

**EASTERN CARIBBEAN SUPREME COURT
SAINT CHRISTOPHER AND NEVIS
NEVIS CIRCUIT**

**IN THE HIGH COURT OF JUSTICE
(CIVIL)**

Claim Number: **NEVHCV2018/0140**

Between

Mervin Powell

Claimant

-And-

Shaquoyah Flanders

Defendant

BEFORE: His Lordship, the Honourable Justice Ermin Moise

APPEARANCES:

Ms. Joanne Flemming of counsel for the claimant

Ms. D. Camilla Cato of counsel for the defendant

2021: April, 22nd
May, 4th (Submissions)
July, 20th

JUDGMENT

- [1] **Moise, J:** The outcome of this case hinges on the interpretation to be placed on a single clause of a rental contract entered into by the parties. The claimant owns a car rental company and leased a motor vehicle to the defendant on 27th March, 2016. Unfortunately, the defendant was involved in an accident for which she has not been held to be at fault. The claimant nonetheless claims compensation from her for the damage caused to the motor vehicle. His contention is that as per the terms of the contract, there is no requirement for her to be negligent or at fault in any way for the accident. He relies on clause 5 of the contract which he claims creates a strict contractual liability on the part of the defendant to make good any damage caused to the vehicle whilst it was in her possession, regardless of whether she is at fault or not. For the reasons outlined in the remainder of this judgment I have decided that the case should be dismissed with costs to the defendant.

The Facts

- [2] The claimant (Mr. Powell) is a sole proprietor and does business as "Mervin's Car Rental". On 27th March, 2016 he entered into a contract with the defendant (Ms. Flanders) for the rental of a 2006 Grand Vitara registration number RA 261. The vehicle was rented for two days and was to be returned by the end of the day on 28th March, 2016. The rental contract between the parties was reduced into writing and the following clause (Clause 5) was contained in it:

"Customers who have not purchased insurance are responsible for all damage caused to the rented vehicle as well as for any damage caused to the vehicle of a third party due to the negligence of the customer."

- [3] Mr. Powell's evidence was that Ms. Flanders opted out of purchasing insurance and was therefore liable for any damage caused to the motor vehicle. For her part Ms. Flanders states that she was not told anything about insurance, despite the clause having been contained in the contract which she signed. She took possession of the motor vehicle on 27th March, 2016. At about 8:00pm on that very day Ms. Flanders was involved in an accident. It was her evidence that she was driving in the vicinity of the Four Seasons Hotel when another motor vehicle came around the corner on her side of the road. She states that she was unable to take evasive action and the vehicle collided with the vehicle she was driving.
- [4] Ms. Flanders indicated that the police arrived on the scene, took a statement from her as well as her address and contact information. She states that she was able to determine the name of the person who was driving the other vehicle. However, the police report indicated that the driver had in fact fled the scene of the accident. Ms. Flanders was never determined to have been the cause of the collision. Despite insisting that Ms. Flanders was in fact negligent during cross examination, Mr. Powell does not plead that she was negligent in his statement of claim. His claim, as was pleaded, was merely on the premise of clause 5 of the contract. He did not seek to hold Ms. Flanders liable on account of negligence and I can find nothing in the evidence to prove that she was.
- [5] For his part, Mr. Powell states that he received a phone call at about 8:00pm on that evening from a friend of his informing him that the vehicle was in an accident. He arrived on the scene and noticed

the police were taking measurements. He states that Ms. Flanders was not on the scene and he was informed that she had been taken to the hospital. He made arrangements for his vehicle to be towed. He also presented evidence from an auto mechanic in order to prove the extent of the damages and the cost of repair to his vehicle. It was Mr. Powell's evidence that Ms. Flanders had simply not spoken to him about the accident so he instructed his attorneys to commence these proceedings in order to recover the cost of repairs to his vehicle.

The Issues

- [6] Apart from Mr. Powell's insistence at trial that Ms. Flanders was negligent in her driving, the facts of the case are generally not disputed. In her pre-trial submissions, counsel for Ms. Flanders argued that the statement of case had pleaded no particulars of any breach attributable to her. She argued in those submissions that the statement of claim did not point to any act or omission on the part of Ms. Flanders which would rise to the level of a breach of the agreement. While this submission may at first glance seem attractive, I do not generally agree with it. The claim form clearly pleads that Ms. Flanders had failed to honour the terms of the contract and was therefore in breach of it. Those terms, as outlined in the statement of claim, were as contained in clause 5 of the agreement. Mr. Powell has pleaded that despite his "diverse requests" for Ms. Flanders to honour these obligations, she refused to do so. As scant as it may seem, the nature of the pleadings are adequate. Simply put, Mr. Powell seeks to hold Ms. Flanders liable for the damage caused to his vehicle while it was in her custody and relies on clause 5 of the agreement in support of that argument.
- [7] There had been no pleading or any evidence presented to show that Ms. Flanders had been negligent in her driving on that day. As such, the only way she can be held liable to make good those damages claimed against her is if there had been a breach of clause 5 of the agreement. At the end of the trial I found the submissions filed by counsel to have somewhat ignored the actual issue which was up for determination. The court therefore invited counsel to file further submissions on this narrow point. The issue is whether Ms. Flanders is liable to pay for the damage to Mr. Powell's vehicle by virtue of clause 5 of the rental agreement, despite there being no evidence that she was the cause of the accident in which the vehicle was damaged.

The Law

[8] In as much as the law on the interpretation of contractual terms is quite clear, the practice of applying the law in a court of first instance is not always straight forward. In circumstances like the present, a clause has been included in a general standard rental contract with no evidence that the parties had ever engaged in any significant discussion as to its meaning and effect. I find that, on balance, Mr. Powell did not discuss the issue of insurance with Ms. Flanders; despite the option of purchasing insurance being included in the contract. It is left to the court to determine what the clause actually means and what is its effect on the events which transpired after Ms. Flanders took possession of Mr. Powell's vehicle.

[9] In the case of ***Rainy Sky SA v Kookmin Bank***¹, Lord Clarke addressed the interpretation of contractual terms in the following manner:

“[T]he exercise of construction is essentially one unitary exercise in which the court must consider the language used and ascertain what a reasonable person, that is a person who has all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract, would have understood the parties to have meant. In doing so the court must have regard to all the relevant surrounding circumstances. If there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other.”

[10] Generally, the court gives consideration to the natural and ordinary meaning of the words used in the clause. In many instances the terms may be so clear that there is no doubt as to their effect on the bargain between the parties. But words without context can sometimes be misleading and Lord Clarke therefore encourages a unitary approach. It is not that one must interpret the words in their ordinary and literal meaning and refer to the context as an afterthought, but rather one must interpret the words used in light of the context in order to determine what the parties must have intended from

¹ [2011] 1 WLR 2900

an objective standpoint. In **Arnold v Britton**² Lord Neuberger outlined 6 issues which the court must consider when performing this exercise. He stated as follows:

“That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party’s intentions.”

[11] One other issue which is often important in the construction of a contractual term is that of ambiguity.

It may be that even after considering all the factors above, the court may conclude that there is a genuine ambiguity in the meaning of the clause. The reasonable man may be drawn to conclude that the clause may be interpreted in one or more ways. Lord Clarke stated in his own judgment that one must give an interpretation which is consistent with business common sense. Even that is not always an easy task to perform. In such an instance, the court may also apply the contra proferentem rule which is simply that ***“an ambiguous term in a contract will be construed against the interests of the party who imposed it.”***³ It is not that the court turns a blind eye to common sense in a commercial contract, in that if one possible interpretation clearly defies commercial sensibilities then the court would surely not apply that construction to the term under consideration. However, a party who drafts a contract will carry a greater burden in showing that it should be interpreted in his favour if there is a clear ambiguity in the manner in which the contract is worded.

[12] I come now to consider the terms of the contract which Mr. Powell seeks to enforce. Clause 5 states as follows:

“Customers who have not purchased insurance are responsible for all damage caused to the rented vehicle as well as for any damage caused to the vehicle of a third party due to the negligence of the customer.”

² [2015] UKSC 36

³ See Baptiste JA in the case of Franklin Reynolds v. State Insurance Corporation HCVAP 2007/005

[13] Counsel for the claimant argues that the words of the clause are quite clear. The submission is that if a customer does not purchase insurance, then she is liable to pay for any damage caused to the motor vehicle, regardless of whether she is negligent or not. Counsel's submission is that proof of negligence on the part of the customer is only relevant if what is being claimed is damage caused to the vehicle of a third party. On the other hand, counsel for the defendant argues that the clause must be read as a whole. There are no punctuation marks within the sentence designed to separate its meaning in this way. It is submitted that when read as a whole, negligence must be established in order to hold any customer liable for damages if she has not purchased insurance, regardless of whether it is damage to the renter's vehicle or that of a third party.

[14] It appears to me to be quite clear that the contract sought to create a distinction between those customers who had opted to purchase insurance with the claimant and those who did not. In addition to clause 5, clause 6 stated that "*customers who purchase insurance are responsible for first \$700.00 collision damage.*" That clause does not make any distinction between damage caused by the negligence of the customer or not. Once insurance is purchased the liability is limited to \$700.00. One other section which addresses issues of damage to the vehicle can be found in another document which is not signed but attached to the contract itself. It states that "*an accident shall be reported within 24 hours to the renting company's office in writing and a police report must be made or else renter assumes full responsibility.*"

[15] Much was not presented by way of evidence as to precisely what the nature of this insurance was. One would assume that Mr. Powell's vehicles were already insured, as it is a requirement of the law that at least third party insurance is in place. It would also make commercial sense to ensure that vehicles in a car rental business of this nature are comprehensively insured, as one would not stretch the facts too much if it is assumed that the average customer would not be able to simply pay for excessive amounts of damages out of pocket. That is often the very basis upon which risks of this nature are mitigated by insurance policies. Be that as it may, as per the contract some direct liability is attached to the customer who does not purchase insurance. The question is whether the clause, within that context can be interpreted to mean that such liability is to be attached to the customer regardless of whether the customer was at fault in the case of any damage to the motor vehicle?

[16] In interpreting this contract, I am of the view of either party's interpretation is plausible; although I much prefer that put forward by counsel for the defendant. From an objective standpoint, the reasonable man may construe the clause to mean that the words "***Customers who have not purchased insurance are responsible for all damage caused to the rented vehicle...***" as being severable from the remaining words of the clause. The term "***as well as***" may mean that the remaining words of the sentence are to be construed separately in that negligence on the part of the renter can only be ascribed to circumstances where a third party's vehicle has been damaged. However, given the lack of any punctuation in the sentence, the clause could be read as a whole to mean that the customer who has not purchased insurance is responsible for any damage caused to the rental vehicle as well as to third parties in circumstances where the renter is negligent. To my mind, the one thing which seems clear about this clause, taken within the context of the contract as a whole, is that it is ambiguous; and in such an instance the clause is to be construed against the interest of Mr. Powell. It was he who introduced this clause into the contract and the law places a greater burden on him to ensure that the liability which the customer is undertaking in such circumstances is sufficiently clear.

Conclusion

[17] I therefore find that it was incumbent on Mr. Powell to both plead and prove negligence before he can establish a claim against Ms. Flanders. The evidence does not prove that there is a breach of contract on her part and he is therefore not entitled to the remedies which he seeks. The claim is therefore dismissed with costs in favour of Ms. Flanders to be prescribed costs in keeping with the provisions of the CPR.

Ermin Moise
High Court Judge

By the Court

Registrar