

GRENADA

**IN THE SUPREME COURT OF GRENADA
AND THE WEST INDIES ASSOCIATED STATES
HIGH COURT OF JUSTICE
(CIVIL)**

CLAIM NO. GDAHCV2002/0502

BETWEEN:

DONNA NEPTUNE-BRATHWAITE

(Administrator of the Estate of Hugh Brathwaite, Deceased)

JEREMY FRANKLIN

(Co-Administrator of the Estate of Hugh Brathwaite, Deceased)

ARIA BRATHWAITE

AARON BRATHWAITE

ALEX BRATHWAITE

(By their next friend Donna Neptune-Brathwaite)

Claimants

AND

RICHARDSON PIVOTTE

ANELICIA PIVOTTE

(Administrators of the Estate of Jefferson Pivotte, Deceased)

Defendants

AND

THE BEACON INSURANCE COMPANY LTD.

Ancillary Defendant

Appearances:

Mrs. Celia Edwards, Q.C. with Ms. Carina Johnson for Ancillary Claimants

Mr. Dickon Mitchell for Ancillary Defendant

2010: October 4

2011: May 4

JUDGMENT

- [1] **PRICE FINDLAY, J.:** This is a claim for indemnity under a policy of insurance for a motor vehicle. The Ancillary Claimants instituted proceedings against the

Ancillary Defendant in this matter to enforce the indemnity contained in the deceased's insurance policy.

- [2] The 1st and 2nd Claimants were the Administrators of the estate of Hugh Brathwaite, who had been killed in a road traffic accident with the deceased defendant, Jefferson Pivotte. The 3rd, 4th and 5th Claimants were his children.
- [3] The Ancillary Claimants (the Defendants) then brought an action against the Ancillary Defendant for an indemnity under the insurance policy issued to Jefferson Pivotte.
- [3] Initially, the Ancillary Defendant denied the existence of an insurance policy, later they denied its validity, and finally they alleged that the insured had breached the policy.
- [4] However, in the final analysis, the Ancillary Defendant made an ex gratia payment to the original Claimants in the sum of \$65,000.00 and paid the Bank the sum of \$6,000.00 for the vehicle.
- [5] The Clause of the policy in question reads as follows:

“SECTION II – LIABILITY TO THIRD PARTIES

- 1. The Company will subject to the limits of Liability stated in the schedule of this Policy indemnify the insured in the event of accident caused by the use of the Motor Vehicle on a Public Road against all sums which the Insured shall become legally liable to pay for damages claimant's costs interests and expenses in respect of any liability as is necessary to meet the requirements under the Legislation in respect of:
 - (a) death of or bodily injury to any person except where such death or injury arises out of and in the course of employment of such person by the Insured and excluding liability to any person being a member of the Insured's household who is a passenger in the Motor Vehicle

unless such person is being carried by reason of or in pursuance of a contract or employment,

(b) damage to property other than property belonging to the Insured or held in trust by or in custody or control of the insured or any member of the Insured's household."

[6] This section has to be read in conjunction with Conditions 6 and 7 of the said Insurance Policy. These sections read as follows:

"6. No admission offer promise or payment shall be made by or on behalf of the Insured without the written consent of the Company which shall be entitled if it so desires to take over and conduct in his name the defence or settlement of any claim or to prosecute in his name for its own benefit any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings and in the settlement of any claim and the Insured shall give all such information and assistance as the Company may require.

7. At any time after the happening of any event giving rise to a claim or series of claims under Section 11-1(b) of this Policy the Company may pay to the Insured the full amount of the Company's liability under Section 11-1(b) and relinquish the conduct of any defence settlement or proceedings and the Company shall not be responsible for any damage alleged to have been caused to the Insured in consequence of any alleged action or omission of the Company in connection with such defence settlement or proceedings or of the Company relinquishing such conduct nor shall the Company be liable for any costs or expenses whatsoever incurred by the Insured or any claimant or other person after the Company shall have relinquished such conduct."

[7] The Ancillary Defendant did after a protracted period of time settle the original claim against their insured, and also paid a sum of money to the Grenada Co-

operative Bank which held a lien on the vehicle driven by the insured deceased (Jefferson Pivotte).

[8] The representatives of the estate of the Ancillary Claimants now want the Ancillary Defendant to indemnify them for the cost incurred in defending these proceedings. The Ancillary Defendant is of the view that they are not liable to pay for these costs.

[9] The Ancillary Defendants submit that they are not liable for either:

- (a) the cost of defending the claim brought by the Claimant against the Ancillary Claimant; and,
- (b) the cost of instituting and prosecuting the Ancillary claim against the insurer, the Ancillary Defendant.

[10] The Ancillary Defendant cites Colman J in **Thornton Springer v NEM Insurance Co. Ltd. & Ors**, where he states:

“The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until they have been found liable and so sustained a loss.”

[11] I believe that there is a distinction in this case. Here the Ancillary Defendant settled the claim of the original claimants in this matter. The Ancillary Defendant therefore accepted that there was liability on the part of the Ancillary Claimant. By making the payments they made to the original Claimants and to the Bank, whether those payments were ex gratia or not, the Ancillary Defendant accepted that there was liability on the part of the Ancillary Claimant.

[12] The Ancillary Defendant settled the matter for and on behalf of the Ancillary Claimant, who was their assured. This, to my mind, was an acceptance of liability on the part of the Ancillary Defendant on behalf of the insured.

[13] In this matter the liability of the insured had been agreed by the Ancillary Defendant. While there was no judgment entered against the Ancillary Claimants,

there was an acceptance of liability on behalf of the insured by the Ancillary Defendant.

[14] Once the insurance company settled the original claim they became entitled to pay the costs of the insured. The insurance company under Condition 7 of the Policy chose (as it was entitled to do) to settle the claim made against the insured by the original Claimants.

[15] The Insurance Company has not paid out the full amount under the Policy, it only made partial payment therefore it cannot rely on the exclusion contained in Condition 7 of the policy. It is clear that in settling the claim the Insurance Company acted in accordance with Condition 6 of the policy. The Insurance Company clearly took control of the matter and settled the original claim in the name and on behalf of the Insured. The Insurance Company did not relinquish conduct of the matter; in fact, they effectively took over the proceedings when they agreed to settle the claim of the original claimants.

[16] The Insured has a right to be indemnified under the contract of insurance. I agree with Justice Olivetti in **Jeffery Joseph v General Insurance Agency & Ors** – Suit No. 67 of 1997 (Antigua & Barbuda), where she stated:

“Once the event giving rise to the indemnity is covered by the contract of insurance and the insured has fulfilled his obligations under his contract, he is entitled to be indemnified. This right arises in contract and is quite separate and distinct from a third party's statutory right ...”

[17] I find here in this case that the Insurance Company is liable for the Insured's costs and expenses, both in defending the original claim and in instituting the Ancillary claim.

[18] In the circumstances, I will award the sum of \$8,000.00 as costs to the Defendants/Ancillary Claimants, including the costs of this application.

[19] With respect to the vehicle, I would make no order.



Margaret Price Findlay
High Court Judge