

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE
Sub-Registry San Fernando

No. S-375 of 1998

Between

RAFIQUE MOHAMMED
SONA RAMPERSAD

Plaintiffs

And

MOTOR AND GENERAL
INSURANCE COMPANY LIMITED

Defendant

JUDGMENT

Before the Honourable Mr. Justice V. Kokaram

Appearances:

Mr. Shastri Parsad for the Plaintiffs

Ms. Nalini Sharma instructed by Mr. Lionel Luckhoo for the Defendant

1. BACKGROUND FACTS:

1.1 The Plaintiffs claim against the Defendant is for the payment of the sum of \$8,040.00 being the amount of a judgment entered in High Court Action no 1556 of 1979¹ on 18th February 1994 against Raymond Baptiste, the Defendant's insured by virtue of a policy of insurance issued by it under the Motor Vehicle Insurance (Third Party Risks) Act², with costs taxed and allowed in the sum of \$6,470.55 together with interest thereon at the rate of 6% from 18th February 1994 to the date of payment.

¹ Hereinafter referred to as "the said action".

² Chapter 48:51 hereinafter referred to as "the said Act".

- 1.2 The Plaintiffs contend that the Defendant is liable as an insurer to pay the said judgment including the sum payable in respect of costs and interest by virtue of section 10(1) of the said Act.
- 1.3 The parties in this action agree that the only issue arising for determination is whether the Defendant was given notice, as alleged in paragraph 4 of the Statement of Claim, of the bringing of the said High Court Action or of the intention to bring the said action before or within seven days after its commencement thereof or within such other period as the Court may in its absolute discretion consider equitable as required by section 10(2) (a) of the Act.³
- 1.4 The determination of this action is therefore cast in a very narrow compass and focuses intently on the nature of the notice required to satisfy the condition set out in section 10(2) (a) of the Act and whether the Defendant in the circumstances of this case had such notice.⁴

2. **AGREED FACTS:**

- 2.1 The parties filed an agreed statement of facts on 22nd May 2006 which form the basis for the determination of this issue. The agreed facts in this case are as follows:

- “1. *At all material times and particular on the 13th day of November, 1978 motor vehicle HX 6495 owned by Raymond Baptiste was insured under a Policy of Insurance issued by the Defendant as authorized insurers.*
2. *In consideration of the premium paid to it the Defendant agreed to insure the said Raymond Baptiste in respect of the death of or bodily injury to or damage to the property*

³ See paragraph 4 of the Defence filed on 13th May 1998

⁴ See paragraph 2 of the Defendant’s skeleton submissions dated and filed 23rd May 2006

of any person caused by or arising out of the use of the motor vehicle on a public road.

3. *The Defendant in pursuance of the provision of Section 4 of the Motor Vehicle Insurance (Third Party) Risks Act Ch. 48:51 delivered to the said Raymond Baptiste a Certificate of Insurance in the prescribed form in respect of the said Policy.*
4. *At all material times and in particular on the said 13th day of November 1978 the Plaintiffs' motor vehicle TX-6941 was insured with Presidential Insurance Company Limited whose agent was Lutchman Agencies Limited.*
5. *By letter dated 14th November 1978 Lutchman Agencies Limited wrote on behalf of the Plaintiffs to Mr. Raymond Baptiste, carbon copy to the Defendant, with reference to a purported accident on the 13th day of November, 1978 between motor vehicles TX – 6941 and HX - 6495.*
6. *By letter dated 23rd November 1978 the Defendant acknowledged receipt of the said letter at “5” hereof and informed Lutchman Agencies Limited that the matter was being investigated, and that as soon as their Investigator's Report comes to hand they would reply.*
7. *By letter dated 19th July 1979 Presidential Insurance Company Limited wrote directly to the Defendant with reference to the purported accident inter alia asking for reimbursement of their expenses in the sum of \$4,425.66.*
8. *By letter dated 20th August 1979 the Defendant acknowledged receipt of the said letter at “7” hereof and stated directly to Presidential Insurance Company Limited that the matter was being investigated, and that as soon as their Investigator's Report comes to hand they would reply.*

9. *By letter dated 19th September 1979 Lutchman Agencies Limited advised the Defendants as follows:
“Please let us have a reply to our letters in the above connection ending with ours of the 25th of January, 1979.
Our client is pressing to take action against your client, for the recovery of his excess and un-insured losses, together with our losses.” (sic)*
10. *On the 22nd November 1979 the Plaintiffs commenced High Court Action No. 1556 of 1979 against the Defendant’s insured Raymond Baptiste claiming damages arising out of the purported accident.*
11. *On the 18th February 1994 by consent Judgment was entered against Raymond Baptiste in the sum of \$8,040.00 and costs to be taxed which were taxed in the sum of \$6,470.55 in the said High Court Action No. 1556 of 1979.”*

2.2 It is agreed that no formal notice of the actual filing of the writ of summons was given to the Defendant within seven days of the commencement of the said action and that no formal notice was given to the Defendant of the progress of the said action⁵ which was launched on 22nd November 1979 and determined on 18th February 1994.

2.3 The Plaintiff’s however contend that in the factual matrix as set out in paragraph 2.1 above, the Defendant as insurers of Raymond Baptiste, before the commencement of the proceedings, namely High Court Action 1556 of 1979, had notice of the bringing of the proceedings.

3. **SECTION 10(2) OF THE ACT:**

⁵ HCA 1556 of 1979

- 3.1 The Act makes provision for the protection of third parties against risks arising out of the use of motor vehicles. Section 10 of the Act sets out the duty of insurers to satisfy judgments against persons insured in respect of third party risks.
- 3.2 Section 10(1) of the Act provides that notwithstanding that the insurer may be able to avoid or cancel or may have avoided or cancelled the policy, the insurer shall subject to the provisions of section 10 of the said Act, pay to the person entitled to the benefit of the judgment any sum payable in respect of liability including costs and interest.
- 3.3 The obligation to pay such sums therefore is subject to inter alia to section 10(2) of the Act which provides as follows:
"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"
- 3.4 This is one of the condition precedents to the liability of an insurer to satisfy any judgment against an insured. Indeed it is not a provision that can be waived by the insurer. See *Wake v Page and Another*.⁶
- 3.5 This section is based upon section 10(2) of the Road Traffic Act 1934 (UK). That provision provides as follows:
"No sum shall be payable... unless before or within seven days after the commencement of the proceedings...the insurer had notice of the bringing of the proceedings".

⁶ (2001) TLR 108

3.6 The present formulation of this provision in the United Kingdom is found in section 152 of the Road Traffic Act 1988 (UK) which provides as follows:

"152- (1) No sum is payable by an insurer under section 151 of this Act- (a) in respect of any judgment unless, before or within seven days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings."

3.7 The local equivalent to these sections in section 10 (2) (a) of the said Act, is similar in that it sets out as a condition precedent to the payment by an insurer with respect to any judgment, notice to the insurer of the bringing of proceedings within the following alternative time frames:

- (a) Before the commencement of proceeding in which the judgment was given or
- (b) Within seven days after the commencement of the proceedings in which the judgment was given.

3.8 However unlike its UK counterpart, section 10(2) of the Act also provides further for another alternative to notice to be given of the bringing of the proceedings in addition to these two options which is: *"Within such other period as the Court may in its absolute discretion consider equitable."*

3.9 This in the Court's view is an improvement on the UK counterpart to our legislation and perhaps mitigates the rigors of notice periods being foisted on third parties seeking to enforce its judgments against the insurer. This third alternative appears to give the Court an absolute discretion to ameliorate the effects on an injured third party of a failure to comply strictly with the first two options to provide notice to an insurer. At the same time equity must be meted out to both parties and the Court must exercise its discretion against the special circumstances of each case to determine whether it is equitable to order the

payment of a sum by an insurer in respect of a judgment in proceedings in which the insurer had notice of same beyond the period specified in the section. Certainly it cannot apply to cases where the insurer simply did not have notice of the proceedings at all.

- 3.6 Indeed such a provision in the Act will cater for a cautious Attorney at Law who issues a writ on behalf of his client in respect of personal injuries sustained in a motor vehicle accident to ensure that the claim is not defeated by the Limitation Act, however does not serve it at once until the negotiations with the parties have come to an end. In those circumstances it may be inequitable to insist as of right upon notice to an insurer within the strict period of seven days after the commencement of proceedings. For the reasons set out below however, there is no need to determine whether the Court should exercise this discretion in this case.

4. FORM OF NOTICE:

- 4.1 There is no statutory format for the type of notice to be given to the insurer as prescribed by section 10(2) (a) of the Act. It is accepted that neither written nor express notice is necessary. See *Re Walker ex parte Nickholl*⁷
- 4.2 The notice must however be actual notice of the commencement of the proceedings, which are begun by writ or other originating process or knowledge or information⁸ of the bringing of or that such proceedings were being threatened.
- 4.3 Shawcross's commentary on this aspect of the section referred to by both parties proves particularly useful in the analysis of this requirement of notice:

"It must in any case be a notice in the sense that it is given formally; it must be a mere piece of casual conversation. It must be shown that the insurers in fact know of the proceedings"

⁷ (1884) 13 QBD 471

⁸ See *R v London Quarter sessions* [1956] 1 AER at 679 D

*commenced against their assured, and it would not, it is submitted, be sufficient to show merely that they ought to have known though proof of the latter fact would no doubt help considerably in establishing the former. But it must be carefully observed that the fact of which notice is necessary is not the commencement of the proceedings i.e. the issue of the writ – but the “bringing” of them. It is conceived that this must mean either knowledge that proceedings had been commenced or that they were threatened.”*⁹

- 4.4 In *Herbert v Railway Passengers Assurance Company*¹⁰ the Court was correct to decide that a bit of casual conversation is not sufficient to qualify as notice. In that case the insured casually mentioned to his insurer’s agent in a friendly conversation that an action was brought against him. There must be something more to bring home to the insurer of a potential exposure in civil proceedings, of an intention to pursue an action against the insurer. Having said that however it is recognized that given the appropriate context informal contact between the parties may amount to sufficient notice.

*“There might well be cases in which contact, even an informal contact, shortly before the commencement of proceedings would put the insurer in the position of having notice of the bringing of the proceedings, everything would depend on the facts of the case, but a prudent solicitor would be well advised to ensure that the insurer received written notice within seven days after the commencement of proceeding. There could then be no room for argument.”*¹¹

⁹ Shawcross on the Law of Motor Insurance 2nd ed (1949) 297

¹⁰ [1939] 1 AER 650

¹¹ See *Wake v Page* (ibid)

- 4.5 Indeed circumstances in which there was no written notice of the proceedings within seven days of the commencement of the proceedings lends itself to ambiguity and controversy. However this does not in itself disentitle the third party from pursuing the insurer by demonstrating from the facts that notice of the bringing of the proceedings was given before the commencement of the proceedings.
- 4.6 One of the objects of notice as required by section 10(2) of the said Act is self evident in section 10(3) of the said Act where an insurer is entitled in an action to obtain a declaration that it is entitled to avoid the policy by inter alia non disclosure of a material fact. Such an action however can be brought within three months after or before the commencement of proceedings.
- 4.7 The determination as to whether an insurer had notice is therefore a question of fact to be determined against the backdrop of the relations of the parties, the knowledge acquired by the insurers and the realities of commercial transactions and communications. The Court must examine the substance and not insist upon the form of notice.
- 4.8 The minimum requirements of notice to an insurer is an identification of the proposed plaintiff, the vehicles involved in and date of the accident and the sum being claimed from the owner as damages.
- 4.9 In *Ceylon Motor Insurance v Thambugala*¹² the Judicial Committee of the Privy Council observed as follows:

“It is to be noticed, however, that s. 134 contemplates the possibility of giving notice before the action is filed. In that event no number could be given. It follows that the section contemplates something containing less than a precise specification of the action...”

A notice of action without such words necessarily carries with the implications that action will be filed only if the claim is not settled, and the addition of the express statement does not alter its meaning or its effect. The notice which has been sent in this case sets out the name and address of the proposed plaintiff, the name of the owner and number of the car which caused injuries, the date of the accident, and the sum which was being claimed from the owner as damages. The Lordships are of the opinion that these elements, taken together, constitute a sufficient notice of action under s. 134 (a) and that there are no elements in it which in any way reduce it to something less than a sufficient notice.”

- 4.9 Stollmeyer J examined a string of correspondence between the insurer and insured to determine the existence of adequate notice of the bringing of proceedings. *“By allowing notice to be given prior to the institution of legal proceedings, the Act clearly requires the insurer to be put on notice, but it does not require a plaintiff to give to an insurer full details of the legal proceedings subsequently initiated.”*¹³

5. BY WHOM MUST NOTICE BE GIVEN:

- 5.1 It is not necessary that notice should be given from the person who is the proposed Plaintiff. Indeed notice can come from one source or the other. The fact that is material is that the insurer obtains notice regardless of source. See Shawcross page 299.

- 5.2 The notice of course however must be given to the insurer or its agent and must be sufficient in substance as discussed above.

6. NOTICE IN THE INSTANT CASE:

¹² [1953] 2 AER 873

¹³ HCA s 726 of 1005 Percy Frazier v Capital Insurance Limited

- 6.1 Notice in this case as in *Percy Frazier* can be gleaned from a string of correspondence passing between the Defendant and the Plaintiff's insurer and/or agent.
- 6.2 In this Court's view after considering the facts of this case within the context of the realities of commercial transactions it would be odd to assert that this Defendant did not have notice of the Plaintiff's claim. To assert such a position would be to insist on pedantry of form rather than the clarity of substance.
- 6.3 The letter dated 23rd November 1978 from the Defendant clearly states that this Defendant was investigating an accident occurring on 13th November 1978 involving the motor vehicles of its insured and that of the Plaintiff. One wonders whether this was an act of providence to commission an investigators report if not to establish the incidence of liability between both parties. The Defendant is clearly on the footing of ascertaining the truth or details of the accident.
- 6.4 Some months later the matter is described as a claim by the Plaintiff's insurer. The letter of 19th July 1979 sets out all the ingredients as required in the *Ceylon*. The date of the accident, the sum claimed, the parties involved and relevant documentation in support of the claim. An insurer in the real world of commerce would be quite aware of its exposure at this stage and indeed such correspondence should raise the red flag of potential liability to the insurer.
- 6.5 The correspondence does not end there however. It ends by letter dated 19th September 1979 in which the Plaintiff's insurer requests of the Defendant a reply to the previous correspondence and then the Defendant is advised "*our client is pressing to take action against your client, for the recovery of this excess and uninsured losses together with our losses.*" It is naïve for an insurer to express ignorance of such a threat.
- 6.6 When pressed by this Court to indicate what ingredient is missing from this string of correspondence to make it a notice that conforms to section 10(2)(a) of the Act,

Attorney for the Defendant indicated that there should be a definitive statement contained in one document that definitively brings an end to the negotiations.

6.7 It stands to reason however that if there is no reply to the last correspondence abovementioned, consistent with the client pressing to recover its loses, proceedings will be brought against Mr Baptiste or the Defendant. This Court takes a dim view of an insurer sitting idly by in the face of such communications, refusing to respond and to now exclaim with force that it had no notice of the bringing of proceedings.

6.8 It is clear that the parties had locked horns in negotiations. This was more than mere casual contacts. They were doing business with one another, investigating and assessing the merits of the claim against the Defendant and its insured. The Defendant choose the unwise option of burying its head in the sand by refusing to answer the last ultimatum given to it by the Plaintiff's insurers. It is indeed a fine distinction to draw in this case to say that the Defendant had no notice of the Plaintiffs claim or bringing of proceedings or the consequence of failing to settle the claim.

6.9 The Defendant acted at its peril. The totality of the correspondence reveals that the insurer knew before the commencement of the said action of the bringing of proceedings to recover judgment against its insured.

7. CONCLUSIONS AND ORDER:

7.1 The statute does not set out any precise statutory format or formula for the provision of notice or the contents thereof. Notice of the insurer of the bringing of proceedings for the purpose of section 10(2) (a) of the Act before the commencement of proceedings, can be in writing or otherwise, either contained in one communication or contact or as in this case a string of correspondence or various contacts. A Court would not insist on the pedantry of from of such a notice but rather insist that in substance the insurer has actual notice or knowledge of the bringing of proceedings against it.

- 7.2 The correspondence in this case, taken in its context, satisfies the notice requirement of section 10(2)(a) of the said Act. It certainly would have been advisable that the Plaintiff or its Attorney gave formal notice within seven days after the commencement of the proceedings to the insurer and this judgment must not be seen to be a derogation from this most salutary and practical common sense approach to affix notice on an insurer of the bringing of proceedings. At the same time this Court cannot countenance the approach taken by the insurer in this case in the face of the correspondence passing between the parties.
- 7.3 The Court therefore finds for the Plaintiff. There will be judgment for the Plaintiff against the Defendant.
- 7.4 The Defendant shall pay to the Plaintiff the total sum of \$14,510.55 together with interest thereon at the rate of 6% per annum from 18th February 1994 to 28th September, 2000 and the rate of 12% from 29th September, 2000 to the date of payment together with the costs of this action to be taxed in default of agreement.

Dated this 21st day of June 2006.

Vasheist Kokaram
Judge (Ag.)