

TRINIDAD & TOBAGO

IN THE HIGH COURT OF JUSTICE
SUB REGISTRY SAN FERNANDO

HCA NO #3387/93

BETWEEN

POLLY SINGH

Plaintiff

AND

MOTOR & GENERAL INSURANCE CO.

Defendant

Before: The Hon. Justice Nolan Breaux

Appearances: Mr S Marcus SC, & Mr I Harracksingh for Plaintiff
Mr P Deonarine & Mr S Maharaj for Defendant

JUDGMENT

On 7th September, 1980, the plaintiff suffered personal injury in a collision with a motor vehicle driven by one Deokaran Rampersad. In 1989 she obtained judgment against him in the Court of Appeal. She now seeks to recover the judgment sum from the defendant by writ of summons filed on 15th October, 1993. In proving her case, she has to contend with the fact that the first action was filed more than eighteen years ago and with a defendant which has sought to use that to its advantage.

The present action is based on the provisions of section 10(1) & (2) of the Motor Vehicle Insurance (Third-Party Risks) Act Chap. 48:51. Section 10 creates a right in the plaintiff to pursue her judgment against the defendant provided that the defendant had been given notice of the proceedings brought against Mr Rampersad, within seven days of its commencement.

There is however an absolute discretion given to the Court to extend the period of notice where it considers that it is equitable to do so.

There are similar legislative provisions in Barbados, Guyana and the United Kingdom and I have had the benefit of looking at decided cases from these jurisdictions on the issues in question though I may not have cited them all in this judgment.

The plaintiff seeks the following reliefs:

- (1) A declaration that the defendant is liable to pay to her the damages and costs awarded in respect of High Court Action No. 955 of 1982 and Civil Appeal No. 149 of 1986 with interest from the date of judgment until payment.
- (2) Payment of the sum of \$189,094.74 being damages payable under the first action.
- (3) Interest at the rate of 6% per annum on the sum of \$189,094.72 from 24th February, 1982 until payment.
- (4) Such further and other relief as the nature of the case requires.
- (5) Costs.

By her statement of claim she contends that:

- (1) The defendant as authorised insurers under the provisions of Section 2 of Motor Vehicles (Third Party Risks) Act Chap. 48:51 (“the Act”) by a policy of insurance agreed to insure one Deokaran Rampersad in respect of any liability by him in respect of death or bodily injury to or damage to the property of any person caused by or arising out of the use of motor vehicle registration number PN 4091, on a

public road in Trinidad and Tobago. Deokaran Rampersad was the registered owner of the motor vehicle. The liability covered was liability in respect of third-party risks which is required to be covered by a policy of insurance under section 3(1) of the Act.

- (2) On 7th September, 1980 during the existence of the policy the plaintiff sustained personal injury and consequential loss and damage due to the negligence of Mr Rampersad, in the control and driving of the motor vehicle.
- (3) She commenced High Court Action 955 of 1982 against Mr Rampersad to recover damages, such liability being covered by the terms of the policy of insurance issued by the defendant in respect of the motor vehicle. The defendant duly instructed attorneys to defend the action.
- (4) On 10th October, 1989, by a consent order on appeal entered on 28th November, 1989, the plaintiff was awarded damages in the following amounts:
 - (a) \$60,000.00 with interest thereon at 6% per annum from 24th February, 1982.
 - (b) #124,000.00 for loss of amenities and loss of earning capacity.
 - (c) \$5,094.72 special damages, interest at a rate of 3% per annum from 7th September, 1980.
- (5) The defendant had the appropriate notice of the high court action brought against Mr. Rampersad who was represented at first instance and on appeal by attorneys at law retained by the defendant company. The defendant's attorney was requested by letter of 31st October, 1989 to effect payment of the award and to agree to costs, but in reply, the defendant's attorney alleged that the terms of the policy limited liability to \$50,000.00 inclusive of costs and

interest. The defendant subsequently offered to pay the sum of \$50,000.00 in addition to costs. No payment has been made to the plaintiff by the defendant to date.

It is not in dispute that Mr Rampersad was the defendant's insured at the time of the accident or that the plaintiff obtained final judgment against him in the Court of Appeal.

The defendant has not admitted having the requisite statutory notice of commencement of the plaintiff's first action and also contends, in the alternative, that the action is statute-barred by virtue of the provisions of sections 5 and 8 of the Limitation of Personal Actions Ordinance. The defendant contends that, per section 5, the cause of action arose more than four years before this action was instituted and, per section 8, that it arose more than two years before. The plaintiff has made a two-fold reply:

- (1) That the award of quantum at first instance was varied and increased by the Court of Appeal on 16th October, 1989 and again on 19th October, 1989 and that this action was commenced against the defendant on 15th October, 1993 and consequently the action falls with section 5 of the Ordinance.
- (2) That the proceedings herein were brought to recover monies secured to the plaintiff by the judgment of the Court of Appeal and, by virtue of section 3 of the Ordinance, may be brought within twelve years next after the right had accrued.

If the contention at item (2) is correct then it renders irrelevant the issues of limitation under section 5 and section 8.

The defendants also raised the issue of limitation of its liability under the terms of the policy to \$50,000.00. That was denied by the plaintiff, placing the onus of proof squarely on the defendant. No evidence was led by the defendant to support this contention and it was not pursued by Mr Deonarine in his submissions before me.

There are certain issues of fact which also arise from the pleadings, these I shall address when I make my findings of fact. I also do not consider that there is any dispute as to the terms of the policy issued to the defendant's insured with respect to coverage of Mr Rampersad's liability to the plaintiff, having regard to the manner in which the trial proceeded before me and to the issues joined therein.

The issues

There are three issues for decision:

- (1) Is the plaintiff's action secured by a specialty and thus within the provisions of section 3 of the Limitation of Personal Actions Ordinance.
- (2) Did the defendant have notice of HCA 955/1982 ("the first action") within seven days of its commencement.
- (3) If the defendant did have notice but not within seven days, are the facts and circumstances of this case such as to allow for the exercise of the court's discretion to extend the period of notice.

The evidence

Agreed Documents

The following agreed documents were put into evidence by consent:

- (1) A certified copy of proceedings HCA 955/82 dated 24.2.82.
- (2) The High Court Judgment in HCA 955/82 dated 29.10.82.
- (3) A certified copy of Court of Appeal's Order in Civil Appeal 149/86.

- (4) A letter dated 26th October, 1990 from Motor & General Insurance Company to Johanna Koorn attorney at law.
- (5) A certified copy of ownership of motor vehicle PN 4091.

Three persons testified on behalf of the plaintiff, Mr Churchill Soogrim, attorney at law, Mr John Sanowar and the plaintiff.

Evidence of Mr Churchill Soogrim

The evidence of Mr Soogrim was directed at establishing that the requisite statutory notice had been given to the defendant by sending the proceedings by registered mail. He was unable to produce the registration receipt which would have established conclusively, the date on which the letter was posted. This however was not fatal to the plaintiff's case.

Mr Soogrim is a practising attorney of some twenty-seven years. He was retained by the plaintiff to prosecute related criminal proceedings in Princes Town Magistrate's Court. He testified that on 24th February, 1982, he instituted HCA 1955 of 1982 on the plaintiff's instructions. On the same day, he prepared a notice of the commencement of the proceedings addressed to the defendant. According to Mr Soogrim:

"I attached to that notice a sealed copy of the writ of summons and gave it to my clerk Felix Carrington now deceased. I gave him instructions to send the package i.e. the notice and the writ, by registered mail, such notice to be prepared. I saw the said Felix Carrington folding the said notice and the writ and put them into an envelope addressed to Motor and General Company.

He returned sometime thereafter on the same day and handed me a registration receipt concerning prepaid registered post in

respect of that package. I stuck the receipt for the registered parcel unto copy of the notice. I then placed it onto the file relating to the proceedings in this matter.”

Service of the writ was effected and an appearance was entered by Mr Dave de Peiza who was then a solicitor of the Supreme Court and in-house attorney for the defendant. Prior to receiving the acknowledgement of service from Mr de Peiza, Mr Soogrim had known Mr de Peiza for about a year but had not dealt with him in a professional capacity.

He (Soogrim) prosecuted the suit to trial, obtained judgment for the plaintiff and thereafter ceased being attorney for the plaintiff.

Under cross-examination by Mr Deonarine, Mr Soogrim said that he handed over the file relating to the suit to Mrs Johanna Koorn attorney at law. It was given for the purpose of lodging an appeal. He did not keep any notes of the file. In preparation for giving evidence in this action he had no discussion with Mrs Koorn or anyone else, neither did he rely on any document.

Challenged by Mr. Deonarine that his many appearances in court affected his office duties, Mr Soogrim stated his court appearances had no adverse effect on his office duties because any document requiring his signature would simply await his return and it was not difficult for him to attend to relevant matters on the same day.

He kept a register of correspondence which reflected the date of postage, the mode of postage or delivery. Hand delivered mail was acknowledged in signature of the person receiving it. If delivered by registered post, that fact would also be recorded. He added that he did not have possession of the register because his records are destroyed after five years and this matter was more than eighteen years old.

Mr Soogrim was also challenged about his role in retaining the postal receipt and placing it on file; Mr Deonarine suggesting that it was neither his function nor practice to do so. I understood Mr Soogrim's answer to be that he undertook that role as a matter of office practice so as to ensure that his notices were sent out by registered mail as he instructed.

He also could not recall the date when an appearance was entered nor could he not recall whether he tried to take up judgment in default of appearance. He admitted that he would not have been able to take up judgment in default of appearance if he did not have a return of service but denied that it happened in this case. Challenged by Mr Deonarine to explain the nine month hiatus between the filing of the writ and entry of an appearance, he could not recall what steps he took between 24th February, 1982 when the writ was filed and 12th November, 1982 when an appearance was entered on behalf of Mr Rampersad.

John Sanowar

Mr Sanowar stated that he was employed at Motor and General Insurance Company between 1973 and 1991 as the claims manager and supervisor of its legal department. His evidence went towards proving that the defendant received the requisite statutory notice of the plaintiff's first action. He had conduct of and control over all files relative to insurance claims against the company and its policy holders. He testified as to the procedure adopted by the defendant company with respect to those claims.

He is the eldest son of Norris Sanowar, the managing director of the defendant company. It appears from his evidence in cross-examination that Mr Sanowar had broken with his father and was the defendant in a suit brought by the defendant for the alleged conversion of US \$86,000.00. Those proceedings were not in evidence before me.

In my judgment Mr Sanowar was a truthful witness. He was not always able to give precise evidence but I am mindful of the fact that he was seeking to recall events occurring since 1982.

He testified that from time to time, the defendant would receive letters from attorneys making claims on behalf of their clients. After writs were filed, solicitors usually notified the defendant of the commencement of proceedings. Copies of the writs were usually annexed to the letter. Upon receipt an entry would be made in a ledger by the secretary who receives and opens the letter. All communications received by solicitors or attorneys or anyone else would be entered into the ledger. Thereafter a claim file would be located or created. The records of the company would be checked to verify that the defendant in question was insured with them.

In some cases, an investigation would be carried out into the circumstances of the accident; in some cases the company retained an attorney to defend the action. In 1982, Mr Dave de Peiza was the defendant's solicitor. He occupied an office at the defendant's offices at 17 Rust Street, St Clair. Those offices were also the defendant's registered office. Mr Sanowar recalled receiving and reviewing a report on the accident in which Mr Dookeran Rampersad was involved.

He detailed an investigator to obtain a police report. He also recalled sending someone to visit the plaintiff. Mr Sanowar then added that he knew that high court proceedings were instituted on behalf of Mrs Singh in respect of the accident. He said:

“I came to know that upon receipt of a notice, a stereotyped notice, it would have been received at our registered office at 17 Rust Street, St Clair. Yes, I saw the notice. We didn't do anything with it.”

He went on to say that “*most likely*” the defendant did nothing further on the matter until the writ and statement of claim was brought to the defendant’s offices by Mr Rampersad in late 1982. Asked by Mr Marcus whether he saw the writ and statement of claim Mr Sanowar answered:

“I think so. I instructed Mr de Peiza to enter an appearance on behalf of Mr Rampersad. It has been a long time and to say specifically what I did with each and every matter would be very difficult.”

His practice at the time was to prepare a short memorandum of instructions to Mr de Peiza, together with the claim file, the writ and the statement of claim. He added that it was not the practice of the defendant to have someone attend court in all instances. It was only in those cases where the matter was considered sufficiently important or the company had been joined as a defendant. He recalled attending the Court of Appeal hearing of the action. He identified a letter dated 26th October, 1990 which he had signed by him on behalf of the defendant and addressed to Ms Koorn, the plaintiff’s then attorney and by which an offer of \$50,000.00 was made to compromise the action.

Mr Sanowar added that the notice of the action he received had come from Mr Churchill Soogrim. As claims manager and supervisor of the legal department, it was rare for litigation involving the company’s insured to occur and the company not be informed.

He was cross-examined by Mr Deonarine. Mr Sanowar readily admitted to being fired by the defendant as a result of the dispute between them. He denied harbouring any bitterness towards his father over that issue. He stated that all correspondence, including notices, were received by the telephone operator at the defendant company at 17 Rust Street. All letters and notices were entered in a register and would then be passed to the claims department where it was recorded

in another register known as the “*letter book*”. Mr Sanowar admitted to recalling the plaintiff’s notice from memory. On that aspect he stated:

“As I recall, Mr Soogrim’s notice would have been his usual form of notice, would have said simply that in accordance with section 10, or whatever section it would be of the relevant Act, he was enclosing a copy of the writ and statement of claim in this particular matter. But his form did not lend itself to particulars of the matter such as vehicle number etc, that information we would get from the writ.”

The witness conceded that he could not, at this time, say with precision that he did see the particular notice. Pressed by Mr Deonarine, he went on to say this:

“Yes, my recollection is based on an assumption of a number of things. Yes, I would have received the writ and statement of claim. Yes sir, I sent the writ and statement of claim to Mr de Peiza. In this case, I know I passed the notice to Mr de Peiza when I received them from the policy holder. Generally, we would expect the defendant, the insured, to bring the writ and statement if he received it and thereafter we would retain Mr de Peiza. Yes, even if we didn’t get notice, we are obliged to indemnify the insured. We would pass the writ and statement of claim to our solicitors. Yes, that would mean that they would enter an appearance and put in a defence. That was so even if we didn’t get notice of the claim from the plaintiff’s solicitors”.

Mr Deonarine suggested to the witness that it was the defendant’s practice to raise the issue of lack of notice only when a plaintiff was seeking to enforce judgment against it after having succeeded against the defendant’s assured. Mr Sanowar’s answer was as follows:

“Generally that would be so if we felt that the plaintiff or his attorneys might have some difficulty in establishing that they did in fact give us notice.”

In answer to me, he added:

“We wouldn’t know that the plaintiff might have difficulty in proving, unless we raised it. We might suspect.”

He went on to make clear that the defendant would raise the issue of lack of notice even though the defendant had been properly served.

Polly Singh

The plaintiff testified that she was represented by a number of lawyers in the prosecution of the first action beginning with Mr Soogrim and ending with Mr Harracksingh. Ms Koorn was one of them. After Ms Koorn ceased to act, efforts to retrieve the file from Ms Koorn were unsuccessful. Cross-examined by Mr Deonarine, the plaintiff said she was unaware that the defendant was contending that they had no notice of her action against Mr Rampersad when she changed from Mr Soogrim to Ms Koorn. That answer was a credible one given that, prior to the appeal, Mr Sanowar wrote to Ms Koorn seeking a compromise.

The defendant called one witness, Mr Sterling Brown. His evidence is addressed later in this judgment.

Issue 1 - Whether action falls within section 3 of the Limitation Ordinance.

I have chosen to address the issue of limitation first, because if the defendant’s contentions are correct they would render the other two issues irrelevant. The plaintiff’s reply is that her action falls within the provisions of section 3 of the Ordinance.

Section 3, in so far as it is material provides as follows:

“All actions, suits, or proceedings, brought to recover any sum of money secured by ... judgment, or specialty ... shall and may be brought at any time within twelve years next after a present right to receive or have the same shall have accrued to some person capable of giving a discharge for or release of the same...”

Section 5, in so far as it is material, provides:

“All actions for the recovery of any chattel or moveable thing, or the possession thereof, all actions founded upon any simple contract without specialty, all actions for damage or injury to persons or property, and all personal and mixed actions whatsoever, shall and may be commenced and sued within four years next after the cause of such actions, and not after...”

Section 8 provides that:

“All actions or suits, for penalties, damages, or sums of money given to the party grieved by any Statute, order in council, or Ordinance shall be commenced and sued within two years after the cause of such actions or suits...”

For the purposes of the facts and issues of this case the relevant provisions of the Motor Vehicles Insurance (Third-Party Risks) Act are section 10 subsections (1) to (3)

Section 10(1) provides:

“If, after a certificate of insurance has been delivered under section 4(8) to the person by whom a policy has

been effected, judgment in respect of any such liability as is required to be covered by a policy under section 4(1)(b) (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.

(2) No sum shall be payable by an insurer under the foregoing provisions of this section:

(a) in respect of any judgment, unless before or within seven days after the commencement of the proceedings in which the judgment was given or within such other period as the Court may in its absolute discretion consider equitable the insurer had notice of the bringing of the proceedings;

(b) in respect of any judgment, so long as execution thereon is stayed pending an appeal; or

(c) in connection with any liability, if before the happening of the event which was the cause of the death or bodily injury giving rise to the liability, the policy was cancelled by mutual consent or by virtue of any provision contained therein, and either -

(i) before the happening of the said event the certificate was surrendered to the insurer, or the person to whom the certificate was

delivered made a statutory declaration stating that the certificate had been lost or destroyed; or

(ii) after the happening of the said event, but before the expiration of a period of fourteen days from the taking effect of the cancellation of the policy, the certificate was surrendered to the insurer, or the person to whom the certificate was delivered made such a statutory declaration as aforesaid; or

(iii) either before or after the happening of the said event, but within the said period of fourteen days, the insurer has commenced proceedings under this Act in respect of the failure to surrender the certificate.

(3) No sum shall be payable by an insurer under the foregoing provisions of this section, if, in an action commenced before, or within three months after, the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact, or by a representation of fact which was false in some material particular, or, if he has avoided the policy on that ground, that he was entitled to do so apart from any provision contained in it.

However, an insurer who has obtained such a declaration in an action shall not thereby become entitled to the benefit of this subsection as respects any

judgment obtained in proceedings commenced before the commencement of that action, unless before or within seven days after the commencement of that action he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled, if he thinks fit, to be made a party thereto.

The question from me is whether an action brought pursuant to section 10(1) is an action secured by a specialty and thus within section 3 of the Ordinance. In **Makhan v Chin Aqui**, Magisterial Appeal 42 of 1957, sections 3,5 and 8 fell to be considered by the Court of Appeal. In that case the issue was whether an action to recover rent paid in excess of the standard rent, was an action on a specialty for the purposes of section 3. Section 10 of the Rent Restriction Ordinance gave a tenant a right of action to recover any rent paid to the landlord in excess of the standard rent payable by virtue of the Ordinance. The right of recovery was expressed to be recoverable from the landlord or his personal representatives in spite of any agreement between landlord and tenant to the contrary. The Court of Appeal, comprising **Camacho, Acting C J** and **Watkin Williams J**, reviewed a number of English decisions on the point, including the often cited decisions in **Cork and Brandon Railway Company v Goode** 138 E.R. 1427 and **Gutsell v Reeve** [1936] 1 K.B. 272.

The Court of Appeal found the respondent's action to be an action solely on the statute and in consequence was secured by a specialty. Its approach is reflected in the dictum of **Romer L J** in **Gutsell** at pg. 288:

“The question which arises upon this appeal may be stated in this way: Is the plaintiff bringing an action on the statute ... or is he

merely suing in respect of a cause of action given to him by that statute.”

What fell to be considered by the Court of Appeal was whether the tenant’s cause of action arose out of the deed of lease or on the statute. At pg. 6 of its judgment the court said:

“We think that the deciding factor in this case lies in the fact that the Rent Restriction Ordinance creates an entirely new right of action and, but for that right of action, the plaintiff would be unable to sue for overpayment of rental; not only for the difference between the contractual rent and the standard rent but at all.”

As to section 5 of the Ordinance the Court of Appeal held that it applied to actions founded upon simple contract without specialty. As to section 8 the Court of Appeal held that the words “*All actions or suits for penalties, damages or sums of money given to the party aggrieved by any statute*” were ejusdem generis and applicable to personal actions.

The decision in **Makhan** is to be contrasted with another decision of the Court of Appeal in **Caribbean Insurance Company Ltd v Suresh Matadeen**, Civil Appeal 163/1995. One of the several issues in that appeal concerned the provisions of section 17 of the Motor Vehicles Insurance (Third-Party Risks) Act. By section 17 the right of an insured to be indemnified by the insurer under a third party policy vests in the third party should the insured have become insolvent after the accident. The appellants contended that the action was statute-barred by virtue of the provisions of section 5 of the Limitation Ordinance and the question for the Court of Appeal was whether the right of indemnity which had then vested in the third party by operation of section 17, was one secured by a specialty. The Court held that it was not.

At pg. 17, **Hamel-Smith J A** who gave the leading judgment said:

“... the right that is transferred to the third party is the right to the indemnity in the policy in respect of the liability covered (s.12) but the insurer’s obligations to the third party are circumscribed by the terms of that policy that exists between the insurer and the insured. No specialty or debt upon the statute is thereby created.”

After quoting the dictum of **Lord Reid** in **Central Electricity Generating Board v Halifax Corp.** [1962] 3 All E.R. 915, he added.

“Section 17 may be said to “give a cause of action as opposed to being an action” on a statute and for this purpose one has to look to the original contract between the insurer and the insured for the rights and remedies arising therefrom to determine that cause of action.

In these circumstances it seems that the respondent’s cause of action is identical to the insured when he steps into his shoes so to speak and is subject to the same limitation period as the insured. That period is four years from the date of the main judgment ...”

I am advised that this decision is on appeal to their Lordships Board but it illustrates the approach adopted by the Courts in deciding this issue.

Simply put, the question is whether the plaintiff’s claim under section 10(1) is a suit brought on the statute or whether it is a cause of action given by a statute. In my judgment, it is the former. Section 10(1) gives the plaintiff the right to pursue her judgment against the defendant subject to the defendant having had notice of

the proceedings. There is no cause of action. It simply permits her recovery of the judgment sum against the insurer. There is no inquiry into “*liability*” as such but into whether certain conditions precedent have occurred. Strictly speaking the “*cause of action*” was the injury to the plaintiff brought on by the negligent driving of the defendant’s insured for which the plaintiff has recovered judgment.

I hold that the plaintiff’s judgment is a sum of money secured by a specialty and is within the provisions of section 3 of the Limitation Ordinance.

Whether the defendant had the requisite notice

I turn now to the second issue, which is, whether the defendant had notice within seven days as the plaintiff alleges in paragraph seven of her statement of claim. There has been no denial by the defendant that it did not. Rather, the assertion in the statement of claim simply has not been admitted. The onus of proof is on the plaintiff, to be discharged on a balance of probability.

Mr Deonarine submitted that any interpretation of section 10 2(a) must be consistent with that of subsection 3 and that under subsection 3 a positive act of notice is necessary. He added that notice of the proceedings and knowledge thereof are not the same. Mere knowledge of the commencement of proceedings was not sufficient, actual notice was required. He relied on **New India Assurance Co. v Jumai & Gangasarran**, (1980) 28 W.I.R. 231 and his submission was a paraphrase of the dictum of **Crane C**, to which I shall later refer.

Following on from this submission counsel contended that the absence of the registration slip evidencing that the notice was posted by registered mail, was not sufficiently accounted for and that the plaintiff’s evidence did not rise to the quality required to be a sufficient account. He relied on the judgment of **Blackman J** in **Dhroop Jagessar v N.E.M. Insurance (West Indies Ltd)** HCA 560/1976 and **Holwell Securities Ltd v Hughes** [1974] 1 All ER 161.

I do not agree. Under section 10(3), the insurer is expressly required to give notice to the third party who has initiated proceedings to recover against its insured. The legislative intent is to protect the rights of third parties. In **New India Assurance Co. v Jumai & Gangasarran** (supra), one of the issues was whether the third party had been given the appropriate statutory notice of the insurer's action to avoid its policy with its insured, pursuant to the Guyanese legislative equivalent to our section 10(3). By a majority, the Court of Appeal of Guyana held that the necessary statutory notice was not proven to have been served on the third party and in those circumstances the insurers were not entitled to avoid the policy. **Crane C** with whom **Massiah J A** agreed, held that the provision was to be strictly construed. At pg. 244(d) he said:

“I think s. 8(3) must be strictly complied with because, being plainly drafted in the interest of the third party, the implication is that it is designed to protect him.”

In his judgment **Crane C** relied on the dictum of **Goddard C J** in **Zurich General Accident & Liability Insurance Co. Ltd v Morrison** [1942] 72 Lloyds Law Report at pg. 174 in respect of a similar provision. **Goddard C J** said:

“... in the case of motor car insurance it was the third parties who needed the warning, and unfortunately they had no voice as to the warranties or conditions that were inserted in policies, though it was only because they held a policy that careless drivers were enabled to drive and put other persons in peril. It is not surprising, therefore, that by 1934 Parliament interfered, and by Sect. 10 of the Act of that year they took steps towards remedying a position which to a great extent nullified the protection that compulsory insurance was intended to afford. Generally speaking, Sect. 10 was designed to prevent conditions

in policies from defeating the rights of third parties. But insurers are still allowed to repudiate policies obtained by misrepresentation or non-disclosure of material facts. This right, however, was made subject to certain conditions and restrictions contained in Sub-s. (3) of section 10. It seems to me that what the Legislature had in mind was that if an insurer was intending to repudiate a policy it was only fair that the injured third party should know the grounds on which repudiation was sought before he went to the expense of endeavouring to establish his claim against the assured, who, if not entitled to indemnity, might be unable to satisfy a judgment. It was to prevent an injured party incurring further useless expense. Hence the necessity of the notice prescribed by the proviso to the sub-section.”

Crane C then went on to say at pg 245(g) that:

“.....if it were mere knowledgeof the fact that the company had filed an action to avoid the policy that caused him to intervene and to be made an added defendant, that fact alone will not have been a sufficient compliance with s. 8(3). Notice is therefore more than mere knowledge that causes a party to intervene as an added defendant in the proceedings. It is obligatory that notice be proved, namely, that the third party must have had positive notice of the allegations of non-disclosure and misrepresentation of material facts.”

It is on this dictum that Mr Deonarine relied but as I understand it, **Crane C** was simply stating that the provisions of section 10(3) are strict and mere knowledge by the third party of the insurer's proceedings to avoid liability, will not suffice. Actual service of the notice on the third party must be proved in order to satisfy the requirements of section 10(3).

Section 10(2)(a) however is not to be construed as strictly. The intention therein is to allow the insurer the opportunity to defend the action of the third party before a default judgment is obtained. See **Lawton J** in **Mc Goona v Motor Insurers' Bureau & Marsh** [1969]2 Lloyds Law Report 34 at pg. 47 where he said:

“It may well be that if the facts are gone into, for example, a plaintiff may have no grounds of claim at all and unless the insurers have notice of the commencement of proceedings, they are not in a position to intervene. It is important from the insurers’ point of view, too, that they should have notice not later than seven days after the commencement of proceedings because of the danger of judgment in default of appearance being given against a defendant assured.”

Notice will also allow for the insurer to commence an action under section 10(3) to avoid liability, but the words of subsection 2 are clear: there is no duty cast on the third party by section 10(2) to serve the notice on the insurer. While it is in the third party’s best interest, he or she is not required to. It is necessary to show only that the insurer has had notice. Of course the easiest way for the third party to prove notice is to show that he or she has provided it, but notice may also be proved by adducing evidence of the defendant’s insured having provided the defendant with copies of the proceedings. I refer to the dictum of **des Iles J A** in **Motor & General Insurance Company Ltd v Sonnyboy Koongie** (unreported) Civil Appeal 18 of 1982. At pg. 5 of the judgment he said

“The first point to be noted in my respectful view, is that no-one was under any obligation to give notice to the appellant, but the section merely requires that either before or within seven days after the commencement of the said action or within such other period as the Court may in its absolute discretion consider

equitable the appellant [should have] notice of the bringing of the proceedings. Notice from any source is sufficient, though it is not infrequently given by the plaintiff.”

The legislature has also mitigated any injustice which may result from the seven day notice requirement by giving the court the absolute discretion to extend the period of notice to such period as it may consider equitable.

The decision of the High Court of Barbados in **Rollins v New India Insurance Co. Ltd.** (1978) 33 W.I.R. 51 is a decision on both aspects. In that case the plaintiff had instituted proceedings against the insured for damages resulting from a fatal accident. The insured showed the writ to the manager of the insurance company, shortly after the writ had been served on him but no formal notice was sent to the company. The matter was revived some three years later, the plaintiff's new counsel having informed the insurance company of the plaintiff's intention to do so. The company did nothing. At trial the issue was whether the company had notice of the action within the terms of section 9(2)(a) of the Motor Vehicle Insurance Act of Barbados, which section is identical to our section 10(2)(a).

It was held that the company through its manager had notice within section 9(2)(a) and that while the notice was not within the seven day period, it was given soon after the writ was filed and in those circumstances the court would exercise its jurisdiction to extend the time for giving notice. The court took into account the fact that the company had been given notice of the plaintiff's intention to revive the action and extended the period to the date of that latter notice.

It seems to me therefore that section 10(3) stands entirely on its own and Mr Deonarine's reliance on the **New India Assurance** decision is misplaced. The **Dhroop Jagessar** decision is also inapplicable, since it too is a decision on

section 10(3). As to the decision in **Holwell Securities Ltd. v Hughes** (supra) it turned on the specific wording of an agreement and is also distinguishable.

In my judgment, under section 10(2) the third party simply has to prove, on a balance of probability, that the defendant had notice of the action within seven days of its commencement; subject to the discretion of the court to extend the time for giving notice.

I turn now to the evidence adduced.

The evidence

Mr Soogrim testified to preparing the notice of the defendant and attaching it to a sealed copy of the writ of summons giving instructions to his clerk to send them to the plaintiff by registered mail. He saw his law clerk place the notice and writ of summons in an envelope addressed to the defendant and that having left his office, returned sometime later on the same day and handed him a registration receipt. He, Soogrim, stuck the receipt unto a copy of the notice and placed it into the plaintiff's file. I accept Mr Soogrim's evidence.

I also found Mr Sanowar to be a truthful witness. Mr Deonarine had sought to impugn his credibility on the basis of on-going litigation brought by the defendant against Mr Sanowar but even if that were the motivating factor for Mr Sanowar coming forward to testify, it did not denude him of credibility.

As Mr Marcus so aptly put it in his submissions, there is a difference between the revealing of the "*trade secrets*" of an employer by a disgruntled former employee and the giving of false evidence by that employee. Mr Sanowar's evidence falls into the former category. The legal dispute between the defendant and Mr Sanowar and their subsequent parting of ways have merely provided a window of opportunity for the plaintiff to prove that the defendant did have notice of her first action within the requisite statutory period. No doubt there may have been

bitterness generated between both parties over the dispute but even if Mr Sanowar was motivated by bitterness or disgruntlement that does not render his evidence false.

My observations of him, under cross-examination in particular, have led me to conclude that he spoke truthfully. There was no evidence of bitterness towards his father or towards the defendant and he demonstrated a sufficient awareness of the first action as to persuade me of his truthfulness. I refer in particular to the following:

- (1) He remembered having reviewed a report of the accident and of sending someone to interview the plaintiff.
- (2) He recalled attending the hearing of the appeal in the first action.
- (3) He wrote a letter dated 26th October, 1980 to Mrs Koorn on behalf of the defendant seeking to compromise the appeal.
- (4) He was able to describe the form of Mr Soogrim's notices.

He also displayed an intimate knowledge of the defendant's administrative process with respect to its defence of third party actions including the iniquitous tactic of raising a lack of notice when it was perceived that a plaintiff may have difficulty proving that notice had been provided to the insurer, even though the company had been properly notified.

Indeed, the defendant in its defence has chosen to not admit getting the appropriate notice, (rather than an outright denial), leaving it to the plaintiff to prove her pleading that the defendant had notice.

As to the letter of 26th October, 1990, it is curious that such an offer would be made if the defendant did indeed have no notice of the first action.

Mr Sanowar conceded in cross-examination that he was unable to say with precision that he did see the notice in question, but he was strong in his denial of Mr Deonarine's assertion that no notice was received by the defendant. I am mindful that this witness was testifying to events which occurred more than eighteen years ago and having left the defendant's employ, would have had no opportunity to review its files before giving his evidence. Moreover, during Mr Sanowar's employment with the defendant his department was in receipt of notices of High Court proceedings against his company's insured on an on-going basis. The plaintiff's notice of proceedings as well as the writ of summons and statement of claim would have been among many such proceedings he would have encountered. In those circumstances, it would have been surprising if he were able to recall with alacrity or precision the actual notice in question. He displayed sufficient knowledge of the plaintiff's action, however, as to impress me of the truthfulness of his assertion that the defendant did in fact receive the appropriate notice of the commencement of the defendant's first action.

But there is no clear evidence of when the defendant received notice of the proceedings. Mr Sanowar gave no evidence as to the date of receipt. Mr Soogrim's evidence is to the effect that the letter was posted on 24th February, 1982, the same day on which it was filed. I accept that evidence. His office was located at No. 14 St Vincent Street, Port of Spain. The defendant's offices and that of its solicitor were located at 17 Rust Street, Port of Spain. Even allowing for sloth in the delivery of mail, the natural inference is that the letter would have been received within the outer limit of the seven day time period required by section 10(2)(a) and I so find.

Mr Deonarine pointed to the delay between service of the writ of summons and entry of appearance and the fact that no default judgment was taken up during the period, as a basis for inferring that no service was effected within seven days of commencement of the proceedings but I have accepted Mr Sanowar's evidence that it was the policy of the defendant, even after service of notice, to sometimes

await the arrival of its insured with the proceedings before proceeding further. Certainly, given Mr Sanowar's evidence as to the tactical ploy of the defendant, entry of judgment in default of appearance may not necessarily have helped the plaintiff when she came to recover against the defendant.

The defendants also sought to disprove receipt of notice by calling Mr Sterling Brown to give evidence. The purpose of his evidence was to disprove any receipt of notice through the post. His function between 1979 to 1985 was to record incoming mail at the defendant's office and to pass it on to the various departments. The register was used by the claims department to verify whether the company had received any writ of summons or notice. He stated that despite his most diligent efforts he has been unable to locate it.

I can see no point to his evidence. Production of the register may have gone some way to establishing whether there was any record of the plaintiff's proceedings having been received by the defendant. In its absence, Mr Brown was required to show that he had knowledge of all mail received during the seven day period beginning 25th February, 1982 the date of the filing of the proceedings. His evidence never addressed that issue and testimony of his inability to locate the mail book is of no consequence. To the extent that he sought to disprove Mr Sanowar's evidence as to the procedure for recording notices received by the defendant, his evidence was not credible.

The agreed documentary evidence shows that Mr de Peiza, attorney at law was involved in the defence of the action and was successful in setting aside a judgment entered in default of defence on behalf of the plaintiff. The evidence also shows that his office was located on the defendant's premises at No. 17 Rust Street, Port of Spain. It corroborates Mr Soogrim's evidence of Mr de Peiza's role in the defence of the first action and Mr Sanowar's evidence of giving instructions to Mr de Peiza to defend it. I find that the defendant had the requisite

statutory notice and that it proceeded to defend the plaintiff's first action both in the High Court and Court of Appeal.

The plaintiff, on the totality of the evidence, has discharged her onus of proof and is entitled to judgment.

Issue 3 – Exercise of the Court's discretion

But for my finding of fact as to notice, I would have exercised my discretion to extend the period of notice to include the period up to November 1982 when the defendant's insured provided the defendant with the proceedings of the first action. In this case, such an extension would have been to 12th November, 1982 when an appearance was entered on behalf of the defendant's insured. Mr Sanowar's evidence was that Mr Rampersad brought the court proceedings to the defendant's offices in November and that the company sometimes waited until its insured did so before entering an appearance. Thereafter, the defendant retained attorneys to act on behalf of Mr Rampersad both in the High Court and Court of Appeal. Mr Sanowar himself attended the Court of Appeal hearing.

The defendant had ample opportunity to defend the first action and retained counsel on its insured's behalf right up to the Court of Appeal. I can see no prejudice to the defendant in extending the period of notice to 12th November, 1982 having regard to the evidence.

The Order

I shall grant a declaration in the following terms:

“that the defendant is liable to pay the plaintiff the damages and costs awarded in respect of High Court Action 985 of 1982 and Civil Appeal 49 of 1986.”

On the face of it the plaintiff is entitled to full payment of the judgment sum and costs of the first action together with interest at the statutory rate from the date of

the Court of Appeal's award. However, at the urgings of Ms. Dindial, I shall defer such an order pending further argument on the applicable rate of interest.

NOLAN P G BERAUX
Judge

23rd February, 2001