COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2012/CLE/GEN/FP00392

IN THE MATTER OF SECTION 12 ROAD TRAFFIC ACT CAP 220

BETWEEN

SEAN B. CALLENDER

Plaintiff

AND

THE INSURANCE COMPANY OF THE WEST INDIES (BAHAMAS) LTD.

Defendant

BEFORE	The Honourable Mrs Justice Estelle G. Gray Evans
APPEARANCES:	Mr Sean Callender pro se
	Mr Wayne Munroe for the defendant
HEARING DATE:	2013: 19 March

JUDGMENT

Evans, J.

1. This is an application by the plaintiff, who claims to be the insured, under a policy of insurance No. 05-221-95, 18300 issued on 12 February 2008 by the defendant, via its agents, General Brokers and Agents Limited ("the said policy"). The said policy includes a renewal confirmation issued by the defendant on 15 February 2010.

2. The plaintiff commenced this action on 26 November 2012 by an originating summons, seeking inter alia, a declaration that by virtue of section 12(1) of the Road Traffic Act ("RTA"), the defendant is liable to pay for all damages costs and interest, if any, which may be awarded to a third party against the plaintiff in respect of the said accident; and/or alternatively, a declaration that the defendant is obliged to indemnify the plaintiff against liability at law for such damages, costs and interests pursuant to section 1 (1) (a) (ii) aforesaid of the said policy.

3. The application is supported by the affidavits of the plaintiff, Sean B. Callender, filed on 26 November 2012 and 12 March 2013 respectively.

4. The facts leading up to the commencement of this action, as gleaned from the aforesaid affidavits, are set out hereunder.

5. On 12 February 2008 the defendant, via its agents, General Brokers and Agents Limited, issued the said policy to "Mr Sean B. Callender & Co."

6. On 15 February 2010 the defendant issued a certificate of insurance as well as a renewal confirmation relative to the said policy, evidencing coverage for a 2003 Grand Cherokee Laredo Jeep for the period 16 February 2010 to 15 February 2011. The "policy holder" is stated on the certificate of insurance as "Mr Sean B. Callender & Co." and the "insured" is noted on the renewal confirmation as "Sean B. Callender & Co."

7. By section 1(1) (a)(ii) of the said policy, the defendant undertook to indemnify the insured against liability at law for, amongst other things, bodily injury caused to any person as a result of an accident caused by or in connection with "the driving by the insured of any motor vehicle not belonging to him and not hired to him under a hire-purchase agreement."

8. The said policy was never cancelled; the said certificate was never surrendered and the defendant has never brought proceedings to extinguish the efficacy of the policy.

9. On 3 November 2010, during the currency of the said policy, the plaintiff was involved in a traffic accident in Grand Bahama with another vehicle, owned by Mr Clarence Simmons and driven by Mr Dominic Kemp ("the third party").

10. At the time of the accident, the vehicle being driven by the plaintiff was owned by the plaintiff's father. The plaintiff was over the age of 25; the vehicle was being driven with his father's permission and was not being used for a purpose prohibited by the said policy.

11. On 22 May 2012, the third party along with Mr Clarence Simmons commenced Supreme Court Action No. 2012/CLE/GEN/FP00188 in which they claimed against the plaintiff damages, including special damages in the sum of $56,665.00 (and continuing), interest and costs.

12. On 27 June 2012 the said writ was served on the plaintiff, who, on 4 July 2012, forwarded a copy thereof to the defendant's agent.

13. The defendant refuses to indemnify the plaintiff against liability at law for the third party claimant's damages, costs and expenses in respect of his alleged bodily injury and damage to his property should the same be adjudged due to him by the plaintiff. By letter dated 18 September 2012, the defendant informed the plaintiff that it would not pay for any such damages, interests and costs of the third party claimant. The defendant advised the plaintiff to defend the matter personally.

14. The plaintiff has settled the claim against him for damages in connection with the vehicle with its owner, Mr Clarence Simmons, the second plaintiff in the above-mentioned action against the plaintiff.

15. According to the plaintiff, after the said traffic accident he had engaged in ongoing communications with Insurance Management (Bahamas) Limited ("Insurance Management"), the company which issued a policy of insurance to the owner of the vehicle which he was driving at the time of the accident; that it appeared to him that Insurance Management would pay for any damages, costs and interests, if any, payable by him, as a result of the action brought by the third party. However, it seems that that did not happen and the plaintiff says that while he was still in negotiations with Insurance Management, it occurred to him that the said policy would have been effective at the time of the accident and accordingly, he "immediately served the defendant, through its agents, General Brokers and Agents Limited with a copy of the said Writ on July 4th 2012."

16. Section 12 of the Road Traffic Act, chapter 220, provides, inter alia, as follows:

> 12. (1) If, after a certificate of insurance has been issued under subsection (4) of section 10 of this Act 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 paragraph (b) or paragraph (c) of subsection (1) of section 10 of this Act (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then, not withstanding 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, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

17. It is clear that by that section, an obligation is placed on an insurer to pay to the persons entitled to the benefit of a judgment against its insured any sum payable thereunder in respect of liability, together with costs and interest. However, it is accepted that the section avails a third party, not the insured. See the Court of Appeal case of Provincial Insurance Public Ltd v Eagle Star Insurance Co [1991] BHS and the case of Presidential Insurance Company Limited and Resha St Hill, [2012] UKPC 33, Privy Council Appeal No. 0062 of 2011, a decision on appeal from the Court of Appeal of Trinidad & Tobago which involved a provision in the Trinidad and Tobago legislation similar to section 12(1) aforesaid.

18. Furthermore, the insurer's obligation under section 12(1) aforesaid is subject to the provisions of section 12(2)(a) which provides that the insurer is not required to pay any such sums under the subsection (1) aforesaid unless "before or within 21 days after the commencement of the proceedings in which the judgment was given, the insurer had notice of the bringing of the proceedings."

19. The evidence is that the accident occurred in November 2010. The third party commenced an action against the plaintiff herein by a writ of summons on 22 May 2012. There is no evidence that the third party or the plaintiff notified the defendant of the accident prior to the commencement of the action or of the third party's intention to do so.

20. The accident having occurred on 3 November 2010 and notice thereof not having been brought to the attention of the defendant before or within 21 days of the commencement of the action by the third party, counsel for the defendant submits that the plaintiff's application for a declaration that the defendant is liable to pay all damages, costs and interest awarded to any party other than the plaintiff arising from the aforesaid road traffic accident ought to be refused.

21. The provisions of section 12(2)(a) RTA are very clear. A third party seeking to enforce the provisions of section 12(1) RTA must serve the insurer with notice of such intention prior to or within 21 days of commencement of the action. In this case, the action against the plaintiff commenced on 22 May 2012. Thereafter the third party, or the plaintiff, had until 12 June 2012 to serve the insurer with notice thereof.

22. There is no evidence that the third party complied with section 12(2)(a) aforesaid. Instead, some 31 days after commencing the action, he served the writ on the plaintiff, who, it appears, waited a further seven days before forwarding the same to the defendant's agent. Consequently notice of the commencement of the action against the plaintiff did not come to the attention of the defendant until, at the earliest, some 20 months after the accident and some 43 days after the filing of the writ commencing the action.

23. Mr Callender, relying on the English Court of Appeal case of Desouza v Waterloo [1999] RTR 71, submits that the third party's failure to comply with section 12(2)(a) RTA did not matter. In that case, Lord Roch found that the appeal turned on the meaning and application of s. 152(1)(a) of the RTA, 1988 which is essentially the same provision as section 12(2)(a) RTA, with the exception of the time. The English Act provides that notice is to be given within seven days. It appears from his submission that Mr Callender was of the view that the judges in that case took the position that the court was not bound by the strict time limit prescribed in the Act as the purpose of the notice was to avoid insurers being asked to satisfy a judgment against their insured in respect of a claim of which they knew nothing, obtained in proceedings of which they had no notice or warning.

24. Mr Munroe disagreed with Mr Callender's take on the decision in Desouza and submitted that, in any event, Desouza was distinguishable from the present case because notice had been given to the insurance company shortly after the accident and prior to the commencement of proceedings.

25. It seems to me that the issue in Desouza was not whether or not notice had been given, but whether or not the form in which notice was provided to the insurer prior to the commencement of the action was sufficient to satisfy the statutory requirement.

26. In Desouza, the appellant was involved in a traffic accident with Dr Susan Bayley on 23 August 1990. Dr Bayley was insured by the respondent. Shortly after the accident, 19 September 1990, the appellant wrote to the respondents' claims department, providing details which the insurers would have required. The insurers responded by letter on 2 October 1990. Following several exchanges of correspondence between the appellant and the respondents, and without any meaningful participation of Dr Bayley, the appellant communicated with the respondents on 24 April 1991 and again on 30 April 1991 his intention to commence proceedings against Dr Bayley, which he did on 14 May 1991. There was no further communication between the appellant and the respondents until after he obtained judgment against Dr Bayley.

27. The appellant, having failed to recover any part of the amount due from Dr Bayley, sought to recover payment from the respondents, as Dr Bayley's insurers, under section 151 of the [English] Road Traffic Act 1988 ("English RTA 1988"). The respondents denied liability on the ground that the appellant had not complied with the notice provision of section 152(1)(a) English RTA 1988. The judge at first instance found that a letter of 24 April 1991 and a telephone conversation of 30 April 1991 were not sufficient to constitute notice of the proceedings against the insured. He, therefore, ruled against the appellant. On appeal, the

court held that notice had, in fact, been given through the various communications between the appellant and the respondent. Cazalet, J opined that notice in any particular case is a matter of fact and degree and will turn on the extent to which the insurer had been made aware of the background circumstances and of the position of the claimant in regard to the taking of proceedings. He pointed out that a very detailed plan and account of the accident had been sent to the respondents within one month of the accident having occurred; that the appellant had made it clear in his communications with the respondent the course he was proposing to take. In the learned judge's opinion, due notice as to the bringing of the proceedings, as they were in fact issued on 14 May 1991, had been given within the meaning of the subsection by the appellant to the respondents and he allowed the appeal. Roch, LJ agreed that the communications on 24 April 1991 and 30 April 1991, prior to the commencement of the proceedings, were sufficient to comply with the Act.

28. It seems to me that Desouza does not assist the plaintiff. In that case, although Roch LJ opined that the purpose of the notice provision was to avoid insurers being asked to satisfy a judgment against their insured in respect of a claim of which they knew nothing, obtained in proceedings of which they had no notice or warning, the fact is that not only did the third party in Desouza keep the insurers in the picture from the start by providing them with details of the accident within one month after its occurrence, the third party also provided the insurers with notice of his intention to commence proceedings against the insured, prior to doing so. Indeed, Roch LJ noted that "the insurers knew from a very early stage of the accident, of the appellant's claim, both in respect of liability and quantum and had the opportunity to investigate both."

29. In this case, not only was the insurer not provided with any information regarding the accident or the intention of the third party to commence proceedings, but the insurer was not, in fact, notified of such proceedings until 43 days after the commencement thereof, and then not by the third party.

30. Mr Callender argues that in this case, the third party claim has not yet gone to trial and, therefore, the defendant has ample opportunity to set up a defence, to review the matter in detail if so inclined and to make a settlement offer, because, in his submission, that is the essential purpose of the provision regarding notice.

31. By that submission, I understood Mr Callender to be saying that since the insurer was given notice prior to judgment having been entered against him, as the insured, there is no danger of the defendant being called upon to satisfy a judgment without having had an opportunity to take part in the proceedings. However, that does not, in my view, entitle the court, or the insured or the third party for that matter, to ignore the statutory requirement which

makes it a condition precedent to liability that "before or within 21 days after the commencement of the proceedings ... the insurer had notice of the bringing of the proceedings". Clearly, the third party is in breach of the statutory provision. In the case of Herbert v Railway Passengers Assurance Co (1938) 1 All ER 65, Porter J at page 654 expressed the view, with which I respectfully agree, that:

> "where an Act of Parliament stipulates that recovery shall not take place except in certain events, those events must take place before the plaintiff can recover."

32. In view of the fact that there was a clear breach of section 12(2)(a) RTA, and the defendant has indicated its intention to rely on such breach to avoid liability, I do not see how I can give the declaration which the plaintiff seeks at paragraph 3 of its originating summons.

33. In the circumstances then, the plaintiff's application for a declaration that pursuant to the provisions of the Road Traffic Act aforesaid the defendant is liable to pay all damages, costs and interest awarded to any party, other than the plaintiff, arising from a road traffic accident occurring on 3 November 2010 involving the plaintiff, et al, is refused.

34. At the time of the accident, the plaintiff was driving a vehicle not belonging to him, but belonging to his father, which vehicle he says was not hired to him under a hire-purchase agreement. Further, the plaintiff avers that at all material times he was an authorized driver, over the age of 25 years; that the vehicle was not being used in any of the non-permitted uses and, therefore, by virtue of the provisions of the said policy, he is entitled to be indemnified by the defendant against any claim for damages, claimants' costs and expenses, against him which may arise from the aforesaid traffic accident.

35. In that regard the plaintiff relies on section 1(1) (a) (ii) of the said policy which provides as follows:

> "Section 1 – Liability to Third Parties
>
> (1) Indemnity to the Insured
>
> (a) The Company will indemnify the insured against liability at law for damages and claimants' costs and expenses and all costs and expenses incurred with its written consent in respect of death or bodily injury to any person and damage to property in accordance with the amounts stated in the schedule where such death, injury or damage arises out of an accident caused by or in connection with
>
> (i) ...
>
> (ii) the driving by the insured of any motor vehicle not belonging to him and not hired to him under a hire-purchase agreement.

36. Counsel for the defendant submits that the declaration for indemnification should be refused because the firm of Sean B. Callender & Co., and not the plaintiff, is the insured and section 1(1)(a)(ii) aforesaid could never apply to the insured as a matter of contract, since, a firm as the insured cannot drive a motor vehicle. Consequently, he submits, although there is a stated endorsement, there is no ability in the insured, that is the firm of Sean B. Callender & Co., to show cover under section 1(1)(a)(ii) aforesaid, which, in his submission, is a complete answer to the plaintiff's application for indemnity.

37. The plaintiff admits that the vehicle for which the insurance coverage was secured is owned by the firm of Sean B. Callender & Co. However, he says, the premiums therefor were paid by him personally. Moreover, he challenges the defendant's raising of the issue of the identity of the insured when, as he points out, the contract documents prepared by the defendant show the insured as "Mr Sean B. Callender & Co."

38. It is accepted that the documents which comprise the contract between the defendant and the insured are the policy of insurance, which, in this case, is a standard form policy, and the renewal confirmation, a schedule to the said policy.

39. In the standard form policy, the name of the insured is shown as "Mr Sean B. Callender & Co." whereas in the renewal confirmation it is shown as "Sean B. Callender & Co." I note here that the policy holder's name shown on the certificate of insurance is "Mr Sean B. Callender & Co."

40. Consequently, the plaintiff submits that the said policy provides coverage to either himself, Mr Sean B. Callender, personally, or to the firm of Sean B. Callender & Co., which comprises himself and one other person. Further, the plaintiff pointed out that the said policy provides that standard endorsements do not apply unless so stated on the schedule and in that regard, he noted that standard endorsement 12 was not included on the schedule. Standard endorsement 12 provides as follows:

> "Modification of benefits (firms). It is agreed that sub-paragraph (ii) of paragraph (a) of sub-section 1 of Section 1 (driving other motor vehicle) and Section 4 (personal accident to insured and insured's wife or husband) of the policy are inoperative".

41. Therefore, Mr Callender submits, the defendant having failed to include that standard endorsement in the schedule, it does not apply.

42. Mr Munroe argued that where, as in this case, the insured is something other than an actual human being, endorsing endorsement 12 aforesaid would be superfluous.

43. That may be so, but I am inclined to agree with the plaintiff that if the insured is the firm of Sean B. Callender & Co., the defendant would have been cognizant of the fact that it was

dealing with a firm, and could, therefore, have included standard endorsement 12 as one of the terms of the said policy. It chose not to and it seems to me that if the defendant is going to take the point that the firm and not the plaintiff personally is the insured, then it ought to have included standard endorsement 12 – superfluous or not – as a term of the policy. Moreover, as the plaintiff argues, the contract documents were prepared by the defendant and accordingly any ambiguity should be resolved in favour of the insured.

44. So, assuming, but not deciding, that the plaintiff is the insured either in his personal capacity or as a partner in his firm, the question is whether he is entitled to the declaration for indemnification which he seeks.

45. Counsel for the defendant maintains the position that he is not and says that is because he is in breach of the contract of insurance in that he failed to comply with conditions 1 and 2 of the said policy. Condition 1 provides as follows:

> "1. The insured or his legal representatives shall give notice in writing to the Company as soon as possible after the occurrence of any accident injury loss or damage with full particulars thereof. Every letter claim writ summons and process shall be notified or forwarded to the Company immediately on receipt. Notice shall also be given in writing to the company immediately the insured or his legal personal representatives shall have knowledge of any impending prosecution inquest or fatal inquiry in connection with any accident for which there may be liability under this Policy.

46. The plaintiff contends that he has complied with the notice provision in that he advised the defendant of the accident "as soon as possible after realizing that the defendant was liable under the said policy."

47. Moreover, the plaintiff submits, because condition 1 aforesaid does not provide a definitive time within which notice of the accident is to be brought to the attention of the defendant, that condition is an intermediate term and, therefore, failure to perform the obligation within the time limited by notice does not, in itself, constitute a repudiation, irrespective of the consequences of the breach. He argues further that failure to perform an intermediate term will ordinarily entitle the party not in default to treat himself as discharged only if the effect of the breach of the term deprives him of substantially the whole benefit which it was intended that he should obtain from the contract. For those arguments, the plaintiff relies on excerpts from Chitty on Contracts volume 1, 28th edition, at paragraphs 12-038, 12-040 and 25-039. See also Hongkong Fir Shipping Co. Ltd. V Kawasaki Kisen Kaisha ltd [1962] 2 Q.B. 26, 70.

48. However, I agree with counsel for the defendant that the position argued by the plaintiff that condition 1 aforesaid is an intermediate term is not supported by the law or the authorities which he produced. Indeed, as counsel for the defendant pointed out, the learned authors of

Chitty on Contract supra opined at paragraph 12-040 that "the conclusion to be drawn from the cases is that a term of the contract will be held to be a condition if it is so designated in the contract..."

49. In that regard, Mr Munroe pointed out that as the parties have expressly agreed that the conditions in the said policy are, in fact, conditions, the plaintiff's argument that condition 1 aforesaid is an intermediary term is unsustainable. I agree.

50. Furthermore, at paragraph 25-038, the learned authors of Chitty on Contract supra state that:

> "Any failure of performance which constitutes a breach of condition entitles the innocent party to treat himself as discharged from further liability under the contract. The word condition has therefore broken free from its historical roots and can no longer be confined to an obligation which must be performed as a condition precedent to the liability of the other party."

51. The trigger for the giving of notice under the said policy is the occurrence of the accident, injury, loss or damage. The accident occurred on 3 November 2010. The plaintiff notified the defendant via its agent on 4 July 2012. There is no evidence that there was any impediment to the plaintiff reporting the accident to the defendant sooner. Indeed, the plaintiff's evidence is that he was already negotiating with another insurance company to deal with the claim, which is the reason proffered by him for the delay in reporting the matter to the defendant. His evidence is that he was negotiating with the insurer of the vehicle which he had been driving at the time of the accident when it occurred to him that the said policy would have been effective at the time of the said traffic accident. Accordingly, he says, he "immediately served the defendant, through its agents, General Brokers and Agents Limited with a copy of the said writ on July 4th, 2012". According to the plaintiff, "had the negotiations with Insurance Management successfully concluded with their agreement to pay for any damages, costs and interest which would have accrued, if any, as a result of the action brought by Dominic Kemp, [the plaintiff] would not have had any need to consider the involvement of the defendant in this matter."

52. In my judgment, and in light of the evidence, I agree with counsel for the defendant that, by no stretch of the imagination can 20 months after the occurrence of the accident be considered "as soon as possible" nor, for that matter, can seven days after receipt of the writ commencing the action against the plaintiff, be considered "immediately on receipt", particularly when the writ had been served more than 21 days after commencement of the action.

53. Now, the plaintiff says that the defendant has lost nothing by the purported 'late' notice of the accident. He argues that the alleged injuries giving rise to damages have not changed

nor, he says, will be affected by the purported 'late' notice and, in his submission, since the trial of the action between the third party and himself has not yet commenced, the defendant is not prejudiced in meeting that claim by virtue of any purported delay in being advised of the accident.

54. In response, counsel for the defendant submits that although condition 1 aforesaid does not require the insurer to show prejudice, obvious reasons for "immediate" or "as soon as possible" reporting include the opportunity for the insurer, very soon after the accident, being able to: engage the services of a loss adjuster, gather evidence, monitor injured persons and or instruct them to receive care by designated physicians.

55. Again, I agree with the defendant's position. Condition 1 aforesaid was included as a condition of the said policy agreed between the parties thereto and expressed in clear terms and in those circumstances, the defendant is entitled, in my view, to rely on the breach of such condition whether or not such breach caused prejudice.

56. As indicated, the defendant contends that the plaintiff is also in breach of condition 2 of the said policy, which provides as follows:

> "2. No admission offer promise payment or indemnity shall be made or given by or on behalf of the insured or any person claiming to be indemnified without the written consent of the Company which shall be entitled if it do desires to take over and conduct in the name of the insured or such person the defence or settlement of any claim or to prosecute in the name of the insured or such person for its own behalf any claim for indemnity or damages or otherwise and shall have full discretion in the conduct of any proceedings or in the settlement of any claim and the insured and such person shall give all such information and assistance as the company may require."

57. The plaintiff admits to having settled the claim by the second plaintiff in the aforesaid action, who is the owner of the vehicle driven by the third party. There is no evidence that such admission was done with the written consent of defendant. In counsel for the defendant's submission, admissions prejudice a case and if the insured or a person claiming indemnity takes upon himself, as did the plaintiff in this case, to make such admission, he would be disentitled to indemnity under the said policy.

58. In any event, no determination of liability having been made against the plaintiff, it would, in my view, be premature at this time for the declaration sought at paragraph 4 of the originating summons to be made, since, it appears, that a determination of liability on the part of the plaintiff would have to be made before any issue of indemnification by the defendant arises.

59. Furthermore, in light of the defendant having evinced a clear intention to rely on the plaintiff's breach of the aforesaid conditions to avoid liability with respect to any claims against

the plaintiff as a result of the aforesaid traffic accident, and for the foregoing reasons, I decline to make the declaration sought by the plaintiff at paragraph 4 of the originating summons.

60. For completeness, the plaintiff also sought the following declarations:

(1) A declaration that by virtue of the provisions of Section 12 of the Road Traffic Act CAP 220 a policy of insurance remains alive and effective in favor of all persons other than possibly the insured until the Certificate of Insurance (hereinafter called "Certificate") is surrendered or proceedings are taken by the insurer to effect its surrender or otherwise extinguish its efficacy.

(2) A declaration that at all material times the plaintiff was issued with a Certificate pursuant to a Policy of Insurance Number 05-222-95, 18300/001 made between the plaintiff and the defendant, by its agents, General Brokers And Agents Limited, on behalf of the defendant and the defendant nor its agents did not surrender the Certificate nor did the defendant nor its agents undertake proceedings to effect its surrender or otherwise extinguish its efficacy.

61. However, in light of the decision to which I have arrived in regard to what I consider to be the substantive declarations, it is not necessary, in my view, to make those declarations and I, therefore, decline to do so.

62. In the result, the originating summons is dismissed with costs to be paid by the plaintiff to the defendant, to be taxed if not agreed.

DELIVERED this 30th day of May A.D. 2013

Estelle G. Gray Evans, J.