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CAMBRIDGE CREDIT CORPORATION LTD (RECEIVERS APPOINTED) AND ANOTHER v LISSENDEN

Commercial Division: Clarke J

B

26 August 1986; 10 April 1987

Insurance — Third party liability insurance — Statutory charge of liability on insurance moneys — Situs of claim — Multiple underwriters not within jurisdiction — Law Reform (Miscellaneous Provisions) Act 1946, s 6(4).

C *Insurance — Third party liability insurance — Statutory charge of liability on insurance — Nature and effect of charge — Charge enforceable by action — When cause of action accrues — Runs in tandem with primary claim — Law Reform (Miscellaneous Provisions) Act 1946, s 6(1).*

Private International Law — Choice of law — Statutory liability — Statutory charge on third party liability insurance moneys — Situs of claim — Multiple underwriters not within jurisdiction — Situs where claim payable in ordinary course of business — Law Reform (Miscellaneous Provisions) Act 1946, s 6(4).

D

The *Law Reform (Miscellaneous Provisions) Act* 1946, s 6(1), creates a statutory charge of liability on insurance moneys the subject of a third party indemnity insurance "on the happening of the event giving rise to the claim for damages or compensation, and notwithstanding that the amount of such liability may not then have been determined . . .".

Section 6(4) provides that: "Every such charge . . . shall be enforceable by way of an action against the insurer in the same way and in the same court as if the action were an action to recover damages or compensation from the insured . . . ."

E

Held: (1) The effect of 6(1) is to create a charge of uncertain amount upon insurance moneys which charge may be enforced in the manner set out in s 6(4): such charge is created on the accrual of the cause of action against the insured so that the limitation period regulating proceedings to enforce the charge commences at that time and thereafter runs in tandem with the primary claim. (421F)

(2) Accordingly, that where a cause of action against an insured for damages for negligent conduct accrued in 1971, proceedings to enforce the charge commenced in 1986 were outside the limitation period prescribed by the *Limitation Act* 1969, s 63. (421G)

F

(3) In the absence of a specific contractual term, the situs of the chose in action for the purposes of s 6(4), is, where the policy of indemnity insurance is underwritten by many persons resident in and having places of business in different countries outside the jurisdiction and concerning a risk within the jurisdiction, the place where recovery would in the ordinary course of business be achieved. (418B-E)

Jabbour v Custodian of Israeli Absentee Property [1954] 1 WLR 139 at 146; [1954] 1 All ER 145 at 152, applied.

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Ex parte Coote (1948) 49 SR (NSW) 179 at 184; 66 WN 28 at 30; *Andjelkovic v AFG Insurance Ltd* (1980) 47 FLR 348 at 355-356; 31 ACTR 17 at 24 and *Spain v Metropolitan Meat Industry Board* [1971] 1 NSWLR 91 at 97, considered.

(4) Accordingly, the situs of a chose in action under a Lloyds' indemnity policy where the insured was a firm of chartered accountants having a head office and six

branches in the various states of Australia, was the place where the branch of the insured alleged to be liable for negligent conduct was situated. (418D-E)

CASES CITED

The following cases are cited in the judgment:

Andjelkovic v AFG Insurance Ltd (1980) 47 FLR 348; 31 ACTR 17.
Cacciola v Fire & All Risks Insurance Co Ltd [1971] 1 NSWLR 691.
Coburn v Colledge [1897] 1 QB 702.
Coote, Ex Parte (1948) 49 SR (NSW) 179; (1948) 66 WN (NSW) 28.
Distillers Co Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd (1974) 130 CLR 1.
Haque v Haque (No 2) (1965) 114 CLR 98.
Helbert Wagg & Co Ltd, Re [1956] Ch 323.
Jabbour v Custodian of Israeli Absentee Property [1954] 1 WLR 139; [1954] 1 All ER 145.
New York Life Insurance Co v Public Trustee [1924] 2 Ch 101.
O'Connor v Isaacs [1956] 2 QB 288.
Sevcon Ltd v Lucas CAV Ltd [1986] 1 WLR 462; [1986] 2 All ER 104.
Spain v Metropolitan Meat Industry Board [1971] 1 NSWLR 91.
Sydney Formworks Pty Ltd (In liq), Re (1965) 82 WN (Pt 1) (NSW) 558.

The following additional cases were cited in argument:

Aylmore, Re [1971] VR 375.
Rossano v Manufacturers Life Insurance Co Ltd [1963] 2 QB 352.
Sutherland v Administrator of German Property [1934] 1 KB 423.
Utah Construction & Engineering Pty Ltd v New India Assurance Co Ltd (1969) 90 WN (Pt 1) (NSW) 145.

SUMMONS

This was an application pursuant to the *Law Reform (Miscellaneous Provisions) Act* 1946, s 6(4), for leave to commence proceedings against the insurer of an allegedly negligent third party insured.

D E Horton QC and *S M P Reeves*, for the plaintiffs.

K R Handley QC and *J C Campbell*, for the defendant.

Cur adv vult

10 April 1987

CLARKE J. The plaintiff in this application in 1977 sued a firm of accountants which at the relevant times had carried on business under the name "Fell and Starkey" (a description I will use in this judgment) claiming damages for negligent conduct which occurred during, and prior to, 1971.

After some delays the action came on for hearing before Rogers J who, in the ultimate, found a verdict in the plaintiff's favour and awarded it the massive sum of $A145,000,000 damages. Fell and Starkey has appealed from the judgment, the entry of which was directed on 3 April 1985, and, in the meantime, has obtained a stay of execution upon terms which it is unnecessary to recite.

During the course of the stay application which followed the direction for entry of judgment the plaintiff discovered that Fell and Starkey was prima facie entitled to be indemnified under an insurance policy — there are in fact a number of policies but it is convenient to speak only of one — which had been issued on behalf of a number of underwriters. Some of these are

individuals operating as syndicates of Lloyds and others are corporate underwriters. All are resident outside New South Wales.

The amount of the cover is (US)$20,000,000 and this fact explains, in part, the plaintiff's dilemma. The amount due under the insurance policy, even allowing for current monetary exchange rates, will, in the event the plaintiff is ultimately successful in its action, satisfy but a small part of the judgment. The individual partners of Fell and Starkey could be expected to provide a minor supplement only to the (US)$20,000,000 with the consequence that the plaintiff, if successful, will receive considerably less than half its judgment.

If one takes account of the interest which will, on the hypothesis I have expressed, be payable on the judgment sum pursuant to the *Supreme Court Act* 1970, s 95, and the possibility of an award of interest under s 94 of the same Act then, obviously enough, the percentage recovered will be much smaller.

In these circumstances it is quite inequitable, the plaintiff contends, that the defendants should not be required to set up an investment fund of (US)$20,000,000 (being the sum payable under the policies) which will obtain immediate returns of interest.

In this way the plaintiff will, on the stated hypothesis, obtain a greater percentage of its entitlement. On the other hand if Fell and Starkey succeeds in the appeal the insurers will have suffered no prejudice being entitled to the return of their capital sum plus interest.

These arguments were advanced to the Court of Appeal in support of a submission that a condition of the stay should be imposed requiring the creation of a fund of (US)$20,000,000. For reasons which appear in the judgment and which are compelling, to say the least, the Court declined to impose the condition sought.

The plaintiff has accordingly changed course and mounted the present application. In this application it seeks leave to institute proceedings directly against the insurers under the *Law Reform (Miscellaneous Provisions) Act* 1946, s 6(4), claiming that, if leave is granted, it should be able to sign summary judgment fairly quickly, and once that is done, interest under s 95 will commence to run. In this way it would achieve its object of supplementing the capital sum with the interest which would accrue prior to the culmination of the appellate process.

Because there are a large number of insurers, all of whom are situated outside the jurisdiction, the parties have agreed that the present defendant be appointed as representative (although no formal order has yet been made) without prejudice to the insurer's rights to oppose the granting of leave on the several grounds which were pressed in argument.

The *Law Reform (Miscellaneous Provisions) Act*, s 6, on which the entitlement to sue the insurers direct is based, reads:

> "(1) If any person (hereafter in this Part referred to as the insured) has, whether before or after the commencement of this Act, entered into a contract of insurance by which he is indemnified against liability to pay any damages or compensation, the amount of his liability shall on the happening of the event giving rise to the claim for damages or compensation, and not-withstanding that the amount of such liability may not then have been determined, be a charge on all insurance moneys that are or may become payable in respect of that liability.

A

. . .

(4) Every such charge as aforesaid shall be enforceable by way of an action against the insurer in the same way and in the same court as if the action were an action to recover damages or compensation from the insured; and in respect of any such action and of the judgment given therein the parties shall, to the extent of the charge, have the same rights and liabilities, and the court shall have the same powers, as if the action were against the insured:

B

Provided that, except where the provisions of subsection (2) apply, no such action shall be commenced in any court except with the leave of that court. Leave shall not be granted in any case where the court is satisfied that the insurer is entitled under the terms of the contract of insurance to disclaim liability, and that any proceedings, including arbitration proceedings, necessary to establish that the insurer is so entitled to disclaim, have been taken."

C

The plaintiff claims that, Fell and Starkey having entered into a relevant insurance policy and the events giving rise to the claim having occurred, a charge was thereby created on all insurance moneys. Accordingly, the present proceedings were taken to enforce that charge and, as justice required that the plaintiff be placed in a position where it could, if ultimately successful, obtain interest on the amount of the cover, it is appropriate to grant leave for the commencement of the proposed proceedings.

The defendant raised three objections to the grant of the leave sought and I will deal with them seriatim.

D

Section 6 has no application to the relevant insurance policies:

This submission involves a consideration of the question whether a charge can attach to the moneys which may become payable under an insurance policy the underwriters of which are resident outside the State of New South Wales — and if so, whether it can attach in this case.

E

Mr Handley QC's point can best be summarised in this way: s 6 is a part of the municipal law of New South Wales finding no counterpart in any other State in Australia. The limits of the legislative power of the New South Wales Parliament relevantly enable it to legislate in respect of the imposition of a charge only upon choses of action situate within New South Wales. The rights of the insured under the policy presently under consideration are properly categorised as a chose in action but one which is not situated in New South Wales. Whilst it may be difficult to determine the correct situs of the chose Mr Handley submits that the better view is that it is situated in Victoria. There being no chose in New South Wales there is nothing to charge and the application must fail.

F

In stating the basic proposition in the concise manner I hope that I am not doing Mr Handley an injustice but whether I am or not Mr Horton QC, who appeared for the plaintiff, responded that the place of payment of a successful claim under the policy was in New South Wales and that fact was sufficient to enable the creation of the charge under s 6.

G

The problem of determining a situs of the chose in action is starkly posed. There are three policies underwritten by a large number of underwriters. Portion of the risk was underwritten by Lloyds syndicates whose members almost certainly reside in the United Kingdom and the United States of

A America and, perhaps, other countries. Each member is, in a sense, underwriting a percentage of the risk. The balance of the risk in each case is underwritten by numerous international insurers.

There is no evidence that any single underwriter resides or carries on business in New South Wales. Consequently, I am bound to approach this application upon the basis that the residences and places of business of the underwriters, or potential debtors, are spread over many countries and do not include New South Wales.

B

If one looked only to the wording of s 6 and in particular the words "insurance moneys that are or may become payable" one might conclude that, as these moneys were the property of persons foreign to New South Wales, there were no moneys susceptible to the statutory charge. But there is no doubt that the insured's rights fall within the description "chose in action" and the argument has focussed on the search for the situs of that chose.

Dicey *Conflict of Laws*, 10th ed (1980) vol 2 at 528, describes the rule in

C these terms:

> "The *situs* of things is determined as follows:
>
> (1) Choses in action generally are situate in the country where they are properly recoverable or can be enforced",

and cites in support *New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101 at 109.

Pollock MR in his judgment in that case quoted the rule (in almost

D identical terms) which appears in the 3rd edition of *Dicey* (at 342) and said that he attached great importance to it.

In the case of a debt the same text states "(it) is situate in the country where the debtor resides for it is only in that place that the creditor can normally enforce payment".

In *New York Life Assurance* the court was faced with the problem of determining the situs of money payable under an insurance policy issued by a company with a central office in New York and branches in European cities

E including London. The court held it necessary in such circumstances to look at the contract in order to determine where the moneys were payable and in so far as that particular policy stipulated for payment in London the chose was situate in England. "Because", Pollock MR said (at 112) "it is the country where it (the chose) is properly recoverable and can be enforced".

Warrington LJ, after adverting to the general rule (at 115), said that in the case of a defendant with multiple residences the only way to settle the

F question is:

> ". . . to take the contract which creates the debt and look at that and see whether, having regard to its terms, the parties have themselves selected for this purpose one of the several residences in question; and if you can find that, then I think that that place which they have selected will be the residence for the purpose of determining the locality of the debt."

In *Jabbour v Custodian of Israel Absentee Property* [1954] 1 WLR 139

G at 146; [1954] 1 All ER 145 at 152, Pearson J, as he then was, expressed the rule in these terms:

> "Where a corporation has residence in two or more countries, the debt or chose in action is properly recoverable, and therefore situated, in that one of those countries where the sum payable is primarily payable, and

that is where it is required to be paid by an express or implied provision of the contract or, if there is no such provision, where it would be paid according to the ordinary course of business; *Rex v Lovitt* [1912] AC 212; *New York Life Insurance Co v Public Trustee* [1924] 2 Ch 101."

These authorities justify the following propositions:

1. In the case of a single residence obligor/debtor the situs of the chose is the country in which that residence is situated.

2. Where the obligor has two or more residences then the chose is situated where the debt, or money, is payable in accordance with the terms of the contract. If no provision appears concerning the place of payment then the question "Where it would be paid according to the ordinary course of business" needs to be answered.

In this case the position is more complex. Very many persons, and companies, have undertaken the responsibility to indemnify Fell and Starkey and there is no evidence that any of them had a residence, or place of business in New South Wales.

The basis of the fundamental rule is that the chose is situated where it is recoverable. What then is the position when there are a great number of obligors dispersed widely throughout the world but none of whom reside, or have a place of business, in the sovereign state in which the obligee carries on business?

One might be tempted to conclude that the chose in action has no situs. But as Windeyer J said in *Haque v Haque (No 2)* (1965) 114 CLR 98 at 136:

> "... When we go from the field of corporeal things, lands and chattels, and rights and interests related to them, to purely incorporeal things, questions of *situs* become artificial. Such things can have no actual place anywhere. But law for its own purposes puts all its incorporeal creatures in their proper places. The conventional rules that have been adopted to this end had their beginnings in early ecclesiastical law. It was necessary to determine, for purposes of administration of the goods of a deceased, which ordinary had jurisdiction, and that meant deciding within which province or diocese debts owing to a deceased were *bona notabilia*."

And, as Jordan CJ observed in *Ex Parte Coote* (1948) 49 SR (NSW) 179 at 184; 66 WN 28 at 30:

> "... Unless there is some special reason which makes it necessary so to hold, property should not be regarded as legally situate in two different places at the same time."

Earlier in the judgment (at 184; 30) Jordan CJ had observed:

> "... a simple contract debt is locally situated where the debtor resides, unless it is agreed to be paid in a particular place, in which case it may be locally situated in that place."

But if the debtor is not resident in the agreed place of payment then it is difficult to see why that location is chosen as being the place where the debt is recoverable.

In *Haque* Windeyer J recognised that the notion that recoverability was the touchstone could be somewhat artificial. He said (at 137):

> "... The rule that a simple contract debt is where the debtor resides has been explained as relating it to the place where it can most readily be enforced: see *Commissioner of Stamps v Hope* ([1891] AC 476 at 482) and *New York Life Insurance Co v Public Trustee* ([1924] 2 Ch 101 at 119). But to-day that may be not much more than a rationalization, since execution is no longer to be had against the person of a debtor and his wealth and property may be not where he resides. Moreover the rule has its exceptions: a debt that is made payable at a particular place may sometimes be regarded as being located in that place, but only it seems when the debtor has a residence there: *Re Helbert Wagg & Co Ltd* ([1956] Ch 323)."

In *Re Helbert Wagg & Co Ltd* [1956] Ch 323, Upjohn J concluded that, unless the debtor had a residence in the country in which the parties had, by their contract, stipulated that the debt should be repaid, the chosen place could not qualify as the situs of the debt.

Jordan CJ did not impose that qualification in his expression of principle and if it is a necessary one then in a case such as the present one might search in vain for the situs. It is, of course, possible that a member of one of the Lloyd's syndicates resided in New South Wales but it would be extraordinary if that fact was determinative of the situs of the chose (particularly when dozens of members are probably involved in the relevant syndicates).

Mr Handley recognised the problem and argued that the place of payment test should be applied in the present case. He contended that whilst most of the insurers probably resided in, or had a place of business in England, a provision in the policy fixed the locus in Victoria.

That clause read:

> "It is hereby noted and agreed that:
>
> (a) this Insurance shall be governed by the law of Australia, whose Courts shall have jurisdiction in any dispute arising hereunder; and
>
> (b) any Summons, Notice or Process to be served upon the Insurers for the purpose of instituting any legal proceedings against them in connection with this Insurance may be served upon—
>
> Mallesons,
> 121 William Street,
> Melbourne 300, Australia
>
> who have authority to accept service on their behalf."

(At some later date Mallesons were replaced by Hedderwick, Fookes & Alston, 103 William Street, Melbourne, Australia.)

He submitted that this provision evidenced a contractual intention that the insured could enforce repayment in that State which was therefore the situs of the chose.

Mr Horton submitted that was an artificial approach for in truth that contractual provision did not require that payment take place in Victoria. Drawing on a broad principle that a debtor must seek out his creditor (except when he is beyond the seas) he submitted that the insurers were bound to pay at the office of the particular branch of Fell and Starkey which had been sued and the location of that office fixed the situs.

In this case the branches concerned were Newcastle and Sydney and it followed that the chose was situated in New South Wales. He drew support for that submission from the judgment of Atkin LJ in *New York Life Insurance* but this support is quite limited given that the debtor had a place of business in the particular locale. The other cases on which he relies are concerned with different problems and I am quite unable to accept, for

example, that the situs of a debt owed by a London resident to a Brazilian is the latter's country simply because of a suggested obligation to seek out one's creditor.

On the other hand I do not find in the policy any indication that the debt was recoverable only in Victoria. The provision to which attention was drawn concerned only the applicable law and the place of service of documents. Neither of these evinced a contractual intention that either payment was to occur, or the moneys were only recoverable, in Victoria. The contract is, in my view, silent on both these aspects.

I do agree, however, that the residence test is of no use in the present circumstances and that the adoption of the *Helbert Wagg* approach provides no assistance. It seems to me that the only solution is to adopt the test articulated by Pearson J in *Jabbour* freed from the qualification that the debtor must have a residence (or place of business) in the agreed place.

This approach, which is consistent with the dictum of Jordan CJ in *Ex parte Coote*, necessarily involves a recognition of the fact that recoverability (reflected in the presence of assets of the debtor) is not the ultimate universal test. If, however, that concept is to be equated with the right to sue in a particular location then it is concomitant with *Jabbour*.

In a case such as the present one needs to have recourse first to the contract and if that is silent concerning the place of payment one should embark on the second inquiry postulated by Pearson J.

That test affords, in my view, the only solution to a case in which the policy is underwritten by many persons in different countries concerning a risk situated in a country in which the underwriters neither reside nor have a place of business.

In the present case the policy refers to the head office and six branches of Fell and Starkey. This is indicative of a recognition that that firm might be sued in one of the States in which a branch operated and seek cover in the same State in respect of its potential liability. It follows, in my opinion, that recovery would in the normal course of business be achieved in the State in which the branch concerned was situated. In this case the State is New South Wales. Consequently, the chose is situated here and s 6(4) applies.

The claim is statute barred:

The plaintiff's claim against Fell and Starkey arose out of a number of acts and/or omissions on the part of that firm which culminated with the audit for the year ended 30 June 1971 which was complete by about September or October of that year. The claim against Fell and Starkey became statute barred by the end of 1978 at the latest. Consequentially, the defendant argued, the present claim became barred at the same time and certainly is not open now. This argument propounded a theory whereby the plaintiff's cause of action was complete upon the happening of the events which made the cause of action against the insured complete so that time ran from that moment. It appears to have been assumed by both parties that the relevant period of limitation was six years and the argument before me focussed on the date when time began to run.

Mr Handley drew attention to that portion of s 6(1) in which it is stated that the amount of the insurer's liability should, *on the happening of the event* giving rise to the claim for damages etc be a charge on all insurance

moneys that are or *may* become payable in respect of that liability (my emphasis). It followed, he submitted, that the charge arose at the time of the happening of the event giving rise to the claim for damages against the insured.

The particular means of enforcement of the charge are described in s 6(4). It provides that the charge shall be enforceable by way of an action against the insurer "in the same way and in the same court as if the action were an action to recover damages or compensation from the insured". Accordingly the prescribed method of enforcement of the charge was an action to recover moneys from the insurer which was equated to the action between the particular plaintiff and the insured. Furthermore the balance of the subsection, which appeared before the proviso, reinforced the equation by expressly stating that the parties to any such action should have, to the extent of the charge, the same rights and liabilities and the Court should have the same powers as if the action were against the insured.

It followed, Mr Handley argued, that the charge was created at the same time as the cause of action was vested in the plaintiff. Effectively, therefore, upon the happening of the relevant events the plaintiff had two potential claims. One against Fell and Starkey to recover damages and one against the defendant to enforce the charge. Both claims came into existence at the same time, both went before a court which had identical powers with regard to the two actions and in both, the parties, to the extent of the charge, had the same rights and liabilities.

The consequence, according to the argument, is there was a clear statutory intention that the cause of action be complete upon the happening of the event giving rise to the primary case with the consequence that the time would then commence to run.

Nor did the proviso alter the position. It was, counsel submitted, purely procedural and did not have the effect of delaying the accrual of the cause of action.

Whilst there is little authority in Australia concerning this very difficult statutory provision the purpose of s 6(4) has received some attention. In *Andjelkovic v AFG Insurances Ltd* (1980) 47 FLR 348 at 355-356; 31 ACTR 17 at 24, Blackburn CJ made this observation:

> ". . . The main purpose of the provision requiring leave to commence the statutory action is to prevent the substitution of a statutory claim for a claim against the insured where the latter is available and will apparently be effective. Leave may also be refused where the applicant's claim is unarguable, that is where the applicant's contention, that the statutory conditions for the vesting in him of a right of action have been fulfilled, could not possibly succeed."

It is important to understand these observations in the context of the purpose of the whole section. This purpose was articulated, in terms with which I agree, by Isaacs J in *Spain v Metropolitan Meat Industry Board* [1971] 1 NSWLR 91 at 97, in these terms:

> ". . . The purpose of the section is to ensure that the plaintiffs who recover verdicts against persons who are insured against a particular liability shall be able to have resort to that fund irrespective of the solvency or insolvency or the cash liquidity of the insurer."

I believe that the last word is a typographical error for "insured" and I

would add my own observation that the legislature appears to have been primarily concerned at the financial situation of the insured. For instance, the legislation endeavours to eliminate or minimise the problems that may be created by the liquidation of an insured against whom a claim is pending. This is particularly so in circumstances in which there are no funds enabling the liquidator to enforce indemnity against an intransigent insurer. In these circumstances s 6 would operate to enable the plaintiff to sue the insurer direct.

The procedural nature of a similar provision, s 218 of the *Companies Act* 1936, was demonstrated by the decision of McLelland CJ in Equity in *Re Sydney Formworks Pty Ltd (In liq)* (1965) 82 WN (Pt 1) (NSW) 558 at 562. He said:

> "The result of the cases on the Companies Acts which I have mentioned is that the section cannot be pleaded in bar to the action and that the court administering the liquidation may give leave, if it thinks proper to do so, to continue an action which has been commenced without leave. This view is in keeping with what I consider to be the obvious intention of the section, namely, to ensure that the assets of the company in liquidation will be administered in accordance with the provisions of the *Companies Act* and that no person will get an advantage to which, under those provisions, he is not properly entitled and to enable the court effectively to supervise all claims brought against the company which is being wound up."

The fact that Blackburn CJ in *Andjelkovic* took the same approach in relation to the Australian Capital Territory equivalent of s 6 is evident from his orders granting liberty nunc pro tunc to commence an action despite the fact that proceedings had been on foot for some time.

There are other decisions dealing with analogous statutory provisions which emphasise the procedural nature of similar statutory provisions. In *Coburn v Colledge* [1897] 1 QB 702, the court was concerned with provision which prohibited a solicitor from commencing an action for recovery of fees until the expiration of one month after delivery of a bill of costs. Lord Esher MR (at 706) said:

> "... It takes away, no doubt, the right of the solicitor to bring an action directly the work is done, but it does not take away his right to payment for it, which is the cause of action. The Statute of Limitations itself does not affect the right to payment, but only affects the procedure for enforcing it in the event of dispute or refusal to pay. Similarly, I think s 37 of the Solicitors Act, 1843, deals, not with the right of the solicitor, but with the procedure to enforce that right. ... If that be the true construction of the section, it does not touch the cause of action but only the remedy for enforcing it."

Likewise in *O'Connor v Isaacs* [1956] 2 QB 288, Diplock J, as he then was, pointed out that statutory provisions requiring the delivery of notice of intended action prior to action were purely procedural saying (at 325):

> "... It is plain that the draftsman of the Act regarded the cause of action as having accrued, but the requirement of notice was a procedural requirement before the action could be brought."

Lastly, I would refer to *Sevcon Ltd v Lucas CAV Ltd* [1986] 1 WLR 462; [1986] 2 All ER 104, in which Lord MacKay of Clashfern distinguished

procedural provisions from those which provided elements in a cause of action. He said (at 467; 108):

> "... However, the true principle as illustrated in the cases to which I have referred is that time runs generally when a cause of action accrues and that bars to enforcement of accrued causes of action which are merely procedural do not prevent the running of time unless they are covered by one of the exceptions provided in the Limitation Act itself."

Accordingly, Mr Handley argues, that the proviso has no effect on the running of time. The statutory period has passed. Accordingly, in the light of the existence of the *Limitation Act* 1969, s 63, the plaintiff's cause of action against the defendant is statute barred and has been extinguished.

Mr Horton did not deny the procedural nature of the proviso but took issue with Mr Handley on the question of the accrual of the cause of action. Focussing on the word "liability" in s 6(1) he argued that the insured was not liable unless and until a finding had been made against him. Furthermore, the insurer came under no liability to indemnify until the plaintiff established the insured's liability to pay specific damages. In other words the determination of a liability to pay damages to the plaintiff was a necessary condition of the creation of the insurer's obligation to indemnify and the fixing of the amount of damages fixed the extent of that liability and the consequent charge.

He drew attention to *Cacciola v Fire & All Risks Insurance Co Ltd* [1971] 1 NSWLR 691, wherein the Court of Appeal determined that in the circumstances confronting them the signing of judgment was a necessary pre-condition to the existence of a legal liability by way of damages. He also referred to the judgment of Stephen J in *Distillers Co Bio-Chemicals (Australia) Pty Ltd v Ajax Insurance Co Ltd* (1974) 130 CLR 1 at 26, where his Honour pointed out that no event against which the obligation to indemnify occurred until there had been a finding that the insured should become legally liable for damages.

However it seems to me that there are clear indications in the section itself which deny the need for the existence of a judgment against the insured before the charge affixes. In the first place in s 6(1) the charge is expressed to arise on the happening of the event giving rise to the claim against the insured. In the second place s 6(5) makes it plain that the legislature contemplated that actions might be brought to enforce the charge both before and after a judgment had been obtained against the insured.

The concept of the enforcement of a charge of uncertain amount by action of the nature required by the system is a difficult one, as is the measuring of the charge by the amount of the insured's liability when that has not been determined. Nonetheless, it seems to me that the effect of s 6 is to create a charge of uncertain amount upon insurance moneys which charge may be enforced in the manner set out in s 6(4). In order, however, to avoid the evil of which Blackburn CJ spoke the proviso was added which operates, in my opinion, as a procedural condition but does not delay the running of time under the statute of limitations. Given that the charge is created on the accrual of the insured's cause of action, it seems to me that the limitation period regulating proceedings to enforce that charge commenced at that moment and thereafter ran in tandem with the primary claim. It follows that the present proceedings have been brought well out of time and are statute barred and the present application must be dismissed.

Discretion:

Because of my earlier conclusion it is not strictly necessary to deal with this ground of opposition to the granting of leave. My tentative view, however, is that, there having been a lengthy hearing of the primary proceedings which are now subject to the appellate process, and there being no reason to expect that these proceedings will, in the event the plaintiff is ultimately successful, be any less effective in enabling it to obtain the insurance moneys than a direct claim against the defendant, my discretion should be exercised in favour of declining to grant leave.

I appreciate that Blackburn CJ was not speaking exhaustively, nonetheless, his statement that the proviso was primarily intended to prevent the side stepping of a primary action or the running of two cases in tandem is clearly correct.

It seems to me that given that the plaintiff has already recovered a judgment after a lengthy hearing it would require very exceptional circumstances to lead a court to grant leave. The plaintiff argues that the present circumstances are exceptional. I accept that to a degree but I am not persuaded that the present process is a proper means for the alleviation of its problems. For instance, I do not accept that upon the issue and service of proceedings consequent upon the grant of leave the plaintiff would be able to enter summary judgment without much ado. My expectation is that any application for summary judgment would be met by reference to the proceedings on appeal with a likely consequence that the application would either be dismissed or delayed until the determination of the appeal. I find it difficult to foresee a situation in which the plaintiff would be able to obtain a direction for the entry of judgment in these proceedings prior to the ultimate outcome of the appellate process in the case which has already been decided. If I am correct in this apprehension then the grant of leave would not advance the plaintiff's cause at all. The only consequence would be the issue of further proceedings, the incurring of further costs and additional court time. I do not believe any of those consequences are justified and I would, if necessary, dismiss the application on this ground also.

The application is dismissed. The plaintiff is to pay the defendant's costs.

Application dismissed

Solicitors for the plaintiffs: *Stephen Jaques Stone James.*

Solicitors for the defendant: *Allen Allen & Hemsley.*

N J HAXTON,
Barrister.