

IN THE COURT OF APPEAL FIJI ISLANDS  
ON APPEAL FROM THE HIGH COURT OF FIJI  
LEAVE TO APPEAL TO THE SUPREME COURT

CIVIL APPEAL NO. ABU 0056 OF 2006  
(High Court Civil Action No. HBC 424 of 1995)

BETWEEN :            DILIP KUMAR and JYOTISNA DILIP KUMAR  
*Applicants*

AND:                 NATIONAL INSURANCE COMPANY OF  
FIJI LIMITED  
*Respondent*

Coram:                Pathik, JA  
                              Shameem, JA  
                              Hickie, JA

Leave Hearing:        Monday, 7 July 2008, Suva

Counsel:             R. Newton with S. Singh for the Applicant  
                              A.K. Narayan for the Respondent

Date of Judgment:   Wednesday, 30 July, 2008

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**DECISION**

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THE APPLICATION FOR LEAVE

[1] This is an Application for Leave to Appeal to the Supreme Court pursuant to Article 122(2)(a) of the Constitution to clarify the proper construction of a clause in a standard fire insurance policy which abrogates the statute of

limitations such that legal proceedings must be instituted within 12 months of the action arising.

[2] Clause 18 of the said policy provided:

***“In no case whatever shall the company be liable for any loss or damage after the expiration of 12 months from the happening of the loss or the damage unless the claim is the subject of pending action or arbitration.”***

[3] On 10 September 1994, the Applicants warehouse was damaged by fire. They were required by clause 10 of the insurance policy to:

(a) Give notice forthwith to the insurer; and

(b) Within 15 days thereafter give notice in writing of a claim.

[4] The Applicants satisfied the above requirements providing notice immediately to their insurer and then providing formal notice in writing two days after the fire.

[5] Correspondence then ensued between the parties and their legal advisers eventuating in the Applicants commencing an action in the High Court on 18 September 1995. The Respondent took issue that under Clause 18 the Applicants were out of time as ***the claim was NOT the subject of a pending action*** (8 days outside of the 12 month period). The Trial Judge agreed and struck out the claim.

[6] The Court of Appeal agreed with the Trial Judge saying that “an insurance policy is a commercial contractual document” and citing Lord Hoffman in ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** (1998) 1 All ER 98 at 114 adopted by the Court of Appeal of the Fiji Islands in ***Hassan Din and Finance Sector Management Staff Association v Westpac***

**Banking Corporation** (ABU0006/2003, 26 November 2004, Ward P, Barker and Tompkins JJA), stated at paragraph 22 that:

*“the essential question for our determination is to ascertain the meaning which would be conveyed by clause 18 to a reasonable person with the relevant background knowledge”.*

[7] Thus the Court of Appeal concluded at paragraph 28:

*“We conclude that the words ‘pending action’ on a proper construction have only one meaning in the context of clause 18 and the policy as a whole. They refer to an action which has actually being [sic] commenced in a court of law within 12 months from the occurrence of the loss or damage.”*

[8] The concern of this Court is that there is an issue of significant public importance at stake. It is one which, in our view, goes to the heart of public policy considerations and that the commencement of civil litigation should be seen as a last resort. We are sufficiently concerned that the Court of Appeal by upholding the view taken by the Trial Judge in the High Court has, in fact, endorsed the encouragement of litigation.

[9] The statute of limitations is there for a purpose. In particular, it allows practitioners to safely advise their clients as to the period by when legal proceedings must be formally commenced. Should prejudice be caused by such limitation, it is also the reason why there is provision for a party to be able to apply to a court to seek leave to commence an action out of time.

[10] Should parties seek to “contract out” of such provisions, particularly by reducing the limitation period, (as in the present case whereby a limitation period of six years has been reduced down to 12 months), then, in our view, courts should be wary of such provisions for two reasons:

1. First, the effect may well be to encourage parties to litigation; and

2. Second, if the clause “contracting out” of the statutory limitation does not specify that the claim will be forfeited “***unless the claim is the subject of pending LEGAL proceedings***” it defeats the public policy purposes of –

- (a) encouraging parties to negotiate before they litigate; and
- (b) the Court’s overseeing role of making provision for a party to be able to apply to a court to seek leave to commence an action out of time should there be good reason for such delay.

[11] The Affidavit and written submissions of Mr SATISH RATILAL PARSHOTAM (a senior practitioner) together with the detailed oral submissions by Mr NEWTON at the hearing of the Application for Leave have persuaded us that uncertainty persists and, if the Court of Appeal is correct then it must mean that all practitioners are put on notice that as soon as a possible claim arises they should advise their clients to notify the insurer, file their claim AND, in terms of best practice to safeguard against any possible professional negligence claim, immediately commence legal proceedings.

#### THE QUESTION

[12] The question we certify to be of significant public importance is as follows:

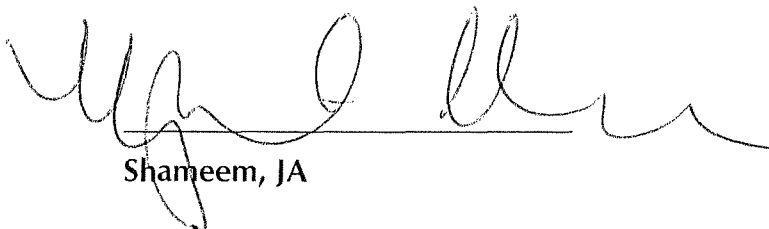
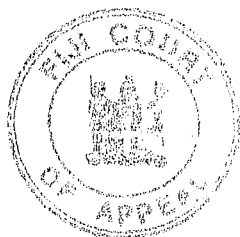
***“WHETHER on the proper construction of clause 18 of the respondents standard form fire insurance policy at issue in these proceedings it is necessary, for an action to be a ‘pending action’, that it will be actually commenced in a court of law within 12 months from the occurrence of the loss or damage or whether it is sufficient if the action is in contemplation or threatened against the insurer during that 12 month period.”***

[13] ORDERS

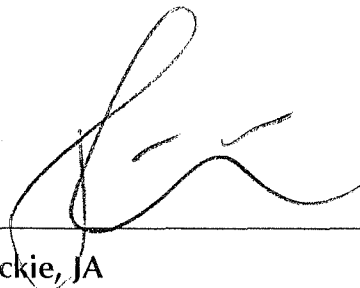
1. Leave to Appeal to the Supreme Court is granted which we certify to be of significant public importance.
2. The Applicants to pay both parties costs of the Application for Leave.



Pathik, JA



Shameem, JA



Hickie, JA

Solicitors:

Parshotam & Co, Suva, for the Applicant

O'Driscoll & Seruvatu, Suva, for the Respondent