REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

HCA. S-1224 of 2005
Claim No. CV 2006-02217

BETWEEN

COREY BAILEY

Claimant

AND

JASON GEORGE

First Defendant

RODNEY LAVIA

Second Defendant

NEW INDIA ASSURANCE COMPANY
(TRINIDAD AND TOBAGO) LIMITED

Third Defendant

Before the Honourable Madame Justice Rajnauth-Lee

Appreances:

Mr. Shawn Roopnarine and Mr. Robin Ramoutar for the Claimant.

Mr. Vijai Deonarine instructed by Mr. Richard Arjoon Jagai for the Third Defendant

Dated: the 23rd September, 2010.

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REASONS

1. In this claim, the Claimant claimed against the Defendants damages for personal injuries, loss and expenses caused by the negligent driving, management or control of motor vehicle registration No. PAY 475 by the Second Defendant, the servant and/or agent of the First Defendant on the 27th February, 2005, along the Solomon Hochoy Highway, Couva. As against the Third Defendant, the Claimant claimed an order pursuant to section 10A of the Motor Vehicles Insurance (Third Party Risks) (Amendment) Act 1996 (notice having been given to the Third Defendant by registered letter dated the 25th May, 2005) that the Third Defendant do pay the Claimant the benefit of any judgment obtained together with interest and costs.

2. The claim was commenced on the 4th July, 2005, by writ of summons pursuant to the Rules of the Supreme Court, 1975, and was converted to the Civil Proceedings Rules, 1998 ("the C.P.R") pursuant to Part 80.3 of the C.P.R. by notice dated the 18th August, 2006.

3. On the 31st October, 2005, the First and Second Defendants not having entered an appearance, judgments were entered against them. Only the Third Defendant on the 11th October, 2005, had filed a Defence. The Third Defendant pleaded at paragraphs 4 – 11 of the Defence as follows:

> *4. If the Plaintiff suffered the alleged loss and damage (which are not admitted) this Defendant will contend that it is not liable and would rely on the facts hereinafter set out.*
>
> *5. On or about the month of January, 2005 the First Defendant parted with possession of motor vehicle PAY-475 to the Plaintiff for his own use and*

benefit and/or the Plaintiff was a baliee of motor vehicle PAY-475 for the purposes of using the same for his social and domestic interest and benefit.

6. *This Defendant will contend that the acts carried out by the First Defendant was a fundamental breach of the Policy of Insurance whereby the First Defendant parted with possession of the vehicle PAY-475 without notification to this Defendant.*

7. *Further or alternatively by the said Policy of Insurance, #CHM 50/5091 it was agreed between the Third and First Defendant inter alia:*

"The Company shall not be liable in respect of:

1. Any accident, loss, damage or liability caused sustained or incurred whilst on the Insured's order or with his permission or to his knowledge:-

(b) Any Motor Vehicle in respect of which indemnity is provided by this Policy is being used otherwise than in accordance with the Limitations as to Use".

(c) Motor vehicle PAY -475 was to be used only for social, domestic and pleasure purposes and for the Policyholders business.

(d) The Policy does not cover use for hire or reward.

8. *Further or alternatively in breach of the terms stated in Paragraph 7(1) hereinabove this Defendant will contend that the Second Defendant was not the servant and/or agent of the First Defendant but the servant and*

agent of the Plaintiff and was driving the said vehicle for the benefit and concerns of the Plaintiff and was not driving the vehicle for the First Defendant.

9. *Further or alternatively in breach of Paragraph 7(b), (c) and (d) hereinabove of the policy this Defendant contends that at the time of the said accident and while the vehicle was in possession of the First Defendant the said vehicle was used for reward which was contrary to the Limitation as to Use.*

PARTICULARS

While the vehicle was in possession of the Plaintiff he used the said vehicle to carry out an Escort Service for reward.

10. *Further or in the alternative the Plaintiff as Bailee and/or in control and custody of motor vehicle PAY -475 failed and/or neglected to maintain the said vehicle in his possession where upon immediately prior to the accident one of the rear wheels came off.*

11. *This Defendant will rely on the failure to maintain the vehicle as an act of negligence and/or of contributory negligence of the Plaintiff and/or will rely on the doctrine of res ipsa loquitor.*

4. Pursuant to Legal Notice No. 33 of 1993, on the 31st October, 2005, the Claimant applied for a date for the assessment of damages.

5. In addition, on the 2nd December, 2005, the Claimant set down the action on the General List of Cases for trial.

6. Prior to the trial of the matter, by Amended Notice of Application filed on the 17th September, 2007, the First Defendant, Jason George, the Insured, applied to the Court for an order:

1. *That the default judgment entered herein in default of appearance and all subsequent proceedings be set aside on the ground of:*

   (a) The Defendant has a realistic prospect of success in the claim; and

   (b) The Defendant acted as soon as reasonably practicable when he found out that judgment had been entered against him.

2. *That the Defendant be granted leave to defend this action;*

3. *That the Cost of this application be costs in the cause.*

7. On the 20th September, 2007, the Court heard submissions advanced on behalf of the Claimant and the First Defendant and dismissed the First Defendant's application with costs.

8. Subsequently, the Court inter alia made an order for the filing of witness statements on behalf of the Claimant and Third Defendant and the trial was fixed for the 1st May, 2008.

9. At the commencement of the trial on the said 1st May, 2008, the Claimant's Attorney informed the Court that the Claimant had not filed any witness statements since judgments were entered against the First and Second Defendant. Once judgments were so entered against the First Defendant, the Insured, it was argued, judgment ought to be entered against the Third Defendant, the Insurer. Further, it was argued by Attorney for the Claimant, that the Claimant had obtained judgments in default against the owner/insured and driver of the vehicle, and in those circumstances, the Third

Defendant was deemed to have admitted the allegations contained in the Claimant's Statement of Case.

10. It was further argued on behalf of the Claimant that the Third Defendant in these circumstances was not entitled to challenge the Claimant's damages.

11. On the other hand, it was submitted on behalf of the Third Defendant that the liability of the Third Defendant did not arise until there was an ascertained sum payable to the Claimant pursuant to section 10(1) of the Motor Vehicles Insurance (Third-Party Risks) Act Chap 48:51 ("the Act").

12. Section 10(1) of the Act provides as follows:

> *10. (1) 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.*

13. In addition, Attorney for the Third Defendant argued that since the Court had not ordered that the trial be split, in the absence of evidence as to damages filed by the Claimant, the Court could not ascertain what sum was payable under section 10(1) of

the Act and in those circumstances, the claim against the Third Defendant ought to be dismissed.

14. After hearing these oral submissions, the Court made it clear that the Court always understood that the trial had been set to deal with the points of law raised by the Third Defendant in it Defence. The Court indicated to Attorneys that it also understood that the assessment of damages, if necessary, would follow the Court's ruling on the Defendant's points of law. The Court observed that extensive written submissions had been filed by the parties with respect to the points of law raised in the Third Defendant's Defence.

15. Having heard brief arguments on behalf of the parties (no authorities having been cited on the point) and having examined section 10(1) of the Act, the Court ruled that section 10(1) of the Act could not be interpreted to mean that only where damages had been assessed in favour of the Claimant, judgment could be entered against the Third Defendant, the Insurer. In the view of the Court, such an interpretation would run contrary not only to the ordinary meaning of section 10(1) of the Act, but also to years of established civil practice both under the Rules of the Supreme Court, 1975, and under the C.P.R. where [in the absence of any special defence on the part of the Insurer] once judgment in default had been entered against the insured, judgment was granted against the Insurer. Subsequent to the judgment, an assessment of damages was carried out either by the Judge or by the Master. Accordingly, in the judgment of the Court, in the circumstances where the Claimant had obtained judgments against the First Defendant, the Insured, and the Second Defendant, the driver, which judgments had not been set aside, the Claimant had the benefit of a judgment pursuant to section 10(1) of the Act. Nothing in section 10(1) suggested that damages had to be assessed before a judgment could be entered against the Third Defendant, the Insurer.

16. In addition, the Court ruled that having regard to the default judgments against the First and Second Defendants and the Defence advanced by the Third Defendant, the

burden of proof was on the Third Defendant. The Court therefore directed that the Third Defendant begin its case.

17. Thereafter, the Third Defendant produced its only witness, Ms. Lily Mohammed, who had made a witness statement which was filed on the 20th December, 2007. I will set out the witness statement in full:

> *1. As Branch Manager I have access to all the files, documents and records relating to persons insured with The New India Assurance Company (Trinidad & Tobago) Limited hereinafter called "New India") including the First Defendant **JASON GEORGE**.*
>
> *2. On the 15th September, 2003, a Policy of Insurance #CHM/50/5691 was issued to JASON GEORGE by the New India with respect to the motor vehicle registration PAY -475. A true copy of the Policy is hereto annexed and marked **"LM1".***
>
> *3. On the 24th May, 2004 a Certificate of Insurance #CHM/50/5691 was issued to **JASON GEORGE** for the period 26th May, 2005 to 25th May, 2006 with respect motor vehicle registration number PAY -475.*
>
> *4. By Letter dated 8th July, 2005 New India was served with the proceedings in the matter herein. Following receipt of same New India instructed Exponential Services to investigate the accident. A report dated 25th July, 2005 was subsequently forwarded to New India which included a statement from the following*
>
> *(i) Jason George dated and signed 12th July, 2005*
>
> *(ii) Antonio Chandlar dated and signed 8th July, 2005*
>
> (iii) *Dwayne Duncan dated and signed 8th July, 2005*

A true copy of the said Report including these statements is hereto annexed and marked ***"LM2".***

5. *From these statements Jason George's vehicle was in the possession of Corey Bailey for some period of time and used by Corey Bailey who paid Jason George for use of the vehicle. Further from the said statements on the date of the accident the 26th November, 2005 Corey Bailey was transporting Antonio Chandlar and Dwayne Duncan.*

6. *The said Policy of Insurance provided inter alia: - that the vehicle was supposed to be used for social domestic and pleasure purposes and for the Policyholder business and did not cover hire or reward inter alia.*

18. Objection was taken by the Claimant's Attorney to paragraphs 4, 5 and 6 of the witness statement. It was argued on behalf of the Claimant that the witness did not have custody of the documents sought to be tendered into evidence, that the evidence therein was hearsay pure and simple, and that for reasons that were unexplained, the makers of the documents did not make witness statements and were not presented for cross-examination.

19. On the other hand, Mr. Deonarine, Attorney for the Third Defendant, argued that as to the first document, that is, the statement of Jason George dated and signed the 12th July, 2005, the Third Defendant had filed a hearsay notice dated the 20th December, 2007. As to other documents in the Report, for which no hearsay notices were given, Mr. Deonarine placed reliance on the unreported case of **Anand Rampersad v Willie's Ice-Cream Ltd** Civil Appeal No. 20 of 2002 and the judgment of Archie J.A. (as he then was). According to Archie J.A. at page 3:

It is a fundamental common law rule of evidence that hearsay evidence is generally inadmissible. Subject to certain statutory exceptions, the rule against hearsay applies to documents as well as oral statements. Apart from

express statutory provision it is not competent for a party to prove a fact by producing a document in which that fact is recorded without calling the maker of the document to say that what he wrote in the document represented a true statement of fact.

At page 4 of the judgment, Archie J.A. laid out the test:

Order 38 Rule 29 gives the Court the discretion to admit documents even if there is non-compliance with rules 21 & 22. That overriding discretion is designed to enable the Court to do what is just in the particular circumstances of the case. It should not be exercised in favour of the defaulting party where there is a risk of material prejudice or injustice to the other party.

20. Mr. Deonarine also argued on behalf of the Third Defendant that there was no material prejudice to the Claimant since the Court had set the deadline for the filing of witness statements at such an early stage that the Claimant had ample opportunity to call these witnesses on his own. According to Mr. Deonarine, the Third Defendant did not have to put them on witness statements or send witness summonses to them.

21. The Court considered the documents exhibited to the witness statement of Ms. Lily Mohammed, but dealt with the statement of Jason George separately. Having considered these documents (not including the statement of Jason George) and the judgment of Archie J.A., the Court ruled that this was a classic case of the Third Defendant seeking to have a technical advantage over the Claimant. There was indeed the risk of material prejudice and injustice to the Claimant. The Court noted that the Third Defendant sought, without explanation, to tender into evidence the statements of witnesses who were not presented before the Court for cross-examination. The credibility of these witnesses could not be tested. The Court found that this was unfair and materially prejudicial to the Claimant.

22. As to the statement of Jason George, for which a hearsay notice was filed, Attorney for the Claimant argued that although no counter notice was filed by the Claimant, the Court ought not to admit the statement for the following reasons:

(i) The hearsay notice did not comply with Part 30.3 of the C.P.R., which provides:

30.3 (1) This rule applies where the statement is admissible under s.37 of the Act (admissibility of out of court statements).

(2) Where the statement was not made in a document, the notice must contain particulars of –

(a) the time, place and circumstances at or in which the statement was made;

(b) the persons by whom and to whom the statement was made; and

(c) the substance of the statement and so far as practicable the words used.

(3) Where the statement was made in a document –

(a) a copy or a transcript of the document or of the relevant part of the document must be annexed to the notice; and

(b) such of the particulars required under paragraph (2)(a) and (b) as are not apparent on the face of the document must be given.

(4) If the party giving the notice-

(a) does not intend to call any person of whom details are contained in the notice; and

(b) claims that any of the reasons set out in rule 30.6 applies, the notice must say so and state the reason(s) relied on.

It was argued on behalf of the Claimant, that although the hearsay notice contained particulars of the date and maker of the statement, and although the place where the statement was made was apparent on the face of the statement, the other requirements of Part 30.3 of the C.P.R. were not complied with.

(ii) Further, it was argued on behalf of the Claimant that the witness, Jason George, had not been shown to be unavailable in accordance with Part 30.6 of the C.P.R. Part 30.6 provides as follows:

30.6 The reasons referred to in rules 30.3(4)(b), 30.4(4)(b) and 30.5(4)(b) are that-

(a) the person-

(i) is dead;
(ii) is overseas;
(iii) is unfit by reason of bodily or mental condition to attend as a witness; or
(iv) cannot reasonably be expected to have any recollection of matters relevant to the accuracy or otherwise of the statement; or

(b) that despite using reasonable diligence it has not been possible to-

(i) identify that person; or

(ii) find him.

23. On the other hand, it was argued inter alia on behalf of the Third Defendant that the hearsay notice as a whole complied with Part 30.3 and was admissible pursuant to section 37 of the Evidence Act Chap. 7:02. It was conceded, however, that Jason George was a witness who was available. It was argued however that Jason George was an adversary to the Third Defendant and in the circumstances the Third Defendant was entitled not to call him.

24. The Court has again considered the unreported case of **Anand Rampersad v Willie's Ice-Cream Ltd** (supra) and the learning in **Phipson on Evidence** (13th Edition) at pages 356-357 on the exercise of the court's discretion to exclude admissible hearsay or to admit hearsay statements where the Rules have not been complied with. The court must consider whether any injustice would be caused by the waiving of the technical requirements, and it should have regard to the possibility that the failure to comply with the Rules was a tactical manoeuvre [**Morris v. Stratford-upon-Avon U.D.C.** [1973] 3 All E.R. 263]. The Court noted that the hearsay notice filed by the Third Defendant did not comply with Part 30.3(4)(a) and (b) in that the notice did not say that the Third Defendant did not intend to call Jason George and did not state the reason(s) relied on. In fact, the Third Defendant never gave notice that it did not intend to call Jason George. In addition, the Court ruled that Part 30.3 had also not been complied with in that the important requirements as to the circumstances in which the statement was made and as to whom it was made, were not met. Accordingly, the Court ruled that the Third Defendant sought to have an unfair tactical advantage in attempting to have admitted into evidence the statement of Jason George who was available to give oral evidence before the Court. Injustice would indeed have been caused to the Claimant. In all the circumstances of the case, the Court in the exercise of its discretion refused to admit into evidence the statement of Jason George. The Court also ruled that Jason George did not make the statement to Ms. Mohammed and therefore her evidence was of no assistance as to the requirements of Part 30.3.

25. In addition, the Court did not agree with Mr. Deonarine that this was a case where the witness, Jason George, was an adversary to the Third Defendant. The Court has examined the affidavit of Jason George sworn in support of his application to set aside the default judgment. Nothing in that affidavit suggests that there was anything adversarial between Jason George and the Third Defendant.

26. Further, the Court ruled that in the interest of justice, the witness Jason George should have been produced for cross-examination on what were the central issues in the case. In the absence of such cross-examination, the Court ruled that no weight could be attached to such a statement.

27. In all the circumstances, the Court ruled that paragraphs 4, 5 and 6 of the witness statement of Ms. Lily Mohammed and the exhibits attached thereto were struck out as being hearsay, inadmissible and materially prejudicial to the Claimant.

28. Having heard closing arguments advanced on behalf of the parties, the Court found that although there was not an *automatic* estoppel against the Third Defendant, the default judgments against the First and Second Defendants had the effect that, in the absence of proof by the Third Defendant of the issues raised by it in the Defence, the Claimant was entitled to rely on the judgments obtained against the First and Second Defendants. Accordingly, the Court found that the Third Defendant had failed to prove the allegations made in its Defence and had not discharged the burden of proof which was placed squarely on it.

29. Accordingly, the Court gave judgment for the Claimant against the Third Defendant with damages to be assessed on the adjourned date. The Court also ordered that the costs of the trial were to be paid to the Claimant by the Third Defendant such costs to be quantified on the adjourned date.

30. The Court wishes to add that as to the issue of the splitting of the trial, the Court is of the view that once the overriding objective of justice set out in Part 1 of the C.P.R. is achieved, in the light of the docket system that is now employed in the civil courts, it cannot be properly argued that in the exceptional circumstances of this case, the Court could not hear the trial on the points of law and adjourn the assessment.

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Maureen Rajnauth-Lee
Judge