AILA

19 May 2017

INSURANCE GANGNAM STYLE (REDUX)

When does a cause of action accrue for a claim for payment under a contingency insurance policy?

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Introduction

1 All insurance operates on a contingency; that is, the occurrence of an event that is uncertain when the contract of insurance is made. However, the label 'contingency insurance' is given where the underwriter agrees to pay on the happening of an event and the insured need not prove that a loss has occurred or that there is any likelihood of a loss: ***Westwake Price & Co v Ching*** [1957] WLR 54, 51, per Devlin J. It may be contrasted with indemnity insurance. The essence of an indemnity clause is that the insured must prove a loss. An insured cannot recover anything until, in the case of liability insurance, the insured has been found liable and so sustained a loss: ***Ibid*** 49.

2 Indemnity insurance has been described as having a compensatory nature whereas contingency insurance insures against what might happen, for example life insurance, but there may or may not be an adverse event for which the insured can be compensated: ***Medical Defence Union v Department of Trade*** [1980] Ch 82, 85 per Megarry VC.

3 For the purposes of this presentation I have taken the term ‘contingency insurance policy’ to mean a contract of insurance that is not a contract of indemnity. Many examples may be given of contracts of insurance that are not contracts of indemnity. The more obvious ones are contracts of life insurance or disability insurance where an agreed payment is made when an event happens (death or disability) and the amount is not determined by reference to a quantifiable loss suffered, whether an assessed amount or agreed pre-estimate.

Law in Western Australia

4 In Western Australia the law on limitation periods and contingency insurance was determined almost 17 years ago by a decision of the Full Court of the Supreme Court in ***Cigna Insurance Asia Pacific Ltd v Packer*** [2000] WASCA 415; (2000) 23 WAR 159. The cause of action arises when the circumstances have occurred that create the entitlement to payment under the contract of insurance. It may not be necessary for the insured to make a claim for payment or for the insurer to breach the contract by refusing or failing to pay after a claim has been made. The insurer may not even know that an entitlement under the contract has arisen.

Packer litigation

5 I will describe the broad framework of the case in terms of facts and litigation:

5.1 Philip Jeffrey Packer (**Packer**) was injured on 20 March 1986 when he was in the course of his employment;

5.2 In 1988 Packer became aware that Cigna Insurance Asia Pacific Ltd (**Cigna**) had issued a contract of personal accident insurance (**policy**) to Woodside Offshore

Petroleum Pty Ltd (**Woodside**) that was in force when Packer was injured. Packer was an insured person under the policy;

5.3 On 30 August 1988 Packer made a claim under the policy;

5.4 Packer did not hear from Cigna for almost five years and eventually received a letter dated 30 April 1993 by which Cigna denied liability;

5.5 On 27 August 1998 Packer commenced an action against Cigna in the District Court claiming damages for breach of contract;

5.6 By its defence Cigna alleged that the cause of action was statute barred under the *Limitation Act 1935* (WA) and an order was made that one of the limitation defences be tried as a preliminary issue;

5.7 On 14 January 2000 the preliminary issue was determined against Cigna by judgment of Commissioner Stavrianou sitting as a Judge of the District Court;

5.8 An appeal against the decision of Commissioner Stavrianou was allowed by a Full Court comprising Malcolm CJ, Kennedy J and Pidgeon J on 22 December 2000 and the Court ordered that the action be dismissed;

5.9 On 5 June 2001 the Full Court, by Malcolm CJ and Pidgeon J dismissed an application by Packer that the appeal should be dismissed, contrary to the orders set out in reasons for decision delivered the previous year. Kennedy J dissented;

5.10 Packer applied for special leave to appeal to the High Court and on 31 May 2002 Gummow and Hayne JJ dismissed the application for leave to appeal but Gummow J said that they tended to prefer the view expressed by Kennedy J as to the powers of the Full Court disposing of the appeal;

5.11 Before the insurance contract litigation Packer successfully recovered substantial damages in negligence from his employer Mermaid Sound Port Marine Services Pty Ltd (**Mermaid**) and from Australian Shipbuilding Industries (WA) Pty Ltd (**Australian Shipbuilding Industries**) the builder of the vessel where he was

injured: ***Australian Shipbuilding Industries (WA) Pty Ltd v Packer***; (1993) 9 WAR 375.

Background

Injury

6 Packer was employed by Mermaid as a seaman. He worked on the ocean going tug *Withnell Bay*. On 20 March 1986 Packer was injured when he fell from a ladder between the main deck and the engine room of the vessel. He suffered serious injuries to his spine.

7 He recovered a substantial sum of damages from Mermaid and from Australian Shipbuilding Industries.

Contract of personal accident insurance

8 Under the policy Cigna agreed to pay to the policy holder (Woodside) the Compensation (as defined in the policy) if during the period of insurance any of the Events (as defined) happened to the insured person.

9 A schedule of accident compensation set out a number of "Events" each of which was or was a consequence of bodily injury. Relevant to Packer's claim was the Event of bodily injury and permanent total disablement.

10 The words "resulting" appears to have been left out of the express description of the relevant Event in the applicable schedule. It read:

> "Bodily injury as defined, caused solely by violent, accidental external means and independently of any other cause in … permanent total disablement (other than total loss of sight of one or both eyes or loss of limb)."

11 The lack of clarity may have been exacerbated by the definitions of "bodily injury" and "permanent total disablement". They were respectively:

> "BODILY INJURY" shall mean:
>
> injury which is caused by accident and which shall solely and independently of any other cause result in the Insured Person's death or disablement within 12 calendar months from the date of the accident on which injury was caused.

> "PERMANENT TOTAL DISABLEMENT" shall mean:
> Disablement by bodily injury caused other than by loss of limb or eye, which has lasted for at least 12 months and entirely prevents the Insured Person from engaging in any occupation for which he is fitted by reason of education, training or experience for the remainder of his life.

12 The contingency required to happen for an entitlement to payment of compensation to arise under the policy was "Any of the Events" as defined in the policy. In Packer's case that appears to have required proof and satisfaction of the following conditions:

12.1 Occurrence of bodily injury;

12.2 Solely and independently of any other cause the bodily injury has resulted in disablement within 12 months of the date of the accident that caused the injury;

12.3 The disablement has lasted for at least 12 months; and

12.4 The disablement has entirely prevented the insured person from engaging in any occupation for which he was fitted by reason of education, training or experience, for the remainder of his life.

District Court action – *Packer v Cigna Insurance Asia Pacific Limited* [2000] WADC 3

13 On 27 August 1998, more than 12 years after the date of his injury, Packer commenced an action in the District Court to recover damages from Cigna for breach of a contract of personal accident insurance by reason of Cigna's failure to pay Packer the sum of $93,000. By its defence Cigna alleged that Packer's cause of action was statute barred under the *Limitation Act 1935* (WA) and an order was made that one of the limitation defences be tried as a preliminary issue.

14 By his statement of claim Packer alleged that he was injured on 20 March 1986 when he was working as a seaman and crewman on the *Withnell Bay* and he fell down a ladder and that by reason of his injuries and disabilities from that injury he suffered bodily injury and permanent total disablement as defined in the policy. Packer pleaded that the compensation was $93,500.

15 He did not plead when he became permanently totally disabled. Nor did he plead the date when he was entirely prevented from engaging in any occupation for which he was fitted by reason of education, training or experience, for the remainder of his life.

16 Cigna pleaded in its defence that any cause of action that Packer had against Cigna must have arisen by 20 March 1987.

17 The parties did not agree a statement of facts but agreed:

17.1 On 17 October 1983 Cigna issued to Woodside a personal accident policy;

17.2 Mermaid was a wholly owned subsidiary of Woodside and Packer was an insured person;

17.3 The policy was in force during a period that included the date when Packer was injured;

17.4 On 20 March 1986 Packer was injured in the course of his employment with Mermaid.

18 On the hearing of the trial of the preliminary issue facts were not agreed, and the defendant did not adduce any evidence, as to when Packer was entirely prevented from engaging in any occupation for which he was fitted by reason of his education, training or experience for the remainder of his life.

19 Packer contended that the cause of action arose either:

19.1 In April or May 1993 when Cigna advised Packer by letter that on the evidence available to it, it was unable to entertain a claim for permanent disablement; or

19.2 On or about 12 September 1994 when Cigna's lawyers told Packer's lawyers by letter of that date that Packer's claim had prescribed (sic) and for that reason will not be entertained by Cigna.

20 Accordingly Packer contended that the cause of action arose when Cigna breached the contract of insurance by failing or refusing to pay after it had been required to do so. Cigna contended that the cause of action arose when the contingency occurred.

21 Commissioner Stavrianou did not accept Cigna's argument. His reasons for decision are found in ***Packer v Cigna Insurance Asia Pacific Limited*** [2000] WADC 3 delivered 14 January 2000.

22 He accepted that a cause of action is the fact or combination of facts that give rise to a right to sue. He referred to ***Do Carmo v Ford Excavations Pty Ltd*** (1984) 154 CLR 234, 245 and ***Judamia v State of Western Australia*** unreported; FCt SCt of WA, Lib No. 960114, 1 March 1996 per Malcolm CJ at 35.

23 Commissioner Stavrianou had held that Packer must first make a claim and the claim must be refused or possibly not dealt with within a reasonable time.

24 He held that if an accident occurring on 20 March 1986 produces bodily injury (as defined) which lasts at least twelve months (the injury not being the loss of a limb or eye) the earliest date on which a claim might be made on account of permanent total disablement would be 20 March 1987. However Cigna did not, without more, then come under a liability to make a payment for the non-performance of which Cigna is thenceforward in breach of contract. Packer must first make a claim and the claim must be refused, or possibly not dealt with within a reasonable time. The policy permits an insured to elect whether to receive weekly payments or a lump sum. Further, in the event of death the obligation is to make payment to the executors or administrators of the insured. Clearly, payment in that circumstance could only be made after the event. The nature and purpose of the contract was one to provide compensation in the event of accident or sickness resulting in disablement. The event may not occur within the policy period as appears from the definition of bodily injury. Until notice of claim is given the insurer may not know of the happening of an event.

25 He held that the occurrence of an event may give rise to an entitlement to payment under the policy but does not *ipso facto* place the insurer in breach of its obligation under the

policy. He considered it improbable that the intention of the parties was that Cigna would immediately be in breach upon the occurrence of an event as defined.

26 The issue to be determined was whether the cause of action must have arisen by 20 March 1987. In his view the cause of action need not as a matter of law have arisen by that date. He refused an application to amend the defence to add the alternative that the cause of action must have accrued by 20 March 1988.

27 He considered that the action must proceed and ordered that it be relisted for a pretrial conference on an expedited basis.

Appeal to the Full Court –
***Cigna Insurance Asia Pacific Ltd v Packer* [2000] WASCA 415; (2000) WAR 159**

28 Cigna appealed successfully to the Full Court, comprised of Malcolm CJ, Pidgeon and Kennedy JJ. They ordered that Packer's action be dismissed.

29 Both Malcolm CJ and Pidgeon J said that a cause of action is the fact or combination of facts which gives rise to a right to sue: [31] per Malcolm CJ and [69] per Pidgeon J.

30 Malcolm CJ appears to have agreed with Pidgeon J that the cause of action arose when Cigna became liable to pay a fixed amount of compensation upon the happening of a defined Event and that liability was not dependent on Packer making a claim: [32]. Pidgeon J delivered the main reasons for decision on that issue. Kennedy J agreed with Malcolm J.

31 Malcolm CJ recognised that the relevant defined Event contained three elements, namely:

31.1 Disablement by bodily injury caused other than by loss of limb or eye;

31.2 Which has lasted for at least 12 months; and

31.3 Entirely prevents the Insured Person from engaging in any occupation for which he is fitted by reason of education, training or experience for the remainder of his life: [32].

32 In Malcolm CJ's view the possibility must be envisaged that the fact that the bodily injury entirely prevents an insured person from engaging in any occupation for which he is fitted by reason of education, training or experience for the remainder of his life may not become apparent for some indefinite period of time: [35].

33 In his view no particulars had been sought by Cigna or interrogatories administered to determine the date upon which it was alleged that the disablement became permanent in the sense that a prognosis could be made that the disablement entirely prevented Packer from engaging in any occupation for which he was relevantly fitted for the remainder of his life. In the opinion of Malcolm CJ that was the date that had to be identified to determine when the cause of action accrued: [35].

34 Malcolm CJ considered that the limitation defence as pleaded, or as amended to extend the relevant date to 20 March 1998, must fail. However he did not dismiss the appeal.

35 Packer pleaded that he made a claim under the policy on 30 August 1988: [5]. Malcolm CJ said that if that were correct then the writ was not issued until 27 August 1998, which was almost 4 years after the action became statute barred: [54]. In his view Packer's action should be dismissed.

36 According to Pidgeon J in his statement of claim Packer said that he was not aware of the policy until August 1988 and he then filled in a claim form on 30 August 1988 and sent it to Cigna. The claim form was not in evidence and Pidgeon J understood it cannot be located and Cigna did not admit receiving it. The statement of claim indicated that the claim was for an amount of $93,500 for permanent total disablement. Packer claimed that for five years he received no communication at all from Cigna and in 1993 he made enquiries. Packer said that as a result of the enquiries he received a letter dated 30 April 1993 whereby Cigna denied liability for permanent total disablement and the reason given was that the medical evidence showed he was not permanently disabled from engaging in any occupation for the remainder of his life: [58].

37 Pidgeon J acknowledged that the submission of counsel for Packer was that the definition provided that the disablement must have lasted for at least 12 months and in addition it must entirely prevent the Insured Person from engaging in any occupation for the remainder of his life and there was no evidence on that question so it would be a question of fact to be determined by the trial Judge.

38 Pidgeon J was of the view that there was no need to determine facts because as pleaded the claim was for an injury that had within 12 months caused total permanent disablement and given the nature of the pleaded injuries this was a case where the injuries were so severe that the conclusion can be drawn at the time of the accident or within a short time thereafter that the injured person will, for the remainder of his life, be unable to engage in the occupation for which he was fitted by reason of his education, training and experience.

39 Pidgeon J declined to follow the decision of Giles J in ***Council of the City of Penrith v Government Insurance Office of New South Wales*** (1991) 6 ANZ Ins Cas 61-070 to the effect that the claim under a contract of indemnity insurance was for unliquidated damages for breach of contract and only when the insurer failed to do what was required of it could a cause of action for damages for breach of contract accrue to the insured. Pidgeon J considered that in so far as it was applicable to personal accident policies it was contrary to what was said in a previous decision of the Western Australian Full Court, ***Tillotson v ANZ Life Assurance Co Ltd*** (1997) 9 ANZ Insurance Cases 61, and contrary to other authorities that he set out in his reasons. In his view there was no requirement to prove that Cigna was not going to carry out its promise: [84].

40 Pidgeon J held that money was payable on the happening of the event and that was the only fact to be proved. It did not matter that the insurer did not know of the happening of the event. The facts to be proved were the happening of the accident, the permanent total disablement as claimed in the writ and its lasting for 12 months: [88].

41 He considered that the cause of action accrued upon the expiration of 12 months after the accident – namely, on 20 March 1987. He considered the action should be dismissed.

Application to Full Court to review and change its own order

42 Subsequently, Packer applied to the Full Court for an order that the appeal be dismissed. Further reasons for decision were delivered in ***Cigna Insurance Asia Pacific Ltd v Packer*** [2001] WASCA 171.

43 Counsel for Packer submitted that the judgment of the Chief Justice (with whom Kennedy J agreed) went outside the preliminary issue as it had been defined by Commissioner Stavrianou.

44 Malcolm CJ and Pidgeon CJ held that the application by Packer should be dismissed. However, Kennedy J held that there was nothing in the pleadings or in the limited amount of material before the Court to indicate the date on which Packer became permanently and totally disabled, and there being no agreement as to that date, he did not then consider it was open to the Court, in deciding the preliminary issue, to proceed summarily to dismiss Packer's claim at that stage of the proceedings. He was therefore agreeable to reopen and review the Court's decision by revoking the order for dismissal of the action: [34].

Application for special leave to appeal to the High Court

45 Packer unsuccessfully applied for special leave to appeal to the High Court. Gummow J delivered *ex tempore* the reasons for decision for himself and Hayne J. He said, among other matters, that the Court tended to prefer the view expressed by Kennedy J as to the powers of the Full Court disposing of the appeal but considered it was not demonstrated that a grant of special leave would lead to a disposition of the litigation that would differ from that brought about by the order of the Full Court (dismissing the action). In addition it was an unsuitable vehicle for the exploration of more general questions of law: ***Packer v Cigna Insurance Asia Pacific Ltd P232001*** [2002] HCATrans 268.