IN THE COURT OF APPEAL FIJI

ON APPEAL FROM THE HIGH COURT

CIVIL APPEAL NO. ABU 0042 of 2014
(High Court Case No. HBC 18 of 2011 and Action No.388 of 2011)

BETWEEN	:	**JAI KUMAR SOLANKI**
		Appellant
AND	:	**NEW INDIA ASSURANCE COMPANY LIMITED**
		Respondent
Coram	:	**Basnayake, JA** **Prematilaka, JA** **Kamal Kumar, JA**
Counsel	:	**Ms. M. Rakai for the Appellant** **Mr. A. K. Narayan for the Respondent**
Date of Hearing	:	**18 May 2016**
Date of Judgment	:	**3 June 2016**

JUDGMENT

Basnayake, JA

[1] I agree that the appeal should be allowed.

Prematilaka, JA

Chronology of events

[2] The Appellant's shop covered by a Fire Insurance Policy issued by the Respondent had been destroyed by fire between 1 and 2 January 1998. The Appellant had lodged a timely claim with the Respondent under the said policy. Referring to the Appellant's claim dated 02 February 1998, by an undated letter, the Respondent had informed the Appellant as follows.

"As per Crime Office, Labasa letter dated 29.08.2000, we regret to inform you that claim has been repudiated due to breach of Policy condition."

[3] The said letter dated 29 August 2000, is not available in the High Court Record furnished to this Court.

[4] However, in the meantime the Appellant had been convicted by the High Court in High Court Criminal Case No. HAC 0005 of 1999L, for arson on the shop so insured together with another and he was sentenced to a term of imprisonment of 06 years from 11 May 2000. Thus, obviously when the Respondent's above undated letter was dispatched the Appellant was serving his sentence in prison as the letter refers to the crime office letter dated 29 August 2000. It is mentioned in the Respondent's second letter dated 08 May 2007, that the first letter had been sent under registered cover on 18 October 2000. The Appellant admittedly received the said letter and did not dispute these dates either.

[5] The Appellant appealed against the conviction and sentence. After a lengthy delay beyond the control of the Appellant explained in detail in the Judgment of the Court, in Criminal Appeal No. AAU 0018 of 2000 decided on 09 March 2007; [2007] FJCA 1, the Court of Appeal allowed the appeal and acquitted the Appellant along with the co-accused. The Court decided against ordering a retrial in view of

the serious delays in the appeal process and the Appellant and the co-accused having already served their sentences.

[6] The Appellant upon being acquitted of the charge of arson, had written a letter on 24 April 2007 (not available in the appeal brief), to the Respondent referring to his claim for loss and damage to his stock and property on 02 January 1998, and the Respondent had replied by its letter dated 08 May 2007, stating *inter alia* as follows

> *"Your claim was formally declined vide our registered letter dispatched on18th October, 2000. Notwithstanding the Judgment of the Fiji Court of Appeal delivered on 9th March, 2007 which you forwarded to us with your aforesaid letter our position remains unaltered. New India Assurance will not pay any claim on your policy for the loss allegedly sustained by you in the fire on 2nd January, 1998. The claim lodged by you was fraudulent and in breach of the policy conditions. Amongst other matters New India Assurance relies on the following:*
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> - *The fire causing the loss on 2nd January, 1998 was deliberately initiated by you with the intention of obtaining a benefit under the policy of insurance.*
> - *Your claim under clause 12 of the policy is now barred as you failed to refer the matter to arbitration which should have been set in motion within one year of the alleged loss and any right of action is deemed abandoned and released.*
> - *Your claim and any right of action is statute barred under the Limitation Act"*

[7] Assuming that his action against the Respondent had been time barred under section 4 of the Limitation Act Cap 35 on the basis that 6 years had expired since the cause of action had accrued, the Appellant then filed an application in the High Court bearing Civil Action No. 285 of 2007 seeking an extension of the limitation period under section 11 of the Limitation Act to sue the Respondent on the Fire Insurance Policy as he was under a disability due to his incarceration. The Respondent opposed the application on the basis that incarceration was not a disability recognised under section 11(3) of the Limitation Act. The Master in his order dated 31 May 2011, while agreeing with the Respondent that 'incarceration'

did not amount to a 'disability' under section 11 went onto hold that as long as the conviction stood, the Appellant simply did not have a cause of action on the fire insurance clause *'because Solanki's conviction meant that all losses and damage suffered as the result of the fire would be excluded from the insurance cover. More importantly, it meant that NIASL was under no obligation to pay out on Solanki's claim"*. Thus, the Master concluded that the Appellant began to have a cause of action only upon the quashing of the conviction. He also added that the Appellant was therefore within time to file action and his application under section 11 of the Limitation Act was rather misguided.

[8] The Respondent appealed against the Ruling of the Master and the appeal was assigned HBA No.17 of 2011 (later changed to 18 of 2011). The first to fourth grounds of appeal were as follows.

(i) The Master erred in law when he held that as long as the conviction stood the plaintiff did not have any cause of action on the fire insurance claim.

(ii) The Master erred in law when he held that the plaintiff only began to have a cause of action upon the quashing of the conviction.

(iii) The Master erred in law when he held that the plaintiff was within time to file a claim on a purported breach on the part of the defendant to settle his fire insurance claim following the quashing of the conviction and thereby failed to properly or adequately apply the Limitation Act Cap 35

(iv) The Master erred in law in not dismissing the plaintiff's application to extend time to file the claim.

[9] The Appellant accordingly filed Action bearing No. 388 of 2011 on 16 December 2011, against the Respondent claiming *inter alia* a sum of $300,000.00 being the

amount covered by the insurance policy. The Respondent filed its Defence on 16 February 2012 *inter alia* seeking a dismissal of the Appellant's claim and stated specifically under the heading 'arson' as follows

"It was an express term of the policy under Condition 7 and/or implied under the common law and under the duty of good faith that if the claim be in any respect fraudulent or if any fraudulent means or devices be used by the insured or anyone acting on his behalf to obtain any benefit under the policy or if the destruction or damage be occasioned by the wilful act or with the connivance of the insured all benefit under the policy shall be forfeited."

[10] Answering the Appellant's averments on the first refusal, the Respondent had stated in its Defence that the fire had been deliberately lit (by or on behalf of the Appellant) and the Appellant had been convicted of arson.

[11] In addition the Respondent had also taken up defences based on clause 12 of the insurance policy on the Appellant's alleged failure to refer all differences to arbitration and pleaded that in any event the action had been prescribed under section 4 of the Limitation Act.

[12] The Appellant had also filed a Reply to Defence on 13 March 2012. Both parties had filed their respective lists of documents on 06 and 20 July 2012 respectively.

[13] However, before the case was taken up for trial, the Respondent on 27 August 2012, had made an application by way of summons along with an affidavit in pursuant to *'Order 4 rule 2 and Order 33 of the High Court Rules and/or inherent jurisdiction of Court'* seeking to have Civil Action number 388 of 2011, and Appeal HBA 18/2011 arising from Civil Action No. 285/2011, be consolidated and heard together on the same issue of limitation of action. The Respondent also applied to the High Court to have a trial in Civil Action number 388 of 2011 on the

preliminary point as to whether the Appellant's action is time-barred under section 4 of the Limitation Act.

[14] Both parties had filed written submissions with regard to the application on consolidation of both matters in April 2013. The Appellant appears to have opposed the consolidation on the basis that there was no right of direct appeal against the aforesaid decision of the Master, now in appeal under Appeal HBA 18/2011 but the Respondent should have sought leave to appeal in the first place. However, it appears that later at the hearing of the consolidated matter the counsel for the Appellant had conceded that the Master's ruling was not one requiring leave to appeal. The Respondent had justified the application among other grounds on the need to avoid duplicity of proceedings.

[15] The order on the application for consolidation had been delivered on 01 May 2013, and the Learned High Court Judge had allowed consolidation of both Appeal HBA 18/2011 and Civil Action Number 388 of 2011, and fixed the hearing on the preliminary point referred to above.

[16] The Learned High Court Judge had delivered the Judgment on the said preliminary point regarding the applicability of section 4 of the Limitation Act on 11 February 2014, and had decided that the Appellant's cause of action had arisen on 18 October 2000, when the Respondent declined his claim in the first instance and held that, therefore, his action was time barred. Accordingly the appeal from the Ruling of the Master on grounds 1 to 4 had been allowed and the Appellant's action had been dismissed subject to cost of $1500.00 to be paid by the Appellant.

[17] The Appellant appealed against the Judgment of the Learned High Court Judge constituting the present Appeal No. ABU0042 of 2014.

Hearing of the Appeal

[18] At the hearing of the instant appeal, Counsel for the Appellant informed this Court that she was in agreement with the position of the Master that the Appellant's incarceration could not come within the definition of 'disability' in section 11(3) of the Limitation Act, given that 'disability' had been defined in relation to an infant or a person of unsound mind and therefore was not contesting that part of the Judgment of Learned High Court Judge who had concurred with the Master on that point. Therefore, this Court will not go into the question whether in the circumstances of this case 'incarceration' of the Appellant or any other disability of similar kind could be accommodated within section 11(3) of the Limitation Act.

[19] Although counsel for the Appellant was not in agreement with the decision of the High Court Judge and seemed to contest the decision toconsolidate Appeal HBA 18/2011 and Civil Action Number 388 of 2011, I find that no such ground has been raised in the Notice of Appeal dated 06 June 2014, filed on behalf of the Appellant as required by Rule 15 of the Court of Appeal Rules. This requirement was highlighted in **Newworld Ltd v Vanualevu Hardware (Fiji) Ltd** Civil Appeal ABU 76 of 2015 decided on 17 December 2015; [2015] FJCA 172 where the Court of Appeal held

> *"In order for the appeal to be properly argued before the Court it is essential that the Appellant states the grounds of appeal with clear and concise particulars. This requirement was emphasized in* ***Nasese Bus Company Limited and Another –v- Muni Chand*** *(ABU 40 of 2011 delivered 8 February 2013) at page 32 of the unreported version:*
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> *"Every notice is required to specify the precise form of the order which the appellant proposes to ask the Court of Appeal to make. The purpose of the Rule (Rule 15 of the Rules) is to narrow the issues in the appeal, to shorten the hearing and to reduce costs. This can only be achieved if the Appellant states in his notice of appeal the findings of fact and points of law which are in issue in the appeal."*

[20] The decisions in **Life Insurance Corporation of India v Arbitration Tribunal, Fiji Bank and Finance Sector Employees Union &Aseri Kolikata** Civil Appeal No.ABU0069 of 2006S decided on 17 July 2008; [2008] FJCA 45, **State v Arbitration Tribunal, Land Transport Authority & Reena Maureen Narayan ex-parte Suva City Council** Action No. HBJ 22 of 2008 decided on 15 August 2008; [2008] FJHC 185 and **Prasad v Singh** Action No. HBC 269 of 2001L decided on 08 February 2002; [2002] FJHC 8 are some examples where the above principles were considered and applied.

[21] No amendment to the notice of appeal had been effected in terms of Rule 20 (1) of the Court of Appeal Rules with or without the leave of this Court bringing this as a ground of appeal either (see **Attorney General v Burnett** Civil Appeal no. ABU0023 of 2009 decided on 21 March 2012; [2012] FJCA 15).

[22] The Appellant had also not challenged the interlocutory order consolidating the two matters in separate appellate proceedings. Further counsel who had appeared for the Appellant in the High Court had conceded that leave was not required to appeal against the Ruling of the Master thus removing from consideration the only ground of objection to the consolidation that had been taken at that time.

[23] The above circumstances, perhaps, explain why the written submissions on the question of consolidation of the two matters had been set out under Ground 1 on the issue of limitation. In fact, the solicitors for the Appellant had admitted in the written submission dated 02 May 2016, that this appeal hearing is limited to the grounds of the Notice and Grounds of Appeal filed on 06 June 2014, where the matter of consolidation had not been urged.

[24] The counsel for the Respondent strongly objected to the issue of consolidation of both matters being considered by this Court as part of this appeal. Further, the Appellant did not seem to have urged nor will this Court in all the circumstances referred to above be disposed to act under Rule 5 of the Court of Appeal Rules, and look into the question whether the consolidation was correctly done or not by the Learned High Court Judge.

Ground 1

"The Learned Judge erred in law and in fact in dismissing the Appellant's action on the basis that it is time barred under the Limitation Act."

[25] However, both counsel agreed that therefore the main issue to be decided in this appeal is when the cause of action had accrued to the Appellant: was it when the Respondent repudiated the appellant's claim on or about 18 October 2000, or when the Respondent informed the Appellant by the letter dated 08 May 2007 informing the Appellant that its position communicated earlier remained unaltered. Answer to this question, would automatically resolve whether the Appellant's action is time barred or not. If the cause of action arose on or about 18 October 2000, then the Appellant's action filed on 16 December 2011, is prescribed in terms of section 4 of the Limitation Act. If the cause of action accrued to the Appellant only when the Respondent sent letter dated 08 May 2007 then his action is within time.

[26] The Learned High Court Judge in paragraph 4.1 of the impugned Judgment had correctly identified this as the contentious issue, or the preliminary point for determination and held that the Master was wrong to have concluded that the Appellant only began to have a cause of action upon the quashing of the conviction. The counsel for the Appellant also did not pursue that line of thought but submitted that the Appellant's cause of action arose with the second letter of the Respondent on 08 May 2007.

When did the cause of action arise?

[27] The argument of the Respondent that, the cause of action for the Appellant accrued when the Respondent declined his claim by the registered letter dispatched on 18 October 2000, and therefore, the limitation period began to run from that date, is based on the premise that the Appellant had a right to make a claim on 02 February 1998. It is clear from the Respondent's said letter that the repudiation had been *"As per Crime Office, Labasa letter dated 29.08.2000."* Therefore, the repudiation in the year 2000 was directly and unmistakably founded upon, connected to, or flowing, as it were, from the Crime Office letter. It could not have meant anything other than the Appellant's conviction and sentence for arson on the subject matter of the insurance policy. There is nothing to indicate that the repudiation was based on any independent assessment on the part of the Respondent.

[28] The second letter of the Respondent elaborates on the appellant's claim of it being fraudulent and in breach of policy conditions as the fire causing the loss on 02 February 1998 on the basis that it had been deliberately initiated by the Appellant. The Respondent's Defence filed in Court makes this position even clearer.

[29] The High Court Rules, 1998 do not define what a cause of action is. It defines 'cause' and 'action' separately which is not helpful to understand the concept of "cause of action". **Stroud's Judicial Dictionary of Words and Phrases** 6th Edition Volume 1 at page 375 states that "cause of action" is a broad concept denoting the factual or legal basis out of which a claim arose. Cause of action has been defined in different ways in several jurisdictions and one of them appealing to me is its definition as the wrong for the prevention or redress of which an action may be brought, including the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury. Similarly, a cause of action arises when one has a right and there is a denial or violation of that right by another. Jurisprudentially, for someone to have a right there must be a corresponding duty or obligation on another.

[30] When the Appellant was convicted and sentenced to imprisonment in 2002, in respect of arson, allegedly committed on the very property covered by the insurance policy his culpability in relation to the fire that had taken place on 02 February 1998, had indeed been established beyond reasonable doubt, but subject to his appeal. Clause 7 of the insurance policy states that *"If any destruction or damage be occasioned by the wilful act or with the connivance of the insured, all benefits under this Policy shall be forfeited."* In my view, the forfeiture was automatic and it goes to the root of the insurance contract unlike misrepresentation, misdescription or non-disclosure where the policy is voidable. In the case of alteration, the policy shall be avoided whereas exclusions set out are what the policy does not cover. The policy could also be terminated by either party as stipulated. The forfeiture of benefits is different and unique and automatic upon fraud or self-inflicted fire attributed to the Appellant.

[31] In my view, in that scenario the Appellant had no legal right to make a claim under the insurance policy. No right could be based on, arise or flow from a civil wrong leave aside a criminal offence. Somebody who had forfeited his benefits could claim nothing. Similarly, the Respondent had no legal obligation to consider the Appellant's claim as the Respondent had nothing to pay under the policy as at that point of time. But, rights of the parties were in a frozen state because of the Appellant's appeal pending for determination. In other words, there could not have been a legal claim or legal repudiation as long as the conviction of the Appellant was in operation. There was no party capable in law of suing and a party liable in law to be sued for the limitation period to begin to run (see **Kalesi Cakau v Abdul Habib** [1999] 45 FLR 117)

[32] In the circumstances, I am of the view that, the so called claim of the Appellant made on 02 February 1998, had no legal validity in law and could not have constituted a valid claim on the insurance policy. Consequently, logically and legally, the Respondent's repudiation also had no legal validity in law. Thus, there were no conditions for a cause of action to arise on the basis of the said claim in

1998 and the repudiation in 2000. Therefore, I conclude that no cause of action accrued to the Appellant with the so called repudiation on 18 October 2000.

[33] The argument of the Respondent could also be dealt with having regard to the judicial pronouncements of what constitutes a cause of action. **Halsbury's Laws of England Fourth Edition Volume 37 Paragraph 20 at p. 27** states that from the earliest time the phrase 'cause of action' has been held to include every fact which is material to be proved to entitle the plaintiff to succeed, and every fact which the defendant would have a right to traverse (per Breet J. in **Cooke v Gill** [1873] LR 8 CP 107 at 116)

[34] In **Cigna Insurance Asia Pacific Ltd v Packer** [2000] WASCA 415 involving a Personal Accident Policy Malcom CJ citing several authorities in support declared *"A cause of action accrues when all the facts have occurred which the plaintiff must prove in order to succeed."*. Pidgeon J. in the same case citing paragraph 63 in 19 Halsbury (1st edition) 42 said that it sets out the law that has long been applied on when a cause of action arises.

> *'A cause of action accrues, when there is in existence a person who can sue and another who can be sued and* ***when all the facts have happened which are material to be proved to entitle the plaintiff to succeed."***
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> *" The words in bold are based on the authority of* ***Cooke v Gill*** *[1873] LR 8 CP 107."*

[35] In **Coburn v Colledge** [1897] 1 QB 702 Lord Esher said of the cause of action

> *"Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court."*

[36] Lord Guest in **Central Electricity Board v Halifax Corporation** [1962] 3 WLR 1313 said

" The date when a cause of action accrues may be said to be the date on which the plaintiff would be able to issue a statement of claim capable of stating every existing fact which, if traversed, it would be necessary for the plaintiff to prove in order to support his right of judgment."

[37] Megaw J. in **Chandris v Agro Insurance Co Ltd & Ors** [1963] 2 Lloyds List Law Reports 65 applied the basic test of determining when all the facts have happened which are material to be proved to entitle the plaintiff to succeed to decide when the cause of action arose in the way the test was explained by Lord Esher and Lord Guest.

[38] When one applies the above statements of law relating to the question as to when a cause of action arose for the Appellant, it is clear that in view of the Appellant's conviction the Respondent had traversed the fact of fire being the result of any events described in paragraph (1) on the first page of the insurance policy but had claimed that it had been deliberately initiated by the Appellant. In fact in terms of the said paragraph the agreement on the part of the Respondent to pay the value of the property destroyed by fire is subject to the Conditions on page 2 thereof, being conditions precedent to right of the Appellant to recover under the policy. According to Clause 7 of the insurance policy, if any destruction or damage be occasioned by the wilful act or with the connivance of the insured, all benefits under this Policy shall be forfeited.

[39] Thus, in the light of the said challenge by the Respondent the burden of proving that he had not breached condition 7 fairly and squarely fell on the Appellant if he was to claim that a cause of action had accrued to him to sue the Respondent. As long as the conviction stood the Appellant could not do that and he did not have all

the existing facts material to be proved to entitle him to succeed including the non-breach of condition 7. Thus, no cause of action could arise for him to sue the Respondent. The only way he could do that was to get the conviction set aside by the Court of Appeal in which he eventually succeeded only on 09 March 2007. That is the date on which when all the facts occurred which the Appellant had to prove in order to succeed. Thus it is only after 09 March 2007, that a cause of action accrued to the Appellant.

[40] Both parties have cited **Council of the City of Penrith v Government Insurance Office of New South Wales** New South Wales [1991] 6 ANZ Insurance Cases 61-070 and **Cigna Insurance Asia Pacific Ltd v Packer**(supra) in support the proposition of law that a cause of action accrues to the insured to sue for damages for breach of contract only when the insurer fails to do what is required of it and not when the claim is made or notified to the insurer as the insurer could thereafter fully perform its promise.

[41] In the first place it must be mentioned that Giles J in **Council of the City of Penrith v Government Insurance Office of New South Wales** (supra) was dealing with contract of indemnity insurance whereas their Lordships in **Cigna Insurance Asia Pacific Ltd v Packer** (supra) were considering Personal Accident Policy where the claim had been for unliquidated damages. The full Bench in **Cigna Insurance** did not follow Giles J. in ***Council of the City of Penrith.***

[42] Parke B in **Dalby v The India and London Life-Assurance Co** [1854] 15 CB 364 said that policies of assurance against fire and marine risks are properly contracts of indemnity. Pidgeon J. in **Cigna Insurance Asia Pacific Ltd v Packer** (supra) held that personal accident policies providing for fixed sums payable on the happening of an event are not contracts of indemnity.

[43] Giles J. in **Council of the City of Penrith v Government Insurance Office of New South Wales** (supra) considered that a breach could not occur while there was a possibility of the defendant performing its promise. His Lordship was considering a policy of insurance where the insured promised to *"indemnify the Insured, against any claim ... for breach of professional duty which may be made against the Insured ... by reason of any negligent act, error or omission ..."*.The policy required the insured to give prompt notice to the insurer of any such claim made against the insured and included an entitlement in the insurer to take over the conduct of the defence or settlement and prohibited the insured from admitting liability or settling any claim without the written consent of the insurer.

[44] It is clear from a plain reading of the Fire Insurance Policy in the instant case that it is not exactly the same as the policy of insurance considered by Giles J. though it is also a policy of indemnity. As posed by Pidgeon J. in **Cigna Insurance Asia Pacific Ltd v Packer** (supra) the question is whether the principle referred to by Giles J is a principle of general application. I think the question when a cause of action accrues under a simple contract should be decided by referring to the language used in the contract itself guided by the law relating to the birth of a cause of action.

[45] Megaw J. in **Chandris v Agro Insurance Co Ltd & Ors** (supra) did not apply the reasoning in **Cigna Insurance Asia Pacific Ltd v Packer** (supra) to a claim for unliquidated damages under a marine policy of insurance (indemnity) and said that no demand was necessary to initiate proceedings. Privy Council in **Castle Insurance Co v Hong Kong shipping Co** [1984] 1 AC 226 approved Megaw J.'s reasoning in***Chandris***.

[46] In my view, there is nothing to suggest in the Fire Insurance Policy under consideration in this appeal to affirmatively indicate that the Respondent's

liability to pay would arise only upon the rejection of the Appellant's claim. In fact it is clear that the Respondent had promised to pay the Appellant upon the insured property being destroyed or damaged by fire subject to the conditions thereof. One of the conditions is a timely notice of the destruction or damage. Thus, what is required is a notice and not a demand for payment. Fire Insurance Policy in issue is certainly not in the nature of an "on demand guarantee' or "on demand pro-note" where the payment is required only upon demand. Therefore I am of the view that provided the Appellant had not been in breach of conditions technically he could have filed action against the Respondent on the Fire Insurance Policy after he gave notice of the destruction or damage. However, as explained above since the Appellant was alleged and later proved to have been in violation of condition 7 no cause of action could accrue to him to sue the Respondent and he had to wait until he was cleared from the criminal charge of arson to do so.

[47] As pointed out by Megaw J. **Chandris v Agro Insurance Co Ltd & Ors**(supra) and Pidgeon J. in **Cigna Insurance Asia Pacific Ltd v Packer** (supra) Giles J's argument that *"Only when the defendant failed to do what was required of it could a cause of action for damages for breach of contract accrue to the plaintiff'* could pose a couple of uneasy problems when applied to the Fire Insurance Policy in the present case. It presupposes that a demand should have been necessarily made as opposed to a notice to see whether the Respondent was going to perform its obligation which was not part of the contract. Secondly Giles J's interpretation would mean that the insurer could postpone unilaterally and indefinitely the accrual of the cause of action and the commencement of running of time for the purpose of prescription. Should an insured be placed in that predicament or have to face such a consequence? In my view, the insured should not.

[48] Therefore I am persuaded to follow the line of reasoning in Pidgeon J. in **Cigna Insurance Asia Pacific Ltd v Packer** and Megaw J. **Chandris v Agro**

Insurance Co Ltd & Ors (supra) in the present case and in my view, the principle referred to by Giles J in **Council of the City of Penrith v Government Insurance Office of New South Wales** (supra) is not a principle of general application and in any event should not be applied to the facts of this case.

[49] Even if, for the sake argument, one were to apply Giles J's logic in **Council of the City of Penrith v Government Insurance Office of New South Wales** (supra) to the instant case, in view of my reasoning above, the Appellant's cause of action arose only with the Respondent's letter dated 08 May 2007, rejecting the claim upon the Appellant's letter dated 24 April 2007, in as much as until 09 March 2007, the Appellant could not make a legitimate claim on the Fire Insurance Policy nor could the Respondent make a legitimate repudiation thereof. Even on Giles J's proposition, the Appellant's action was within time in terms of section 4 of the Limitation Act.

[50] However, my conclusion that the Appellant's cause of action accrued only after his conviction was quashed on 09 March 2007, is enough to hold with the Appellant in this appeal. It is immaterial whether it arose on 09 March 2007, or 08 May 2007. His action instituted on 21 December 2011, was not time barred in terms of section 4 of the Limitation Act.

[51] Nevertheless, what I have said so far should not be taken to mean by any stretch of imagination that the Respondent cannot take up the other defences including reliance on condition 7 of the Fire Insurance Policy except what is based on section 4 of the Limitation Act, set out in its Defence dated 16 February 2012. The fact that the Court of Appeal quashed the Appellant's conviction does not mean that the Respondent could not allege his involvement in the fire on his property which the Respondent is required to prove only on a balance of probability at the trial in order to succeed and deny the Appellant any benefit

under the policy. I have ruled only on the question of limitation and the rest is for the trial judge to decide at the trial proper.

[52] Therefore, I conclude that, the decision of the Learned High Court Judge that the cause of action accrued to the Appellant on 18 October 2000, was wrong and should be set aside. I also hold that this judgment should apply to both High Court Case No. HBC 18 of 2011 and Action No.388 of 2011.The Appellant is entitled, if he so wishes, to take steps according to law to proceed with the trial in Action No.388 of 2011 from where it stopped. Thus, the Appellant is entitled to succeed on this ground of appeal.

Grounds 2 and 3

"The Learned Judge erred in law and in fact in not evaluating the evidence of the Appellant and hence, there has been a substantial miscarriage of justice."

"The Learned Judge erred in law and in fact in not giving any weight to the evidence tendered by the Appellant and hence, there has been a substantial miscarriage of justice."

[53] These two grounds set out in the notice of appeal taken collectively complain of the Learned High Court Judge not having evaluated the evidence of the Appellant in coming to his conclusion resulting in a miscarriage of justice.

[54] The Learned High Court Judge had ruled only on the preliminary point on the applicability of section 4 of the Limitation Act in the context as to when the cause of action had accrued to the Appellant. All the material necessary for the High Court Judge to consider that issue was before him and I fail to see what other facts or evidence the Appellant could have placed before the Trial Judge in that regard. Even in the written submissions of the Appellant or at the hearing

this Court was not apprised of any such additional material as having a bearing on the preliminary point. In any event there was no dispute over the facts relevant to the said preliminary point of law between the parties.

[55] In the circumstances I do not think there is merit in these grounds and in view of the decision on the main point this argument pales into insignificance. I reject these grounds of appeal.

Grounds 4 and 5

"The Learned Judge erred in law and in fact in not finding as fact that the claims made by the Respondent/Plaintiff (sic), hence there has been a miscarriage of justice."

"The Learned Judge's decision is unfair and unreasonable in all the circumstances"

[56] It is difficult to gather what the Appellant's real grievance is on Ground 4. Ground 5 states that the Learned High court Judge's decision (to try the preliminary point on limitation in the first instance as urged in the written submissions) is unfair and unreasonable in all the circumstances of the case. The House of Lords had remarked in **Tilling v Whiterman**[1] [1980] A.C. 1 against the courts of first instance allowing preliminary points of law to be tried before and instead of first finding the facts. Lord Scarman in **Tilling v Whiteman**(supra) said that preliminary points of law are too often *"treacherous short cuts, Their price can be delay, anxiety and expense"*. However theHouse of Lords also held in **Ashmore v Corporation of Lloyd's (No.1)** [1992] 1 W.L.R. 446 ; [1992] 2 All E.R. 486, HL having also referred to ***Tilling***

[1][1979] All E.R. 712 n, CA ; [1979] 1 All ER 737, HL

"The control of proceedings was always a matter for the trial judge and the parties were not entitled as of right to have their case tried to a conclusion in such manner as they thought fit and if necessary after all the evidence had been adduced and could have no legitimate expectation that such a course would be followed. A party's only legitimate expectation was that he would receive justice, which could only be achieved by assisting the judge and accepting his rulings. Furthermore, the decision or ruling of the trial judge on an interlocutory matter or any other decision made by him in the course of the trial should be upheld by an appellate court unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings.Since the issue whether Lloyd's owed a duty of care to the plaintiffs would eventually have to be decided by the judge it was sensible to determine that issue at the outset of the trial because, if it was held that no duty was owed, the action would be at an end without further delay, expense or harassment of witnesses but if it was decided in the plaintiffs' favour the judge, having defined the relevant duty, could then logically proceed to hear evidence in order to decide whether Lloyd's had acted in breach of duty and determine the consequences of any breach"(emphasis mine)

[57] Therefore what is necessary is to strike a proper balance between these two ends. I have no doubt that the Learned Trial Judge in the instant case had come to a correct decision to decide upon the preliminary matter of law in the first instance based on section 4 of the Limitation Act. I reject these grounds of appeal.

Kamal Kumar JA

[58] I agree with the reasoning and conclusions of Prematilaka JA, however, in my view the cost should be $3000.00.

Orders of the Court:

(i) The Appeal is allowed and the Judgment of the High Court is set aside.

(ii) The Respondent shall pay the Appellant costs in this Court fixed in the sum of $5000.00

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Hon. Mr. Justice E. Basnayake
Justice of Appeal

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Hon. Mr. Justice C. Prematilaka
Justice of Appeal

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Hon. Mr. Justice Kamal Kumar
Justice of Appeal