mr. Hernandez was using the vehicle as Mr. Meyer's servant or agent. Had such a statement been wholly absent from the claim then this criticism would be justified. However, the first paragraph of the amended claim states that it is 'against the Defendant for personal injury and loss suffered arising from a motor vehicle accident on or about 25th July 2011 caused by the negligence of the Defendant's servant, one Luis Hernandez, whilst acting in the course of service to the Defendant'. While it is true to say that this averment is not repeated in the statement of claim which goes on to particularise the negligent acts of Luis Hernandez, in my judgment, that does not justify a total disregard for the statements contained in the claim form itself making the claim, and permit a holding to the effect that no averment has been made to the effect that Luis Hernandez was driving at the material time as the servant or agent of Mr. Meyer. In my view, the learned master fell into error in so holding and fell into further error in treating this factor as fatal to Mr. Baynes' claim

[17] See also: Bretton v Hancock [2005] EWCA Civ 404; Philip Owen Lloyd-Wolper v Robert Moore and Others [2004] EWCA Civ 766.

such as to amount to an exceptional circumstance warranting the setting aside of the default judgment, when in fact, the claim as made out was not devoid of such an averment. In any event, the claims were made in the alternative and either was sufficient for grounding a default judgment in the absence of a defence. I am unable to accept the submissions of counsel for Mr. Meyer to the effect that the averment of breach of the statutory duty contained in section 3 of the Act was not properly pleaded. Mr. Baynes has not only pleaded that Mr. Meyer was the owner of the vehicle; he also pleaded his breach of duty in allowing (same as permitting[18]) his vehicle to be used on a road without there being in place a policy of insurance in respect of third party risks. While it may be considered that the claim and the statement of claim were not as tidy and fulsome as may be desired, that does not translate to the claim not being sufficiently made out and sufficiently pleaded when read together. The learned master's conclusion to the contrary, having regard to the claim and statement of claim is unsustainable and amounts to another error of principle enabling this court to interfere with his decision.

Proof of ownership of the vehicle

[24] Counsel for Mr. Baynes says that the ruling on this legal issue was not necessary to support the judgment on the alternative claim for breach of statutory duty in determining whether Mr. Meyer was responsible as owner for the actions of Mr. Hernandez, the tortfeasor.[19] I agree. The tort of negligence for breach of the statutory duty imposed by the Act does not depend upon another person being the tortfeasor. The alleged tortfeasor in relation to the claim for breach of statutory duty is Mr. Meyer himself as the owner of the vehicle who is alleged to have breached his statutory duty owed to the third party Mr. Baynes in failing to have in place a policy of insurance covering third party risks as required by the Act. As Monk shows, the third party may sue the owner of the car directly for damages for breach of his statutory duty and need not first sue the uninsured person.

[18] Section 3 of the Act (set out at para. 12 above) uses the word 'permit'.
[19] See para. 42 of the learned master's written decision.

Exceptional circumstances

[25] In any event, proof of ownership of the vehicle or the allegation that Mr. Meyer was not the owner of the vehicle at the relevant time is not in my judgment a factor which would amount to an exceptional circumstance as urged by counsel for Mr. Meyer. I am prepared to so hold even if the learned master had found that the evidence pointed to Mr. Meyer not being the owner. If there was indeed a body of facts tending to show that Mr. Meyer may not have been the owner at the material time, then Mr. Meyer ought to have been diligent and timeous in putting forward his defence to this effect or provide good reasons for his delay in so doing. Such an averment could only have gone to a consideration of whether the defence may have been considered to have realistic prospects of success under the third limb of CPR 13.3(1). Inasmuch as sub-rule (1) requires, as one of the conditions, that a party seeking to set aside a regularly obtained judgment must demonstrate (together with the other two conditions) that his defence has a realistic prospect of success, a party may, however, fail in setting aside a default judgment even where this is shown, having failed in satisfying the other two conditions. It must follow that the 'exceptional circumstance' limb contained in sub-rule (2) is not to be understood or applied as a substitute to condition (c) under sub-rule (1).

[26] What amounts to an exceptional circumstance is not defined by the Rules and no doubt, for good reason. What may or may not amount to exceptional circumstances must be decided on a case by case basis.[20] I am in full agreement with the reasoning of Bannister J, as approved by this Court, that it must be 'one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained'[21]. It must be something more than simply showing that a defence put forward has a realistic prospect of success. Showing exceptional circumstances under CPR 13.3(2) does not equate to showing realistic prospects of success under CPR

[20] See Elvis Wyre (Personal Legal Representative of the Estate of Arnold Wyre, Deceased) et al v Alvin G. Edwards et al (ANUHCVAP2014/0008 (delivered 3rd September 2014, unreported).
[21] See para. 31 of Sylmord Trade Inc. v Inteco Beteiligungs AG BVIHCMAP2013/0003 (delivered 24th March 2014, unreported).

13.3(1)(c). They are not to be regarded as interchangeable or synonymous. CPR 13.3(2) is not to be regarded as a panacea for covering all things which, having failed under CPR 13.3(1), can then be dressed up as amounting to exceptional circumstances under sub-rule (2). Sub-rule (2) is intended to be reserved for cases where the circumstances may be said to be truly exceptional, warranting a claimant being deprived of his judgment where an applicant has failed, to satisfy rule 13.3(1). A few examples come to mind. For instance, where it can be shown that the claim is not maintainable as a matter of law or one which is bound to fail, or one with a high degree of certainty that the claim would fail or the defence being put forward is a "knock out point" in relation to the claim; or where the remedy sought or granted was not one available to the claimant. This list is not intended to be exhaustive. Indeed I would have been prepared to hold, had the learned master been correct as to the non-viability of the claims herein, that such could be regarded as an exceptional circumstance. In the exercise of the discretion afresh, and for the reasons set out above I find no basis for holding that the bases put forward by Mr. Meyer, amount to exceptional circumstances warranting Mr. Baynes being deprived of his default judgment. I would accordingly restore the default judgment.

Conclusion

[27] For the reasons set out above, I would hold that the learned master erred in principle in holding that the claim for breach of statutory duty was not a claim actionable as a private law claim as intended on a proper construction of the Act. He failed to properly construe the Act. This in turn led him into further error in holding that this amounted to an exceptional circumstance. He erred in holding that the claim for negligence based on vicarious liability had not been pleaded and that this also amounted to an exceptional circumstance. Furthermore, the claims were expressed to be in the alternative. Either was capable of grounding a perfectly regular judgment in default. For the reasons given, I am of the view that the claims were properly maintainable and thus did not give rise to any matters which may have been considered as amounting to exceptional circumstances. He

therefore erred in the exercise of his discretion and was wrong to set aside the default judgment on these bases. I would accordingly allow the appeal and set aside the learned master's order, save his order for costs, and restore the default judgment. I would further order that Mr. Meyer bears the costs of this appeal fixed in the sum of $2,000.00

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal

I concur.

Paul Webster, QC
Justice of Appeal [Ag.]