THE REPUBLIC OF TRINIDAD AND TOBAGO

In the High Court of Justice

Claim No. CV 2015-01892

BETWEEN

RICO MOHAMMED

Claimant

AND

MARITIME GENERAL INSURANCE COMPANY LIMITED

Defendant

Before the Honourable Madam Justice Donaldson-Honeywell

Appearances:

Yaseen Ahmed and Tara Lutchman, Attorneys-at-Law for the Claimant

Ravindra Nanga and Savitri-Sookraj-Beharry, Attorneys-at-Law for the Defendant

Delivered on: February 25, 2016

RULING

1. The Claimant herein was sixteen years old when he was injured in a motor vehicle accident on October 20, 2006. He was a passenger in the vehicle involved in the accident and the injuries he sustained to his left hand resulted in 60% permanent disability. The vehicle in which he was being driven was owned by his employer and driven by a fellow employee.
2. He succeeded in obtaining an award of damages against the vehicle owner, his employer Roopnarine Furnishing and Hardware Limited, and the driver of the vehicle, one Shane Phillip. That order was made by the Honourable Mr. Justice Aboud in CV 2010-04138 ["the underlying matter"] on March 24, 2014 and the quantum of damages was assessed on May 6, 2015 by the Master to an amount totalling Three Hundred and Eighty-Five Thousand, One Hundred and Thirty-three Dollars and Sixty Cents ($385,133.60) with interest and costs accrued to the time of this action.
3. The Defendant, herein, is the insurer of Roopnarine Furnishing and Hardware Limited ["the Insured"] against Motor Vehicle third Party Risks but has refused to pay the amount ordered by the Court to the Claimant. Accordingly, the Claimant filed the instant action against the Defendant pursuant to Section 10 of the **Motor Vehicle Insurance (Third Party Risks) Act, Chapter 48:57** ["the Act"]to recover the quantum of damages previously awarded.
4. By Notice of Application filed on October 20, 2015 the Claimant applied for an order under the **Civil Proceedings Rules, 1998** [CPR] Part 26(2)(c)and (b) to strike out the Defence herein as an abuse of process and/or as disclosing no cause of action. Alternately, the application sought summary Judgment pursuant to CPR Part 15.
5. The Defence filed on September 15, 2015 is comprised of two limbs as follows:
    a. At paragraph 6 the Defendant contends "in so far as it is liable to settle third party claims, pursuant to Section 4(2) (a) of the Act, a policy of insurance is not required to cover liability in respect of bodily injury sustained by a person arising out of and in the course of his employment." It is not in issue that the Claimant was such a person.
    b. At paragraph 7 the Defendant denies receiving due notice of commencement of proceedings in the underlying matter. More specifically the Defendant says it was notified 29 days after the underlying matter was commenced and such noticewas outside the 7 day period prescribed at Section 10(2)(a) of the Act.

The relevant provisions of the Act:

6. Section 10(1) of the Act 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, in addition to 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.*"

7. Section 4(1)(b) states:

> *"In order to comply with the requirements of this Act, a policy of insurance must be a policy which—*
>
> *(a) Is issued by a person who is an insurer; and (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of any death of or bodily injury to including emergency treatment therefor performed by a duly registered medical practitioner or damage to the property of any person caused by or arising out of the use of the motor vehicle or trailer mentioned in the policy on a public road."*

8. Section 4(2) (a) provides:

> *"(2) In the case of death or of bodily injury, a policy of insurance shall not be required to cover—*
>
> *(a) Liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment; or*"

The Defendant in issuing the certificate of insurance under its policy covering the insured did not opt to exclude provision for employees as envisioned by this Sub-section.

9. Prior to 1996 there was a Sub-section 4(2) (b) which followed after the "or" in 4(2) (a) and provided another exception where persons need not be covered. Within that exception there was an exception for certain types of employees, thus in a roundabout way mandating that they must be covered. The Sub-section was as follows:

> *"except* ***in the case of a motor vehicle in which passengers are being carried*** *for hire or reward or* ***by reason of or in pursuance of a contract of employment****, liability in respect of the death or bodily injury to persons being carried in or upon or entering or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise;*" [Emphasis Added]

That Sub-section was repealed by Act No. 38 of 1996.

10. Section 12A of the Act, which was an amendment also introduced by Act No. 38 of 1996, says:

> "*Where a certificate of insurance has been delivered under section 4(8) to the person by whom a policy has been effected****, so much of the policy as purports to restrict the insurance of the persons insured by the policy as regards liability*** *in respect of the*
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> *death of or bodily injury* ***to persons being carried*** *in or upon the motor vehicle at the time of the occurrence of the event out of which the claims arise* ***by reference to whether or not those persons*** *are carried gratuitously or* ***belong to any particular class of persons shall, as respects such liabilities as are required to be covered by a***
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> ***policy under section 4(1) (b) be of no effect***." [Emphasis Added]

11. Section 10(2) (a) of the Act addresses the requirement for the Insurer to have notice of the underlying matter. It provides:

> *"(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." [Emphasis Added]*

Determination:

Re Defence Limb #One:

12. In considering whether to grant this application consideration is given firstly, whether to strike out paragraph 6 of the Defence. On an application of the literal rule of interpretation of legislation, the grammatical and ordinary sense of the words of Section 10(1) of the Act is that once Judgment was entered for the Claimant in respect of such liability as was required to be covered by Section 4(1) (b) and is in fact so covered by the terms of the policy then the insurer must pay the benefits of the Judgment to the Claimant.
13. There is no mention made in Section 10(1) of Section 4(2) (a) which the Defendant relies on to claim exemption from the requirement to pay. In fact Section 10(1) is not made subject to Section 4(2) (a) and if it is read alone the clear grammatical meaning of Section 10(1) is that the benefit must be paid.
14. Even if, as the Defendant in essence contends, Section 10(1) must be read in context with the whole Act, that would mean taking account not just of Section 4(2)(a) but also Section 12A which effectively cancels the effect of Section 4(2)(a). This interpretation was expounded on with clarity in the Court of Appeal decision in **CV 144 of 2006 American Life and General Insurance Company (Trinidad and Tobago) Limited v Calvin Cayenne and Environmental Management Authority** delivered on November 27,2008.
15. Although the facts in that case differed in that the Claimant was not an employee and the Insurance Policy specifically excluded coverage of employees, Mendonca JA's interpretation of the Section provides valuable guidance. He explained at paragraphs 61 and 62 that Section 12A which was also introduced at the same time that Section 4(2) (b) was repealed, gives an indication as to the intention of the legislature.

    "*The effect of that provision seems to me that if a policy provides that the insurer shall not be liable for bodily injury to passengers who are employees of the insured that that provision will be of no effect since the policy purports to restrict the insurance of the persons insured by reference to the class to which they belong**. If section 12A would capture that, as I think it does, then***

Section 4(2) (a) *and the provision in the policy that mirrors it* ***cannot apply to passengers who are employees.***"[Emphasis added]

16. Further in the case of **S 703 of 1998 Gibraj Sankar v Mahase Sookhai & B&L Insurance**, Dean Armorer J. considered briefly at page 20 the effect of the amendment. The learned judge stated that because in that case the policy was created prior to the Amendment being proclaimed, that it was permissible for it to have excluded liability for employees. This means by implication that in her consideration, if the policy was made after the amendment, exclusion of liability for employees would not have been permitted under the Amendment.

17. Furthermore, even if Section 10(1) is read as being subject to Section 4(2) (a) a purposive approach to interpretation should be applied to the latter section so as to avoid absurdity and repugnance or inconsistency with the rest of the Act.[1] In using the purposive approach the intention of the legislature can best be given effect by reading Section 4(2) (a) in context of the statute as a whole and its historical context.[2] The Mischief Rule of interpretation is also relevant.[3] The rule as usefully summarised in **Re Mayfair Property Co. [1898] 2 Ch. 28 at 35** is that:

> "*In order to properly interpret any statute it is as necessary now as it was when Lord Coke reported Heydon's Case to consider how the law stood when the statute to be considered was passed, what the mischief was for which the old law did not provide, and the remedy provided by the statute to cure that mischief*."

18. The decision in **Pepper v Hart [1991]2 All E.R. 824, C.A.** has made the reference to Hansard, a relevant source of information, in determining the intention of the legislature in cases where the legislation is ambiguous, obscure or leads to an absurdity. The speech of the Minister introducing the Bill for debate is particularly relevant in assessing what mischief the legislation was intended to remedy.[4] In the instant matter the relevant extract has been examined with a view to seeing what the underlying intention was in repealing Section 4(2) (b) of the Act while at the same time introducing Section 12A.

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[1] On purposive interpretation see - Craies on Legislation, Eighth Edition, 2004 at 17.1.2 citing **Grey v Pearson (1857)6 H.L.C. 61 at 106**

[2] Craies on Legislation at 20.11.5

[3] Craies on Legislation at 20.1.5

[4] Craies on Legislation at 28.1.3

19. The Hansard report on the September 20, 1996 Second Reading of the Bill that preceded the Act reveals that the purpose of the Bill was "*to seek to redress the difficulties and injustices which are suffered by persons who are injured, or suffer damage as a result of motor vehicle accidents*." The then Honourable Attorney-General ["AG"] Ramesh L. Maharaj SC, in introducing the Bill, further underscored that "*This Bill is going to make it difficult for insurance companies to avoid liability for accidents for which they are responsible, but which they have in the past, used construction of principles to say that the insurance policies do not cover the particular accident . …….. Some of the clauses, in effect, would place statutory restrictions on insurance companies being able to avoid insurance liability*." Though not expressly mentioned by the then AG as one such clause, it is clear from a reading of Section 12A that the clause of the Bill which introduced it was one of the clauses the then AG was referring to as intended to make it difficult for insurance companies to avoid liability.
20. In my determination whether to grant the application to strike out, consideration was given to the written submissions on both sides and the cases cited therein. Both parties, however, relied on some decisions made prior to the 1996 amendments to the Act which were not relevant in interpreting the current legislation. Notably, the case of **Civ Appeal No 101 of 2004 Capital Insurance v Guishard & Anor** cited by the Defendant at paragraph 26 of its submissions is not relevant since it interprets the law as it existed prior to the introduction of Section 12A.
21. A final consideration pertinent to determining whether to strike out the first limb of the Defence is the fact that the Defence is inconsistent with the Defendant's prior position with regard to risks to be covered. Although the Defendant now seeks to rely on Section 4(2) (a) to say that there was no requirement to cover the risk of injury to employees the Defendant did in fact opt to provide such coverage. The Certificate of Insurance issued to the insured by the Defendant, in fact, goes so far as to include an asterisk next to the words "*Limitations as to Use*" and to stipulate that "*limitations rendered inoperative by Section 12 of the* ***Motor Vehicles Insurance (Third Party Risks) Act*** *are not to be included under this heading*". It is clear from the terms of the Defendant's own document that there was full appreciation for the fact that coverage of the risk of injury to employees being driven pursuant to the business of the insured could not be avoided.

22. Having considered the relevant provisions and authorities cited on both sides as applied to the facts of this case it is my determination that Paragraph 6 of the Defence must be struck out as disclosing no cause of action.

Re Defence limb #2:

23. Section 10(2) (a) of the Act provides that no sum shall be paid on a judgment unless **before** or **within 7 days** after commencement of the proceedings **or within such other period as the Court may consider equitable** the insurer **had notice of** the bringing of the proceedings.
24. Having considered the submissions, herein, I am of the view that the Claimant is correct in saying that on a literal interpretation there is no need for the Claimant to have given a formal notice to the Defendant. It remains. however, a question of fact whether the Defendant had notice of the proceedings, by whatever means the information may have come to its attention, within the required time. If not there is the further issue to be determined by the Court as to whether in all the circumstances there should be a finding that the 29 day period after which the Defendant got a written notice of the underlying matter from the Claimant was equitable.
25. That the onus of proving that they had no notice lies on the Defendant, as Insurer, was established in the Judgment of des Iles JA in **Civ Appeal No 18 of 1982 Motor and General Insurance Company Ltd. V Koongie**. The Defendant will have a duty in fulfilling disclosure requirements for this matter to reveal all correspondence from the insured that are likely to have made them aware of the underlying matter even before the proceedings were commenced.
26. On the face of it, even if the Defendant only got notice when the Claimant sent it after 29 days there is precedent for a finding that the said time was equitable. This is so because as Mc Millan J explained in **HCA No 2292 of 1981 Blizzard and Others v Motor and General Insurance Company** the 29 days is within the three month period under Section 10(3) of the Act when the Defendant as insurer can either:
    a. Avoid the policy;
    b. Take steps to defend the action; or
    c. Take steps to settle the action.

It will be difficult, in the circumstances, for the Defendant to prove any prejudice from delay, if any, in receiving notice of the underlying matter.

27. In all the circumstances although there in not a strong probability that the Defendant can establish both that they had no notice of the proceedings within the prescribed period and that the time they received notice from the Claimant was inequitable, these remain issues to be tried. Accordingly, paragraph 7 of the Defence will not be struck out. In order to further determine the matter, however, the Defendant will be directed to file an affidavit in support of the contention at paragraph 7.

Re Summary Judgment:

28. Having determined that only one aspect of the Defendant's case, paragraph 6, is to be struck out, it remains to be determined whether there should be Summary Judgment for the Claimant as it relates to the remaining limb - paragraph 7 of the Defence. Part 15.2 of the CPR authorises the Court to "*give summary judgment on the whole or part of a claim or on a particular issue if it considers that- (a) On an application by the Claimant, the defendant has no realistic prospect of success on his defence to the claim, part of the claim or issue*." **Blackstone Civil Practice 2005** explains at page 355 that "*An application for summary judgment is decided applying the test of whether the respondent had a case with a real prospect of success, which is considered having regard to the overriding objective of dealing with the case justly*."
29. Having struck out the first limb of the Defence the sole remaining issue to be determined if the matter is to proceed is whether the Defendant had the required 7 days' notice of the underlying matter and if not whether the notice it had was equitable. In addressing whether to strike out paragraph 7 of the Defence, the hurdles that may be faced by the Defendant in succeeding on this limb of the defence were hereinabove underscored. However, I decided that the said paragraph would not be struck out as it was not entirely clear on the face of the pleadings that no grounds for defending the matter were disclosed therein.
30. For the same reasons it is not my finding at this stage that the Defendant has no realistic prospect of success on the second limb of its defence. Accordingly, my determination is that summary judgment will not be granted on any part of the Defence. Instead the Defendant will be required to submit affidavit evidence in support of the said second limb to be considered during case management.

31. In accordance with CPR 15.6, since the proceedings have not been brought to an end on the hearing of the application for summary judgment, this hearing will be treated as the first Case Management Conference [CMC] and directions will be given inclusive of the direction that the Defendant is to provide the required affidavit evidence. Thereafter, at the second CMC a decision will be made by virtue of CPR 26.1(1) (k) whether to give judgment for the Claimant after determination as to whether there is any realistic prospect of success on the second limb of the Defence as a preliminary issue.

Order:

32. It is hereby ordered that :

a. The Claimant's application to strike out paragraph 6 of the Defence is granted.
b. The Claimant's application to strike out paragraph 7 of the Defence is dismissed.
c. The Claimant's application for summary Judgment herein is dismissed.
d. The Defendant is directed to file an Affidavit setting out the following:
    i. The dates and content of correspondence or oral communication it received, if any, from the Insured regarding the underlying matter prior to and within 7 days after commencement; and
    ii. Evidence of any prejudice suffered by the Defendant in the event that it received no such notice,

    on or before the 10th day of March, 2016 failing which Judgment will be entered for the Claimant.

e. The Claimant is granted permission to file a Reply on or before the 31st day of March, 2016 setting out the reasons for the delay if any in providing actual notice to the Defendant of the underlying proceedings.

f. The hearing of the matter is adjourned to 15th April, 2015 at 9.00 a.m. in POS 18 for a second CMC.

g. Costs in the cause.

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Eleanor Joye Donaldson-Honeywell

Judge

Assisted by: Christie Borely

Judicial Research Counsel I