

**IN THE COURT OF APPEAL OF BRUNEI DARUSSALAM**

CIVIL APPEAL NO. 4 OF 1999

BETWEEN

THE LONDON & LANCASHIRE INSURANCE CO LTD                      Appellant

AND

HAJI AHMAD BIN HJ MALAI BESAR                                      1<sup>st</sup> Respondent  
MOHAMMAD QAHRUDDIN BIN AHMAD                                      2<sup>nd</sup> Respondent

Before : FUAD, P.; HUGGINS, J.A. AND SILKE, J.A..

Date of Hearing : 5 NOVEMBER, 1999.

Date of Judgment : 11 NOVEMBER, 1999.

**J U D G M E N T**

**FUAD, P.:**

This is an appeal by an insurance company (“the Insurers”) against the judgment of Steven Chong J., dated 3 April 1999 upholding the decision of the Registrar by which she held that the insurer could not, as against the respondents, rely on the protection afforded by section 9(3) of the Motor Vehicles Insurance (Third Party Risks) Act, Cap.90 (“the Act”).

Following a road traffic accident involving a motor vehicle insured by the Insurers, solicitors acting for the administrator of the estate of a woman who was killed as a result of the accident, and for a man injured in the same accident, sent the following letter, dated 3 June 1997, to the Insurers:

“NOTICE OF BRINGING OF PROCEEDINGS

- 1) Under the Emergency (Fatal Accident & Personal Injuries)

Order 1991

HAJI AHMAD BIN HAJI MALAI BESAR (PROPOSED PLAINTIFF) (Administrator of the estate of NORSURAIYATI BTE AHMAD, deceased)

v.

- 1) HAJI ISMAIL BIN APONG (PROPOSED 1<sup>ST</sup> DEFENDANT) (Administrator of the estate of NOOR ISKANDAR BASUKI BIN ISMAIL, deceased)
- 2) MD SHAHRIN BIN ABDULLAH (PROPOSED 2<sup>ND</sup> DEFENDANT)

2) For damages for personal injuries

MOHAMAD QAHRUDDIN BIN AHMAD (PROPOSED PLAINTIFF)

v.

- 1) HAJI ISMAIL BIN APONG (PROPOSED 1<sup>ST</sup> DEFENDANT) (Administrator of the estate of NOOR ISKANDAR BASUKI BIN ISMAIL, deceased)
- 2) MD SHAHRIN BIN ABDULLAH (PROPOSED 2<sup>ND</sup> DEFENDANT)

Pursuant to section 9(2)(a) of the Motor Vehicles Insurance (Third Party Risks) Act (CAP.90), we shall shortly be commencing legal proceedings on behalf of the abovenamed proposed Plaintiffs against the estate of Noor Iskandar Basuki Bin Ismail, for negligence of the said deceased in his driving and management of the motor car, along Jalan Singa Menteri, Kuala Belait, Brunei Darussalam on 26 July, 1994 which resulted in a traffic accident.”

The actions envisaged by that letter were instituted on 9 June 1997 (Suits 70 and 71 of 1997).

On 21 June 1997 the Insurers’ solicitors responded as follows:

“We act for M/S The London & Lancashire Insurance Co.Ltd.

We refer to your letter of 7<sup>th</sup> June 1997 in respect of the above matter.

Please take notice that, we have been instructed to obtain declaration under section 9(3) of the Motor Vehicles Insurance (Third Party Risks) Cap. 90 with regard to vehicle no. BL 1203. We shall let you have a copy of the declaration once we obtain it.”

Section 9(1) of the Act imposes the following obligations upon insurers:

“If after a certificate of insurance has been issued under subsection (4) of section 4 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) of subsection (1) of section 4 (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 costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.”

One of the qualifications affecting the obligation of insurers to meet a judgment in favour of a third party is contained in section 9(2)(a) of the Act which provides that the insurer must have been given notice of the bringing of the proceedings in which the judgment was obtained, either before, or within 7 days after, the commencement of those proceedings.

The Insurers sought to rely on the protection given by section 9(3) of the Act which is in the following terms:

“No sum shall be payable by an insurer under the foregoing provisions of this section if in an action, commenced before or within 3 months after the commencement of the proceedings in which the judgment was given, he has obtained a declaration that, apart from any provision contained in the policy, he is entitled to avoid it on the ground that it was obtained by the non-disclosure of a material fact or by a representation of fact

which was false in some material particular or, if he has avoided the policy on that ground, that he was entitled so to do apart from any provisions contained in it:

Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within 7 days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto.”

The Insurers commenced their action for a declaration on 3 September 1997 and on 6 October the Registrar granted the following declaration:

“It is hereby declared that in respect of a road traffic accident on 26<sup>th</sup> July 1994 at about 10.30 p.m. along Jalan Singa Mentera Mumong, Kuala Belait, Brunei Darussalam and in respect of any claim (s) made or to be made by any third party or parties that may arise therefrom Insurance Policy No. B3A5A/01614/0893 dated 5<sup>th</sup> August 1993 issued to the Defendant in respect of Motor Vehicle BL 1203 (Honda Civic) by the plaintiff, is void on the ground that the defendant, at the time of the accident was not the owner of the vehicle and that the plaintiff is entitled on the grounds that the said policy was obtained by non-disclosure of a material fact; or by representation of a fact which was materially false, the plaintiff is not at risk and not liable to any third party or parties pursuant to section 9(3) of the Motor Vehicles (Third Party Risks) Act (Cap.90).”

On 28 October 1998, the third parties, in turn, obtained a declaration from the Registrar that the declaration given to the Insurers on 6 October 1997 did not affect them. This declaration was the subject of the Insurers appeal to the Judge in Chambers.

The issues which arise on this appeal are whether the judge was right in holding (i) that the third parties had complied with the requirements relating to notice to the Insurers set out in section 9(2)(a) of the Act and (ii) that the Insurers, as against the third

parties, were not entitled to relief from liability on the grounds contained in subsection (3) of section 9 of the Act because, in the circumstances, they were obliged to satisfy the proviso to that subsection and had not done so.

As regards the first issue, the judge, citing authority, pointed out that a notice which was couched in terms that merely suggested that proceedings might be brought in certain circumstances would not satisfy section 9(2)(a) (Weldrick v. Essex and Suffolk Equitable Insurance Society Ltd. 83 Ll L Rep. 91, nor would a notice be sufficient if it did no more than indicate that damages would be claimed (China Insurance Co.Ltd. v. Ng Siak Yow and Ors. [1963] MLJ 244. The judge said that he had no hesitation in finding that the 3 June 1997 notice was one in unequivocal terms that legal proceedings were being instituted by the third parties; section 9(2)(a) of the Act had been complied with by the plaintiffs.

On the second issue, the Judge noted that the Insurers' submission was that even if the third parties had complied with the notice provisions in section 9(2)(a) of the Act, the Insurers had no knowledge of the institution of the proceedings by the third parties before the action for a declaration was commenced. Thus, it was contended, the Insurers were not obliged to give the third parties the notice for which provision was made in the proviso to section 9(3) of the Act.

The judge concluded that a third party who has given the Insurers the notice required by section 9(2)(a) of the Act before the commencement of his proceedings, is not obliged to give another such notice to the Insurers once his proceedings are actually instituted before he can rely on a failure by the insurer to bring himself within the proviso to section 9(3).

About the Insurers' letter of 21 June 1997, the judge observed that their counsel had stated that it was not intended to be a notice for the purposes of the proviso ("but merely a 'response' to the plaintiffs' letter of 3 June 1997"). The judge, relying on Zurich General Accident and Liability Insurance Co. Ltd. v Morrison [1942] 2 KB

53, held that in any event it could not be relied upon for that purpose since the notice did not specify the particular non-disclosure or false representation upon which it was proposed to rely, adding that counsel had conceded as much.

Although the success of the Insurers' appeal will not depend on the question whether or not the third parties' notice of 3 June 1997 satisfied section 9(2)(a) of the Act, it seems to me that this is the first issue which must be addressed. The Insurers, by their Petition of Appeal, challenge the judge's conclusion on this point and Mr Sankaran, (although, perhaps, with no great conviction) maintained this stand before us.

The plaintiffs' letter of 3 June 1997 must, of course, be approached in the light of the fact that section 9(2)(a) expressly permits the notice to be given before proceedings are commenced. It is therefore not surprising that the parties concerned are referred to as "proposed" plaintiffs and defendants, which is just what they were. In that letter, apart from the mention of the proposed parties, section 9(2)(a) is referred to and particulars are given of the registration number of the car involved, the date and place of the accident, the person whose negligence would be relied upon and the nature of the damages which would be claimed.

Moreover, as we have seen, the letter is headed "NOTICE OF BRINGING OF PROCEEDINGS" and the body of the letter contains the words "...we shall shortly be commencing legal proceedings ....." and later ".....the legal proceedings to be instituted one."

I would uphold the judge's conclusion on the issue. Nothing could be clearer or more unequivocal.

The Insurers' submit that even if the notice was adequate, they had, in the circumstances, no obligation to comply with the proviso to section 9(3) of the Act because they had no knowledge of any proceedings actually instituted by the plaintiffs before they had taken out their Originating Summons on 3 September 1997 for the

declaration they had been granted on 6 October. They did not know this until some time in December 1997. They would not, it is contended, have been able to give the notice required by the proviso until then because they did not know the identity of “the person who is the plaintiff”.

It was conceded by the Insurers before the judge (as he noted in his judgment) that their letter of 21 June 1997 was not a notice which satisfied the proviso (if such a notice was necessary) since it did not specify “the non-disclosure or false representation” on which they proposed to rely. Their stand is that no such notice was necessary.

As indicated by the proviso’s wording, the recipient of a proper notice, has the right to be made a party to the declaration proceedings to enable him to contest the insurer’s right to repudiate even where the insured himself elects not to challenge the repudiation. In his skeleton submissions, Mr Sankaran maintained that nothing would have been achieved had the plaintiffs been able to join in the declaration proceedings because it was such a clear case of non-disclosure. This is, of course, no answer to the complaint that no proper notice was given if the requirements of the proviso should have been complied with.

The Insurers position is that their letter of 21 June 1997 was never intended to be a notice of the kind contemplated by the proviso to section 9(3). It is to be noted that the letter uses the formula “take notice” and section 9(3) is mentioned. They expressed their intention to seek a declaration (which would, of course, affect the recipients of the letter). Speaking for myself, I find it difficult to understand what the purpose of that letter was, if it was not intended to be a “proviso notice” (which proved to be defective). When the Insurers’ letter was sent, they had all the information they needed about the imminent proceedings they would have to face, as well as the grounds upon which they would rely to repudiate liability. Thus they could have complied with the requirements of the proviso. They were in no way handicapped by not knowing that the third parties’ proposed proceedings had actually been filed.

As I understand it, the Insurers contend that the judge erred in finding as a fact that they knew of the filing of Suits 70 and 71 of 1997. If this is indeed the submission it has no substance because the judge's decision was not based on a finding that they did know. All that the judge was saying was that it was common ground that they were filed on 9 June 1997, which was the case.

Mr Sankaran contends that the originating summons taken out by the plaintiffs on 21 April 1998 was premature. In my judgment this was not so. They had to react to a declaration (of 6 October 1997) that the Insurers were not liable to any third party as a result of the accident, by virtue of section 9(3) of the Act. The Insurers were not entitled to the benefit of this declaration as against third parties unless they had complied with the conditions specified in the proviso to section 9(3), if the circumstances required compliance.

I am unable to accept the proposition that where an intending plaintiff has given notice of the bringing of his action before its commencement in the form contemplated by section 9(2)(a) of the Act, he is bound to give another notice once those proceedings are actually instituted. I think that the judge was right in observing that the Insurers could easily have discovered that the actions, notice about which had been given on 3 June 1997, had in fact been filed. Once a third party has sent a notice which satisfies section 9(2)(a), in my view, an insurer who ignores it and assumes, without inquiry, that no action will be filed (so that he does not have to comply with the proviso to section 9(3)) does so at his peril.

I mention here that I do not consider that the continued reference to the third parties as "proposed plaintiffs" in two December letters affect the position.

In my judgment, the judge was fully justified, for the reasons that he gave, in concluding that the plaintiffs had complied with their statutory obligations under section 9(2)(a) of the Act and that the Insurers had failed to give the notice required by the

proviso to section 9(3) with the attendant results. I would therefore dismiss the appeal with costs.

**HUGGINS, J.A.:**

The case turns upon the provisions of s.9 of the Motor Vehicles Insurance (Third Party Risks) Act, which was designed on the one hand to protect insurers against risks which they would not have agreed to cover had they known the true facts and on the other to ensure that third parties did not lose the benefits which the Act intended they should have, unless they had had an opportunity to challenge the insurer's right to avoid the policy.

Section 9(1) lays down the general principle that, once a certificate of insurance has been issued, the insurer is liable to pay the amount of any judgment obtained against the insured even where the insurer has avoided, or would be entitled to avoid, the policy. Section 9(2) then makes it a condition precedent to that liability of the insurer that he had notice of the bringing of the proceedings in which the damages had been awarded "before or within seven days after the commencement of" those proceedings. Although proceedings are in ordinary language "brought" when they are "commenced", the fact that notice of the bringing of the proceedings can be given before their commencement compels a less straightforward interpretation of the phrase "bringing of the proceedings". It is not enough that the insurers shall have notice of a claim and of a vague possibility that legal proceedings may be brought; there must be sufficient certainty that proceedings will be brought to require the insurers to decide whether they wish to apply to be joined. In the present case the insurer was given notice by letters dated 3<sup>rd</sup> and 7<sup>th</sup> June 1997 that the solicitors for the third parties would shortly be commencing legal proceedings for negligence. That was more than an intimation of a vague possibility that proceedings would be brought: there was a settled intention to bring proceedings. In my view there was a sufficient compliance with s.9(2)(a).

However, an insurer has the right to apply for a declaration that he is entitled, apart from any provision in the policy, to avoid a policy on grounds which include non-disclosure of a material fact. Such a declaration is by s.9(1). There is a proviso to s.9(3) which reads:

“Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not thereby become entitled to the benefit of this subsection as respects any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice thereof to the person who is the plaintiff in the said proceedings specifying the non-disclosure or false representation on which he proposes to rely, and any person to whom notice of such an action is given shall be entitled if he thinks fit to be made a party thereto”.

In the present case the insurer has obtained “such a declaration” in an action commenced on 11<sup>th</sup> September 1997 (“the insurer’s action”). The actions brought by the third parties had been commenced on 9<sup>th</sup> September 1997 (the third parties’ action). The third parties contend that the insurer has failed to give a notice to them under the proviso. The insurer, whilst necessarily conceding that the notice dated 21<sup>st</sup> June 1997 was not sufficient notice under the proviso, maintains that no further notice is required, because the insurer had no knowledge of “the commencement of [the third parties’] action[s]”.

The notice with which the proviso is concerned is not one required before or within seven days of the commencement of the third parties’ proceedings but before or within seven days of the commencement of the insurer’s proceedings, the date of which is necessarily within the insurer’s knowledge. The purpose of the notice is to enable the third parties to apply to be made parties to the insurer’s proceedings. In the event the third parties have had no opportunity to join in those proceedings, and they should not be bound by the declaration obtained by the insurer.

I think the trial judge came to the right conclusion and agree that the appeal should be dismissed with costs.

**SILKE,J.A.:**

This appeal turns on the interpretation of section 9 of the Motor Vehicles Insurance (Third Party Risks) Act Cap 90 and its various, and difficult, subsections.

The scheme of the Act is to provide for sums payable under motor car policies to be available to third parties who have recovered damages against the insured. But an Insurance Company can avoid the policy on grounds of material misrepresentation or non-disclosure. It can do so by bringing an action for a declaration that the policy was so obtained. This must be done within three months after the commencement of their action by the injured parties.

There is however a proviso which requires the Insurance Company before, or within seven days after, the commencement of its action for a declaration to give notice of it to the plaintiffs which notice must specify the non-disclosure or misrepresentation upon which it seeks to rely.

The Insurance Company must, before they can act at all, be informed by the injured party – and before that party can make claim under the policy – that proceedings are being brought. This information [Section 9(2)(a)] should be in the form of a notice to be given before or within seven days after the commencement of his proceedings. In the context here the word “before” contained in the legislation assumes importance.

The sequence here was as follows.

The accident happened on the 26<sup>th</sup> July 1994. Persons were killed and others injured. It involved car BL 1203.

On the 3<sup>rd</sup> June 1997 a Letter Leader “Notice of Bringing of Proceedings” was sent by the solicitors acting for the administrator of the estate of one of the persons killed

and on behalf of one of the injured persons informing the Insurance Company of claims respectively under the Emergency (Fatal Accidents & Personal Injuries) Order 1991 and damages for personal injury.

This letter made reference to section 9(2)(a) of the Act, stated the claim lay in negligence and specified the parties involved on the accident.

It called the parties “proposed” plaintiff and defendant - - quite properly as the writ had yet to be filed. It clearly stated “we shall shortly be commencing legal proceedings”.

It has been argued that this letter is not one which falls within the meaning of “Notice of the Bringing of Proceedings” as envisaged by section 9(2)(a).

With respect I view it as falling four square within those provisions. It gives all the details sufficient to put the Insurance Company on notice and was issued, as clearly it could be, before the start of proceedings.

In fact the Civil Suit 70-71 were filed on 9<sup>th</sup> June 1997 though the writ was not served on the Insurance Company.

On the 21<sup>st</sup> June 1997 the Insurance Company through its solicitor making reference to the letter – the “Notice of Proceedings” – of the 7<sup>th</sup> June 1997 wrote:

“Please take notice that, we have been instructed to obtain declaration under section 9(3) of the Motor Vehicles Insurance (Third Party Risks) Cap 90 with regard to vehicle No BL 1203. We shall let you have a copy of the declaration once we obtain It” (sic)

It was noticeably silent on the reason why they intended to obtain the declaration. If this be a notice as required under the provision of section 9(3) it is defective.

On the 6<sup>th</sup> October 1997 the Insurance Company in Originating Summons 20/97 obtained their declaration. The ground of avoidance there shown being that the insured at the time of the accident was not the owner of BL 1203 and that the policy was obtained by non disclosure of a material fact.

By Originating Summons 17 of 1998 the now plaintiffs themselves obtained a declaration from the Registrar that, despite the declaration obtained by the Insurance Company, it was entitled to avoid the policy, it could not avail of this because the notice of the 21<sup>st</sup> June 1997 failed to specify the non disclosure. This was a decision on the 29<sup>th</sup> October 1998.

This declaration was appealed from and the appeal was heard by Steven Chong J. who gave judgment on the 3<sup>rd</sup> April 1999 dismissing the appeal, holding that the Registrar's decision was "unassailable".

The appeal before us is from that decision.

Being entirely satisfied that the letter "Notice of Bringing of Proceedings" – from the now plaintiffs on the 3<sup>rd</sup> June 1997 was a Notice within the requirement of section 9(2)(a) of the Act, I turn to consider the effect of the letter 21<sup>st</sup> June 1997 from the Insurance Company.

It has been argued that this letter was merely an act of courtesy and is not, nor was it intended to be, a Notice as required by the proviso to section 9(3). Therefore the fact that it did not specify the non disclosure is neither here nor there.

Having had the opportunity to read in draft the judgments just delivered by my Lord President and my brother Huggins it is sufficient for me to say that I fully agree with the views there in expressed that this was a Notice issued before the commencement of their action by the Insurance Company which purported to comply with the provisions

of the proviso. That it failed to do this is clear in that no non disclosure was specified.  
What happened later cannot remedy this.

I too would dismiss this appeal with costs.

DATO SERI PADUKA KUTLU TEKIN FUAD  
President, Court of Appeal

SIR ALAN HUGGINS  
Judge, Court of Appeal

WILLIAM JAMES SILKE  
Judge, Court of Appeal

Mr Siva Sankaran

for the Appellant

Mr David Teo

for the Respondent