

**REPUBLIC OF TRINIDAD AND TOBAGO**

**IN THE COURT OF APPEAL**

**CvA. NO. 31 OF 2004**

**BETWEEN**

**SARANA HARRY**

**PLAINTIFF/APPELLANT**

**AND**

**CHAITRAM HARGOBIN  
CHRISTOPHER SINGH  
COLONIAL FIRE & GENERAL  
INSURANCE CO. LTD.**

**FIRST DEFENDANT/RESPONDENT  
SECOND DEFENDANT/RESPONDENT  
CO-DEFENDANT/RESPONDENT**

**CORAM:**

**M. Warner, J.A.  
S. John, J.A.  
I. Archie, J.A.**

**APPEARANCES:**

**Mr. T. Roopnarine for the Appellant  
Mr. R. Bahadoosingh for the third Respondent**

**DATE DELIVERED:**

**3<sup>rd</sup> March 2005**

**Delivered by M. Warner J.A.**

***I have read in draft the Judgment of Warner J.A., I agree with it and do not wish to add anything.***

***S. John,  
Justice of Appeal***

***I also agree.***

***I. Archie,  
Justice of Appeal***

### ***JUDGMENT***

1. This is an appeal by the plaintiff/appellant against the decision of Narine J. dated 19<sup>th</sup> March 2004, dismissing the plaintiff's claim against the third defendant/respondent, Colonial Fire and General Insurance Co. Ltd., in which the plaintiff sought an order pursuant to Section 10 (A) of the Motor Vehicles (Third Party Risks) Act Chap. 48:51. The action was filed on the 17<sup>th</sup> July 2000. The effect of the learned trial judge's order was to absolve the third defendant from any liability to satisfy the judgment obtained against the first defendant.

2. The dispute arose out of a road traffic accident which occurred on the 3<sup>rd</sup> February 2000 at San Fernando, when the plaintiff was a

passenger in a motor vehicle. Judgment in default of defence was entered against the driver of the vehicle, the second defendant. At the trial, counsel for the owner of the vehicle, the first defendant, conceded that he could put forward no defence, in the light of the declaration obtained by the third defendant, in the action referred to below. Counsel accordingly consented to judgment being entered against the first defendant.

3. In the related action referred to above, intituled H.C.A. 2506 of 2000, filed on the 12<sup>th</sup> October 2000 between the third defendant and the first defendant, (the second proceedings), Stollmeyer J. on the 28<sup>th</sup> May 2002 granted a declaration sought by the third defendant as insurer, against the first defendant as the insured, the effect of which was to avoid a motor vehicle insurance policy to which they were both contracting parties.

4. The second defendant has taken no part in these proceedings, and counsel for the first defendant is watching the interest of his client.

Two issues were raised in this appeal -

1. whether the insurer (the third defendant) had discharged the legal and evidential burden of proving that it gave notice to the plaintiff of the earlier proceedings.

2. whether the declaration which the third defendant obtained in the second proceedings against the first defendant was binding on the second defendant, since the latter was not joined as a party to the second proceedings.

5. **Notice**

Section 10 (3) of the Motor Vehicles Insurance (Third Party Risks)

Chap. 48:51 provides -

***"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.*** (Emphasis Added)

6. Under Section 10(3) the insurer's right to the benefit of a declaratory judgment will be defeated, unless it has served the requisite seven day notice upon the insured.

7. The provisions for giving of notice under Section 10 (3) may be usefully contrasted with the notice provision in Section 10 (2) (a) which relieves the insurer from liability to pay unless the insurer ***'had notice of the bringing of proceedings'***. It provides -

***"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." (Emphasis Added)***

8. It is clear therefore, that whereas in Section 10(3) notice must be ***'given,'*** in Section 10 2(a) notice of the proceedings, by whatever means by which it may have been brought to the attention of the insured, would apparently suffice. In the case of ***New India Assurance Co. v Jumai and Gangasarran [1980] 28 WIR 231*** the Guyanese Court of Appeal held that there must be strict compliance in construing Section 8 (3) of the Motor Vehicles (Third Party Risks) Act, the section equivalent to 10 (3) above, because it (8 (3)) was drafted in the interest of the third party.

9. In the instant matter, the evidence adduced in relation to the alleged notice under Section 10(3) was indeed inconclusive. The witness

Caesar was described in the judgment as a police officer who also worked as a '**process server.**' He testified that he went to Robert Street, Philippines, on the 18<sup>th</sup> October 2000 - the plaintiff was not at home. He returned on the following day and served the document on the plaintiff. Although counsel for the plaintiff did volunteer from his position '**at the bar table**' that the notice was served on the plaintiff's mother, though not on the 18<sup>th</sup> October 2000, he failed to put these instruction to Mr. Caesar. That however was not the end of the matter. Mr. Caesar, in cross-examination, pointed out a person then present in the court, as the person upon whom he had served the relevant documents and notice. Indeed, that person was not the plaintiff. The trial judge however, failed to deal with this turn of events, but rather sought to rely on a matter which did not form part of the third defendant's case. The trial judge failed to consider that it was always the third defendant's case that the document was served on the plaintiff personally.

11. The trial judge found in the alternative that the notice was left with the plaintiff's mother. The weakness in this reasoning though, is that there was no evidence of the date on which the notice was allegedly served, or given to the plaintiff's mother. The statute specifically gives the insurance company a period of seven days within which to give notice to the plaintiff. While I do not agree that the section requires personal service, the question as to whether the notice was left with the plaintiff's mother at the plaintiff's abode, did not fall for determination.

12. This provision in Section 10 (3) is to be contrasted with Section 10 2(a) which confers upon the court a discretion to extend the period, as it considers equitable. I am left to conclude that under Section 10(3) the date of service is of extreme importance, since the statute required that it be '**given**' within seven days. In the result there was indeed no cogent evidence as to when the notice was '**given**' to the plaintiff.

13. I conclude therefore that the trial judge's finding of the fact on the question of notice ought to be reversed on the ground that the trial judge failed to properly address and make a finding on substantive matters of evidence. In view of the fact that I have found for the plaintiff, on the question of notice, it will not be necessary, on this occasion to consider the second limb of the argument.

14. I would therefore allow the appeal, and set aside the trial judge's order dismissing the plaintiff's claim against the third defendant, and substitute an order that the third defendant be held liable to satisfy the judgment obtained by the plaintiff against the first defendant, with costs to the appellant both here and in the court below.

Justice of Appeal

Margot Warner,