IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV 2008-463-909

	BETWEEN	SOVEREIGN ASSURANCE COMPANY LIMITED Appellant
	AND	D N SCOTT Respondent

Hearing: 12 June 2009

Appearances: B J Burt for appellant
H Rennie QC for respondent

Judgment: 30 September 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 3.15 pm on Wednesday 30 September 2009

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[1] In 1994 the appellant's predecessor, Prudential, issued a "Critical Illness Cover Policy" to Mr Scott, the respondent. Later, during the currency of the policy, Mr Scott suffered a stroke. His subsequent claim under the policy was declined. The appellant has assumed whatever liability Prudential had under the policy following an amalgamation.

[2] In 2006 Mr Scott issued proceedings in the Taupo District Court. The appellant applied to strike the proceeding out upon the ground that it was statute barred. In a judgment given on 21 November 2008, Judge Cooper dismissed the application. Sovereign now appeals against that decision.

Background

[3] The Critical Illness Cover Policy with which this case is concerned took effect on 1 January 1994. It provided for payment of a benefit of $100,000 where any one of a number of defined events occurred. A stroke was one of those events. The term "stroke" was defined in the policy as follows:

> A cerebrovascular incident producing significant permanent neurological sequelae. This requires evidence of infarction of brain tissue, intracranial or subarachnoid haemorrhage or embolisation from an extra-cranial source. Transient ischaemic attacks, cerebral symptoms due to migraine, cerebral injury resulting from trauma or hypoxia or vascular disorders affecting the eye or optic nerve are specifically excluded.

[4] The policy provided that no cover was available for at least 90 days following its commencement; cover therefore commenced on 1 April 1994. There was a further condition that the insured must survive the event concerned by a minimum of 14 days.

[5] On 1 January 1997, Mr Scott suffered a subarachnoid haemorrhage. On 14 January 1997 he submitted a claim to Prudential in terms of the policy, in that his subarachnoid haemorrhage fulfilled the policy definition of a "stroke".

[6] On 14 February 1997 Prudential declined Mr Scott's claim. It considered that the respondent's subarachnoid haemorrhage did not fit the policy criteria. Nothing more was done for about two years, but in April 1999 the respondent complained to his general practitioner that he continued to suffer from a number of symptoms thought to be associated with his stroke. Dr Davies wrote to Sovereign on 12 April 1999, seeking reconsideration of the respondent's claim and recording his opinion that the respondent "has been left with significant permanent impairment". Dr Davies summarised the grounds for his opinion in the following manner:

> Approximately two years ago Doug sustained a subarachnoid haemorrhage. A report was supplied saying that the neurological deficits he had were not expected to be permanent and I understand his claim was declined. Now some two years down the track these symptoms persist and do not seem to be improving and it is therefore my opinion that he has been left with significant permanent impairment and that his request to have his application reconsidered is appropriate.
>
> I will list these symptoms which appear to be permanent and result from the subarachnoid haemorrhage:
>
> 1. A feeling of tightness and stiffness in the head.
>
> 2. Headaches.
>
> 3. A tingling feeling in the head and an awareness of a blockage.
>
> 4. Lethargy and fatigue preventing him from working a full day, and requiring him often to have a 2-3 hour break during the middle of the day.
>
> 5. Short term memory loss.
>
> 6. Difficulty sustaining concentration, eg, unable to read for more than five minutes at one time.
>
> 7. Lightheadedness.
>
> 8. Lack of motivation.
>
> 9. Poor frustration tolerance.
>
> 10. Reduced sleep quality and duration.
>
> Over the last year there has been no improvement in these symptoms. I believe they are the result of the subarachnoid haemorrhage as Doug does not appear to be depressed.
>
> It is my opinion that Doug has permanent neurological impairment resulting from subarachnoid haemorrhage and his claims should be reconsidered.

[7] In May 1999 Prudential changed its name to Colonial Life (NZ) Ltd (Colonial). It referred the matter the matter to a neurologist, Mr Craven. He examined the respondent and provided a report, as a consequence of which Colonial wrote to Mr Scott on 16 July 1999 confirming the earlier decision to decline the claim.

[8] On 6 August 1999 Mr Scott complained to the Insurance & Savings Ombudsman's Office. By letter dated 22 October 1999, that Office advised that the respondent's complaint could not be upheld because the symptoms suffered by him were neither significant nor permanent.

[9] By letter dated 3 April 2002, Mr Scott cancelled his policy. By then Colonial had changed its name to Sovereign Life (NZ) Ltd. Sovereign Life acknowledged the cancellation by letter dated 9 April 2002.

[10] On 30 June 2003 Sovereign amalgamated with other companies to form the present appellant.

[11] Mr Scott renewed his claim in 2005. On 14 October 2005 Sovereign wrote to Mr Scott advising that it was unable to pay the claim " … because you did not meet the policy wordings criteria for payment". The letter continued:

> We understand that this may not be the outcome you were expecting and that you wish to take the matter further to the Insurance & Savings Ombudsman. For the purposes of that scheme I can advise that we have reached 'deadlock' and you must refer your complaint to her office within 2 months of the date of this letter.

[12] Mr Scott did refer the matter once more to the Insurance & Savings Ombudsman, but in May 2006 that Office rejected his complaint on the basis that it had no jurisdiction to consider it again.

[13] On 27 September 2006, Mr Scott filed this proceeding in the Taupo District Court. He sought judgment for $100,000, being the amount of the cover provided for the policy.

[14] Sovereign applied in the District Court for an order striking out the proceeding on the ground that it was statute barred.

The District Court decision

[15] Sovereign's position from the outset has been that Mr Scott is not entitled to payment of the benefit, because the symptoms or sequelae suffered by him in consequence of his admitted stroke were neither permanent nor significant. Primary reliance is placed upon the first of these two considerations.

[16] In the District Court Judge Cooper held that the question of whether the respondent's subarachnoid haemorrhage produced "significant permanent neurological sequelae" was a question of fact. As to permanence he said that:

> … a state of affairs which, for the time being is temporary or regarded as temporary, may become permanent.

[17] The learned Judge considered that the issue of when (if at all) the sequelae became permanent was a matter for determination at trial. Although not expressly articulated, there is an implied ruling in the judgment that time did not start running against the respondent until the consequences of the stroke did become permanent. The Judge considered that the plaintiff may be able to establish at trial that the sequelae became permanent during the period of six years immediately preceding the filing of proceedings in the District Court. He therefore dismissed the appellant's strike out application.

Strike out principles

[18] The appellant's application in the District Court fell to be considered under rr 209 and 481 of the District Court Rules. Each confers upon the District Court jurisdiction to dismiss a proceeding where it discloses no reasonable cause of action, or is otherwise an abuse of the process of the Court. The principles are well settled and may be briefly summarised. In *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267, Richardson J said that:

a) A strike out application proceeds on the assumption that the facts pleaded in the statement of claim are true, even though those facts are not, or may not, be admitted;

b) Before the Court may strike out a proceeding the causes of action must be so clearly untenable that they cannot possibly succeed;

c) The jurisdiction to strike out is to be exercised sparingly and only in a clear case where the Court is satisfied it has the requisite material;

d) The fact that an application to strike out raises difficult questions of law which require extensive argument does not of itself exclude the Court's jurisdiction.

[19] It is common ground the Court has jurisdiction to strike out a pleading where the pleaded cause of action is statute barred: *Ronex Properties Ltd v John Laing Construction Ltd* [1983] 3 All ER 961 (CA); *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525.

[20] Although the Court will ordinarily proceed on the basis of the facts pleaded in the statement of claim, findings of fact, if available on affidavit evidence, can and should be made in respect of applications founded upon limitation periods: *Attorney-General v McVeagh* [1995] 1 NZLR 558 at 566 (CA); *Clear Communications Ltd v Sky Network Television Ltd* HC WN CP19/96 1 August 1997; *Body Corporate No.202254 v Approved Building Certifiers Ltd* HC AK CIV 2003-404-3116 13 April 2005; *Heaven v Webster Malcolm & Kilpatrick* HC AK CIV 2004-404-2826 9 November 2005.

[21] In *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 at [33] Tipping J offered the following guidance:

> [33] I consider the proper approach, based essentially on *Matai*, is that in order to succeed in striking out a cause of action as statute-barred, the defendant must satisfy the Court that the plaintiff's cause of action is so clearly statute-barred that the plaintiff's claim can properly be regarded as frivolous, vexatious or an abuse of process. If the defendant demonstrates that the plaintiff's proceeding was commenced after the period allowed for

> the particular cause of action by the Limitation Act, the defendant will be entitled to an order striking out that cause of action unless the plaintiff shows that there is an arguable case for an extension or postponement which would bring the claim back within time.

Is this proceeding statute-barred?

[22] Section 4(1) of the Limitation Act 1950 prohibits the bringing of an action after the expiration of six years from the date on which the cause of action accrues under a simple contract:

> **4 Limitation of actions of contract and tort, and certain other actions**
>
> (1) Except as otherwise provided in this Act or in subpart 3 of Part 2 of the Prisoners' and Victims' Claims Act 2005, 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 on tort: …

[23] Actions in respect of bodily injury must be brought within two years from the date on which the cause of action accrued, although a plaintiff may be entitled to apply for leave to extend that period to six years. Section 4(7) provides:

> (7) An action in respect of the bodily injury to any person shall not be brought after the expiration of 2 years from the date on which the cause of action accrued unless the action is brought with the consent of the intended defendant before the expiration of 6 years from that date:
>
> Provided that if the intended defendant does not consent, application may be made to the Court, after notice to the intended defendant, for leave to bring such an action at any time within 6 years from the date on which the cause of action accrued; and the Court may, if it thinks it is just to do so, grant leave accordingly, subject to such conditions (if any) as it thinks it is just to impose, where it considers that the delay in bringing the action was occasioned by mistake of fact or mistake of any matter of law other than the provisions of this subsection or by any other reasonable cause or that the intended defendant was not materially prejudiced in his defence or otherwise by the delay.

[24] The substance of the plaintiff's claim is to be found at paragraphs 9 and 10 of his statement of claim in the District Court. They read:

> 9. The subarachnoid haemorrhage, which he suffered on 1 January 1997 had the following significant consequential effects ('the sequelae') on him, then and in the period after that date:

(a) He was admitted to hospital in Taupo, then transferred to Rotorua, and then to Auckland Hospital from which he was discharged on 9 January 1997;

(b) He experienced head pain, impaired concentration, and deficient short term memory;

(c) He experienced fatigue with consequential inability to work in his full time occupation;

(d) He experienced impaired tolerance, sexual dysfunction, agitation and other impairment to his mood and control of emotion;

(e) He had impaired cognitive function including deficiencies in oral expression and in mental analysis and decision-making;

(f) He experienced impairment of balance associated with light headed and dizzy periods;

10. By reason of each of the matters set out in paragraph 9 of this statement of claim (both individually and together) he sustained significant neurological sequelae to the subarachnoid haemorrhage and at all times on and after 1 January 1997 he has been entitled to payment of the Critical Illness Benefit, contingent only on such sequelae being permanent after passage of further time.

[25] The substance of the plaintiff's claim is that from and after 1 January 1997 he has been entitled to payment of a benefit under his policy, contingent only on his sequelae being permanent " … after passage of further time".

[26] Mr Burt for the appellant accepts that Judge Cooper was correct in interpreting the word "permanent" in the policy in accordance with its ordinary and natural meaning as defined in the Shorter Oxford Dictionary:

> Continuing or designed to continue or last indefinitely without change; abiding, enduring, lasting; persistent. Opposed to temporary.

[27] The issue of whether or not Mr Scott's symptoms, or sequelae, were permanent lies at the heart of this dispute. Over some years Mr Scott himself, and his medical advisers, wrote to the appellant on successive occasions in order to press his argument that he had suffered significant permanent neurological impairment, and that he was entitled to cover. Mr Craven, a consultant neurologist retained by Sovereign and its predecessors, took a somewhat more optimistic view. He

considered that although Mr Scott's symptoms had persisted for longer than was usual, they were unlikely to prove permanent.

[28] As late as 21 February 2005, Dr Davies, the respondent's general practitioner, wrote that Mr Scott "continues to be bothered by symptoms that date back to the subarachnoid haemorrhage".

[29] The facts of this case bear some similarity to those arising in the recent decision of Abbott AJ in *Arnold v American International Assurance Company Ltd* HC AK CIV 2008-404-6987 4 June 2009. That case concerned a claim by Mr Arnold under a life insurance policy. The defendant insurer applied to strike out the claim on the ground it was statute barred. There, the insurer promised to pay a benefit under the policy in the event that a life insured was diagnosed with a terminal illness.

[30] The applicable clause read:

> Should the Life Assured be diagnosed by a Medical Physician registered with the Medical Council of New Zealand (but excluding a physician who is him/herself the Life Assured, spouse or lineal relative of the Life Assured), as having an illness which is likely to result in the death of the Life Assured within twelve (12) months of diagnosis, a lump sum up to the amount of the Flexiterm Benefit will be paid. Benefit will be reduced by the amount of payment made.

[31] Mrs Arnold (the Life Assured) was diagnosed with a terminal illness in early 2001 and died in April 2005. In that case Abbott AJ concluded that time commenced to run for the purposes of the Limitation Act when the insured event, namely diagnosis of the terminal illness, occurred and not at some later date when proof of entitlement became available. It is convenient to reproduce an extensive passage from His Honour's judgment:

> [13] The cause of action under a non-liability insurance policy accrues when the insured event occurs, unless the terms of the policy provide that liability will not arise until a claim is made or certain other conditions are satisfied: *Chitty on Contracts* (Vol 1, 30th Edition 2008, para 28-050).
>
> [14] In the absence of policy terms to the contrary, the limitation period begins to run as soon as the insured event occurs even though no claim has been made at that time. This is because the occurrence of the insured event is treated as equivalent to a breach of contract by the insurer: *Halsburys*

Laws of England Vol 25, 2003 reissue, para 184 (presumably by failing to hold the insured harmless in respect of the relevant loss).

[15] Counsel for AIG submitted that these statements of principle were drawn from a long line of authority, which has been followed by the insurance industry over many years. He referred to two recent English authorities, in particular: *Virk v Gan Life Holdings Plc* [2000] Lloyds Rep IR 159 (CA) and *Callaghan v Dominion Assurance Co Limited* [1997] 2 Lloyds LR 541, in both of which the Court had to decide whether the cause of action had arisen within the limitation period.

[16] In *Callaghan* the High Court construed several provisions in a fire insurance policy to decide whether the cause of action arose at the date of the insurer's avoidance of the policy rather than the date of the insured event (a fire). It found that none of them postponed the insurer's liability to indemnify from the date of the loss. The Court (Sir Peter Webster) had this to say about the nature of indemnity insurance and accrual of the cause of action (at p 544 col 2):

> It seems to me that the best way to define an indemnity insurance is that it is an agreement by the insurer to confer on the insured a contractual right which, prima facie, comes into existence immediately when loss is suffered by the happening of any event insured against ….
>
> Unless, therefore, there are clear words in the policy which have a contrary effect, liability under this policy, being a policy of indemnity insurance, arises immediately loss is suffered as a result of the happening of the relevant event.

[17] In *Virk* the Court of Appeal was asked to construe a policy providing indemnity for "critical illness". The policy contained a clause that made payment dependent upon the life insured being alive thirty days after diagnosis. The Court viewed the thirty day survival as "an essential requirement of the event in respect of which the sum assured is payable". It found that the period of survival was a condition precedent to the insurer's liability. Potter LJ had this to say about accrual of the cause of action (at p 162):

> It is common ground that a contract of indemnity insurance is an agreement by an insurer to confer on an insured a contractual right to indemnity which on the face of it comes into existence immediately when loss is suffered by the happening of an event insured against ….
>
> … the law has long been that, because an insurance policy is to be construed as insurance against the occurrence of an insured event, the occurrence of that event is treated as equivalent to a breach of contract by the insurer. Accordingly, in the absence of policy terms affecting the matter, the limitation period begins to run as soon as the insured event occurs, even though no claim has been made: see generally Colinvaux: *Law of Insurance* 7th ed, para 9-15, page 200.
> ….

> … the prima facie position as I have described it may be displaced or require modification as a result of express terms in the policy appropriate to create a condition precedent to the insured's right to payment.
>
> [18] When construing policy terms with a view to determining when the insurer's liability commences, the Courts have distinguished between matters affecting commencement of liability, and matters going to the proof of the liability and the entitlement to pursue a claim in respect of it. The operation of the Limitation Act is not suspended pending such proof, or taking of steps to establish entitlement to claim, because these are matters that lie within the power of the claimant. The law does not defer commencement of liability for such matters, as to do so would be tantamount to allowing a claimant to postpone the operation of the Limitation Act: *MacGillivray on Insurance Law* 9th Ed para 24-18; *Coburn v Colledge* [1897] 1 QB 702,709; *Monckton v Payne* [1899] 2 QB 603,606; *Callaghan* at p 546; and *Virk* at p 22.

[32] Mr Rennie, for the respondent, argues that, correctly analysed, this is a claim based on a contingency which was not actionable until the contingency was fulfilled: *Gilbert v Shanahan* [1998] 3 NZLR 528; *Law Society v Sephton & Co (a firm)* [2006] UKHL 22 (HL). Accordingly, he maintains, the limitation period cannot be said to have commenced to run until the claim ceased to be contingent.

[33] It is worth noting in passing that the discussion in *Gilbert v Shanahan* arose in the context of a consideration of the solicitors' liability to Mr Gilbert in negligence; claims in tort require proof of loss or damage, and so time will not commence to run in negligence cases until loss or damage has occurred.

[34] The present case involves a claim for breach of contract: in general time will run as from the date of the notional breach, here, the date on which the stroke occurred.

[35] In my opinion this is not a contingency case at all. In order to succeed in his claim the respondent must establish that the sequelae suffered as a consequence of his stroke are permanent. That is a question of fact. The respondent himself pleads that his symptoms were permanent in the sense that they had continued indefinitely without change; in other words they have been persistent since the date of the stroke. Of course the respondent has been unable to persuade the appellant that the sequelae are in fact permanent, but as Abbott AJ held in *Arnold*, problems in proving

a claim, or in taking steps to establish entitlement to it, do not suspend the operation of the Limitation Act.

[36] The respondent's argument is that because there were difficulties in persuading the appellant to accept the claim, the running of time should be suspended until proof became available. In effect, this is an argument not for a contingency, but for an extension of the reasonable discoverability exception to the Limitation Act. Such exceptions are limited and well established: *Murray v Morel*. this case does not fall within the recognised exceptions. In *Murray,* Tipping J said at [69]:

> Save when the Limitation Act itself makes knowledge or reasonable discoverability relevant, the plaintiff's state of knowledge has no bearing on limitation issues. Accrual is an occurrence-based not a knowledge-based, concept. The Limitation Act as a whole is structured around that fundamental starting point.

[37] On the evidence, it appears that within about two years Mr Scott had evidence of on-going sequelae and professional medical support for his contention that his symptoms were permanent, yet he chose not to commence proceedings until some nine and a half years after the date of the stroke.

[38] In my opinion Mr Scott's cause of action accrued on the date of the stroke, which is more than six years before he commenced this proceeding in the District Court. Accordingly, his action is statute barred by s 4(1) of the Limitation Act.

[39] In a separate argument Mr Burt contends that the case is governed, not by s 4(1) of the Limitation of the Act, but by s 4(7). He maintains that the respondent's proceeding is "an action in respect of [a] bodily injury to any person …". Accordingly, he maintains, the respondent was not entitled to bring his proceeding after the expiration of two years from the date on which the cause of action accrued. By reason of my conclusion in respect of Mr Burt's principal argument, it is unnecessary to reach a concluded view as to the application of s 4(7). It is sufficient to say that Mr Burt's argument appears to be correct. The expression "in respect of … bodily injury" is to be accorded a wide meaning: *H v H* [1997] 2 NZLR 700 at

710-711; *Brittain v Telecom Corporation of New Zealand Ltd* [2002] 2 NZLR 201 at 211-212.

Estoppel

[40] In 2005, during the course of lengthy negotiations between the parties, the appellant gave a "notice of dispute" and the parties sought to refer the dispute to the Insurance & Savings Ombudsman. Mr Rennie argues that the effect of the notice was to estop the appellant from raising a limitation argument against the respondent. He says that an estoppel by conduct arguably arose prior to the expiration of six years from accrual of the cause of action, and that whether an estoppel did indeed arise is an issue of disputed fact which can be resolved only at trial. Mr Rennie raised this argument before the learned District Court Judge, but by reason of his principal finding the Judge did not consider it necessary to deal with it.

[41] Mr Rennie does not argue that the giving of a notice of dispute by the appellant amounted to an acknowledgement of liability. Rather, he says that by reason of the rules and protocols associated with the jurisdiction of the Insurance & Savings Ombudsman, the respondent was legally unable to commence proceedings during the currency of the referral to the Ombudsman. Accordingly, he argues, provided the limitation period had not already expired by the date of reference of the dispute to the Ombudsman, time should not be permitted to continue to run against the respondent during the period of the reference. Ultimately of course, the Ombudsman declined jurisdiction and the respondent commenced the District Court proceeding.

[42] The short answer to this argument lies in my conclusion that the limitation period had expired, at the latest, in January 2003, more than two years prior to the second referral to the Ombudsman. This argument therefore does not assist the respondent.

Result

[43] For the foregoing reasons I have come to the conclusion that the learned District Court Judge was wrong to dismiss the appellant's strike out application. The appeal succeeds. The respondent's claim is statute barred and is accordingly struck out.

[44] The appellant is entitled to costs. Counsel may file memoranda if they are unable to agree.

C J Allan J