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*Judgment: approved by the Court for handing down (subject to editorial corrections)**	*Delivered:*	**16/06/2021**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Between:

BANN CARRAIG LIMITED
(FORMERLY BANN SPORTS (NI) LIMITED)

Plaintiff

and

GREAT LAKES REINSURANCE (UK) PLC

Defendant

_____

Mark Orr QC with Mark McEwen BL (instructed by Richard Barbour & Co Solicitors) for the Plaintiff
David Dunlop QC (instructed by Johnsons Solicitors) for the Defendant

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HORNER J

INTRODUCTION

[1] The plaintiff is a limited liability company which operates fitness facilities in Northern Ireland. It was incorporated on 19 September 2001. It changed its name to Bann Sports (NI) Limited on 20 February 2013 and then to Bann Carraig Limited on 5 January 2016.

[2] The plaintiff has been trading and providing gym facilities from January 2012 from leased commercial premises at 51B Church Street, Lurgan Road, Banbridge. The plaintiff had the benefit of a combined policy of insurance, GC17860895, effective from 17 September 2012 to 16 September 2013, with the defendant.

[3] On 11 August 2013 the plaintiff's premises were broken into and vandalised. Damage was caused to the toilets and wash hand basin and there was flooding to the premises. Exercise bikes, furniture, mirrors and other items were damaged. Various items were stolen including computer and audio equipment. The letter of claim of

20 March 2017 valued the claim for the cost of stolen items and repairs to existing equipment as amounting in total to £55,917.29. The business interruption claim was for £153,850 with the plaintiff's loss being capped at £133,330. It goes on to state the plaintiff has been paid £25,000 in respect of the stolen items and repairs to existing equipment leaving, it is claimed, an agreed balance of £30,917.29. There was also a payment of £5,000 on account in respect of the capped claim of £133,330 for the business interruption claim.

[4] A writ of summons followed some 3 years after the letter of claim on 12 February 2020. There is no explanation for this delay. The defence served alleges that the plaintiff's claim under the insurance policy is statute barred. A successful application was made earlier to try the issue of whether the plaintiff's claim is statute barred as a preliminary issue. The writ of summons was issued more than 6 years from the date on which the damage occurred in August 2013.

THE LIMITATION ISSUE

The Plaintiff's Case

[5] The plaintiff essentially makes two points. First of all, the plaintiff submits that the greater part of the plaintiff's claim relates to a business interruption claim and this was a loss which continued over a twelve month period. Therefore the loss to which the plaintiff is entitled to be indemnified extended to 11 August 2014. As the limitation period is 6 years from the date of loss, that means that the business interruption loss for a period of almost 6 months from 12 February 2014 can be recovered under the policy of insurance.

[6] Further, the plaintiff has made two part payments, the last of which was made on 28 February 2014. The part payments amounted to £30,000, apportioned £25,000 to the property damage claim and £5,000 towards the business interruption claim. The plaintiff claims that it can rely on Article 65(1) of the Limitation (NI) Order 1989 which reads:

> "65(1) Where –
>
> (a) any right of action has accrued to recover any debt; and
>
> (b) the person liable therefor makes any payment in respect thereof,
>
> the right of action is to be treated as having accrued on and not before the date of the payment."

[7] It is common case that the writ was issued within 6 years of the date of the payment of the £30,000 and therefore the plaintiff argues that there has been a fresh accrual of a right of action, which means that the claim cannot be statute barred.

The Defendant's Case

[8] The defendant says that the plaintiff's claim accrued from the date of its loss, that is on 11 August 2013 and accordingly when the writ was issued on 12 February 2020 more than 6 years had passed and the plaintiff's claim was statute barred. It is impermissible to treat the claim for an indemnity as continuing to accrue due to the end of the business interruption period. Furthermore, it denies that the plaintiff is entitled to rely on Article 65(1) of the Limitation (Northern Ireland) Order on the basis that the claim on behalf of the plaintiff is not one to recover a debt but is in fact a claim for unliquidated damages. Accordingly, Section 65 does not apply.

DISCUSSION

Accrual of Cause of Action

[9] There is a real dispute between the parties as to when the plaintiff's cause of action accrued. This was not a policy of liability insurance. That is a policy where the event insured against affects the insured financially by reason of it becoming liable to pay to a third party in either damages for breach of contract or tort, or some other form of compensation, restitution or reimbursement, for example, for accidental injury: see Halsburys' Laws of England Vol 60 at paragraph 632.

[10] This is a policy of insurance where, inter alia, the plaintiff insured against the risks of:

(a) Property damage (Section 1); and

(b) Business interruption (Section 2) caused to it by the acts of third parties.

[11] This was a typical contract of indemnity in the sense that the defendant's liability was limited to the losses actually sustained and proved by the plaintiff. In *Versloot Dredging BV and another v HDI Gerling Industrie Versicherung AG and others; the DC Merwestone* [2016] UKSC 45, Lord Sumption said at paragraph [24]:

> "24. The starting point is that in law it is not a precondition of the insurer's liability that a claim should have been made on him. The insured's right to indemnity arises as soon as the loss is suffered: *Chandris v Argo Insurance Co Ltd* [1963] 2 Lloyd's Rep 65; *Firma C-Trade SA v Newcastle Protection and Indemnity Association, The Fanti* [1991] 2 AC 1, 35-36 per Lord Goff."

[12] In *Globe Church Incorporated v Allianz Australia Insurance Limited and another* [2019] NSWCA 27 two insurers covered the claimant under an Industrial Special Risks policy, splitting the risk between them 60%/40% for year ending 31 March 2008. The claimant's premises suffered (what was claimed to be insured) water damage. The damage was first sustained during the 2008 Policy period. The claimant also alleged that, as a result of the damage it incurred additional (allegedly insured) costs, suffered business interruption losses and incurred professional fees for the preparation of its claim against the insurers.

[13] The majority of the New South Wales Court of Appeal observed that the policy was one of indemnity insurance. Absent a provision that made lodgement of a claim a condition precedent to liability, the concept of a promise to indemnify (to make good the loss or to hold harmless against loss) in the context of a property damage insurance policy is such that the promise is enlivened when the property damage is suffered. Unless it is necessary for there to be a claim made on the insurer to give rise to the liability, it is at the point of property damage that the insured has not been held harmless against the loss (leaving aside any defences that might be raised on such a claim). It is then that the insured would be entitled to sue to enforce the promise to indemnify.

[14] Halsbury's Laws of England Vol 60 at 205 state:

> "Proceedings founded on the contract of insurance cannot be brought after the expiration of 6 years from the date on which the cause of action accrued …
>
> For the purposes of determining a date at which a cause of action accrued, there is in general a distinction to be drawn between policies of liability insurance on the one hand and all other types of policy on the other. The cause of action does not accrue under a liability policy until the liability of the insurer is established by judgement, arbitration or binding settlement. However, in respect of other types of insurance, in the absence of policy terms affecting the matter, the limitation period begins to run as soon as the insured event occurs, even though no claim has been made. This is because an insurance contract is to be construed as insurance against the incurrence of an insured event, and the occurrence of that event is treated as equivalent to a breach of contract by the insurer."

[15] From its terms, the instant policy was clearly not a policy of liability insurance. Time began to run from the date of damage. In those circumstances as more than 6 years have passed since the date of damage before the plaintiff issued its writ of summons, its claim is prima facie statute barred.

[16] However, the plaintiff alleges that while the property damage claim may have accrued due on the date of damage, the business interruption claim accrued due on each of the days which were the subject of the consequential loss claims, that is over the period of one year.

It is important to appreciate that in *Globe Church Incorporated* it was an agreed fact that the end of September 2009 was when the business interruption loss and professional fees began to be incurred. The property damage was caused by the undermining of the pier footings to the Church Hall and car park and occurred between 8 June 2007 and 31 March 2008 with further damage occurring up to March 2013. Both claims were proved under the 2008 policy. The case made by the insurers was that as a matter of principle Globe's causes of action for damages under the 2008 policy were not maintainable "since the damage occurred more than 6 years before the commencement of proceedings." The New South Wales Court of Appeal reached the following conclusions:

> "[130] As to the claims for additional costs and consequential loss (under clauses 3 and 9 of the 2008 Policy) we have concluded that there is not a freestanding cause of action each time a loss of that kind is incurred. In *Larking v Great Western (Nepean) Gravel Limited (in liq)* [1940] 64 CLR 221, to which the defendants referred, Dixon J, as His Honour then was, addressed the question whether certain covenants in a lease operated to impose a continuing duty upon the respondent company so that the failure (to erect a fence) involved new breaches for every day of default. His Honour said (at 236):
>
> > 'If a covenanter undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. The duty is not considered as persisting and, so to speak, being forever renewed until he actually does that which he promised. On the other hand, if his covenant is to maintain a state or condition of affairs, as, for instance, maintaining a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, and a further breach arising in each successive moment of time during which the state or condition was not as promised, during which, to pursue the

> examples, the building is out of repair, the life uninsured or the particular support unprovided.'
>
> [131] His Honour went on to say the distinction may be difficult in its application to the given case, but must be regarded as depending upon the meaning of the covenant. In the present case, the covenants to indemnify against additional costs and for loss occasioned by interruption to business and professional fees are covenants to do a definite act – to make good the loss or to hold the insured harmless against the loss. Once the losses or fees are incurred, and there is a failure to make good these losses, there is a breach; and the fact that it persists does not give rise to a further breach even though the losses may be continuing. Thus, once there is loss caused by interruption to the Business (covered by the indemnity in Clause 9) and the insured is not being made good for that loss there is a cause of action available to the insured – the quantum of the amount finally payable need not then be determined or able to be determined. Similarly, there is not a fresh cause of action for each invoice in respect of professional fees incurred in preparation of the claim. Rather, once property damage has resulted and professional services are retained, and fees incurred in the preparation of a claim, the cause of action under the indemnity in Clause 9 accrues (even though the amount of those fees might not be finally determined at that time). That does not mean that there may not be distinct breaches of the promises to indemnify accruing at different times, but in the present case, those additional and consequential losses all commenced outside the limitation periods and the continuing failure to make good those losses does not, in our opinion, give rise to a fresh cause of action after the expiry of the limitation period …"

[17] I am persuaded that the same line of reasoning holds good here. I have carefully considered the policy of insurance. This is not a case where there is a continuing accrual of a cause of action over the business interruption period. Rather it is one where the cause of action accrues when the business is first interrupted "in consequence of loss or destruction of to property used by You at the Premises for the purpose of the Business." The cause of action for business interruption accrued due when the plaintiff first became entitled to claim for it. As this was more than 6 years before the institution of proceedings, such a claim is now statute barred.

Part Payment

[18] The plaintiff sought to escape the consequences of issuing a writ more than 6 years after the date of damage by arguing that there was part payment of its claim by the defendant on or about 28 February 2014. It claimed that the effect of this payment was to set time running again under Article 65. In particular, it relied on the case of *Phillips & Co (A Firm) v Bath Housing Co-operative Limited* [2012] EWCA 1591. That was a case involving a solicitors' claim for costs against their client when the proceedings on their face, had been issued more than 6 years after the letter setting out the costs had been sent. The solicitors relied on the acknowledgement made in writing to their claim as extending the time period to the date of that letter which meant that the claim for the untaxed bill was extended to the date of the letter from the client querying how the costs were made up. In the present case the plaintiff says that the part payment of the claimed losses by the defendant has the effect of extending the date when time begins to run to 28 February 2014.

[19] The defendant responds by pointing out that the plaintiff's claim is one for unliquidated damages on foot of a policy of insurance. In *The Fanti* [1990] 2 Lloyd's Rep at p202 col1, Lord Goff said:

> "I accept that at common law a contract of indemnity gives rise to a claim for unliquidated damages arising from the failure of the indemnifier to prevent the indemnified person from suffering damage, for example, for having to pay a third party. I also accept that, at common law, the cause of action does not (unless the contract provides otherwise) arise until the indemnified person can show actual loss – see *Collinge v Heywood* [1839] Ad & E 634. This is, as I understand it, because a promise of indemnity is simply a promise to hold the indemnified person harmless against specified loss or expense. On this basis, no debt can arise before the loss is suffered or the expense incurred: however, once the loss is suffered or the expense incurred, the indemnifier is in breach of contract for having failed to hold the indemnified person harmless against the relevant loss and expense."

In *Callaghan v Dominion Insurance Co Ltd* [1997] 2 Lloyd's Rep 541 Sir Peter Webster said at page 544 that:

> "It seems to me that the best way define an indemnity insurance is that it is an agreement by the insurer to confer on the insured a contractual right which, prima facie, comes into existence immediately when loss is

> suffered by the happening of an event insured against, to be put by the insurer into the same position in which the insured would have been had the event not occurred, but in no better position."

[20] There can be no doubt that the plaintiff's claim is one for unliquidated damages. In *Sprung v Royal Insurance (UK) Ltd* [1999] Lloyd's Rep IR111 Sir Beldam giving the main judgment of the Court of Appeal said:

> "… the Plaintiff's claim was one for unliquated damages, that being the nature of the claim under an insurance policy …"

[21] I find that the plaintiff is quite unable to call in aid Article 65 of the Limitation (Northern Ireland) Order 1989 because the terms of the Article dealing with part payment have no application to unliquidated claims for damages such as the plaintiff's present claim against the defendant: see, for example, 18.005 of McGee on Limitation Periods.

CONCLUSION

[22] On the basis of the present information, I conclude that the plaintiff's claim is statute barred. The cause of action, that is the right to be indemnified in respect of the loss suffered under a combined policy of insurance, accrued due on the date of damage and the writ was issued more than 6 years after that date. The attempt to rely on the defendant making part payment of a debt fails because the plaintiff's claim is not for a debt but, rather is a claim for unliquidated damages payable on foot of the policy of insurance with the defendant.