IN THE DISTRICT COURT
AT NORTH SHORE

CIV-2012-044-213

BETWEEN	Kevin Allan Saunders and Michele Ann Saunders Plaintiffs
AND	Gregory John Frittelli First Defendant
AND	Financial Planning Group Limited Second Defendant

Hearing: 27 May 2013

Appearances: Mr Wood for Saunders
Mr Robertson with Ms Harper for Frittelli

Judgment: 3 September 2013

RESERVED DECISION OF JUDGE P RECORDON

---

[1] For the purposes of this decision I will refer to the parties as the plaintiffs (Kevin and Michele Saunders) and the defendants – [first defendant (Gregory Frittelli) and second defendant (Financial Planning Group Limited)]. The defendants are asking for an order striking out the plaintiffs' notice of claim which was filed in the North Shore District Court 15 February 2012. The defendants say that the plaintiffs' pleading is statute barred by virtue of s 4(1)(a) of the Limitation Act 1950 (in force by virtue of s 59 Limitation Act 2010). The defendants argue that the plaintiffs' claim accrued more than 6 years before the filing of the notice of claim. They say the alleged negligence in oral advice from the first defendant to the plaintiffs in relation to the relevant insurance policy was given December 2002 and February 2003 i.e. more than 6 years before the claim was filed (expiry date 2 October 2009).

[2] The plaintiffs argue that their cause of action did not accrue until the value of the insurance policy became worth less to them and had they been aware when they purchased the insurance cover that the policy would not cover a life changing medical event there would have been no loss. In other words the loss was contingent on the discovery of the exact nature of the medical condition suffered by Michele Saunders in 2006 and her long term prognosis.

[3] They say they were persuaded into purchasing the policy from AMP as the result of negligent oral advice given by their insurance agent, the first defendant, in either December 2002 or February 2003. They say at their meeting with the first defendant he did not have a copy of the policy with him and the fine print clauses were not explained to them, they were not advised to seek professional medical advice on the policies coverage and exemptions etc. However, notwithstanding the first defendant's actions and omissions (alleged) the plaintiffs took out the policy on 2 October 2003.

[4] Michele Saunders developed an acute kidney disorder whilst on holiday in Australia 2006 and was hospitalised. The plaintiffs both believed their insurance policy covered Michele's medical expenses entitling them to a lump sum payment cover for a "life changing medical event". This did not turn out to be the case when AMP denied liability under the policy claiming that the exemptions applied.

[5] The plaintiffs brought a claim founded in the tort of negligence with the oral misrepresentations made by the defendant. They alleged that he negligently sold them a policy that was limited by the exclusions that were not explained to them and that they were unaware what medical conditions were covered and what were not. They filed their claim, as I said, 15 February 2012 seeking to recover a loss of $121,150 (the lump sum insurance payment) when the plaintiff's husband (Kevin) spent time away from his business. They also claimed $20,000 general damages. The plaintiffs' say that the measurable loss arose from 3 March 2006 when AMP declined the claim and the cause of action accrued at that point.

Issue

[6] Section 4(1)(a) Limitation Act 1950 (repealed) provides as follows:

> **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:
>
> ...

[7] Notwithstanding the Repeal of the 1950 Act, s 4(1)(a) remains in force for the purposes of these proceedings by virtue of s 59 Limitation Act 2010.

[8] The principal issue is whether the plaintiffs' cause of action accrued in 2003 when they took out the AMP Insurance policy or whether it accrued in 2006 when the claim was declined by AMP. If it is found that the cause of action accrued in 2003 then the limitation period applies and the action is statute barred under s4(1)(a). However, if 2006 is deemed the operative date then the plaintiffs' notice of claim was filed within the limitation period and the proceedings may proceed to trial.

Discussion

[9] In The Laws of NZ "Limitation of Civil Proceedings" title (by JCD Corry)when the 1950 Act was in force, the author stated:

> **22. Where damage is part of cause of action.**
>
> Where damage is the cause of action or part of the cause of action, the period of limitation runs from the date the damage occurs and not of the act which causes the damage. Where the damage can be characterised as economic loss the damage is not sustained until the economic depreciation in value is actually recognised or ought to have been recognised by a reasonable person. Where there has been a continuance of the damage, a fresh cause of action arises from time to time, as often as damage is caused. In some cases where damage is an ingredient of the cause of action and it occurs after the expiration of a time bar it will be impossible to commence any proceeding. Where the damage required to complete a cause of action can be characterised as personal injury in the form of serious psychological and emotional damage arising from sexual abuse, awareness of the symptoms of abuse does not complete the cause of action; it is only when the

> psychological damage is or reasonably should have been linked to the abuse that the cause of action is complete.

[10] The plaintiffs submit that a claim in negligence does not accrue until there is damage resulting from the breach of duty. They request the Court to apply the reasonable discovery test to this case in order to oppose the defendants' application to strike out. The reasonable discovery test is a test which deems a cause of action to accrue when the facts of the case become reasonably discoverable.

[11] The plaintiffs referred to a dissenting judgment in *Invercargill City Council v Hamlin* [1994] 3NZLR 513 (CA) where McKay J said at 536:

> In an action in tort based on a wrongful act which is actionable per se without proof of actual damage, the cause of action will accrue at the time the act was committed. Where the claim is based on negligence, however, damage is an essential part of the cause of action, and until the damage has occurred the cause of action is not complete.

[12] Mr Robertson for the defendants argued that the reasonable discovery test only applied to latent building defect cases and in sexual abuse cases with no application to the present case. He referred the Court to the Supreme Court judgment in *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 where the 4 majority Judges, he says, rejected the submission that reasonable discoverability can be applied as a general test to determine accrual of a cause of action for limitation purposes. Having said that the Judges did agree that in claims for economic loss, reasonable discoverability is an element of the accrual part of the cause of action.

[13] Mr Wood submitted, on behalf of the plaintiffs, that Justice McGrath, one of the majority Judges, rejected reasonable discoverability as a general applicable principal in New Zealand Tort Law but left the door open for fact specific circumstances. He further submitted that *Murray v Morel & Co Ltd* is authority for the District Court to exercise its judgment in deciding whether this is a case Justice McKay (in *Hamlin*) and Justice McGrath (in *Murray v Morel & Co Ltd*) were referring to where damage arose before the plaintiffs knew or ought to have known about it. They contend that the reasonable discoverability test applies to the present case by the act of AMP's declining the insurance claim. Mr Wood argued that their plaintiffs' case was indistinguishable from building defects cases since even if the

facts were in existence, the plaintiffs could not have discovered them without making a claim.

Comments

[14] The most appropriate cause of action against the defendant-broker (first defendant) would have been a contractual one by virtue of his retainer with the plaintiffs. He was obligated to furnish his clients with all relevant information to enable them to give him appropriate instructions. The defendant, as an insurance broker, had a contractual duty to act with reasonable competency and care. If he failed to meet this standard in this case then this would have been grounds for a cause of action in contract against him. It is only because of the 6 year limitation period that any potential liability to the plaintiffs on contractual grounds has been barred. Hence the plaintiffs' attempt to bring a negligence claim against the first defendant and the resulting submissions on the date when the cause of action accrued.

[15] It is not difficult to follow how the plaintiffs found themselves in this situation. I doubt that Insurance contracts are read fully by many of the public. Nevertheless, in my view, the plaintiffs' submission that they could not have reasonably discovered the facts without first making a claim on the insurance policy is not totally sound. I presume when an insured takes out an insurance policy it is normal business practice for the insurance company to provide the insured with a copy of their policy. The onus is then on the insured to carefully read the policy including any exemptions/exclusions that are not covered by the policy.

[16] One could also argue that regardless of the first defendant's alleged negligent actions the onus was on the plaintiffs to determine the extent of the insurance coverage of the policy prior to signing the insurance contract. It is normally prudent for any person entering into a contract to understand their obligations, rights and liabilities under the contract before it is executed. Therefore the same expectations should apply to the plaintiffs in this case.

[17] The plaintiffs had from October 2003 when they took out the AMP policy to read the exemptions in the insurance contract and if they had they may have noticed the extent to which their health claims were covered under the policy. The point is that their insurance coverage was reasonably discoverable prior to any claim made on the policy. They only had to read the insurance contract to discover the exemptions.

[18] In his submissions, Mr Robertson, for the plaintiffs states at paragraph 90 that:

> Should the plaintiffs' cause of action only be treated as arising when the damage was reasonably discoverable by the plaintiffs, in extension of the approach adopted in the case of latent damage to buildings? It is submitted that the answer to this case is no ... the insurance policy ... was defective on its face from the outset (did not cover all life changing events as orally advised by the first defendant) and the loss was therefore actual and measurable from commencement of the insurance policy (premium paid and loss of lump sum payment as the second plaintiff's life changing event was not covered under the policy). The defect in the asset (the insurance policy covering only the events defined in the policy) was neither invisible nor concealed.

[19] Determining when the cause of action accrued in this case requires an examination of whether the circumstances reveal that this is a damaged asset case or whether it is one of exposure to a contingent liability. A helpful illustration of this was given by the Supreme Court in *Davys Burton v Thom* [2009] 1 NZLR 438, an authority cited by counsel for the defendants. In his decision Wilson J referred to a United Kingdom Court of Appeal judgment in *Spencer v Secretary of State for Work and Pensions* and *Moore v Secretary of State for Transport* [2008] EWCA Civ 750 (the two appeals were heard together and judgment was delivered on 1 July 2008). In that English Court of Appeal decision the appellants claimed personal injury damages on the grounds that the government had failed to implement European Economic Community law, which required a remedy to be provided to them. They unsuccessfully appealed against findings that the claims were barred by limitation because the cause of action arose when the appellants were injured. Waller LJ had said at [24]:

> The facts may demonstrate that no measurable damage has been suffered at the date when negligent advice has been given or negligent failure has occurred and ... that will be so where damage is totally contingent. But if it

> can be shown that a claimant is worse off in terms that can be measured financially at the date of receipt of the advice or the negligent failure, the cause of action will accrue on that date, even though accurate measurement of damage would be difficult and some of the damage may still be contingent. In particular, if the allegation is of a failure to provide a term in a contract or a failure to provide an effective insurance policy, the cause of action will accrue on receipt of the negligently drafted contract or receipt of the ineffective policy because, as at that date, the claimant has received something of less value and has thus suffered loss.

The essence of this is that although the English appellant had a claim, because of his government's alleged failure his claim "was not as valuable as the claim he would say that he should have had" (at [25]).

[20] In *Davys Burton v Thom* Wilson J summarised and discussed these English appeals at paragraph [46]:

> A cause of action in tort for negligence does not exist and hence time does not start running for the purposes of the Limitation Act unless and until the plaintiff has suffered some actual and quantifiable loss, harm or damage as a result of the breach of duty involved. Damage will be contingent, and hence not actual for limitation purposes, if the plaintiff will suffer no damage at all unless and until a contingency is fulfilled. T hat will be so if the damage results from the plaintiff being exposed to a liability which is contingent on the occurrence of a future uncertain event. A good example is where the liability is that of a guarantor and is contingent on a default by the principal debtors, in contrast to the undertaking ... of a direct and present liability which falls due in the future. The distinction may well be thought to be a fine one, but in any regime of limitation apparently similar cases may fall on opposite sides of the line which divides those which are barred from those which are not. A reduction in the value of an asset, whether tangible or intangible, constitutes actual damage and exists as soon as the asset becomes less valuable.

[21] Applying these principles to the present case, Mr and Mrs Saunders relied on the defendants to arrange extensive health insurance cover. Instead, according to their submissions, they were sold an insurance policy that did not respond to a medical event it ought to have covered. This appears to be a damaged asset case and not one of exposure to a contingent liability. Wilson J then stated at paragraph [50]

> There is a material difference between contingencies relevant to existence of damage and contingencies relevant to valuation of damage. In short, if the defendant's negligence damages an asset of the plaintiff, that damage is immediate and actual. If the negligence exposes the plaintiff to a contingent liability, there is no actual damage until the contingency is fulfilled.

[22] Here the plaintiffs got a less valuable asset, which was still a legally binding contract between the insurer and the insured which would have covered some medical conditions, but due to the exemptions in the policy it do not "cover for certain medical conditions and ill health events". Accordingly the plaintiffs suffered some immediate loss when AMP accepted their health policy cover notwithstanding that the extent of the resultant damage could not be ascertained until sometime later.

[23] It could be argued that if Michele Saunders had not suffered the acute renal failure overseas then significant economic loss would not have resulted. However, according to the dicta in *Davys Burton v Thom*, that does not detract from the proposition that the plaintiff suffered some loss when cover with AMP was arranged. If the plaintiffs had discovered the problem prior to 2006 they would have taken steps to remedy the problem, incurred extra costs in obtaining new insurance cover and taken on consequent higher premiums.

[24] As a result of the defendant's actions and omissions the insurance cover was reduced in value to the plaintiffs thereby constituting actual damage, which existed as soon as the policy became less valuable to the plaintiffs. Therefore the limitation period commenced to run in my view from October 2003 when AMP accepted coverage of the plaintiffs. The plaintiffs' claim was statute-barred when they commenced proceedings against the defendant on 15 February 2012 and I find accordingly.

Conclusion

[25] The plaintiffs' action was time barred under s 4(1)(a) of the Limitation Act 1950 when the notice of claim was filed in February 2012. They suffered loss at the time when the insurance cover was taken out with AMP in October 2003.

P Recordon
District Court Judge