IN THE SUPREME COURT OF QUEENSLAND Appeal No. 370 of 1986

FULL COURT

BEFORE

Mr. Justice Kelly S.P.J.

Mr. Justice McPherson

Mr. Justice Dowsett

BRISBANE, 19 DECEMBER 1986

BETWEEN:

STEPHEN LESLIE MASON (Plaintiff) Respondent

- and -

THE NOMINAL DEFENDANT (QUEENSLAND) (Defendant) Appellant

JUDGMENT

MR. JUSTICE KELLY: In my opinion the appeal should be allowed with costs, the judgment appealed from should be set aside and in lieu there should be judgment for the defendant with costs. I agree with the reasons prepared by my brother McPherson.

MR. JUSTICE McPHERSON: I agree with the order proposed. I deliver my reasons.

MR. JUSTICE DOWSETT: I agree with the order proposed by the learned presiding judge and with the reasons published by my brother McPherson.

MR. JUSTICE KELLY: The order of the Court is that the appeal is allowed with costs, the judgment appealed from is set aside and in lieu it is ordered that the defendant have judgment in the action with costs, including reserved costs if any, to be taxed.

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 370 of 1986

FULL COURT

BETWEEN:

STEPHEN LESLIE MASON (Plaintiff) Respondent

AND:

THE NOMINAL DEFENDANT (QUEENSLAND) (Defendant) Appellant

KELLY S.P.J.

McPHERSON J.

DOWSETT J.

Reasons for Judgment delivered by McPherson J. on 19th December, 1986. Kelly S.P.J. and Dowsett J. concurring with those reasons.

“Appeal allowed with costs.

Judgment below set aside and in lieu there should be Judgment for the Defendant in the action with costs including reserved costs, if any, to be taxed."

IN THE SUPREME COURT OF QUEENSLAND No. 370 of 1986

Before the Full Court

Mr Justice Kelly, S.P.J.

Mr Justice McPherson

Mr Justice Dowsett

BETWEEN:

STEPHEN LESLIE MASON (Plaintiff) Respondent

AND:

THE NOMINAL DEFENDANT (QUEENSLAND) (Defendant) Appellant

JUDGMENT: McPHERSON J.

Delivered the 19th day of December 1986.

CATCHWORDS:

Insurance - Third party liability insurance - Motor vehicles - Obligations to insure - Where vehicle used on road - Whether including road on private property - Motor Vehicles Insurance Act 1936-1975, s.4F(1)(b); Main Roads Act 1920-1979, s.2; Main Roads Regulations, reg.3(1).

Statutes - Interpretation - Interpretation Acts and clauses - Regulations made under Act - Presumption that expressions used in regulations bear meanings assigned in Act - Whether indication to contrary - Acts Interpretation Act 1954-1977, ss.8, 28(a).

Words and phrases - “road”.

Counsel: Hampson QC with Tait for Appellant
Land for Respondent
Solicitors: Williams & Williams for Appellant
Lee Turnbull & Co. for Respondent
Hearing dates: 4th December 1986

IN THE SUPREME COURT OF QUEENSLAND Appeal No. 370 of 1986

FULL COURT

BETWEEN:

STEPHEN LESLIE MASON (Plaintiff) Respondent

AND:

THE NOMINAL DEFENDANT (QUEENSLAND) (Defendant) Appellant

JUDGMENT - McPHERSON J.

Delivered the 19th day of December 1986.

The plaintiff was injured in a collision between a 5 tonne Daihatsu truck driven by him and a 7 tonne Volvo truck driven by one Chris Bull. The collision occurred at about 8.00 a.m. on November 22, 1982 on a stretch of privately owned land ending at a bore. An unsealed road or track had been graded across the land along which trucks travelled some two or more miles to the bore in order to collect water for carriage to a construction site associated with a coal project. For reasons that will appear, it is relevant to add that, the track, as I have called it, was used only by sub-contractors or their employees engaged in carting water to the construction site. The track was not used by members of the general public. Access to it was gained through a gate that was locked each night, being checked by Mr Jensen, a grazier, who was the owner of the land. From the construction site a sealed road led to the Bruce Highway some 10 or 15 miles north of Bowen.

The evidence of Bull, which was accepted by the learned trial judge, was that at the time of the collision he was returning from the bore carrying a load of water destined for the construction site. Travelling unladen in the opposite direction were three vehicles. One was another Volvo truck driven by Mervyn Abel, whose evidence was also accepted by His Honour, and who was proceeding to the bore to load water. There was a grader which at the relevant time was stationary at the side of and off the track. The third vehicle was the Daihatsu truck driven by the plaintiff.

At a place about a quarter of a mile before the point of collision the plaintiff overtook the second Volvo truck driven by Abel. According to Abel, the plaintiff passed that vehicle on its left and was travelling at between 50 and 60 km/h raising a considerable quantity of dust. Bull, who was proceeding in the opposite direction said that the wind was blowing from more or less directly behind him, which implies that the dust was being blown away from the front to the rear of the plaintiff's vehicle.

The loaded weight of Bull's truck was about 21 tons and he was travelling at 20 km/h. There was evidence of a practice or convention by which vehicles tended to occupy the centre of the traffic way; that unladen vehicles gave way to laden vehicles by moving to the extreme left of the track; and that smaller vehicles gave way to larger. The evidence accepted by His Honour was that the left side of Bull's truck was only 4 feet from the left hand side of the track, which was about 30 feet wide. That would have left a margin of about 3 feet between the right side of Bull's truck and the centre of the track, making the whole of the plaintiff's side of the track available for the plaintiff to pass by Bull's vehicle. As the two vehicles closed Bull saw ahead of him an approaching “red haze” of dust. He reduced speed to 10 km/h and then saw the plaintiff's vehicle. He braked and was practically stopped when the plaintiff's vehicle and his own collided. His estimate of the speed of the plaintiff's vehicle was 60 km/h. The point

of impact on the two vehicles was from the right hand front to the centre of each vehicle.

His Honour found that the plaintiff's vehicle was almost wholly on its incorrect side of the track at the time of the collision and that the plaintiff was guilty of “a high degree of fault”. He nevertheless apportioned responsibility for the collision one third to Bull and two thirds to the plaintiff. Against this finding the defendant appeals.

In making the finding of responsibility on the part of Bull His Honour acknowledged that the question of any fault on his part was one of “no little difficulty”. In the result, his conclusion that Bull was at fault was based on Bull's failure to move his truck to the extreme left of the track and stop well back from the approaching dust cloud. Had this been done, said His Honour, “the plaintiff should have seen him in time to move his vehicle to the left, if that was necessary, and a collision would probably have been avoided.” It was on that footing that Bull was found to have been negligent.

The matter has been debated before us at some length. In the end, I am, with respect, not able to agree with His Honour's finding on this point. It seems clear that by itself stopping would not have avoided a collision. The plaintiff's evidence was that he was “practically stopped” at the time of the collision. Stopping earlier would, it is true, have afforded to the plaintiff a slightly longer span of time within which to see Bull's vehicle approaching. The plaintiff seems to have observed Bull's vehicle only just before the collision. He said in evidence “it was just a split second I seen him right on top of me.” The most favourable explanation of his failure to see Bull's vehicle approaching was that he was travelling in a cloud of dust. But that is inconsistent with Bull's evidence as to the direction in which the dust was being blown; and, if the plaintiff's vision was obscured by dust, he was obviously not proceeding within the limits of his vision but was

driving too fast. By doing so, he substantially reduced the opportunity and time available to Bull to see the plaintiff's vehicle.

Much of the detail of these matters was not closely investigated at the trial. That was no doubt because the plaintiff claimed it was Bull who was travelling on his incorrect side of the track. The finding at trial was that the plaintiff, and not Bull, was on the incorrect side. Bull had, in my view, no reason to anticipate that state of affairs. He was returning from the direction of the bore and so was obviously a laden vehicle to which he might reasonably have expected any oncoming vehicle to give way. He might fairly have supposed that no one would be so foolish as to travel on his incorrect side at 60 km/h in a dust cloud with his vision reduced or obscured as that of the plaintiff must have been.

Although His Honour had the advantage of seeing and hearing the witnesses, it seems to me that in this case the matter of apportionment is primarily, if not entirely, one of drawing inferences from primary facts found at the trial none of which were challenged on appeal. In those circumstances the traditional reluctance of appellate courts to interfere with the trial judge's apportionment is not nearly so strong as in other cases. I have therefore reached the conclusion that the apportionment against Bull was not justified, and that he was not to blame for the collision that occurred.

That is sufficient to dispose of the case in favour of the appellant. But both on the appeal and at trial much attention was also devoted to a further defence raised in the action, which I must now deal with. The action was, it may be noticed, not brought against Bull himself but only against the Nominal Defendant. The reason why the Nominal Defendant was sued was that Bull's vehicle was unregistered and uninsured. Section 4F(2) of the Motor Vehicles Insurance Act 1936-1975 (“the Insurance Act”) provides that a claim for damages in respect of accidental bodily injury

caused by an uninsured motor vehicle, for which the owner would be legally liable under that Act if it were insured at the material time, may be made to and enforced by action against the Nominal Defendant. By s.4F(1)(b), "uninsured motor vehicle" means a motor vehicle:—

> "(i) that is required by or under the Main Roads Act 1920-1972 to be registered in accordance with the regulations made pursuant to that Act; or
>
> (ii) that is required by or under the Motor Vehicles Control Act 1975 to be registered in accordance with the regulations made pursuant to that Act or pursuant to the Main Roads Act 1920-1972
>
> and in respect whereof there is not in force at the material time a contract or policy of insurance under this Act ..."

By virtue of the definition in s.2 of the Insurance Act, "registration" is, when the term is used with reference to a motor vehicle, defined to mean "registration or renewal of registration under the Main Roads Acts."

The question here therefore is whether Bull's Volvo truck required registration under the Main Roads Act 1920-1979 ("the Act") having regard to the fact that it was, at the time of the collision, being used on private land.

The matter of registration of a motor vehicle is dealt with not by the Act itself but by regulations, which are cited as the Main Roads Regulations 1933. Regulation 3 provides that:—

> "(1) Except as is otherwise provided in these Regulations a motor vehicle shall not be used on a road unless -
>
> (i) such use is authorized by a permit issued pursuant to this Regulation; or
>
> (ii) such vehicle is registered."

It must be acknowledged that reg.3(1) does not in terms require a motor vehicle to be registered. What it

does is to prohibit the use of such a vehicle on a road unless it is registered or has the benefit of a permit in accordance with that regulation. Contravention of the prohibition is visited by a daily penalty : see reg.103. Nevertheless, it seems never to have been doubted in Queensland that it is to reg. 3 that s.4F(1)(b) of the Insurance Act refers when it speaks of a motor vehicle being “required” to be registered under the Main Roads Act. Regulation 3 is not part of the Act as such; but, by virtue of s.5(2) of the Acts Interpretation Act 1954-1977, s.4F(1)(b)(i) of the Insurance Act is to be taken to refer to the regulations made under the Main Roads Act.

The principal question for determination here is whether Bull's vehicle was required to be registered pursuant to reg.3(1). If it was, then it was an “uninsured motor vehicle” within the meaning of s.4F(1)(b) of the Insurance Act, and the plaintiff's claim may be enforced against the Nominal Defendant. The parties accept that the answer to that question depends upon whether or not what I have so far been careful to call the track on which Bull's vehicle was being used was a “road” within the meaning of reg.3(1). I have already described in general terms the track, its appearance and location. It was plainly not a road to which members of the public had, or it may be inferred sought to have, access.

The word “road” is not defined in The Main Roads Regulations. The Schedule to the Act contains a description of subject matter that may be the subject of regulations made in the exercise of the power in that behalf conferred by s.39(1) of the Act. In cl.13 of the Schedule, one such subject is described in these terms:—

> “Prohibiting the use upon any road (whether a declared road or not) of any motor vehicle in respect of which the prescribed fee has not been paid ... and for the purpose of any such prohibition, defining the term ‘road’.”

Regulation 3(1) may be attributed to the first part of this clause of the Schedule. As regards the second, the

defining provision of the Regulations is reg.2, which, so far as relevant, contains only the following:—

> "'Road', where the context requires, the term shall be taken to include 'highway'."

That is not in the true sense a definition but simply an inclusionary or extending provision. At common law a highway is a way over which members of the public are entitled to pass and repass whether on foot or otherwise. Plainly the track with which we are concerned here is not a highway in that or any other sense.

Section 2 of the Main Roads Act contains a definition of "road", which is as follows:—

> "Any road, whether surveyed or unsurveyed, dedicated to public use as a road and any track used by the public as a road through any vacant Crown land, any pastoral holding, or any reserve, the boundaries of such track not being defined by survey and the area occupied by such track not being especially dedicated for public use as a road: the term also includes bridge, culvert, ferry, and ford;"

The question is whether this definition applies in interpreting the Regulations made in particular reg.3(i). Section 28 of the Acts Interpretation Act provides that, where an Act confers authority to make any instrument (including regulations), then:—

> "(a) Unless the contrary intention appears, expressions used in any instrument so made ... shall have the same respective meanings as in the Act conferring the power;"

In reg.3(1) the word "road" therefore bears the same meaning as that ascribed to it in s.2 of the Act unless a "contrary intention" can be discerned in the Regulations or in the Act itself.

It is, I think, clear that no such contrary intention appears from reg. 3. Nor can the "definition" of "road" in

reg. 2 of The Main Roads Regulations be said to convey any such intention. It is true that the express extension of the term “road” to include “highway” seems not to have been strictly necessary. One would have thought that a highway was already comprehended by the expression “any road ... dedicated to public use ...” in the definition in s.2 of the Act. Perhaps, however, the draftsman was simply being unduly cautious in reg.2. In any event, it is plain that the reg.2 “definition” or inclusion is not intended to be exhaustive. It would be fatal to the respondent's contention if it were, for, as I have said, the track in question is certainly not a highway.

In the court below Kneipp J discovered a contrary indication in the history of the legislation relating to registration of motor vehicles. He pointed out that by s.2 of the original 1920 version of the Main Roads Act, the word “road” was simply extended to include “bridge, culvert, ferry and ford” without further definition. That “definition” was replaced by the present definition in s.2 in 1939. The original Main Roads Regulations of 1927 contained no definition of “road”; but reg.3 required registration of any motor vehicle, and “motor vehicle” was defined to mean “any vehicle used or intended to be used on any public highway.” The original reg.3(1), His Honour said, seems to have required registration of a motor vehicle used “on any public road.” It was only in 1977 that reg.3(1) was replaced by the provision in its present form substituting “road” simpliciter for “public road.”

His Honour attached considerable significance to the change from “public road” to “road” in 1977. If, by that change, it was intended to pick up the definition of “road” in the Act, then the effect was to extend the registration requirement of reg.3(1) to roads (other than roads dedicated to public use as roads) used by the public through any Crown land, or any pastoral holding or reserve. On that footing, there would, His Honour observed, have been no logical reason for not extending the registration requirement to motor vehicles used on roads used by the

public but situated on private land rather than Crown land. On the other hand, if the expression “public road” meant a road used by the public, irrespective of its location on Crown or on private land, then the change to “road” in place of “public road” in 1977 had a limiting effect by incorporating into the interpretation of reg.3(1) the definition in s.2 of the Act.

His Honour considered that, in determining whether “a contrary intention appears” within the meaning of s.28(a) of the Acts Interpretation Act, it was permissible to have regard to the history of the legislation; and that, taken with the provisions of cl.13 in the Schedule to the Act, such a contrary intention did appear. It followed, according to that approach, that the term “road” as defined in s.2 of the Act was not to be applied, and that “road” in reg. 3 (1) was to be given its meaning “in ordinary parlance.” The learned judge accordingly held that the track in the present case was a “road” within the terms of reg. 3(1), and consequently that Bull's vehicle was required to be registered. It followed that it was an “uninsured motor vehicle” and that the Nominal Defendant was responsible for the damages caused by it.

I confess that I am, with respect, unable to accept His Honour's reasoning on the point. I do not consider that c.13 of the Schedule to the Act affords any indication of a contrary intention. It authorizes in the regulations an express definition of the word “road” for the purpose of a prohibition such as that in reg. 3(1); but the invitation to insert such a definition has not been accepted, the word being left undefined except by reference to s.2 of the Act. While agreeing that in some circumstances one may be justified in finding “a contrary intention” in the legislative history of a particular provision, I do not consider it permissible to do so where the current provision is clear and unambiguous.

The only apparent ambiguities or difficulties discernible in the definition of “road” in s.2 of the Act

are its references to “any pastoral holding or any reserve” and the inclusion of “bridge, culvert, ferry or ford”. It is to my mind not clear whether the latter words extend to bridges, etc. situated on private land. Inasmuch as they are the subject of an express extension it is perhaps arguable that, in order to fall within the statutory definition, they need not be of a public character. The question is, however, not one that arises here and it may safely be left for decision when occasion presents. In relation to “pastoral holding” and “reserve”, it seems to have been assumed by all that these terms refer to a pastoral holding from the Crown and a reserve of land from the Crown. Such an approach is consistent with general usage in Queensland, almost certainly deriving from the use of those terms in successive Crown Lands Acts in this State. The Land Act of 1910, which was the relevant Act in force in 1939 when the present definition of “road” was adopted by the Act, has a specific definition in s.4 of the term “pastoral holding”. It refers to a particular form of pastoral lease; but its significance for present purposes is that the area the subject of such a lease is measured in square miles. It is by no means impossible to conceive of roads over properties of such extent which are used by the public without opposition from the lessee. The draftsman of the definition in s.2 of the Main Roads Act may very well have had in mind stock routes passing through such pastoral holdings : cf. The Land Act of 1910, s.205. The reference in the definition in s.2 of the Main Roads Act to a “reserve” seems clearly enough to be to a reserve for public purposes of the kind referred to in s.180 of The Land Act of 1910. Such a reserve may arise from an outright grant in trust by the Crown or a reservation of Crown land from sale or lease. In either case the land ceases to be “Crown land” within the definition in s.4 of the Act of 1910. Again, the prospect of the use by the public of roads across such land may well have been the reason for its specific inclusion in the definition.

None of these considerations are relevant to the facts of the present case. It was not suggested that the land

over which the track in question passed was a “pastoral holding”. It seems to have been used for grazing purposes; but. the evidence, though scant, is that it was “owned” by Mr Jensen. In any event, the track was certainly not used by the public but only by a limited number of contractors and employees who used it evidently by leave and licence of the owner.

Apart from the matters mentioned by His Honour, there is a number of factors tending to confirm the assumption that the statutory definition in s.2 is intended to apply to reg.3(1). In particular, reg.4(1) prohibits a dealer from delivering a motor vehicle upon sale until application has been made for its registration. Regulation 4(3) provides that reg.4 does not apply where inter alia the vehicle is “not to be used on a road”. Similar provision exists in relation to sale of a tractor : reg. 32(1) and (3). In the case of both reg. 4 and reg. 32, the dealer is required to obtain a declaration in the form of a statement by the purchaser that the vehicle or tractor “is to be used on private property” : see reg. 4(4) and reg.32(4). These and other provisions were the subject of detailed consideration by Ambrose J in Kelly v. Alford (Dec.11, 1985 unrep. Sup. Ct. No. 3134 of 1979), who concluded that:—

> “... the content of reg.4(3) and (4) and 32(3) and (4) clearly assume that the ‘road’ to which reference is made in those regulations is not one ‘on private property’ - at least, in any event, in the absence of its dedication for public use.”

His Honour was there considering a case in which an injury caused by a motor vehicle that was not insured took place on a loading by associated with a meatworks on private land to which the public did not have access. His Honour was referred to, but declined to follow, the decision of Kneipp J in the case now under appeal, but instead held that the locus involved in the case before him (Ambrose J) was not a “road” within the meaning of reg.3(1). He accordingly held that the vehicle in question was not required to be registered under the Act, and so was

not an “uninsured motor vehicle” within the meaning of s.4F(1)(b) of the Insurance Act. In Kelly v. Alford, supra, there was evidence that the vehicle in question was used on public roads at times other than that at which the accident, occurred. In that case it was accepted by counsel that, in the definition of “uninsured motor vehicle” in s.4F(1)(b), the reference to a policy of insurance in force “at the material time” was a reference to the time at which the injury occurred. No such question arises in this case because there is here no evidence whether or not Bull's Volvo truck was ever used away from private property and on a public road. Subject to the reservation of that question, which need not be decided here, I respectfully agree with the observations and conclusion of Ambrose J in Kelly v. Alford, supra, so far as concerns the meaning of the word “road” in reg.3(1).

Like His Honour, I consider that the contrast or opposition between the reference to use on a road and use on private property in regs.4 and 32 is an important indication that the registration requirement, of reg. 3(1) is intended to attract the definition of “road” in s.2 of the Act, which does not include undedicated roads on private property. A difficulty created by discarding that definition is to determine what meaning is to be ascribed to the word “road”. Kneipp J in the present case thought it referred to a road “in ordinary parlance”. However, I am by no means sure that there is any readily identifiable meaning of the word “road” in ordinary parlance. Certainty in this context is obviously essential, particularly having regard to the penalty imposed by reg.103 and the consequences of failure to register and insure. For the respondent Mr Land of counsel submitted that “road” meant any form of way that was not simply two parallel wheeltracks with grass growing in between. That would include a concrete driveway on private property leading to a domestic residence along which a motor mower might be driven or ridden; concrete areas around warehouses used by forklift trucks; tracks, such as those on Mt. Coot-tha behind my own residence, on private property frequented by

that modern scourge of tranquillity the child trailbike rider; and at least some tracks across farmlands, such as cultivation strips beside canefields, which may be used by tractors, harvesters and other vehicles driven by members of the public.

It is a matter for judicial notice that some at least of the foregoing types of vehicles are not commonly registered. If the decision below is correct, it will result in a very considerable extension of the obligation to register and insure many of those vehicles. Some further although indirect legislative support for the view that motor vehicles used on private property are not generally required to be registered may be gathered from the provisions of the Motor Vehicles Control Act 1975. Sections 14 and 15 of that Act require the registration under the Main Roads Act of motor vehicles for the carriage of passengers for reward, irrespective of whether or not the vehicle is used at any time on a road : see s.14(2). In that Act “road” is defined in s.4 of that Act in precisely the same terms as in s.2 of the Main Roads Act. The legislation was enacted not long after a serious accident involving an uninsured bus carrying tourists on Fraser Island otherwise than on a “road” as defined. If the respondent's contention here were accepted, it is not easy to understand why that legislation was thought to be necessary at all.

In my opinion, all these circumstances combine to demonstrate that there are in the Regulations, not merely nothing to indicate an intention contrary to s.28(a) of the Acts Interpretation Act, but positive indications that the definition of “road” in s.2 of the Act is intended to apply to the interpretation of reg.3(1). There is, however, one matter which was not mentioned in the course of submissions before us to which I should refer. It has throughout been assumed that the definition of “road” in the Act upon which s.28(a) of the Acts Interpretation Act operates is that now contained in s.2 of the Main Roads Act. However, in Kostrzewa v. Southern Electric Authority of Queensland

(1970) 120 C.L.R. 653 Barwick C.J. and Kindeyer J appear at least to have assumed, if they did not decide, that the meaning to be ascribed in regulations to a term defined in an Act is the meaning as defined in the Act at the time the regulations were made, regardless of any subsequent variations to or amendments of that term. That would here take the matter back to the original 1920 version of the Main Roads Act in which there was no relevant definition of the word “road”, thus leaving the question of its meaning at large. However, as Professor D.C. Pearce has pointed out (Statutory Interpretation in Australia, 2nd ed., at pp.104-106), the statements on this point in Kostrzewa v. Southern Electric Authority, supra, are in direct conflict with the earlier decision of the High Court of Australia in Birch v. Allen (1942) 65 C.L.R. 621, and appear also to be inconsistent with the provision in s. 8 of the Acts Interpretation Act providing, in effect, that a reference in one Act. to another Act is to be deemed to include a reference to all amending enactments : Pierce, op.cit., at pp.104-105, 107. In these circumstances it seems to me that this Court is entitled to choose between what may, on one view, be two conflicting decisions of the High Court, and that we should here prefer the former. It would, of course, be extremely inconvenient if, on every occasion on which the definition provisions of an Act were amended, the regulations were, so to speak, left behind unless they were themselves also expressly amended on each such occasion. For these reasons I consider that the reference in s.28(a) of the Acts Interpretation Act to “the Act” conferring the power to make regulations should be construed as a reference to that Act as from time to time amended, so that s. 28(a) is to be treated as ambulatory in its operation.

It follows that the word “road” in reg. 3 (1) is to be given the meaning attributed to it in s.2 of the Act; that is, in this context, a road dedicated to public use. Because the track in question in this case did not possess that characteristic, Bull's vehicle was not required to be registered and was consequently not an “uninsured motor

vehicle" for which the Nominal Defendant was responsible under the Insurance Act.

On both of these grounds the appeal should be allowed and the judgment in favour of the plaintiff should be set aside. There should be judgment for the defendant with costs, together with the costs of this appeal.