53/91

SUPREME COURT OF VICTORIA

HUNTER v STRONGHOLD INSURANCE (AUST.) LTD

Nathan J

18 January 1991

CIVIL PROCEEDINGS – CONTRACT – HOUSEHOLDER'S POLICY OF INSURANCE – BURGLARY/THEFT AT HOUSEHOLDER'S PREMISES – CLAIM FOR LOSS MADE – LATER REFUSED BY INSURANCE COMPANY – NATURE OF INSURANCE POLICY – WHETHER SIMPLE CONTRACT OR A SPECIALTY – STATUTE OF LIMITATIONS – WHETHER CAUSE OF ACTION ACCRUED WHEN LOSS INCURRED OR CLAIM REFUSED – ONUS OF PROOF.

On or about 14 April 1983, H. made a claim on SI Ltd for idemnification for loss sustained during a burglary on his home. On 22 August 1983, SI Ltd wrote to H. indicating that it was "not prepared at this stage to make any offer of settlement in respect of your claim." On 18 August 1989 H. issued proceedings claiming the value of items said to have been stolen in the burglary. When the matter came on for hearing, the magistrate held that H. bore the onus of proving that the action was brought within time. Further, that the cause of action accrued on the date of the loss which meant that the proceedings were outside the time within which an action may be brought. Accordingly, the claim was dismissed with costs. Upon order nisi to review—

HELD: Order absolute. Matter remitted for further hearing.
1. The insurance policy was in the nature of a simple contract and pursuant to s51A of the *Limitation of Actions Act* 1958 ('Act') any action arising under it was required to be brought within a period of 6 years of the cause of action accruing. The defendant bore the onus of proving that the claim was barred by the Act.

2. The right to sue under a contract arises when the contract is breached. In this case, when the insurance company unequivocally refused on 22 August 1983 to meet the householder's claim, the contract was thereby breached and the 6-year limitation period began to run from that date.

NATHAN J: [1] Mr Hunter, the applicant's house was burgled on 13th or 14th April, 1983. He addressed a claim to his insurance company, Stronghold, on that day or very shortly thereafter. Stronghold sent to Mr Hunter's home a loss assessor and he provided that person with details of the items stolen, receipts and his copy of the insurance policy he had previously negotiated with Stronghold. It was termed a householder's policy. The policy indemnified him for losses incurred by way of a burglary at his home.

It can be said, on the evidence before the magistrate, from whom this matter now comes before me by way of an order to review, that Mr Hunter co-operated handsomely with Stronghold and its servants. **[2]** On 22nd August, 1983 Stronghold, in a without prejudice letter, wrote to Mr Hunter in the following terms:

> "We would advise that we have now closely checked our assessor's report and the various receipts provided by yourself to substantiate your claim. There would appear to be several discrepancies in the receipts as compared to the information in your claim form and your statements to our assessor. Given all the information in our possession, we are not prepared at this stage to make any offer of settlement in respect of your claim. Should you be in a position to provide us with the original receipts for purchase of all the items claimed, the full details of the model and serial numbers of such items, we may further consider the claim."

Nothing further was heard from Stronghold which, I might interpolate, had been provided with the receipts as sought in its letter. On 18th August, 1989 Mr Hunter issued proceedings in the Magistrates' Court at Werribee, claiming $12,920 – that is, the value of the items he alleged had been burgled.

The proceedings sound in contract and assert that, pursuant to the terms of the written policy of insurance issued by Stronghold to Hunter and in consideration of the premium, Stronghold would insure Hunter against loss by way of burglary. It asserted theft on the 13th and the letter

which I have read. It pleaded, as a consequence that in breach of the policy the defendant has failed, neglected or refused to pay to Mr Hunter the $12,920 and, as a result, he has suffered that loss. Stronghold, by its defence, asserted that the breaking and entering as alleged did not occur within six years before this action commenced and is barred by s51A of the *Limitation of Actions Act* 1958.

[3] That Act requires an action sounding in tort or simple contract to be brought within a period of six years of the cause of action accruing. It also provides by s5(3), that in the case of a specialty an action must be brought within 15 years of the cause of action accruing. The Magistrate held that the contract was one of indemnity and time commenced to run from the breach of it. He said, "although equity may safeguard the position pending the ascertainment of the facts and the extent of liability, there appears to be no room for the application of that rule so as to extend time." He said that upon an argument presented to him by Mr Bowditch for Mr Hunter, that if his argument that time commenced to run as from the refusal to pay were followed to its logical conclusion, then if there was no denial of indemnity, time would never commence. He held that Mr Hunter's claim was statute barred. The cause of action having accrued on or about 13 or 14 April 1983, that is, being out of time by approximately four months. He dismissed the action with costs.

[4] It must be observed that if the cause of action arose at, or shortly after the date of the letter declining liability, then the action was within time by a period of four days. On these facts, Mr Hunter has obtained an order nisi in the following terms.

> 1. That I determine the question of law as to whether Stronghold has shown that the relevant contract of insurance was a simple contract; and
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> 2. Whether the time limited for taking proceedings had commenced to run on or about 13 April 1983 or 22 August 1983.

It was put to me that this contract should be characterised as a specialty. I should assume it was under seal and accordingly the relevant limitation period is 15 years. On the contrary, Mr Blumsztein for Stronghold, contended that as a matter of notoriety, insurance contracts are seldom under seal and the contract should be characterised as a simple one.

I am not prepared to act upon either assertion but solely upon the facts as found by the magistrate and conclude, as he did, that the contract was a simple one. If the contract had been a specialty, then it could have been pleaded and appropriate steps taken to bring it to the attention of the court. The fact is the magistrate did not have the instrument before him and could not safely conclude that it was a specialty in the absence of having the seal appropriately proved. **[5]** The next issue which arises is a contention advanced by Mr Blumsztein that Hunter bore the onus of establishing his cause of action accrued within the limitation period, the issue having been raised in the defence. Support for this submission was sought to be had from *Cohen v Cohen* [1929] HCA 15; (1929) 42 CLR 91; 35 ALR 204. That case which concerned the dismemberment of a marriage and the various property matters arising from that fight concerned an amount received by the husband from an insurance company in respect of a claim which the wife alleged contained elements of fraud. In holding that some of the moneys held by the husband were impressed with the obligation of the trust, Dixon J as he then was, said:

> "Upon issue taken on a plea of *actio non accrevit infra sex annos*, it was held that the onus of proof lay upon the plaintiff. So, too, on a plea of *non assumpsit infra sex annos*, it follows from what I have said that the plaintiff is entitled to recover upon this cause action unless she is precluded by lapse of time."

Reference was made in support of this conclusion to ancient English authority, namely *Hurst v Parker* (1817) 1 Barn & Ald 92; 106 ER 34, and *Wilby v Henman* [1834] EngR 374; 149 ER 924; (1834) 2 Cr & M 658; (1834) 2 Car & M 658, and for the latter proposition per Bailey J, *Beale v Nind* (1821) 4 B & Ald 568 at 571; 106 ER 1044. **[6]** It was contended that a comment by Vincent J in *Palmdale Insurance v Grollo* [1986] VicRp 41; (1986) VR 408 at pp409 and 410, also supported the above proposition. Vincent J said:

> "Once the pleadings are before the court, it is, of course, a very different matter. Prior to that stage

being reached, unless there is something more upon which the inference could arise, the plaintiff should not be called upon to demonstrate that his claim is not an abuse of process."

Analogously, it was said that the plaintiff should be obliged to establish the cause of action accrued within the limitation period. I find these references oblique and not directly to the point. The considered practice in this court for many years has been that where a party pleads the limitation period as a matter of defence, or reply, or any other form of pleading, then the customary rules prevail. He who asserts must establish.

It is a commonplace in this court, for the *Statute of Limitations* to be taken as a defence, it is equally as commonplace that the party who chooses to avail itself of that defence must establish the proposition. After all, it is a complete defence to the plaintiff's claim. It is raised by way of defence and it defies commonsense to suggest that as a preliminary matter a plaintiff must establish the action is brought within the appropriate period. It equally defies commonsense to assume that a plaintiff would not in the presentation of its case seek to establish that its case was brought within time.

In so far as the magistrate held that it was the obligation of the plaintiff to establish the action being brought within time, he was incorrect. However, it was not **[7]** on that ground that the magistrate dismissed Mr Hunter's claim. A careful review of that decision indicates he rejected the claim on the ground that the cause of action accrued as at the date of the burglary and not as at the date the claim made by Mr Hunter was rejected by Stronghold. I find this also to be an error. I will allow the appeal on this ground and for the following reasons.

The magistrate was entitled to conclude the contract was a simple one. The ordinary principles of contract prevail, that is the right of action to sue under it arises when the contract is breached and not when the contract is entered into, or an event referred to in the contract occurs. It follows, of course, if there is no breach of the contract there is no cause of action and there is no need for the plaintiff to seek any redress. It is only when one of the parties fails to comply with its terms and loss is incurred that the cause of action accrues. There is no loss in the plaintiff's hands until the defendant has indicated it will not comply with the terms of the contract. There may be a potential liability, an inchoate responsibility which can be the subject of test, but there is no breach. The burglary, itself, did not necessarily give rise to the cause of action. The burglary may have been staged, it may have been bogus, in which case no cause of action would arise under it.

[8] A burglary, itself, may not give rise to a cause of action under a contract of insurance. A burglary may have been staged, or indeed the claim made under it, made pursuant to it, may have been inflated, in which case an insurer is entitled to refuse to indemnify, there being no breach. In this case, the insurer replied to its customer in quibbling and prevaricating terms. Mr Hunter was entitled to take it as being an outright refusal to indemnify. He had in the circumstances previously offered every co-operation to the insurer. He had provided the insurer with all material available to him and, indeed, his own copy of the policy. His evidence before the magistrate was, he relied upon the insurer to make good his claim and failed to keep copies of the documentation because of that reliance. It is apparent it was sadly misplaced.

There may be circumstances where the refusal of an insurer, or any other contracting party, is deliberately couched in equivocal and prevaricating terms, so that an insured is kept dangling at the end of a string wondering whether if, or when the claim may be met. It would be in the interests of such an insurer to prevaricate for a lengthy period in the hope or expectation that the limitation period would expire.

[9] In these circumstances, the court is entitled to evaluate the nature of the refusal and the terms with which it is delivered. In my view, the letter of the defendant of 22nd August, 1983, in the given circumstances amounts to an unequivocal refusal to meet the claim. Stronghold did not go into evidence before the magistrate and there may be matters of which I am innocent relating to other defences. By its pleadings it did not admit the burglary or the quantum of loss and these are proper matters for judicial consideration.

It had been put to me that a simple contract of insurance should be held as akin to a

contract of guarantee. With such contracts, liability arises immediately the guarantee is required. In my view this is not the same as setting the date upon which the cause of action accrues. This contract is not in that class and *Rankin v Potter* (1873) LR 6 HL 83 is not pertinent, nor are any of the insurance cases dealing with totality of loss. This was not the case of the total loss of a ship or of its cargo occurring at a remote or distance place.

This case concerned a refusal to pay in respect of portion only of the total sum insured and in respect of an event about which there was no doubt, and in respect of items which could be readily quantified. The ordinary principles of contract law are in this case simple and clear. The cause of action accrues when a breach of the contract occurs. This was a contract **[10]** to indemnify. The breach became choate and manifest when the party obliged to idemnify refused to do so, that is on 22nd August, 1983.

In *Chitty on Contracts*, 25th Edition, paragraph 3712, the principle is stated as follows:

> "In a simple contract of insurance the assured becomes entitled to payment upon the occurrence of the event insured against. The last does not imply any terms requiring the assured to give notice or to furnish details of the event or his loss."

In my view the statement of principle is perfectly consistent with my remarks. There is no question that an assured becomes entitled to indemnification upon the occurrence of one of the events insured against, in this instance, burglary. The statement of principle does not derogate in any way from the usual contractual principles that the breach of the contract is a separate and distinct issue from any liability arising under it, for it follows as a matter of common sense, if the liability is discharged there is no breach. It is only in the event of the liability properly being incurred and denied, that a breach arises. So, although an insured is not generally obliged to provide written notice, unless required by the contract, (Mr Hunter in this case, did so) it cannot be said that his right of action accrued either at the time of the burglary or at the time he notified Stronghold of his loss. At that time he was of the view that his claim would be met. He cannot be presumed to have knowledge of an impending breach.

Accordingly, I shall answer the questions in the following way. The time for taking proceedings commenced on 22nd August, 1983, the action was brought within the limitation period. I shall remit this matter to the Magistrates' Court at Werribee for further adjudication according to law.

APPEARANCES: For the plaintiff Hunter: Mr I Bowditch, counsel. Caleandro & Guastalegname, solicitors. For the defendant Stronghold Insurance: Mr A Blumsztein, counsel. Alan Faulkner & Co, solicitors.
