

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW AND EQUITY DIVISION
2012/CLE/GEN/FP/00205
BETWEEN

JULIAMAE JOHNSON
Plaintiff

AND

CHADVILLE ADAMS
1st Defendant

AND

BAHAMAS IMMIGRATION DEPARTMENT
2nd Defendant

AND

MINISTRY OF NATIONAL SECURITY
3rd Defendant

AND

ORRY J SANDS & CO LTD, INSURANCE BROKERS AND AGENTS
Third Party

BEFORE The Hon. Mrs. Justice Estelle Gray-Evans
APPEARANCES: Mr J. Kwasi Thompson for the plaintiff
 Ms Ingrid Cooper-Brooks for the defendants
 Mr Chè Chase for the third party
HEARING DATES: 2014: October 16

RULING

Gray Evans J.

1. This is a personal injury claim that arises out of a road traffic accident which occurred on or about 3 April 2012.
2. By a generally indorsed writ of summons filed on 12 June 2012 the plaintiff claims against the defendants, damages for injury and loss suffered as a result of the negligence of the first defendant, the driver of a vehicle owned by the second defendant.
3. The plaintiff's statement of claim providing particulars of the defendants' negligence, as well as the plaintiff's injuries, loss and damages, was filed on 5 November 2012.
4. More than a year later, on 8 November 2013, a third party notice was issued against Orry J Sands & Co Ltd, Insurance Brokers and Agents, on behalf of the defendants claiming an indemnity in respect of liability or, alternatively, a contribution thereto.
5. It is not disputed that the vehicle driven by the first defendant at the time of the accident was duly insured by United Insurance Company Limited through its general agents, the third party. Nor is it disputed that the first defendant was duly authorized to drive the said vehicle.
6. However, the third party contends that it is not compelled by its contract of insurance to indemnify the defendants with respect to this claim because the defendants are in breach of a condition thereof.
7. In that regard the third party seeks, as a preliminary issue, the determination of the question: whether the insurer/third party is still bound by the terms of its insurance policy to indemnify the defendants in the event of an accident on the ground that the defendants failed to comply with Condition 5 of the said contract of insurance, which provides, inter alia, as follows:

"In the event of any occurrence which may give rise to a claim under this Policy the insured shall as soon as possible give notice thereof to the insurers with full particulars..."
8. In that regard, counsel for the third party points out that the third party was not notified of the accident until approximately eight weeks after its occurrence and even then it was not by the insured but by the plaintiff's then attorney. Furthermore, it was the third party who contacted the defendants for information regarding the accident.
9. In that regard, the third party says that despite multiple requests by the third party of the defendants for the "full particulars", it was not until approximately 16 weeks after the accident, on 24 July 2012, that the third party received from the defendants partial information regarding the accident in the form of a partially completed and unsigned claim form. Counsel for the third party points out further that notwithstanding the third party, after receiving the partially completed form, having notified the defendants that the same was incomplete, and having on several subsequent occasions requesting the completed form, the defendants nevertheless failed to furnish the third party with full particulars of the claim until 27 November 2013, coincidentally with service of a third party notice, more than 18 months after the accident had occurred and approximately 17 months after the plaintiff had commenced this action.
10. Consequently, counsel for the third party submits, the defendants having waited so long after the accident to provide the full particulars as required by Condition 5 aforesaid, cannot be said to have provided such information "as soon as possible", and are, therefore, in breach of the said condition.
11. Mr. Thompson for the plaintiff points out that neither "as soon as possible" nor "full particulars" is defined in the contract of insurance and, he argues, counsel for the third party has provided no

authority to establish that the period within which the third party alleges it received the information was not within "as soon as possible" and, therefore, does not comply with Condition 5 aforesaid.

12. In any event, counsel for the plaintiff submits, since no specific time frame is mentioned in Condition 5 aforesaid for the notice to the insurers or the production of the full particulars, one has to look at the particular facts to see whether the information was provided "as soon as possible" and in his submission, given that the third party was dealing with a government agency, the time within which the defendants provided the information to the third party would fall within "as soon as possible".

13. The defendants deny that they are in breach of the conditions of the policy because, they say, the third party did receive notification of the accident and the defendants have provided the particulars thereof to the third party in the completed claim form.

14. Alternatively, the defendants say that the third party would have waived any rights it may have had to avoid its obligation to indemnify the defendants firstly, in relation to notification as it was the third party that contacted the second defendant and sent the forms for completion by the first defendant; and secondly, in relation to the full particulars when the third party in its 27 November 2013 email from its representative, Dawn Armoury-Trottman, to Ms Cordell Frazier of the third defendant, agreed to review the document. An indication, counsel for the defendants argues, that the third party's file on the matter was still open.

15. Moreover, counsel for the defendants points out, the plaintiff's then counsel, Mr K. Brian Hanna, in his 9 May 2012 letter to the third party, had outlined every aspect of the plaintiff's claim and included receipts for medical expenses as well as a copy of the police report, so the third party would have been well aware from the police report that the first defendant had been charged with causing the accident.

16. In any event, counsel for the defendants argues, the third party has admitted that at the date of the accident there was a valid policy in existence, and, to now seek to avoid liability is, in her submission, an act of bad faith on the part of the third party.

17. Consequently, counsel submits, it is the third party who, by failing to address the plaintiff's claim and instead directing counsel for the plaintiff to deal with the second defendant, is in breach of the contract of insurance.

18. Counsel for the defendants also adopts counsel for the plaintiff's submissions in regard to the lack of definitions for "as soon as possible" and "full particulars" in the contract of insurance.

19. In response, counsel for the third party submits that although "as soon as possible" is not specifically defined in the contract of insurance, the Court can accept that an action to be done "as soon as possible" must be done within a reasonable time. Counsel submits further that in determining whether the defendants acted "as soon as possible" or "within a reasonable time", one need only consider that after the accident, the plaintiff had time to consult and instruct her attorneys, who then had time to write to the third party, prepare a writ of summons and have it served on the defendants and the third party, all prior to the defendants notifying the third party with full particulars as required by Condition 5 aforesaid.

20. As for counsel for the defendants' submission that the third party would have been provided with particulars of the plaintiff's claim as well as the police report shortly after the accident, counsel for the third party submits that neither the insurers nor the defendants could properly defend a claim only knowing the particulars of what the plaintiff claimed and, therefore, that cannot, in his submission, be considered the full particulars as required by Condition 5 aforesaid to be provided by the second defendants.

21. Counsel for the third party accepts that, having been informed by the plaintiff's counsel of the accident and having thereafter forwarded the claim forms to the defendants for completion, the third

party cannot now rely on Condition 5 aforesaid, insofar as it relates to notification of the accident, to avoid liability under the aforesaid policy.

22. Not so, however, with regard to Mrs Armoury-Trotman's indication in her 27 November 2013 email that upon receipt of the completed claim form, the third party would decide on the way forward. In counsel's submission that statement does not amount to a waiver particularly when that communication was in response to counsel for the defendants' request that the claim be settled on the plaintiff's behalf, which he submits, further prejudiced the third party's position.

23. As indicated, by Condition 5 of the contract of insurance, the insured/second defendant, was required: as soon as possible to give notice of the occurrence [accident] which may give rise to a claim under the policy to the insurers with full particulars.

24. While there is no dispute that "as soon as possible" is not defined in the contract of insurance, I accept the submission of counsel for the third party that to do a thing "as soon as possible" means to do it within a reasonable time; or, as Dysant J. in *King's Old Country Ltd v Liquid Carbonic Can, Crpn Ltd*. [1942] W.R. 603, 606 said: "with an understanding to do it within the shortest possible time". In that regard, as pointed out in the case of *Goodwyn v Chevely*, 28 L.J. Ex 298, where a duty has to be discharged within a reasonable time (or within no specified time) which connotes a reasonable time (*Nosotti v Averbach*, 79 L.T. 414), such time will have to be determined according to the circumstances of the case and with particular reference to the means and ability of the person by whom the duty is to be discharged (*Postlethwaite v Freeland*, 5 App. Cas. 599; *Hick v Raymond* [1893] A.C. 22). See also *Stroud's Judicial Dictionary*, Fifth Edition, volume A-C.

25. There is also no dispute that "full particulars" are not defined in the contract of insurance. However, the evidence is that the insurer forwarded to the defendants a claim form with a request that the same be completed and returned to the insurer. It is, therefore, in my view, safe to say that that form in the hands of the insurer, properly completed by the defendants, would have been sufficient to satisfy the "full particulars" required by Condition 5 aforesaid.

26. The question, then, is whether, in the circumstances of this case, taking into consideration the means and ability of the defendants, the notice of the accident by the defendants, along with full particulars thereof, were provided to the insurer/third party "as soon as possible" or "within a reasonable time" after the accident occurred.

27. The evidence of what transpired between the date of the accident and the date on which the third party claims to have received the "full particulars" is set out in the affidavits of Dawn Armoury-Trotman on behalf of the third party and Karen Dorsett on behalf of the defendants filed on 4 March 2014 and 5 March 2014 respectively.

28. The time line as gleaned from those affidavits is as follows:

- 1) 3 April 2012 – The accident occurs.
- 2) 9 May 2012 – The plaintiff's counsel notifies the insurer/third party via letter of the accident, outlines the plaintiff's claim for damages and forwards a copy of the police report which indicated that the first defendant was charged with driving without due care and attention.
- 3) 30 May 2012 – The insurer writes to counsel for the plaintiff acknowledging receipt of his 9 May 2012 letter; advises that the insurer had not yet receive a report from its client or the driver; and reserves its position in the interim.
- 4) 31 May 2012 – The insurer forwards, via email, motor claim form to the second defendant and requests completion thereof by first defendant and return via email along with copy of first defendant's driver's license.

- 5) 12 June 2012 – Plaintiff commenced action by generally indorsed writ of summons.
- 6) 6 July 2012 – Follow-up letter sent by insurer to second defendant requesting completion of motor claim form by first defendant.
- 7) 24 July 2012 – Partially completed and unsigned claim form received by insurer.
- 8) 29 July 2012 – Follow-up telephone call to defendant indicating that the information forwarded on 24 July 2012 was incomplete.
- 9) 7 August 2012 – Copy writ of summons served on insurer.
- 10) 19 October 2012 – J. Kwasi Thompson notifies insurer of his appointment as counsel; expresses disappointment that second defendant had not yet sent a report to the third party; and confirms his instructions to proceed with the action.
- 11) 5 November 2012 – Insurer advises Thompson that despite numerous attempts since May 2012, it had not received the necessary documentation from the second defendant in order to handle the plaintiff's claim, in light of which its position had been prejudiced. Insurer directs counsel for the plaintiff to direct the plaintiff's claim for damages to the second defendant as the insurer's file on matter was closed.
- 12) 25 April 2013 – Attorney General writes to insurer inquiring as to insurer's position on the matter.
- 13) 23 May 2013 – Insurer writes to Attorney General indicating that by failing to provide the information requested the second defendant had breached a condition of the policy and that its file on the matter was closed.
- 14) 26 November 2013 – Attorney General serves third party notice on insurer
- 15) 27 November 2013 – Email from insurer to Attorney General advising completed report of accident never received; that upon receipt insurer will decide on the way forward.
- 16) 3 December 2013 – Email from Attorney General to insurer indicating documents sent from 28 November 2013 and requesting update.
- 17) 3 December 2013 – Email from insurer informing second defendant its position had not changed.

29. The crux of the third party's complaint is set out in its letter dated 23 May 2013 to Ms Cordell Frazier of the third defendant as follows:

"We confirm that there was a third party policy in force at the time of the accident that would have answered Ms Juliamae Johnson's claim, but contrary to what you were advised, all of the necessary documents needed to handle this claim were not and have not been received to-date.

First, Bahamas Immigration did not notify us of the accident, which is a breach of the policy condition in relation to the notification of accidents(see copy attached).

We were made aware of the accident only after receiving a letter from Ms Johnson's attorneys on May 30, 2012, and on May 31, 2012, asked the Insured to complete and return the claim form which would include the driver's statement. We requested this again on July 6, 9 and 19, 2012.

The first page of the claim form was received on July 24, 2012, and we asked by telephone on July 29, for the complete form. Not having received this by September 17, 2012, we wrote again and to this date we still have not been given the form.

We have gone above and beyond to obtain the documents needed to handle the third party's claim and to protect our Insured. We have had no cooperation and our file is now closed."

30. Ms Dorsett on behalf of the defendants avers, inter alia, that on 24 July 2012 the defendants forwarded a completed copy of the documents emailed by the third party to the second defendant; that the same was filled out by the first defendant and forwarded to the third party in Nassau.

31. However, Ms Dorsett does not refute Mrs Amoury-Trotman's claim that on 29 July 2012 an officer of the insured was notified by telephone that the information forwarded on 24 July 2012 was incomplete. Nor does she deny, as contended by the defendant, that as at 23 May 2013, the third party had "yet to receive the full particulars of the incident as mandated by the conditions of the policy." Nor does Ms Dorsett refute the third party's claim that it was not until receiving the third party notice on 27 November 2013 did the third party receive the information that had been requested since May 2012.

32. In the circumstances, I accept the third party's evidence that the information which it required from the defendants was not received by the third party until on or about 27 November 2013.

33. No explanation is given by the defendants for why the particulars required by the insurer were not provided until more than 18 months after the accident.

34. There is no evidence that the defendants had a difficulty having the documents completed and signed by the first defendant, say, because he had been injured in the accident or was incapacitated for some reason. Indeed, it appears that the second defendant may have had the information in its possession from as early as 24 July 2012 when a part of the form was sent to the insurer.

35. Moreover, after having been reminded on at least three occasions that the form provided to the third party was incomplete, the defendants had an opportunity to rectify the situation and forward the completed form, which the evidence suggests was in their possession. They did not, even after they were informed in November 2012 and again in May 2013 that the third party's file on the matter had been closed because of their failure to provide the information.

36. So, it seems to me that even allowing for the bureaucracy of government, by no stretch of the imagination can eighteen months, in the circumstances of this case, be said to have been "as soon as possible" or "within a reasonable time" to provide the full particulars which the second defendant as the insured was obliged by Condition 5 aforesaid to provide.

37. I, therefore, find that by failing to provide the full particulars required by Condition 5 aforesaid as soon as possible, the defendants breached the terms of the policy.

38. Condition 2 of the policy under the heading "Insured's Duty" proves as follows:

"The due observance and fulfillment of the Terms of this Policy in so far as they relate to anything to be done or not to be done by the Insured or any person claiming to be indemnified and the truth of the statements and answers in the proposal shall be conditions precedent to any liability of the Insurers to make any payment under this Policy. [underline added]

39. In my judgment, then, the third/party insurer is entitled to rely on the breach of the notification of accidents condition in the policy to avoid making any payment under the aforesaid policy or indemnifying the defendants with respect thereto because condition 2 of the policy clearly states that

notification with full particulars was a condition precedent to the insurers' liability to make payment under the policy.

40. In the circumstances, I am constrained to agree with counsel for the third party that the third party is not bound to indemnify the defendants with respect to any claim for damages in respect to the aforesaid traffic accident on the ground that the defendants in breach of Condition 5 of the policy failed to provide the third party with full particulars of the accident as soon as possible after the accident or, in the circumstances of this case, within a reasonable time.

41. In the result, the defendants' claim against the third party is dismissed with costs to be taxed if not agreed.

Dated this 28th day of November A.D. 2014

Estelle Gray-Evans
Justice