COURT OF APPEAL

Ruparatne
V.
Manufacturers Life Insurance Co. of Canada.

C.A. (S.C) 480/73 — D.C. Colombo No. 69418/M

English Law of Insurance applicable. Insurable interest essential ingredient in contract of insurance Effect of Illegality in a suit. Duty of Court in such a case.

Prescription. When does prescription begin to run in cases of failure to pay on insurance contracts?

Appellant a retired Village Headman, and Don Benjamin Appuhamy obtained a Joint Thirty Year Endowment Insurance Policy dated 30.10.67 for a sum of Rs.60,000/- payable on maturity on 10.10.87 if both were living or on receipt and due proof of the prior proof of death of either of the insured to the survivor receiver. A and Don Benjamin were also associated in starting a brick manufacturing industry A had contributed the entirety of the capital and had also paid the first premium which was in fact payable by both.

In December 1957 Don Benjamin was drowned. A informed Respondent Co. on 05.01.57 of death of Don Benjamin and made claim for payment. R replied on 12.04.58 that on inquiries made there was no evidence at all of the death of Don Benjamin and therefore his claim would not be considered. A then made inquiries himself and found that there had been an inquest on a person by drowning who was identified as Don Benjamin.

A submitted Death Certificate and proceedings of Inquest to R. On 23.09.67 R wrote to A stating that their Principals were not satisfied with the claim and that liability was not being admitted. In an action for the recovery of the sum of Rs.60,000/- due on the policy the Trial Judge held that –

1. Proof of Death was not satisfactory,
2. A did not have an insurable interest,
3. Action was time-barred.

Held (1). That the Trial Judge's finding that there was no reasonable proof of death should be set aside.

(2). That as the contract was one where A insured his life naming Don Benjamin beneficiary he had an unlimited insurable interest on his life and Don Benjamin insured his life naming A beneficiary Don Benjamin had an unlimited insurable interest on his life and therefore the full amount of the Policy was payable on Don Benjamin's death.

(3). That prescription according to S.6 of the Prescription Ordinance begins to run from date of breach of contract and date of breach of contract in this case was the day R refused to pay which in turn was the day R refused to accept proof of death of Don Benjamin and thereby denied A's claim.

APPEAL from judgment of the District Court of Colombo

Before: Soza, J. (President) & Rodrigo, J.
Counsel: C. Ranganathan, Q.C. with L.A.T. Williams for Plaintiff-Appellant.

G.F. Sethukavalar, S.A. with Bashir Ahamad for Defendant-Respondent.
Argued on: 18.6.80, 19.6.80, 08.12.81, 15.12.81 17.12.81, 18.12.81, & 11.01.82.
Decided in: 22.1.1982.

Cur. adv. vult.

SOZA, J. (President C.A)

The plaintiff-appellant in this case a retired Village Headman and one Don Benjamin Appuhamy had obtained from the defendant-respondent Insurance Company a joint thirty year endowment insurance policy (No. 1447611) dated 30th October 1957 for a sum of Rs. 60,000/- (P3) payable if the policy was still in force, on maturity on 10th October 1987 to both insured if they were living or on receipt and approval of due proof of the prior death of either of the insured to the survivor. One K.J.M.A. Fernando an agent of the defendant Insurance Co. was instrumental in getting this policy for the plainitff and Benjamin Appuhamy. The plaintiff and Benjamin Appuhamy were associated in starting a brick-manufacturing business and the agent Fernando utilized his knowledge of this fact to persuade the two men – especially the plaintiff – to take out this policy. So far as the brick-manufacturing business went, the plaintiff was not able to conduct it in his own name, as he was a public servant. Although the plaintiff's evidence was that he and Benjamin Appuhamy contributed in equal shares to the capital, the learned District Judge held rightly that the Capital, if any, was to come solely from the plaintiff. On 23.9.1957 the plaintiff submitted proposal form D1 and

Don Benjamin Appuhamy proposal form D11. On information supplied by the parties themselves the agent Fernando filled up these forms and an interim policy (D2) was issued providing cover until the issue of the main policy. The first premium of Rs.877.75 payable quarterly by the two insured persons was paid by the plaintiff along with the appliction for the insurance policy. On 28.09.1957 Don Benjamin Appuhamy took out a license (P2) to establish a brick kiln on a land held by the plaintiff on a permit (P1) under the Land Development Ordinance. The purported arrangement was for Benjamin Appuhamy to run the business.

In December 1957 there were floods in this area and Don Benjamin Appuhamy who, according to the plaintiff, had gone to collect moneys due on the sale of bricks was reported drowned. The plaintff on learning of this informed the defendant Company of this by his letter P4 of 05.01.1957 and submitted claim D6 dated 04.03.1958 calling upon the defendant Company to pay the sum of Rs.60,000/-. The defendant-Company replied by letter P6 of 12.04.1958 that on the inquiries made by them they found there was "no evidence at all of the death of Don Benjamin Appuhamy" and that therefore the claim could not be considered. If however proof of death was furnished the matter would be looked into further. Presumably the inquiries referred to in P6 were those referred to in the subsequent report of 15.01.1959 (D15) by Mr.C. Schafter. Subsequently the plaintiff found that on 28.12.1957 there had been an inquest (see P10) held by the Inquirer into Sudden Deaths of Rajakadaluwa, where it had been found that Don Benjamin Appuhamy was drowned on 27.12.1957. Having procured the death certificate P11 of Don Benjamin Appuhamy the plainitiff appears to have through the agent Fernando submitted it on 06.04.1965 along with the inquest proceedings P10 to the defendant Company in support of his claim. The plaintiff appears to have written on his own too to the defendant Company and to this he received reply P8 on 28.07.1966 stating that his letter of 22.07.1966 had been referred to their Principals for their advices. On 25.09.1967 the defendant-Company wrote P9 to the plaintiff stating that their Principals were not satisfied with the claim and liability was not being admitted. On 26.10.1967 the plaintiff through his lawyers sent letter D16 to the defendant-Company demanding payment. The defendant-Company's lawyers replied by D17 denying liability.

The plaintiff then instituted the present suit in the District Court of Colombo claiming on a first cause of action Rs. 60,000/- as the sum due on the Policy of Insurance P3 and on a second cause of action a sum of Rs. 36,000/- as damages sustained on account of the defendant Company's unreasonable delay and negligence in settling payment. The defendant-Company filed answer raising mainly the questions of proof of death, absence of insurable interest and prescription. The learned District Judge found for the defendant-Company on all these points and dismissed plaintiff's action with costs. The plaintiff then filed the present appeal from this Judgment.

At the hearing before us the claim for the sum of Rs.36,000/- by way of damages was not pursued and therefore it is not necessary to consider that question. The questions argued before us were the same as those that were at the centre of the dispute during the proceedings in the District Court, namely,

1. Proof of the death Don Benjamin Appuhamy.
2. The question of insurable interest in the policy the subject matter of this suit.
3. Prescription.

On the question of proof of death the best evidence was before court, namely, the death certificate P11. The inquest proceedings which formed the basis for this Certificate were before Court as P10. As against this the thinking of the learned trial Judge could be summarised as follows:

1. The death certificate P11 was obtained in 1961 but was forwarded with the inquest proceedings only on 6.4.1965. The delay and hesitancy are attributable to the fact that the certificate was not genuine.

2. The inquest proceedings could have been on the body of another Don Benjamin Appuhamy and not on the body of the insured or more probably on a dead body fraudulently described as the body of Don Benjamin Appuhamy.

3. While the death certificate P11 gave the occupation of Benjamin Appuhamy referred to therein as "Brick Manufacturing" none of the witnesses who gave evidence at the Inquest (P10) spoke of the occupation of the deceased.

4. Even the Inquirer has lent himself to be made use of by the plaintiff in fraudulently identifying some unknown body as that of Benjamin Appuhamy.

I regret I an unable to agree with reasons given by the learned District Judge who appears to have placed undue weightage on the evidence of the representative Mr. Schafter whose report D15 was admitted and made use of in the teeth of opposition by learned Counsel for the plaintiff who pointed out that this was a means of bringing hearsay evidence into the case. The Inquirer Jusey Appuhamy who held the inquest was called as a witness but none of the witnesses who testified before him, namely, Carathelis Silva, J.M. Don Manuel Appuhamy, W.H.M. Dharmapala, Agosinghe Guneratne and S.A.M. Singappu were called. Carathelis Silva and Manuel Appuhamy had given evidence before the Inquirer that they were with Don Benjamin Appuhamy when he was swept off by the flood waters of the Sengal Oya. These two witnesses had informed the village school master Guneratne and he with the V.C. member Dharmapala and the Village Headman of the area one Singappu (now deceased-see P12) did a search both on the 27th and 28th December. On the second day of the search they found the body of the deceased stuck in a tree near the Sengal Oya. At the inquest which was subsequently held the body was identified as that of Don Benjamin Appuhamy by his two erstwhile companions Carathelis and Manuel Appuhamy. To say that the body was not that of a person called Benjamin Appuhamy in the absence of any other positive evidence to the contrary is in my view unwarranted.

If the body was that of one Don Benjamin Appuhamy, was it that of the insured? The learned District Judge is here influenced by the fact that the occupation "brick manufacturing" was not spoken to by any of the witnesses at the inquest. When Jusey Appuhamy the Inquirer gave evidence not one question was addressed to him as to how the information about the occupation of the deceased was obtained. This information could have been gathered by the Inquirer by questioning the witnesses who identified the body even though he failed to make a record. In the circumstances to hold this omission as a ground to doubt the genuineness of the proceedings is not justified. The name and the age of the dead man apart from the occupation according to the Death Certificate are consistent with the particulars on these points as they appear in the other evidence adduced before Court on behalf of the plaintiff.

I would like to add that no issue was raised at the trial on any allegation of fraudulent representations and/or misrepresentations though there is such an allegation in the answer. Possibly the allegation of fraudulent representation or misrepresentation refers to the particulars given in the proposal. However this may be in making findings on fraud the learned District Judge has overshot the range and scope of the dispute in the case before him.

So far as the question of the death itself of the insured Benjamin Appuhamy is concerned nothing turns on delay. If it was Don Benjamin Appuhamy the insured that had died, and the inquest proceedings and death certificate relate to his death, the delay to submit the death certificate proves nothing.

I am conscious of the fact that an appellate Tribunal should not ordinarily interfere with the findings of fact made by the original court. But in the present case the handicap of our not having seen and heard the witnesses in the witness box is one from which even the learned trial Judge suffers to some extent for the plaintiff and one of his chief witnesses B. Don Solomon Appuhamy had not given evidence before him but before his predecessor. No doubt after the cases of both the plaintiff and the defendant were closed and when addresses were in progress, the learned District Judge on his own motion called the plaintiff into the witness box and examined him on the question of the floods. Having done this the learned District Judge seems to have felt doubts on whether there were floods at all. No one who gave evidence in the case denied there were floods and I feel constrained to say that the learned District Judge's doubts on whether there were floods are founded on very tenuous grounds.

The finding of the learned District Judge that there was no reasonable proof of death of the insured cannot be sustained and should be set aside. I hold that the plaintiff has submitted acceptable proof of death and that the defendant Company was unreasonably refusing to approve it.

I will turn now to the contention that the plaintiff had no insurable interest in the policy. At the outset it should be remembered that in all questions or issues arising with respect to the law of life insurance the law to be administered has to be the same as would be administered in England in the like case at the corresponding

period if such question or issue had arisen or had to be decided in England unless the matter is governed by a local statute-see section 3 of the Civil Law Ordinance. The law of England applicable even today to life insurance is found in the four sections of the Life Assurance Act 1774 (14 Geo. 3c. 48) commonly called the Gambling Act. The provisions of this Act can be summarised as follows:

1. The person effecting the insurance must have an interest in the life assured. If there is no such interest or if the policy is made by way of gaming and wagering then it is null and void.

2. The name of the person or persons interested in the policy must be inserted in it.

3. No sum greater than the amount or value of the interest of the insured may be recovered.

The argument is that the plaintiff has no insurable interest in the policy sought to be enforced in this suit because in truth and in fact what the plaintiff has done is to insure the life of Don Benjamin Appuhamy in contravention of the provisions of section 1 of the Life Assurance Act 1774. Where A having no interest in the life of B induces B to take out a policy in his (B' s name) funding B for the purpose in the expectation of getting the benefit of the policy himself, such policy is void in terms of section 1 of the Life Insurance Act 1774 see the case of *Wainewright v Bland* [1]

Lack of insurable interest is a defence always available to the insurance Company. In the instant case this defence was not even hinted at in any of the numerous letters that were written by the defendant-Company. It is only in the answer that the defence was taken for the first time. Yet this cannot be held against the defendant-Company because it is the duty of Counsel however belatedly to invite the attention of court to the illegality. In the case of *Mercantile Credit Co v Hamblin*[2] Counsel had raised the defence of illegality in the transaction which was the subject-matter of the suit at a late stage of the case and asked for leave to amend the pleadings. John Stephenson J. refused leave to amend but finding for the defendant on other grounds observed that Counsel was not acting improperly in drawing attention to the possible illegality. On

the contrary it was Counsel's duty however belated and embarrassing it may be, to prevent the Court from enforcing an illegal transaction.

In the case of *Scott v Brown, Doering. McNab & Co*[3] Lindley L.J. made the following oft-cited pronouncement on the question of illegality:

> "Et turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well-recognised legal principle, which is not confined to indictable offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him."

This dictum was cited with approval by Kennedy J. in the case of *Gedge v Royal Exchange Assurance Corporation.*[4] This was an action brought by certain insurance brokers as plaintiffs for the benefit of their clients on a policy of marine insurance. The defendants pleaded that there was concealment of material facts and that the persons on whose behalf the plaintiffs effected the alleged policy had no insurable interest in the subject-matter insured. At the trial however it became apparent that the alleged policy was in truth a mere wager or wagering speculation and constituted an infringement of section 1 of the Marine Insurance Act, 1745 (19 Geo. 2, c. 37).

The defendants however in their defences had not pleaded the invalidity of the alleged policy under the provisions of the Marine Insurance Act. 1745. Kennedy J. held that when upon the trial of the plaintiffs suit as happened there, the transaction which formed the basis of the claim is found to be illegal, the Court cannot properly ignore the illegality and give effect to the claim even though the particular illegality had not been pleaded.

This principle in regard to pleadings cannot be accepted without qualification. The cases draw a distinction between illegality for contravention of a statute and the general issue of illegality. If it is a statutory defence that is being relied on, it must be pleaded. As far back as 1853 Parke B. held in the case of *Bull v Chapman*[5] that if a contract is contended to be illegal because a statute prohibits it, the defence founded upon the statutory provision must be specially pleaded. The same view was taken in the case of *Brutton v Branson*[6]. In the case of *Willis v Lovick*[7] Lord Alverstone C.J. held that when the defence is a statutory defence, it must be pleaded and the decision in *Scott v Brown. Doering. McNab & Co* (supra) has no application in such a case. The decision in *Scott*'s case is applicable only when the illegality is "duly brought to the notice of the Court" or where the illegality is a general issue. Although in *Gedge'ss* case (supra) the statutory defence was not pleaded the illegality became apparent at the trial. In such circumstances whether the illegality is pleaded or not, the Court will not enforce the transaction. Where the illegality is apparent on the face of the record the court will not enforce the contract (see also *Taylor v Chester*[8]). If the contract is not ex facie illegal but the question of illegality depends upon surrounding circumstances; the Court will not as a general rule entertain the question unless it is raised in the pleadings. If authority is needed for this proposition it will be founded in the cases of In *Re Robinson's Settlement, Gant v Hobbs*[9] and *North Western Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd*[10]. In the latter case Viscount Haldane speaking from the Woolsack explained the law as follows at p. 469:

> "My Lords, it is no doubt true that where on the plaintiff's case it appears to the Court that the claim is illegal, and that it would be contrary to public policy to entertain it, the Court may, and ought to refuse to do so. But this must only be when either the agreement sued on is on the face of it illegal, or where, if facts relating to such an agreement are relied on, the plaintiff's case has been completely presented. If the point has not been raised on the pleadings so as to warn the plaintiff to produce evidence which he may be able to bring forward rebutting any presumption of illegality which might be based on some isolated fact, then the Court ought not to take a course which may easily lead to a miscarriage of justice. On the other hand, if the action really rests on a contract which

on the face of it ought not to be enforced, then, as I have already said, the Court ought to dismiss the claim, irrespective of whether the pleadings of the defendant raise the question of illegality."

In the instant case we are invited to consider a statutory defence of illegality, namely, infringement of section 1 of the Life Assurance Act 1774 and not a general issue of illegality. This defence does not arise necessarily from the plea of lack of insurable interest for such a plea can be founded on other causes too apart from contravention of the statute. Hence as the statutory defence has not been specifically pleaded in the instant case it will be entertained only if the record makes such illegality apparent. No doubt the proviso 1 of section 92 of our Evidence Ordinance enables the defendant to show that the contract is invalid and illegal by adducing oral evidence and then the general prohibition against the admission of oral evidence to contradict or vary or add to or subtract from the terms of a written contract will not apply. However in the instant case the defendant failed to plead its reliance on the proviso 1 to section 92 and hence the Court will have to consider such evidentiary material as went into record without opposition which is germane to the question of illegality. It is of course plaintiff's position that all the evidence pertaining to illegality that has got on the record is irrelevant.

Section 3 of the Life Assurance Act 1774 provides that no greater sum may be recovered than the amount or value of the interest of the assured. The insurable interest must be a pecuniary interest and the defendant-Company contends that the amount or value of this pecuniary interest must be computed from authentic figures. A partner would have an insurable interest in the life of a co-partner to the extent of the moiety of the capital contracted to be brought in by the co-partner. In certain circumstances one partner would have an insurable interest in the life of his co-partner but it is the calculated pecuniary loss that would be the amount or value of the insurable interest. In the instant case it was submitted that the calculation has been on a speculative basis and therefore is not legal. It is only when a person insures his own life that he is deemed to have an unlimited insurable interest in his own life. Reliance was placed for these arguments on *Houseman's Law of Life Assurance* (1978) 9th Ed. PP., 35,36,38.

In the instant case there can be little doubt that a partnership was started for a brick-making enterprise. As a first step in the venture a licence P2 was taken for a brick kiln to be established on plaintiff's land. Whether the relationship is regarded as that of partner and partner or employer and employee one had an interest in the life of the other at the time the contract of insurance was entered into even if such interest did not persist until the date of the death of Don Benjamin Appuhamy. About the nature of the interest and its quantum the case of *Dalby v India and London Life Assurance Co*[11] can be usefully referred to. In delivering the judgment of the Court in the case Parke B explained the meaning and import of sections 1 and 3 of the Life Assurance Act 1774. Referring to section 1 the learned Judge said as follows at p. 388:

> "This section, it is to be observed, does not provide for any particular amount of interest. According to it, if there was any interest, however small, the policy would not be avoided."

In regard to section 3 the learned Judge after discussing the arguments adduced in the case stated that if a reasonable construction is to be put on the section it should be interpreted to mean "that, if there is an interest at the time of the policy, it is not a wagering policy, and that the true value of that interest may be recovered in exact conformity with the words of the contract itself" (p. 391).

In the case in question it was further held that the Life Assurance Act 1774 required an interest only at the date of the contract and the sum assured becomes payable irrespective of whether the assured in fact sustains a pecuniary loss or not. Contracts of Life insurance are not contracts of indemnity unlike contracts of fire and marine insurance-see *Mac Gillivray on Insurance Law* (1961) 5th Ed. Vol. 1 pp. 180 to 183 paragraphs 361, 363, 364 and 365. *Dalby's* case is authority for the proposition that although the insurable interest should be a pecuniary interest, it need not be calculated with mathematical precision. The contracted amount will generally speaking be the value of the interest.

If the present case is considered on the basis of a partnership there is however one besetting difficulty for the plaintiff. As the partnership was not in writing and the capital exceeded Rs. 1,000/-, the partnership agreement was of no force or avail in law. It has

been held that the interest will not amount to an insurable interest unless it be one capable of being enforced under a binding contract or a legal right. A mere engagement binding in honour will not suffice-see the cases of *Stockdale v Dunlon*[12] (unenforceable contract as there was no memorandum in writing), *Stainbank v Fenning*[13] and *Stainbank v Shepard*[14] (unenforceable hypthecation), and *Hebdon v West*[15] (unenforceable promise).

It is not plaintiff's case as presented to us that the insurance effected in this case was on the footing of a partnership. But as the defence contention was that this was a case of one partner illegally insuring the life of his co-partner and, as we heard considerable argument on the point, I thought it fit to discuss the law relating to it.

If this was no more than a case of one person insuring the life of another, and this again is not plaintiff's case, then this suit must fail for violation of section 1 of the Life Assurance Act 1774. The cases of *Wainewright v Bland* (supra) and *Anctil v Manufactures' Life Insurance Company*[16] show that the Court will be always prepared to pierce the veil of legality with which an insurance contract may be cloaked and unravel the truth. If the truth is that it is a case of one person insuring the life of another in violation of section 1 of the Life Assurance Act 1774 then the Court will hold there is no insurable interest and decline relief.

In the instant case however we have a contract which is valid on the face of it. The contract documents are the policy P3 and the proposals D1 and D11 and these demonstrate that the plaintiff insured his own life naming Don Benjamin Appuhamy as his beneficiary and Don Benjamin Appuhamy insured his own life naming the plaintiff as his beneficiary. The proposals D1 and D11 are clear on this, and although only one Policy was issued by the defendant-Company it represents two separate contracts of insurance – one with the plaintiff on the basis of his proposal D1 and the other with Don Benjamin Appuhamy on the basis of his proposal D11.

Even if the brick-manufacturing partnership business was a sham and in any event illegal it has no more than a historical relevance to the contract of insurance which was at the end of all the negotiations concluded between the parties. However much the discussions hovered on the brink of illegality, however much the preliminary actions of

the parties were characterised by shallow pretences and whatever were the intentions and understanding of the parties (as evidenced by the testimony of the plaintiff and the agent Fernando and the statement in the claim D6 that plaintiff was the surviving partner in a joint endowment policy) the contract that was entered into was on the face of it unexceptionable.

The defendant-Company contends that what the plaintiff did was in reality to insure the life of Don Benjamin Appuhamy behind the legal facade of a life endowment insurance on his own life. That is why plaintiff alone paid the premium on this contract of insurance. That is why he did not take meaningful steps to proceed with the brick-manufacturing business or to commit the partnership agreement into writing.

But the contract of insurance embodied in the documents P1, D1 and D11 is clear and unequivocal and admits of no ambiguity. It is a fundamental principle in the construction of documents that the language and words used must receive their ordinary, plain and popular meaning. Where the language of a document is ambiguous or would become fully intelligible only in the light of surrounding circumstances at the time when it was executed or where a knowledge of trade usages and technical terms is desirable to comprehend its meaning then extrinsic evidence may be permissible. But in the instant case the documents P1, D1 and D11 are clear and precise in their terms. Therefore there is no necessity to travel outside the four corners of these documents and the evidence of prior negotiations is irrelevant. The documents admit of only one construction, namely, that the plaintiff insured his own life naming Don Benjamin Appuhamy as the beneficiary while Don Benjamin Appuhamy insured his own life with the plaintiff as beneficiary.

Fraud was not in issue. Illegality for want of insurable interest was in issue but the Court should have had much more cogent evidence than the defendant Company succeeded in adducing before Court to find on that. The factual bases of the plea of illegality must be examined in the light of the fact that at no stage before the answer was filed did the defendant Company put forward any of them although it had caused very careful investigations of its own to be made (see P6) and was in possession of Mr.G. Schafter's report D15 at least by 15.1.1959. The factual allegations made in this case

are belated and smack very much of being an afterthought. They are in any event irrelevant.

The case of the plaintiff is a straightforward one. Don Benjamin Appuhamy entered into a contract of life insurance with the defendant Company on his own life and named the plaintiff as beneficiary. It is indisputable that a person has an unlimited insurable interest in his own life. Don Benjamin Apphamy died on 27.12.1957 and in the circumstances plaintiff is entitled to receive the sum insured. For the reasons stated I am unable to agree with the findings of the learned District Judge on the question of insurable interest.

I will now turn to the question of prescription. We are here dealing with a written contract and its breach. Section 6 of the Prescription Ordinance stipulates that no action shall be maintainable upon a written contract unless such action shall be brought within six years from the date of the breach of such written contract. In order to decide whether the plaintiff's action is prescribed it is necessary to determine the date of breach of the contract. Is the date of the breach of the contract in the instant case the date of refusal to perform the contract? When a date for performance can be gathered from the contract, three situations can be envisaged.

Firstly, when the date for the performance of an obligation is fixed, the maxim dies interpellat pro homine (the day interposes demand instead of a human being) applies and prescription will begin to run, even without formal demand, from the date fixed for performance (*Ismail v Ismail*[17] and *Nomis Perera v Masinghe*[18]). This principle is embodied in the following passage of *Voet's Pandects* (22.1.26) (Gane's Translation):

> "Default in fact is that which arises without a demand, and thus is brought on by law without any act of a human being. Or it occurs when the very fact includes default in itself..... Although no default is understood to take place where no claim is made, still you should know that demand is not made by a human being only, but that the law also and even a day makes demand instead of a human being, provided that a definite day has been attached to the obligation."

Secondly, where performance has to be automatic on the happening of an event depending on the terms of the contract, prescription will begin to run with the happening of that event: (*Babun Nona v Starrex*[19]).

Thirdly, where on an interpretation of the terms of the contract the happening of the event is only a prerequisite to the right to demand performance, prescription will begin to run from the date of refusal after demand is made (*De Silva v Margaret Nona*[20]). To quote Voet (ibid) again (22.1.26):

> If an obligation has been made to depend on an uncertain day or an uncertain condition, the position is rather that the debtor is only put into default by a demand made by a human being."

With these principles in mind let as examine the terms of the contract on the question of payment. The policy P1 states that the sum insured will be payable.

(a) on the 10th day of October 1987 (the maturity date), if both insured are living and the policy is in force, or

(b) on receipt and approval of due proof of the prior death of either of the insured while the policy is in force.

It will be at once seen that if payment became due on maturity under paragraph (a) above, the maxim *dies interpellat pro homine* would become applicable and payment will be due on 10th October 1987. Under this clause if the question of prescription arises no demand for payment will be considered necessary. Prescription will run from 10th October 1987 because that was the day fixed for payment and that will be reckoned as the day of the breach, or as the civilians Paulus and Voet term it, *mora in re*.

Under paragraph (b) there are two factors governing payment: firstly, the death of the insured person and secondly the receipt and approval of due proof of death.

It was however argued that prescription should be reckoned from the date of death. In support of this learned Counsel for the defendant Company referred us to a passage from *MacGillivray* (ibid) Vol. 2

pages 333 and 334, paragraph 1087. *MacGillivray* here discusses the application of section 2 of the Limitation Act, 1939 which provides that all actions of debt grounded upon any lending or contract without specialty must be commenced within six years next after the cause of action has arisen. Special reliance was placed on the following passage in paragraph 1087 (p. 534) of McGillivray:

> "Prima facie the cause of action in respect of the sum assured arises upon the maturity of the policy, i.e., upon the happening of the death of the life assured or such other event on the happening of which it is expressed to be payable. Where a policy provides that the office shall pay the sum assured on proof satisfactory to the directors of the death of the life assured and the title of the claimant, or at some specified period of time after such proof has been furnished, the operation of the statute is not suspended until after the furnishing of such proof or the lapse of such time as may be specified, because these are matters which lie within the power of the claimant to proceed with or not as he pleases, and if he does not proceed to perfect his right to sue by furnishing the necessary proof the fault lies with him alone. The condition requiring proof is a condition precedent to the right to demand payment and the right to sue: but it does not touch the cause of action, only the proof of it and the remedy."

As authority three cases are referred to in the footnote to this passage. Of these I have been able to consult two, namely, *Coburn v Colledge*[21] and *Monckton v Payne*[22]. The first of these cases concerned a suit by a solicitor for recovery of his costs. Under section 37 of the Solicitors Act, 1843 there was no right of action to recover these costs until a month had elapsed from the delivery of a signed bill of costs to the defendant. If the cause of action was considered to have arisen when the work was completed, the defendant would succeed; but if it was considered to have arisen only at the expiration of the period of one month from the delivery of the signed bill of costs, the plaintiff would succeed. Lord Esher M.R. who delivered the leading judgment in the case said the Solicitors Act did not touch the cause of action but only the remedy for enforcing it. The Act did not take away the right to payment which is the cause of action but rather the right to bring an action directly the work is done. The right to payment and with it the cause of action arose

on the completion of the work. In the second case the suit was by the lord of a manor. He was entitled to an arbitrary fine on the admittance of a tenant to copyhold but he filed his suit more than six years from the assessment and demand of the fine. A.L. Smith L.J. who tried this case pointed out that it was competent to the lord to complete his cause of action by assessing and demanding the fine on the very day of the admittance. The cause of action was the admittance and not the assessment and demand. No doubt the lord would not have been able to sue until he made assessment and demand but if he chose to delay doing so he had only himself to blame.

MacGillivray uses the reasoning adopted in these cases to support his conclusion that the furnishing of proof satisfactory to the directors of the death of the life assured and of the title of the claimant; does not affect the cause of action because these are matters which lie within his power to do or not to do. Furnishing proof of death relates only to the proof of the cause of action and the remedy but not to the cause of action itself.

We cannot however adopt this reasoning because we have a local statute dealing with the question, that is, the Prescription Ordinance where the relevant provision is different. In terms of Section 6 of our Prescription Ordinance, prescription will begin to run upon breach of the contract. The word "breach" with reference to the case we are considering refers to an act by the defendant-company. The plaintiff is entitled to maintain his suit within the period of six years from the date of the breach. The terms of contract cannot make the death of Don Benjamin Appuhamy alone a breach by the defendant company of its contract of insurance. Therefore prescription cannot begin to run from the date of the death. The requirement of breach of contract as the starting point of prescription laid down by our Prescription Ordinance makes it impossible to adopt the test formulated by MacGillivray and Lord Esher.

The requirement of receipt of due proof of death connotes a demand for payment. And not only that. There should be approval of due proof of death. These stipulations make this a case which falls into the third category in my earlier classification. This is a case where the happening of the event (here death) is a prerequisite to the right to demand performance. Therefore prescription will run from the date of the refusal to pay.

When then was the refusal to approve payment? Learned Counsel for the defendant company contends that the letter P6 of 12.4.1958 must be regarded as the refusal to approve proof of death. Although in this letter the defendant-company wrote that the plaintiff's claim cannot be considered, they left the matter open. In P6 itself the defendant company wrote as follows:

> "If, however, you can furnish us with proof of death we shall be pleased to look into the matter further."

It will be seen therefore that in P6 there is no unconditional and conclusive refusal. In fact when the plaintiff did submit proof of death in 1965 the defendant Company took more than two years to consider it and eventually on 25.9.1967 wrote P9 to say that their Principals were not satisfied with the claim and denied liability. If P6 was the effective refusal all the defendant company need have said on the second occasion would have been that they had nothing to add to their earlier refusal. The date of the refusal to approve proof of death, in other words, the denial of plaintiff's right to payment should be taken as 25.09.1967. That was the date of the breach. This action was filed on 03.07.1968 less than a year later. Therefore plaintiff's action is not barred by prescription.

In the result I allow the appeal and set aside the judgment and decree appealed from and order that judgment be entered for plaintiff as prayed for in paragraph (a) of the prayer to the plaint with costs both here and in the court below.

RODRIGO, J. — I agree.

References: *Appeal allowed*

1. (1835) 1M & Rob. 481.
2. (1964) 1 All ER 680 (note)
3. (1892) 2Q.B. 724, 728.
4. (1900) 2. Q.B. 214.
5. (1853) 8 Ex. 444.
6. (1898) 2 Q.B. 219.
7. (1901) 2 K.B. 195, esp. 198.

8. (1869) 4 Q.B. 309.
9. (1912) 1 Ch. 717.
10. (1914) A.C. 461.
11. (1854) 15 C.B. 365.
12. (1840) 6 M. & W. 224, 233.
13. (1815) 11. C.B. 51
14. (1853) 13. C.B. 418
15. (1863) 3 B. & S. 579
16. (1899) A.C. 604
17. (1921) 22 N L R 476.
18. (1956) 59 N L R 14.
19. (1948) 50 N L R 143.
20. (1938) 40 N L R 251.
21. (1897) 1 Q.B. 702.
22. (1899) 2 Q.B. 603.