

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. 177 of 2016

(On appeal from the
Ruling of the Master Mr
Vishwa Datt Sharma
dated 30 July 2018)

BETWEEN : WILLIAMS AND GOSLING LIMITED

APPELLANT

AND : NEW INDIA ASSURANCE COMPANY LIMITED

RESPONDENT

CORAM : The Hon. Mr. Justice David Alfred

COUNSEL : Mr. N. Prasad for the Appellant
Mr. G. O'Driscoll for the Respondent

Date of Hearing : 10 December 2018

Date of Judgment : 12 December 2018

JUDGMENT

1. This is the Appellant's Appeal seeking the following orders:
 - (1) That the Ruling of the Master dated 30 July 2018 be set aside.
 - (2) The Writ of Summons and Statement of Claim filed on 22 July 2016 by the Respondent be struck out because it is time-barred by section 4 of the Limitation Act.

2. The Notice of Appeal states the grounds of appeal are:
 - (1) The Master erred in law in not finding that the cause of action did not arise within 6 years before the commencement of the action and is barred by section 4 of the Limitation Act 1971 (Act) based on:
 - (a) The insured Narseys Plastic Industries Ltd had on 6 January 2010 made a claim in writing against the shipper of its goods, DHL Global Forwarding (Fiji) Ltd (DHL) and DHL had made a preliminary Notice of Claim to the Appellant on the same date.
 - (b) DHL making a formal claim against the Appellant on 14 January 2010 for the sum of \$119,880.88.
 - (c) McLarens handing to the Respondent (New India) its report, regarding the claim, on 17 March 2010.

 - (2) The Master erred in law in finding with regard to the Appellant's pleading that the cause of action is embarrassing and offends the High Court Rules (HCR) and suggest the issues are opposed and thus tantamount to a triable issue.

 - (3) The Master erred in law and in fact in finding that the facts were not plain and obvious when the affidavit of Lockwood on behalf of the Appellant was unopposed.

3. The hearing commenced with Mr Prasad stating he would only be arguing on limitation. He said the fire was on 4 January 2010 and this is the date the cause of action arose. In the alternative it would be 17 March 2010 the date McLarens Young International (McLarens) submitted their detailed report to New India. On that date New India was in possession of facts to make payment to their insured. The knowledge of McLarens is the knowledge of New India. Counsel said the claim is time barred and ought to be dismissed with costs.

4. Mr O'Driscoll then submitted. He said in subrogation the insurer carries out investigation and the subrogation only becomes effective when the insurer accepts the claim and payment is made. New India is not bound by the Investigation report. Evidence ought to be given and it is therefore inappropriate for summary decision. New India accepted responsibility on 27 October 2010 and the 6 years runs from that date.
5. Mr Prasad in his reply referred to the White Book and to O.18 r.18(1) HCR
6. At the conclusion of the arguments I said I would take time for consideration. Having done so I shall now deliver my decision.
7. The sole issue for decision in this appeal is this. Does limitation run from the date of the cause of action in tort which is the date of the fire or does the limitation period commence on the date the insurer accepts responsibility to meet its insured's claim.
8. I shall start with the Act, section 4(1) of which reads as follows:

“The following actions shall not be brought after expiration of 6 years from the date on which the cause of action accrued, that is to say-
(a) actions founded on simple contract or tort;”
9. Thus the applicable period of limitation is 6 years. This period commenced on 4 January 2010 when the Applicant's depot was destroyed by fire. In the depot were New India's insured's (insured) consignment of goods which were also destroyed. The insured's cause of action against the Appellant accrued on that date. Thus the insured had 6 years from 4 January 2010 to file an action against the Appellant.
10. I turn next to the Statement of Claim and observe:
 - (a) Para 6 states “On 4th January 2010 the insured's consignment was kept at the Defendant's warehouse located in Walu Bay Suva awaiting final delivery to the insured when a fire ensued, completely destroying the warehouse and its contents including the insured's consignment.”
 - (b) Para 7 states “The Defendant breached its duty of care for the insured's consignment when the same was destroyed in the said fire and should have had sufficient insurance cover to alleviate any damage at its warehouse in Walu Bay at the time of the referenced fire incident.”

(c) Para 8 states “The destruction of the insured’s consignment resulted in a substantial loss to the insured relating to the consignment.”

11. I turn to the claim of New India against the Appellant under the doctrine of subrogation. McGillivray on Insurance Law, 14th edn, at para 24-036 states “The insurer is subrogated to any claim of any character which the insured is entitled to bring in proceedings against a third party to diminish his loss.”

12. At para 24-039 it is stated “An insurer is not entitled to make any claim which the insured himself could not have made, as where, for example, the insured has allowed it to become time barred.”

13. The Oxford Dictionary of Law, 9th edn, defines “subrogation” as “The substitution of one person for another so that the person substituted succeeds to the rights of the other.”

14. Thus it is as clear as daylight that the insured’s cause of action (breach of duty) against the Appellant arose on 4 January 2010. New India’s claim against the Appellant is for recovery of the amount it paid its insured less the excess of \$250. New India is making its claim under subrogation. In my opinion there are 2 components to a claim under subrogation (1) The cause of action and (2) the period within which to file a claim based on (1). The cause of action arose on 4 January 2010, and the 6 year period, before limitation applies, commences on that date. Since New India is subrogated to its insured it follows as the night the day that it too has to file its claim against the Appellant within that selfsame period. Once it pays its insured it becomes subrogated to its insured. But that by no means entitles New India to say the 6 years period commences from the date it pays its insured. It does not. A requirement that the insured be paid first before subrogation is available to New India is not tantamount to saying New India can exercise its right under subrogation at any time within the 6 years thereafter. New India can only claim against the Appellant if its insured could and here the insured could not after 4 January 2016. Therefore it is clear that when New India filed this action on 22 July 2016, the claim was already time barred. The Master should therefore have dismissed the action.

15. In the result, the Appeal filed on 7 December 2018 is allowed and I shall make the following orders:

- (1) The Ruling of the Master dated 30 July 2018 is set aside.
- (2) The instant action filed on 22 July 2016 is dismissed.

(3) The Respondent shall pay the Appellant the costs of these proceedings throughout here and below which are summarily assessed at \$2,000.

Delivered at Suva this 12th day of December 2018.



David Alfred
JUDGE
High Court of Fiji