1951 *Present :* **Gratiaen J. and Gunasekara J.**

THE CEYLON INSURANCE CO., LTD., Appellant, *and*
RICHARD *et al.*, Respondents

S. C. 374—D. C. Colombo, 18,823

Motor Car Ordinance, No. 45 of 1938—Part 8—Insurance against third party risks—Scope of insurer's liability to third party—Restrictive and excepted conditions in policy—Breach of excepted condition—Action for declaration of non-liability—Statutory rights and obligations of injured party—Requirement of prescribed notice to injured party—Sections 54, 63, 69, 75, 127, 128, 130, 133, 134, 137, 138.

In an action instituted under Section 137 of the Motor Car Ordinance by an insurer to obtain a declaration of non-liability for breach of an excepted condition in a policy of insurance in respect of third party risks issued in conformity with the requirements of Part 8 of the Motor Car Ordinance—

Held : (i) As between insurer and insured, their rights and obligations *inter se* are measured solely by the terms of their contract, so that the contractual duty of the former to indemnify the latter may be avoided on any lawful ground which the parties might mutually agree upon.

(ii) As far as the injured party is concerned, however, his right against the insurer to claim direct satisfaction of a decree entered in his favour against the insured is unaffected by the terms of the contract itself unless the insurer is protected by a declaration (under section 137) that there has been a breach of a condition in the policy which falls within one or other of the categories of excepted conditions enumerated in Section 130 (4).

(iii) A person who drives an insured motor car of a weight which is in excess of that which is specified in his certificate of competence is not " the holder of a certificate of competence " within the meaning of Section 130 (4) (c) (ii) of the Motor Car Ordinance.

(iv) If an insurer desires, by obtaining a declaratory decree against the insured under Section 137, to escape his statutory obligations towards the injured third party under Section 133 as well, he must, within the statutory period fixed by the proviso, give to the third party a notice *specifying the particular condition* a breach of which is relied on; and no breach other than that so specified can be relied on in order to escape the statutory obligation imposed by Section 133.

(v) If no such notice or if a defective notice (in which no particulars are specified) is furnished to the third party, the latter's statutory right to obtain satisfaction of his decree under Section 133 direct from the insurer would be unaffected by any declaration of non-liability which the insurer may obtain against the insured in terms of Section 137; in that event, the insurer must first discharge his obligation under Section 133, and then seek his remedy against the insured under Section 138.

APPEAL from a judgment of the District Court, Colombo.

Defendant was the owner of a motor car which was 23 cwts. 3 quarters in weight. Plaintiff Company issued to the defendant in respect of this motor car a comprehensive policy of insurance, covering third party risks. It was, however, a condition of the policy that the Company should not be liable in respect of any claim arising while the vehicle was " being driven by . . . . an ' excluded driver ' " as defined in the Schedule to the policy. The expression " excluded driver " was defined in the Schedule and included " any person who is not the holder of a certificate of competence unless he has held and is not disqualified from obtaining such certificate ". Subsequently, when the car was being driven on the public highway by the defendant's employee, it met with an accident in consequence of which the added defendant sustained certain injuries. It was established that on the day of the accident the driver did not possess, and had never possessed, a certificate of competence authorising him to drive a car whose weight exceeded 19 cwts.; he had only possessed a certificate of competence which in terms authorised him to drive motor cars weighing " 19 cwts. and below ".

Plaintiff Company commenced the present proceedings under section 137 of the Motor Car Ordinance, No. 45 of 1938, for a declaration against the defendant that it was not liable to indemnify him in respect of the accident on the ground that the car was at the relevant time being driven by " an excluded driver " within the meaning of the policy. The Company further prayed for a declaration that, as the condition in respect of which a breach had been committed was a condition of a kind authorised by Section 130 (4) of the Ordinance, it was not liable, under

Section 133, to pay any damages that may be decreed in an action which had already been instituted against the defendant by the injured party and was still pending. Notice of the institution of the present proceedings was given to the injured party (added-defendant) who thereupon intervened in order to protect his rights against the Company.

H. V. Perera, K.C., with *H. Wanigatunga* and *M. Ramalingam*, for the plaintiff appellant.

N. K. Choksy, K.C., with *J. M. Jayamanne*, for the defendant respondent.

S. J. Kadirgamar, with *E. R. S. R. Coomaraswamy*, for the added-defendant respondent.

Cur. adv. vult.

August 1, 1951. GRATIAEN J.—

This action relates to a policy of insurance in respect of third-party risks issued in conformity with the requirements of Part 8 of the Motor Car Ordinance, No. 45 of 1938. It will be convenient if I set out shortly the scheme of this legislation which has been introduced for the protection of members of the public who might be injured on the highway through the negligence of drivers of motor vehicles.

Sections 127 and 128 prohibit the user of a motor car, as defined in the Ordinance, unless there is in force a policy of insurance (issued by an " authorised insurer ") against third-party risks in relation to the use of the vehicle by the driver concerned. Section 130 generally renders inoperative, as far as the rights of third parties against the insurer are concerned, any restrictive conditions in the policy which may bind the insured person himself, *except to the extent provided by Section 130* (4). For the purposes of the present case it is sufficient to refer only to one category of the excepted conditions, namely, a condition of non-liability if the accident occurs at a time when the car is being driven " by any person who is not the holder of a certificate of competence.". *Section 130* (4) (*c*) (ii). Should the insured become liable under a decree to pay damages to an injured person in respect of an accident occurring at a time when the policy is in force, Section 133 imposes a duty on the insurer to satisfy the decree by payment direct to the injured person—unless the insurers are entitled to escape liability on the ground that there has been a breach of an excepted condition such as I have previously described. As a condition precedent to relief from such statutory liability, however, Section 137 requires the insurer, within a prescribed period, to obtain a declaration from a Court of competent jurisdiction that a breach has been established of " a condition of the policy being one of the conditions enumerated in Section 130 (4) ". The proviso to Section 137 also requires that notice of such an action, *specifying* the breach of the condition relied

on, should be given within a prescribed period to the injured party whose rights against the insurer are regulated by the Ordinance and not by the terms of the contract itself. The injured party on receipt of this notice is empowered, if he so desires, to be made a party to the declaratory action instituted under Section 137. The underlying purpose of this legislation is made clear by the provisions of Section 138. *As between insurer and insured*, their rights and obligations *inter se* are measured solely by the terms of their contract so that the contractual duty of the former to indemnify the latter may be avoided on any lawful ground which the parties might mutually agree upon. *As far as the injured party is concerned*, however, his right against the insurer to claim direct satisfaction of a decree entered in his favour against the insured is unaffected by the terms of the contract itself unless the insurer is protected by a declaration (under Section 137) that there has been a breach of condition in the policy which falls within one or other of the categories of excepted conditions enumerated in Section 130 (4). Subject to this, the insurer must pay the injured third party and seek thereafter to recover from the insured any sum which exceeds the amount of his strict liability under the contract subsisting between them. It will thus be seen that the insurer's *statutory* liability towards a third party may well exceed his contractual liability towards the insured himself. It is permissible and proper, in my opinion, for a Court whose jurisdiction is invoked under Section 137, to enter a decree, if the circumstances so warrant, declaring that the injured party's rights against the insurer shall not be affected by a declaration in respect of the insurer's rights against the insured.

I shall now consider the facts of the present case. The plaintiff Company is an " authorised insurer " within the meaning of the Ordinance. The defendant was at all material times the owner of a Wolsley motor car No. Z 784 which was *23 cwts. 3 quarters* in weight. On April 11, 1946, the Company issued to the defendant in respect of this motor car a comprehensive policy of insurance, covering third party risks, for a period of one year. It was a condition of the policy that the Company should not be liable in respect of any claim arising while the vehicle was " being driven by . . . . *an ' excluded driver '* ", which expression is defined in the Schedule to the policy as meaning;

" (1) any person other than the insured or a person driving with the insured's express or implied permission;

(2) any person who is not the holder of a certificate of competence unless he has held and is not disqualified from obtaining such certificate ".

It will be seen that the first category of " excluded driver " under the policy corresponds to the class dealt with by Section 130 (4) (*b*) (i) of the Ordinance. The second category corresponds to, but is narrower than, the class dealt with by Section 130 (4) (*c*) (ii). In fact, the Company was entitled, if it so desired, to relieving itself, in terms of the policy, of statutory obligations to a greater extent than it has chosen to do in the present case.

On May 17, 1946, when the car was being driven on the public highway by the defendant's employee J. P. Silva, it met with an accident in consequence of which the added-defendant, who is a minor, sustained certain injuries. The added-defendant, through his next friend, has sued the defendant, with notice to the Company, in action No. 18,669 in the District Court of Colombo for the recovery of Rs. 15,000 as damages in respect of the accident. I understand that this action has been pending for over four years.

On December 18, 1947, the Company commenced the present proceedings under Section 137 of the Ordinance for a declaration against the defendant that it was not liable to indemnify him in respect of the accident because the motor car was at the relevant time being driven by " an excluded driver " within the meaning of the policy. The Company further prayed for a declaration that, as the condition in respect of which a breach had been committed was a condition of a kind authorised by Section 130 (4) of the Ordinance, it was not liable, under Section 133, to pay any damages that may be decreed in favour of the added defendant against the defendant in the pending action No. 18,869 (which I assume the parties concerned will some day have the energy to bring to a conclusion). Notice of the institution of the present proceedings was given to the added defendant who thereupon intervened in order to protect his rights. The learned District Judge after hearing arguments upon the relevant provisions of the Ordinance and upon the meaning of the contract of insurance, dismissed the Company's action against the defendant with costs. The added defendant was ordered to bear his own costs. The Company then appealed to this Court asking for a reversal of the judgment against it. The added-defendant has filed certain cross objections in terms of Section 772 of the Civil Procedure Code.

I propose in the first instance to consider the merits of the case *as between the Company and the defendant*, without reference to the statutory rights and obligations of the added defendant and the Company *inter se*.

It is common ground that on the day of the accident J. P. Silva was driving the insured motor car with the express permission of the defendant. He did not therefore fall within the first category of " excluded driver " defined in the Schedule annexed to the contract. It is also common ground, however, that Silva did not possess, and had never possessed, a certificate of competence authorising him to drive a car whose weight exceeded 19 cwt. He only possessed a certificate of competence P3 which in terms authorised him to drive private motor cars weighing " 19 cwt. and below ", whereas the weight of the insured car, as I have already pointed out, slightly exceeded 23 cwt. In spite of these admitted facts the learned District Judge took the view that the Company could not rely on a breach of the condition of the policy which excludes liability when the car is being driven by " a person who is not a holder of a certificate of competence unless he has held *and* is not disqualified from obtaining such certificate ". With great respect, I find it impossible to appreciate the logic of the learned District Judge's conclusions on this part of the case.

The contract of insurance relates expressly to the Wolsley motor car No. Z 764, *and to no other vehicle*. It is therefore quite apparent that the relevant part of the definition of " excluded driver " in the schedule makes it a condition of liability that the driver should possess at the relevant time or have previously possessed (without any supervening disqualification) a certificate of competence issued by the Commissioner of Motor Transport authorising him to drive a motor car of a description (in respect of weight or any other factor) *to which the insured vehicle belongs*. It is true that Section 63 of the Ordinance divides " motor cars " into only five specified classes, and that the insured vehicle falls within the class described in Section 63 (*e*). It is also true that Section 54 prohibits a person from driving a motor car " of any class " on a highway unless he is the holder of an effective certificate of competence which is valid " for that class of motor cars ". If these two Sections had stood by themselves, there might have been some justification for the view that the licensing authority, when issuing certificates of competence, has no authority to submit a particular " class " of vehicle to some further sub-classification. But this is precisely what Section 69 of the Ordinance empowers him to do. It expressly declares:—

" (1) Notwithstanding anything contained in this Part the Commissioner may in his discretion issue to any person a certificate of competence expressed to be valid for a specified motor car or for motor cars of any specified weight or description.

(2) No person who is the holder of a certificate of competence issued under sub-section (1), shall drive on a highway any motor car other than the motor car specified in that certificate or a motor car of the weight or description specified in that certificate, as the case may be ".

It is quite apparent that Silva's certificate of competence was not valid for the insured vehicle or for any motor car whose weight exceeded 19 cwt. There are obvious reasons why the Commissioner should, in the public interest, be vested with a discretion in matters of this sort, and it is no less reasonable for an insurer to insist as a condition of his liability that the vehicle should be driven by some person whom the licensing authority has certified as competent to drive a motor car *of the particular weight and description to which the insured vehicle corresponds*. A contract must be construed with reference to its context, and it would be monstrous to suggest that the terms of the policy would be satisfied if the driver possessed only a certificate of competence in such a restricted form that he could not drive the insured vehicle without committing a punishable offence.

It has also been suggested that as Silva was not an " excluded driver " within one part of the definition of that term he could not be regarded as " excluded " even if he fell within the second category of excluded drivers. This argument must be rejected because it does great violence to the language of the contract. It would imply that liability attaches to the Company if, for instance, the insured consciously permits the vehicle to be driven by a lunatic or a person whose certificate of competence has

been cancelled by a Court of law under Section 75 of the Ordinance ; similarly, it would imply an agreement to indemnify in a case where a person who possesses a valid certificate of competence steals the car and drives it without the owner's permission. The language of the policy does not sanction the imputation of such reckless benevolence on the part of the insurer.

For the reasons which I have set out I take the view that the Company was under no *contractual* liability to indemnify the defendant in respect of the accident which occurred on March 17, 1946. I am also of the opinion, for similar reasons, that the breach of the condition relied on by the Company was a breach of a condition contemplated by Section 130 (4) (*c*) (*ii*) of the Motor Car Ordinance, No. 45 of 1938, because Silva was not " the holder of a certificate of competence " within the meaning of that section. If, therefore, the Company has satisfied the conditions prescribed by the proviso to Section 137, it would also be entitled to claim non-liability to satisfy, in terms of Section 133 of the Ordinance, the decree which the added-defendant may obtain against the defendant in action No. 18,669 of the District Court of Colombo. In order to decide this latter question, it is necessary to consider the cross-objections filed on behalf of the added-defendant.

As I have previously stated, the added-defendant exercised his right to intervene in this action in order to protect his rights against the Company. His intervention was specially necessary because the Company had expressly asked for a declaration of non-liability to satisfy the decree in the pending proceedings in D. C. 18,669. He associated himself with the defences raised by the defendant, and to that extent his objections have failed. He has in addition raised two additional issues (1) that the District Court of Colombo had no territorial jurisdiction to entertain the Company's action and (2) that *as far as he is concerned* the Company cannot claim the benefit of its declaration of non-liability *against the defendant* because he has not within the prescribed period been furnished with a notice from the Company, as required by the proviso to Section 137, " specifying the breach of the condition on which (it) proposes to rely ". The section expressly declares that such a notice is a condition precedent to an insurer's right to escape his *statutory* obligations under Section 133.

We have had the benefit of a very well-considered argument from Mr. Kadirgamar on the issue as to jurisdiction, but it is unnecessary to give a definite decision on this question because the added-defendant's second objection is in my opinion entitled to prevail.

The only notice which the Company furnished to the added-defendant within the prescribed period is contained in the letter P7 dated December 16, 1947, informing him that the Company intended to institute proceedings against the defendant " for a declaration that there has been a breach of *a* condition enumerated in Section 130 (4) of the Ordinance and specified in the Policy of Insurance ". It is apparent, and Mr. Perera has very properly conceded, that this notice does not purport to *specify* the particular condition a breach of which is relied on. Indeed, Section 130 (4) enumerates as many as a dozen conditions. The purpose of

the proviso is abundantly clear, and has been explained by the Court of Appeal in England in connection with Section 10 of the Road Traffic Act, 1934, which corresponds to Section 136 of our local Ordinance, in which similar words—viz., a " notice . . . . *specifying* the non-disclosure or false representation on which he proposes to rely "—appear. Vide *Zurich General Accident and Liability Insurance Co. v. Morison* [1]. Applying the *ratio decidendi* of this authority, I would in the present case say:—

(1) that if an insurer desires, by obtaining a declaratory decree against the insured under Section 137 of the Ordinance, to escape his statutory obligations towards the injured third party under Section 133 as well, he must within the statutory period fixed by the proviso give to the third party a notice *specifying the particular condition a breach* of which is relied on; and no breach other than that so specified can be relied on in order to escape the statutory obligation imposed by Section 133 ;

(2) that if no such notice or if, as in this case, a defective notice (in which no particulars are specified) is furnished to the third party, the latter's statutory right to obtain satisfaction of his decree under Section 133 direct from the insurer would be unaffected by any declaration of non-liability which the insurer may obtain *against the insured* in terms of Section 137; in that event, the insurer must first discharge his obligation under Section 133 and then seek his remedy against the insured under Section 138.

The principle is clear enough. The terms of the policy of insurance are matters within the knowledge of the immediate parties to the contract, whereas pedestrians and others, for whose benefit compulsory insurance legislation has been introduced, have no voice as to the warranties and conditions in insurance policies. The Ordinance withdraws statutory protection from an injured third party only if contractual conditions of a particular kind are proved to have beeen violated, and then only provided that the third party has been duly furnished with particulars of the breach relied on. This procedure enables the injured man to investigate the specific allegations of which he has been given notice within the prescribed period, so that he can decide whether or not to protect himself by contesting the grounds on which the insurer seeks to escape the statutory obligations imposed on him by Section 133. If, upon such investigation, the third party is satisfied that the insurer is protected, the third party might well consider in any particular case that the expense of obtaining a decree which does not bind the insurer but only an impecunious tort-feasor would be profitless.

It has been suggested that, although the notice served on the added-defendant did not comply with the requirements of the proviso, he must be deemed, by having intervened in these proceedings, to have waived the deficiencies in the notice. On the contrary, the purpose of a third party's intervention, which is expressly contemplated by the proviso, is to enable him to protect himself by relying on the defective notice

[1] *(1942) 2 K.B. 55 C. A.*

so as to ensure that his statutory rights are declared to be unaffected by the order which the insurer is seeking to obtain against the insured. To impute some idea of a notional waiver to the conduct of the added-defendant in this case seems to me to be unwarranted by the circumstances of this case. I refuse to believe that there is any principle of law under which words of protest can, at the moment and indeed by the very fact of their utterance, become converted into words of condonation.

For the reasons which I have given, I would set aside the judgment appealed from, and enter a decree in the following terms:—

(*a*) declaring that, as between the plaintiff and the defendant, there has been a breach of a condition in the policy of insurance No. 2,200 dated April 11, 1946, so as to relieve the plaintiff of its contractual obligations to indemnify the defendant in respect of the accident which occurred on May 17, 1946 ;

(*b*) declaring that, as between the plaintiff and the added-defendant, the plaintiff is nevertheless under a statutory obligation to pay to the added-defendant the amount of the decree including costs, which might be entered in favour of the added-defendant against the present defendant in action No. 18,669 of the District Court of Colombo ;

(*c*) declaring further that, as between the plaintiff and the defendant, the plaintiff will be entitled to recover from the defendant, both under the terms of the said policy No. 2,200 and by virtue of Section 138 of the Motor Car Ordinance, No. 45 of 1938, such amount as may be paid by the plaintiff to the added-defendant in satisfaction of the decree in the said action No. 18,669.

I would also make order that the plaintiff should pay to the added-defendant his costs both here and in the Court below, but that the defendant should pay to the plaintiff its costs in both Courts.

GUNASEKARA J.—I agree.

Judgment set aside.