

THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 177 of 2016

BETWEEN : NEW INDIA ASSURANCE COMPANY LIMITED

PLAINTIFF

AND : WILLIAMS AND GOSLINGS LIMITED

DEFENDANT

Coram : The Hon. Mr Justice David Alfred

Counsel : Mr G. O'Driscoll for the Plaintiff
Mr N. Prasad for the Defendant.

Date of Hearing : 26 September 2018

Date of Decision : 28 November 2018

DECISION

1. This is the Defendant's Summons seeking an order that leave be granted to appeal against the Ruling of the Master dated 30 July 2018..
2. The application is made under Order 59 rule 11 of the High Court Rules. It is supported by the affidavit of Bill Lockwood (Lockwood).
3. Lockwood deposes as follows:
 - (1) He is the Credit Controller of the Defendant.
 - (2) On 30 July 2018, the Master dismissed the Defendant's application to strike out the statement of claim herein.
 - (3) He is advised that the Ruling contains issues of law that must be rectified on appeal dealing with the striking out of statute barred claims under section 4 of the Limitation Act 1971.
 - (4) If leave is not granted, injustice will result in the Defendant having to defend a stale action.
4. Mr O'Driscoll informed the Court he would not be filing any affidavit in opposition. The Court stated the only issue is whether the claim was time - barred.
5. The hearing commenced with Mr Prasad submitting. He said the date of the fire was 4 January 2010. Section 4 of the Limitation Act applied and the 6 years started to run from 17 March 2010 when Maclarens Loss Adjusters submitted their claims report to the Plaintiff (New India). New India filed the instant action on 22 July 2016. The Maclaren's letter was sufficient for New India to file an action. There are meriterous grounds for the appeal in that the claim is time-barred.

6. Mr O'Driscoll then submitted the Maclaren's report was not binding and New India had to consider other matters. The Master held there was a basis for the claim which should be decided after the trial. It was premature to bring it up now.
7. At the conclusion of the arguments I said I would take time for consideration. Having done so I now deliver my decision.
8. The sole issue for me to decide at this juncture is whether the claim is time barred. So I shall look at section 4(1) of the Limitation Act 1971 which reads as follows:
"The following actions shall not be brought after the 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 the 4th January 2010 when the Defendant'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 Defendant accrued on that date. Thus the insured had 6 years from 4 January 2010 to file an action against the Defendant.
10. With that out of the way, I turn to the claim of New India against the Defendant 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".

11. 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".
12. 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".
13. The insured could not have filed the action against the Defendant after 4 January 2016. Neither can New India.
14. Here from the court file I note New India filed the instant action against the Defendant on 22 July 2016. Thus the action was time-barred.
15. In the result, the Defendant is entitled to be granted leave to appeal against the Master's Ruling which I hereby grant. The costs of this application shall be costs in the cause.

Delivered at Suva this 28th day of November 2018.



David Alfred

JUDGE

High Court of Fiji