In The Supreme Court of Bermuda

CIVIL JURISDICTION

2017 No: 92

BETWEEN:-

ANTONIO PIMENTEL DA COSTA

Plaintiff

-v-

(1) CHRISTOPHER CARTER
(2) BF&M GENERAL INSURANCE COMPANY LIMITED

Defendants

JUDGMENT ON PRELIMINARY ISSUE
(In Court)

Whether insurance policy covered driver of motor car involved in collision – whether ownership of motor car transferred to driver, in which case the policy was cancelled – whether coverage excluded because driver was convicted of driving while impaired

Date of hearing: 20th October 2017
Date of judgment: 8th November 2017

Ms Sara Tucker, Trott & Duncan Limited, for the Plaintiff
Ms Victoria Greening, Wakefield Quin Ltd, for the First Defendant
Mr Jeffrey Elkinson, Conyers Dill & Pearman, for the Second Defendant

Introduction

1. On 1st January 2016 the Plaintiff ("Mr Da Costa") suffered extensive injuries in a collision between the motor car that he was driving and the motor car driven by the First Defendant ("Mr Carter"). Mr Da Costa issued proceedings against the Mr Carter for negligence and the Second Defendant ("BF&M") as Mr Carter's insurer. Mr Carter has admitted liability but reserved his position as to the quantum of damages pending discovery. BF&M denies that at the time of the accident there was an insurance policy in force covering either Mr Carter or the motor car that he was driving.

2. On 13th July 2017 I ordered the trial as a preliminary issue of whether, for the purposes of Mr Da Costa's claim, Mr Carter was covered by an insurance policy issued by BF&M. This is my judgment on that issue.

The issues

3. BF&M denies that it has ever insured Mr Carter and avers that, whereas it had previously insured the motor car that he was driving at the time of the accident, this was when it was owned by a third party, a man named Ian Mummery. BF&M avers that Mr Mummery transferred legal title to the motor car to Mr Carter, whereupon the policy was automatically cancelled. To succeed, Mr Da Costa must prove that at the time of the accident the third party and not Mr Carter was still the legal owner of the motor car and hence that the insurance policy was still in force. ("The Ownership Issue".)

4. As a result of the collision, Mr Carter was charged with driving when under the influence of alcohol, contrary to section 35AA of the Road Traffic Act 1947 ("the 1947 Act"), to which he pleaded guilty. BF&M alleges that if the

insurance policy which had previously covered the motor car was still in force, then by reason of an exclusion clause ("the Exclusion Clause") in the policy, read in conjunction with a statutory provision limiting the effect of the clause, any liability under the policy would be capped at $125,000.00. To defeat this allegation, Mr Da Costa must satisfy me that the facts of the present case do not fall within the Exclusion Clause. ("The Exclusion Clause Issue").

5. The trial of the preliminary issue was a dispute between Mr Da Costa and BF&M. Although his interests were aligned with Mr Da Costa's interests on this issue, Mr Carter took a neutral position at the hearing. Consequently, whatever the outcome of the hearing, he is not at risk as to costs.

The Ownership Issue

Evidence

6. The motor car in question was a Nissan motor car, registration number 29030. It was covered by an insurance policy which provided in material part: (i) the driver, who must hold a valid and current license, must have the policy holder's permission to use the vehicle; (ii) no assignment of the policy or any interest in it is binding upon the insurer without the insurer's written consent; and (iii) if the vehicle is transferred to new ownership, then, unless the insurer agreed in writing to continue the insurance, the policy is cancelled from the time of transfer. The policy holder would be entitled to a return of premium less the premium for the period the policy had been in force. It was common ground that there had been no assignment of the policy to Mr Carter and that BF&M had not been asked, let alone agreed, to transfer the policy to him.

7. I had the benefit of evidence from Mr Carter. As his witness statement, which contained his evidence in chief, is short, I shall set it out in full.

"*1. My good friend Ian Mummery was leaving the island and he said to me that I could have his car. He told me that it was till insured and TCD was still valid, and that the documents for both were in the glovebox.*

2. I drove him to the airport in the car and dropped him off and then he left and I drove it home. I already had a car of my own, and I used mine the majority of the time, and was going to give Ian's car to another friend. He did not have a driver's license but he was going to get it and then the car would be transferred into his name.

3. I usually drove my car but the night of the accident my car had a broken water pump and I did not want to spend the money to fix it over Christmas and New Year so I drove Ian's car. I either kept it at my house or at work, because I could park it there.

I would never have driven it if I did not think I was insured to drive. I am a car mechanic and I would lose my job doing that.

My own car had insurance with Colonial. It did cross my mind to put Ian's car on my insurance but I thought I was covered under his."

8. Mr Carter was cross-examined by Jeffrey Elkinson, counsel for BF&M, who asked him whether he regarded the car as his own in the time that he had it after Mr Mummery left. Mr Carter replied that he had his own car, so he wouldn't necessarily say it was his own. Mr Elkinson then asked whether it would be fair to say that Mr Mummery gave him the car as a gift. Mr Carter said that it would.

9. Mr Carter was then cross-examined by Sara Tucker, counsel for BF&M. He explained that Mr Mummery had given him the car to hold for a mutual friend until the friend got his driver's licence. He was to look after it in the interim. He didn't use it as he had his own vehicle. He knew that this was Mr Mummery's desire for the car from conversing with him. Ownership was never transferred to him, but Mr Mummery did give him permission to drive the vehicle.

10. I also had the benefit of evidence from Larenzo Ratteray, who is Vice-President of Claims at BF&M. He exhibited an exchange of emails with Mr Mummery which took place in February 2016.

11. On 4th February 2016, Mr Mummery emailed an employee at BF&M as follows:

"*I am contacting yourself regarding the policy no: P229055.*

Myself and Emma Law owners of the vehicle left the island end of July 2015, leaving the vehicle Reg no: 29030, giving Chris Carter permission to drive the vehicle.

We are aware of the situation with Chris, I hope this can help with the process. Any issues please don't hesitate getting in touch."

12. On 9th February 2016 Mr Ratteray sent an email in reply:

"*Thank you for your email confirming that your vehicle was being used by Mr. Carter at the time of the collision and that he was left with access to and granted permissive use vehicle free of charge.*

We ask that you confirm if the vehicle was left with the intention of ownership passing on to Mr. Carter via sale of [sic] gift? If so please confirm the details of that arrangement."

13. Mr Mummery replied:

"*I can confirm that the vehicle, registration P29030 was given to Chris Carter as a gift with no cost.*"

14. On 11th February 2016 Mr Ratteray emailed Mr Mummery to advise him of the legal consequences of this information:

"*When a vehicle is given or sold, although interest (ownership) in the vehicle is transferred, the insurance policy associated with the vehicle is non-transferable. The result is Mr. Carter while driving a vehicle registered and insured in your name, as the new owner, was in effect driving an uninsured vehicle. I put this to you at this early stage prior to BF&M following up with Chris.*"

15. Mr Mummery did not reply. Some months later, on 15th December 2016, Mr Ratteray emailed Mr Mummery again to inform him that BF&M had denied liability on the basis of Mr Mummery's previous reply that the vehicle was given to Mr Carter. Mr Ratteray asked:

"*If there are further details regarding the transfer of ownership we must be made aware of please do so urgently so we are adequately prepared to defend this matter.*"

16. Once again, Mr Mummery did not reply.

The law on gifts

17. The Ownership Issue boils down to whether Mr Mummery gave his car to Mr Carter, either for Mr Carter to keep for himself or to hold on trust for their friend once he got his driving licence. A car is a chattel, and the test for determining whether there has been a gift of a chattel was considered by Lloyd LJ in Day v Harris and others [2014] Ch 211 EWCA. The relevant facts appear from the headnote. In 1976 Sir Malcolm Arnold, a distinguished composer, sent two tea chests containing the majority of the manuscripts of his compositions together with other items to his daughter's house, and sent a postcard to his son reading: "*All the books, pictures, sculptures etc are for you and Katherine to share and keep, or sell if you like!*" One of the questions on appeal was whether this action by Sir Malcolm, who was by now deceased, was sufficient to gift the manuscripts in the tea chests to the two children. The Court held that it was. Lloyd LJ, with whom the other members of the Court agreed on this issue, reviewed the applicable principles at paras 67 – 71 of his judgment:

"***67*** *A chattel may be given by one of three methods: a deed of gift, a declaration of trust or delivery. If there is a deed or a declaration of trust, whatever issues of interpretation may arise, there will be some words, probably relatively formal, from which the intention of the party or parties can be found. With delivery, something is needed to show the basis of the delivery to be a gift, but this may be relatively informal, as in In re Cole, A Bankrupt [1964] Ch 175 (though in that case the Court of Appeal disagreed with Cross J and held that there had been no delivery).*

68 *The 1976 boxes, with their contents, were delivered by Sir Malcolm to Miss Arnold. This was a unilateral, unexpected and unsolicited act on his part. It was not explained by any prior discussions or dealings between them. Miss Arnold did not reject the items, but*

it is perhaps hardly likely that she would have done, whatever she thought about her father's conduct in this respect. She did not welcome or rejoice in the gift, but, unlike her father (and for that matter her brother), she did have some space in which to keep the boxes in her home. In those circumstances the legal nature of the act must depend, essentially, on determining what Sir Malcolm's intention was in respect of it. The only words of gift are those on the postcard sent by Sir Malcolm to Mr Arnold.

69 *We were shown passages from Palmer on Bailment , 3rd ed (2009), in support of submissions as to the legal test for the effect of a delivery of chattels otherwise than pursuant to an agreement. The point is made at para 3-011 that*

> *'the nature and terms of an agreement are not to be determined by the subjective intention of a single party. Rather, they depend on what each party was reasonably entitled to infer from the conduct or attitude of the other.'*

Correspondingly, if the governing intention is that of a single party, the deliverer of the goods, the issue depends on the intention of that party, and again not his subjective intention but rather his intention objectively ascertained from his words and conduct. At para 3-013 the authors go on to discuss in terms the issue "Gift or loan". The text tells us that the recipient, making a case for a gift, must prove an intention in the deliverer to make a gift, an intention of the recipient to accept the gift, and delivery. The intention may be proved by conduct as well as by words.

70 *In turn at para 3-014 the authors identify some evidential criteria, based on decided cases, by which a court might decide as between gift and loan. These include the following which were relied on as relevant to the facts of this case. (i) Credible statements made by one party to the transaction to a reliable third party, identifying or indicating the nature of the transaction. (ii) One party's acquiescence in, or failure to take obvious steps to contest, statements made or procured by a third party that support the other party's version of the identity of the transaction. (iii) Conduct by one or both parties indicating a perception of the relationship more convincingly explicable by reference to one possible version of the relationship than by reference to the alternative. (iv) A denial of ownership by the recipient, when the cost of some past conservation of the object, or some other inconvenient question, is raised with him.*

71 *We were also shown Dewar v Dewar [1975] 1 WLR 1532 , a decision of Goff J about whether a payment of £500 by their mother to one of two brothers who were the litigants was to be treated as a gift or as a loan. The evidence showed that the mother always intended it to be a gift, that the son wanted to receive it as a loan, but that he did not refuse to take it at all. The judge considered submissions about the need for the recipient*

to accept the thing as a gift, and therefore as to the relevance of the intention of the recipient as well as that of the payer or deliverer. He concluded that acceptance by the recipient of the thing given was necessary, but no more than that. The recipient can refuse to take it, or if it arrives without prior arrangement he can reject it or send it back when he becomes aware of it. But otherwise his intention is not relevant. The case was complicated by pleading points, and it is rather far from the facts of the present case, but it is consistent with the view that I have formed that, on facts such as those of the present case, the only intention that matters is that of Sir Malcolm. Given the fact of delivery and the absence of rejection by Miss Arnold after delivery, if Sir Malcolm's intention (objectively assessed) was to make a gift of the contents, then ownership passed by way of gift on delivery.

***72** On that basis, if the subsequent conduct to which I have referred is of any relevance at all on this issue, it is not that it shows what the intention of Miss Arnold or Mr Arnold was, but that it might cast light on what her father's intention should be taken to have been. It has a separate relevance to the argument based on estoppel.*"

18. As to Dewar v Dewar, cited by Lloyd LJ at para 71, I have found it helpful to have regard to a passage from the judgment of Goff J (as he then was) at 1538 H – 1539 A:

"*The passages to which I have referred lead me to the conclusion that where a person intends to make a gift and the donee receives the thing given, knows that he has got it and takes it, the fact that he says: 'Well, I will only accept it as a loan, and you can have it back when you want it' does not prevent it from being an effective gift. Of course, it does not turn it into a loan unless the donor says: 'Very well, let it be a loan.' He could not force the donor to take it back, but the donor, having transferred it to him effectively and completely, intending to make a gift, and he — so far from repudiating it — having kept it, it seems to me that that is an effective gift ...*"

Submissions

19. Ms Tucker submitted that Mr Carter was a reliable witness whose evidence was to be preferred to the emails of Mr Mummery. The latter was not called as a witness and his version of events had, she suggested, been influenced by the questions asked by Mr Ratteray. Mr Mummery had not contacted the insurer to cancel the policy or request a transfer, nor signed any transfer

documents in relation to the car. Neither of them had complied with any of the formalities required by section 67 of the Motor Car Act 1951 ("the 1951 Act") upon the change of ownership of a motor car. That section provides in material part:

"*(1) On any change of ownership of a motor car otherwise than by reason of the death of the owner—*

(a) the motor car shall not be used until the new owner is registered in the motor car register as the owner thereof; and

(b) the former owner or his authorized agent shall within seven days deliver the motor car licence to the Minister and shall inform the Minister in writing and in such form as the Minister may require of the name and address of the new owner and of the date of the change of possession of the motor car.

(2) Application for the registration of a new owner of a motor car may be made before the actual transfer of the motor car, but the registration of a new owner shall not be effective until the motor car licence has been surrendered to and reissued by the Minister.

. . . . .

(4) On the registration of a new owner of a motor car the Minister shall make the necessary alterations in the motor car licence if it is still in force, and shall deliver the licence as altered to the new owner."

20. Ms Tucker relied upon two further sections of the 1951 Act. Section 16(1) provides that no person shall own or be registered as the owner of more than one private motor car. Ms Tucker submitted it followed that as Mr Carter already owned one motor car it was as a matter of law impossible for him to own another one concurrently. Section 68 deals *inter alia* with the obligations of an owner of an unlicensed vehicle. It provides that for the purposes of the section the person in whose name the motor vehicle was last registered shall be deemed to be its owner. Ms Tucker submitted that Mr Mummery had abandoned the car in Mr Carter's possession and that therefore Mr Mummery, as the person in whose name it was last registered, was deemed to be its owner.

21. Ms Tucker submitted in summary that the actions of Mr Carter and Mr Mummery supported Mr Carter's evidence that he had been given the car to look after until it was transferred to their mutual friend when he got his driving licence and not given it to keep.

22. Mr Elkinson submitted that, both in his witness statement and when cross-examined by Mr Elkinson, Mr Carter had accepted that he had received the car as a gift. It was not until he was questioned by Ms Tucker that he had changed his account to say that he had received the car only to look after it.

23. Mr Mummery had also stated that Mr Carter received the car as a gift: Mr Ratteray had not put words into his mouth and had given him the opportunity to reconsider his position once its legal consequences were explained to him. As Mr Mummery had left Bermuda to return to the UK it was highly improbable that he would have intended to retain any interest in the car. Clearly, he wanted nothing more to do with it.

24. As to the requirements in section 67 of the 1951 Act, Mr Elkinson submitted that a person had to comply with the requirements because they were the new owner; they did not become the new owner because they had complied with the requirements. The requirements were a precondition of being permitted to drive the motor car, not a precondition of ownership.

25. As to section 16(1) of the 1951 Act, Mr Elkinson submitted that this did not make it legally impossible for a person to own more than one private motor car but prohibited them from doing so. Breach of this prohibition was an offence under section 120 and liable to punishment under section 120(1).

26. As to the deeming provision regarding ownership in section 68 of the 1951 Act, Mr Elkinson submitted that this was inapplicable as the motor car in question was not unlicensed at the date of the collision but licensed to Mr Mummery.

27. Mr Elkinson submitted in summary that Mr Mummery gave the motor car to Mr Carter, either as his own, to do with as he wished, or alternatively to hold

as trustee for their mutual friend until he got his driving licence. Either way, Mr Mummery had transferred legal ownership of the car to Mr Carter prior to the collision, and the policy was cancelled at the point of transfer.

Discussion

28. I must decide first whether there was an agreement between Mr Mummery and Mr Carter as to the ownership of the car and, if there was, what were its terms. I must resolve these questions based on what can properly be implied from their words and conduct at the time, viewed objectively, and not on the basis of their subsequent evidence about their subjective intentions.

29. I accept Mr Elkinson's interpretations of the various sections of the 1951 Act relied upon by Ms Tucker. They appear to me to be self-evidently correct.

30. I accept Mr Carter's evidence that the terms of the agreement between him and Mr Mummery were that he would look after the car until their friend had got his driving licence and then hand over the car to him, and that he had Mr Mummery's consent to use it in the interim. Although it is fair to say that Mr Carter's account solidified under Ms Tucker's cross-examination, in my judgment it was consistent with what he had said previously, both in his witness statement and to Mr Elkinson. I am satisfied that he was a reliable witness.

31. I am therefore satisfied that Mr Carter held the car as a bailee rather than a trustee. The agreement was that he would look after the car not that he would assume legal ownership of it. Thus he satisfied the classic definition of a bailee given by Pollock and Wright in Possession in the Common Law (1888) at 163:

"*Any person is to be considered as a bailee who otherwise than as a servant either receives possession of a thing from another or consents to receive or hold possession of a thing for another upon an understanding with the other person either to keep and return*

or deliver to him the specific thing or to (convey and) apply the specific thing according to the directions antecedent or future of the other person." [1]

32. The fact that Mr Carter took no steps to have the car registered in his name supports the conclusion that he was a bailee. Moreover, I take judicial notice of the fact that the "one owner: one car" policy of the 1951 Act is widely known and am satisfied that it is something of which Mr Carter would most likely have been aware. That, too, tends to support my conclusion.

33. I therefore find that at the date of the collision the car driven by Mr Carter which was involved in the collision was owned by Mr Mummery and driven by Mr Carter with his permission. Consequently, for the purposes of Mr Da Costa's claim, Mr Carter was covered by the insurance policy issued to Mr Mummery in respect of that motor car by BF&M.

The Exclusion Clause Issue

The Exclusion Clause

34. The Exclusion Clause upon which BF&M relies reads as follows:

"*This Policy does not cover:*

. . . . .

11) A claim where the driver of the vehicle has been convicted (or prosecution is pending) relating to the level, concentration and/or quantity of alcohol or drugs at the time of the event that caused the loss or damage. In addition, the Policy will not cover a claim where the driver of the vehicle is convicted of refusing to provide a sample of breath or blood which could have been the basis of a conviction relating to the level, concentration and/or quantity of alcohol or drugs in the body, or where a subsequent

[1] Cited Chitty on Contracts, Thirty-Second Edition, Volume II at para 33-003. The learned author points out that the bailor need not consent to the bailee taking possession of the goods.

medical record confirms a blood to alcohol or drugs ratio that is over the legal limit immediately after the event giving rise to a claim."

35. It is common ground that, if the Exclusion Clause does apply, it is modified by section 4(1) of the Motor Car Insurance (Third-Party Risks) Act 1943 ("the 1943 Act"). This provides in material part that, in order to comply with the requirements of the 1943 Act, a policy of insurance must cover the insured in respect of any liability which may be incurred by him in respect of the death of or bodily injury to any person, or damage to the property of any person, caused by or arising out of the motor car on a highway. However a policy shall not be required to cover liability in respect of any sum in excess of $125,000.00 arising out of any one claim by any one person. The practical consequence of section 4(1) is that with respect to Mr Da Costa's claim the Exclusion Clause can only exclude any liability in excess of $125,000.00.

Submissions

36. Ms Tucker submitted that the reference in the Exclusion Clause to an offence "*relating to the level, concentration and/or quantity of alcohol or drugs at the time of the event that caused the loss or damage*" should be construed narrowly to mean an offence where a prohibited concentration and or/quantity of alcohol or drugs in the body is an ingredient of the offence. Thus the offences under the 1947 Act covered by this wording would be those created by section 35(b) (causing death or grievous bodily harm when the blood/alcohol concentration is over the prescribed limit); 35(c) (causing death or grievous bodily harm when there is present in the body any dangerous drug); 35A (driving when the blood alcohol concentration is over the prescribed limit); and 35B (driving with a dangerous drug present in the body).

37. Ms Tucker submitted that the wording would not cover the offences under section 35(a) (causing death or grievous bodily harm when driving under the influence of alcohol or drugs) or 35AA (driving when under the influence of

alcohol or drugs). (A "*drug*" is defined in section 1 as including any intoxicant other than alcohol, and is to be distinguished from a "*dangerous drug*", which is given a more restricted meaning by section 35B.) This is because the criminality lies not in the level/concentration and/or quantity of alcohol or drugs in the body, but in the effect of the alcohol or drugs upon the driver. A person's ability to drive might be impaired by alcohol even though their blood/alcohol concentration is not over the limit and there is no prescribed limit for non-dangerous drugs. (The limit for dangerous drugs is zero.)

38. Ms Tucker submitted that the Exclusion Clause was clear and unambiguous. If the Court found that it was not then she invited the Court to construe the clause *contra proferentem* against BF&M as the party who had put forward the wording. She relied upon Thomson v Thomson and Colonial Insurance Co Ltd [2013] Bda LR 48 SC, in which at para 41 Kawaley CJ applied this rule of construction to an insurance contract. He noted earlier in his judgment at para 39 that, according to the Thirteenth Edition of Chitty on Contracts at para 41-058, the rule applied with particular force to contracts of insurance.

39. Mr Elkinson submitted that an offence of impaired driving under section 35AA of the 1947 Act was an offence "*relating to the level, concentration and/or quantity of alcohol or drugs*" in a defendant's body at the material time in that, in order to be guilty of the offence, a defendant would have to have a sufficient level, concentration and/or quantity of alcohol or drugs in his body to impair his driving. As the Exclusion Clause was clear and unambiguous, *contra profentem* did not apply.

Discussion

40. I agree with Mr Elkinson's submissions on this point. They are consistent with the natural meaning of the clause and accord with its underlying intent, which is to exclude, so far as the law permits, coverage for loss or damage

due to events that were likely caused or contributed to by the fact that the insured had alcohol or drugs in his body. The way that drugs or alcohol in the insured's body would cause or contribute to the event would be by impairing his driving. It would make no sense to exclude coverage for events from which the causal role played by alcohol or drugs may be inferred from their level in the insured's body, but not for events where the court has found as a fact that his driving was impaired as a result of the presence in his body of alcohol or drugs.

41. I therefore find that the Exclusion Clause applies to any claim brought by Mr Carter under the policy for an indemnity in relation to Mr Da Costa's claim against him for damages. The effect is that the amount payable by BF&M in relation to this claim is limited to $125,000.00. This is substantially less than the damages claimed by Mr Da Costa. I respectfully endorse the view expressed by Kawaley CJ in Thomson v Thomson and Colonial Insurance Co Ltd at para 38 that:

> "*The time may well be ripe for Parliament, if it be right that the present financial limits were fixed more than two decades ago, to consider elevating the minimum obligation owed by insurers to third parties, contract apart.*"

42. I shall hear the parties as to costs.

Dated this 8th day of November, 2017

Hellman J