Case No: C14YM052

IN THE CENTRAL LONDON COUNTY COURT
Royal Courts of Justice
Strand, London, WC2A 2LL

On Appeal from DJ Sterlini
sitting at Clerkenwell & Shoreditch County Court

Date: 19th July 2017

Before :

Mr Recorder Grahame Aldous QC

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Between :

Mrs Filiz Karakus	**Claimant**
- and -	
Tradewise Insurance Services Ltd	**2nd Defendant**

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Jason Evans-Tovey Esq. (Instructed by **Nesbit Law Group LLP**) for the **Claimant**
Shaman Kapoor Esq. (Instructed by **Horwich Farrelly**) for the **2nd Defendant.**

Hearing date: 23rd June 2017

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Judgment:

The Issue

1. This appeal raises the issue of whether an action brought directly against a motor insurer under Regln. 3 of The European Communities (Rights Against Insurers) Regulations 2002 ('Regln. 3' and 'the 2002 Reglns' respectively) is an action to which the 3 year limitation imposed by s. 11 Limitation Act 1980 applies, or whether the only applicable limitation period is that of 6 years under s. 9 of the Limitation Act 1980.

2. It is common ground that if the 3 year limitation period applies then these proceedings were brought outside that period and they should be dismissed. No application is

made to extend time under s. 33 of the 1980 Act. Equally, it is common ground that if the 6 year limit is applicable then these proceedings were issued within time and should proceed.

The Background

3. On 23rd September 2016 this matter came before District Judge Sterlini, who concluded that s. 11 did apply and accordingly made an order that the claim be dismissed. There is no judgment or transcript available from the court below, and I am told by counsel that no detailed judgment was given and the District Judge merely indicated that the action was one to which the 3 year limit applied and should accordingly be dismissed. The District Judge did, however, grant permission to appeal. The point is one of law. No issue of fact or the exercise of discretion arises. Accordingly I approach this appeal on the basis that I should determine the issue of law that has been raised, and the absence of any detailed reasoning from the court below is of no consequence..

4. The Claimant contends that on 14th October 2011 she was a passenger in a Volvo motor car when it was involved in a collision with another vehicle driven by an employee of the 1st Defendant, and that as a result she suffered personal injuries. The accident occurred within the UK. The 2nd Defendant is the motor insurer for the 1st Defendant and the vehicle in question.

5. The Claimant issued proceedings on 27th May 2016, more than 3 years, but less than 6 years, after the accident. She named the 1st and 2nd Defendants but also named as 3rd and 4th Defendants the driver of the Volvo and his insurer respectively. I am told that the proceedings against the 1st Defendant have been struck out without objection as being time barred. No application under s. 33 of the 1980 Act has been made. I am also told that the proceedings against the 3rd and 4th Defendants have been discontinued. That leaves only the 2nd Defendant, as the motor insurer for the 1st Defendant.

6. The Claim Form states that 'The Claimant claims damages arising from a road traffic accident that took place on 14th October 2011'. It adds that 'The Claimant pursues the

claim in accordance with the provisions of [the 2002 Reglns]'. Reference is made to the attached Particulars of Claim.

7. By her Particulars of Claim dated 25th May 2016 the Claimant claims only damages for pain, suffering and loss of amenity, limited to £5,000. The prayer claims 'Damages in excess of £3,000 but limited to £5,000, including a claim for general damages for pain, suffering and loss of amenity in excess of £1,000' together with interest thereon and costs. No other relief is sought.

The Limitation Act

8. S. 9 of the Limitation Act 1980 provides that an action to recover any sum recoverable by virtue of any enactment shall not be brought after the expiration of 6 years from the date on which the cause of action accrued. Mr Evans-Tovey on behalf of the Claimant contends that the remaining action is one brought under an enactment, namely the 2002 Reglns, and that the Claimant has 6 years from the date of the accident, being the date upon which he asserts the cause of action arose, within which to bring proceedings.

9. S. 11 of the Limitation Act 1980 provides a special time limit for actions in respect of personal injuries. The section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of a provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person. Where the section applies then the applicable limitation period is 3 years from the date on which the cause of action accrued, or the date of knowledge (if later) of the person injured. That period expired 3 years after the accident in the present case, and before the issue of proceedings.

The Regulation

10. As against the 2nd Defendant the Particulars of Claim plead, at para. 15, that 'By virtue of Regln. 3 (2) of the 2002 Regulations the Second Defendant has been and

remains directly liable to the Claimant to the extent that the Second Defendant is liable to the First Defendant'.

11. Regln. 3 (2) of the 2002 Reglns provides that in the circumstances of the present case the Claimant 'may, without prejudice to [her] right to issue proceedings against the insured person [i.e. the 1st Defendant], issue proceedings against the insurer which issued the policy of insurance relating to the insured vehicle [i.e. the 2nd Defendant], and that insurer shall be directly liable to the entitled party [i.e. the Claimant] to the extent that he [i.e. the 2nd Defendant] is liable to the insured person [i.e. to the 1st Defendant]'.

Damages or Indemnity?

12. The issue that arises in the present case is whether that regulation gives a direct right of action against the insurer for the liability of the insured for damages for negligence that consist of or include damages in respect of personal injury, or whether it gives rise, as the Claimant contends, to a different sort of action, a right to enforce the indemnity that the insured is entitled to from the insurer by issuing proceedings directly against the insurer. If it is the latter, then the Claimant contends that it is a claim for a contractual indemnity rather than damages, and that it is brought by reason of an enactment and is subject to s. 9 and not s. 11 of the 1980 Act.

13. Whilst the amount of the indemnity may be calculated by reference to the damages that the Claimant would have obtained against the 1st Defendant for her personal injuries, the Claimant contends that the indemnity to which she is entitled under Regln. 3 is an indemnity that she is entitled to under the regulation and is not damages for personal injury. She is not therefore caught by s. 11, so she contends, and can sue the insurer even though she is out of time to sue the insured.

14. This issue raises the question of what is meant by the right 'to issue proceedings against the insurer' and the provision that 'that insurer shall be directly liable' to the Claimant. The Claimant contends that the right is the right to issue proceedings for whatever indemnity the insured would have been entitled to and that the liability of the insurer is defined by the words 'to the extent that he is liable to the insured

person'. The liability, it is contended, is for, rather than to, the extent of the insurer's liability to indemnify.

15. The 2002 Reglns were made to give effect to the EU Directive 2000/26/EC of 16th May 2000, the so-called Fourth Motor Insurance Directive ('the 4th MID'). It is in the context of that Directive that I must approach the task of construing the 2002 Reglns. A duty to approach the matter in this way can be derived from Article 4 of the Treaty of the European Union and numerous authorities of the ECJ, but the same approach would be required to a certain extent by the common law so long as it did not involve departing from the wording of the statutory provision. I have been taken by both counsel to three judgments in *Howe v MIB*. In *Howe v MIB (No. 2*) [2016] EWHC 884 (QB) at para. 14 Stewart J. adopted the dicta of Lord Mance JSC in *Bloomsbury International Ltd v DEFRA* [2011] 1 WLR 1546, para. 10 where he summarised the approach to be taken thus:

'In matters of statutory construction, the statutory purpose and the general scheme by which it is to be put into effect are of central importance. They represent the context in which individual words are to be understood. In this area as in the area of contractual construction, 'the notion of words having a natural meaning' is not always helpful…and certainly not as a starting point, before identifying the legislative purpose and scheme.'

16. Article 1 of the 4th MID provides that 'The objective of this Directive is to lay down special provisions applicable to injured parties entitled to compensation in respect of any loss or injury resulting from accidents….' In the light of that objective Article 3 provides that 'Each member State shall ensure that injured parties referred to in Article 1 in accidents within the meaning of that provision enjoy a direct right of action against the insurance undertaking covering the responsible person against civil liability'.

17. It seems clear to me that the purpose and intent of both the Directive and the Regulations was to make it easier for injured parties to enforce their rights to compensation by being able to enforce those rights directly against the insurers concerned. The focus is on the right to compensation rather than the right to enforce

the contractual indemnity rights of insured persons. When Regln. 3 refers to the right to 'issue proceedings against the insurer' the proceedings that are referred to are proceedings for the relief that could otherwise be claimed against the insured. It is a separate right to bring proceedings that only arises in the circumstances provided for by the regulation. It is against a different party. It arises as a result of that party's contractual relationship as indemnifier. It is, however, a right to claim the compensation that could have been claimed against the insured. That is why it is without prejudice to the right to issue proceedings against the insured person, it is saying that the same relief can be sought against both at the same time, but that the relief can be sought directly against the insurer with or without joining in the insured. When Regln 3 says that the insurer 'shall be directly liable' to the claimant it means that the insurer shall be directly liable to the claimant for the liability of the insured, i.e. in this case the liability for damages for personal injuries caused by negligence.

18. That interpretation is, in my view, supported by the final words. The effect of those words is not to define what the liability <u>for</u>, it is to set what the liability is limited <u>to</u>. The insurer's liability is limited 'to the extent that he is liable to the insured person'. I accept the Claimant's submission that this is a reference to the extent of what would be the insurer's liability to indemnify the insured, but in order for the liability to be limited <u>to</u> that extent then it must otherwise be capable of being greater than that, i.e. the liability is for the compensation that the directive is focused on, but limited by the regulation to what the insurer would be liable to indemnify the insured for.

19. To accept the Claimant's contention would involve a strained construction of the regulations. The Claimant contends that the insurer's liability is defined by, rather than limited to, what the insured could have sued the insurer to be indemnified for. In a case such as the present the insured has no right to be indemnified as it will not have to pay anything out. If the 2002 Regulations are to be interpreted as allowing a Claimant to enforce an indemnity that the insured could not actually claim, then it produces a very odd way of giving effect to the purpose of the Directive. If I was compelled to that interpretation by the words used, or by binding authority, then I would accept such an interpretation. In my view, however, the alternative interpretation, that it is a direct right to claim damages for personal injury due to the insured's negligence, imposed due to the contractual indemnity provision that the

insurer has accepted a premium for, is a more straightforward one. It more clearly gives effect to the purpose of the Directive to make special provision for the recovery of compensation.

20. Further, in his written speaking note, Mr Evans-Tovey contends that the contractual indemnity does not arise until the liability of the insured has been established. He relies of the authority of *Post Office v Norwich Union* [1967] 2 QB 363. It seems to me that that is a very real reason why the 2002 regulations cannot have been intended to give a direct action to enforce an indemnity, since it would be a right to enforce something that did not yet exist. Further, if Mr Evans-Tovey's suggestion is right then that would be quite inconsistent with his suggestion that time runs from the date of the accident, at which point no such liability would have been established.

21. For these reasons is seems to me that on a proper construction of the 2002 Reglns, the liability of the insurer is for damages for personal injury as claimed in the Particulars of Claim. It is not a claim for an indemnity to be calculated by reference to what an award for damages for personal injury would have been. It is not a claim akin to that in *Ackbar v C.F Green & Co Ltd* [1957] QB 582, whose authority I do not doubt, where a claim for damages for professional negligence that led to a failure to recover damages for personal injury was not itself a claim for damages in respect of personal injury. Nor do the 2002 regulations give rise to a statutory right to claim an indemnity under a contract of insurance rather than a direct liability for the negligence of the insured, see *Burns v Shuttlehurst Ltd* [1999] 1449, 1457 D, per Stuart-Smith L.J. It is a claim in negligence for damages for personal injury caused by an insured vehicle in a motor accident in the UK that can be brought against the 2nd Defendant by reason of the 2002 Reglns.

Nemeti

22. It is submitted on behalf of the Claimant, however, that it is not open to me to find as I have set out above, but rather that I am bound by authority of the Court of Appeal to find the contrary. In *Nemeti v Sabre Insurance Co Ltd* [2013] EWCA Civ. 1555, the Claimants issued proceedings for damages for personal injury arising from a road traffic accident against insurers of a driver involved in the accident. They did so

purportedly under the 2002 regulations. In fact the 2002 regulations did not apply as the accident had taken place in Romania. Outside of the three year limitation period they applied to add/substitute the driver's estate in place of the insurer under s. 35 Limitation Act 1980. The case turned on the scope of s. 35, as reflected in the provisions for addition and/or substitution of parties under CPR 19.

23. S. 35 provides in subsection (5) (b) that for the addition or substitution of a new party the addition or substitution must be necessary for the determination of the original action. Subparagraph (6) provides that an addition or substitution of a new party (as was sought in *Nemeti*) shall not be regarded as necessary for that purpose unless either (a) the new party is substituted for a party whose name was given in any claim made in the original action in mistake for the new party's name, or (b) any claim already made in the original action cannot be maintained by or against an existing party unless the new party is joined or substituted as plaintiff or defendant in that action.

24. The Court of Appeal held that the Claimant had not made a mistake as to the name of the party they intended to sue within the scope of s. 35, but had sued the party they intended to sue in the mistaken belief that they would be liable. They were not liable under the regulations and that would not be cured by joining the Estate. It is not difficult to see why they reached that decision, and clearly it is binding on me. As Hallet L.J said at para 41 'Absent s.35 and CPR 19 there is no power to substitute the deceased's Estate outside the limitation period'.

25. The judgment of Hallet L.J., however, goes on to comment on the nature of the cause of action under the 2002 regulations. It was a judgment with which the other members of the court agreed. In the course of the comments Hallet L.J. said:

'The original claim was not, therefore, a claim for damages for personal injury against the respondents, as Mr Burton insisted. It was not a claim in negligence. It was effectively a claim for an indemnity under statute (as the Claim Form made clear) limited to the respondents' liability to their insured'.

26. Understandably Mr Evans-Tovey placed great reliance on those words, which appear to support his submission about the nature of the Claimant's claim against the 2nd Defendant.

27. Further, the passage that I have referred to was also referred to by Stewart J. in *Howe v MIB (No. 2)* [2016] EWHC 884, para. 18, in the course of a judgment where he considered whether a claim against the MIB under the Motor Vehicles (Compulsory Insurance) Regulations 2003 was subject to the qualified one way costs shifting provisions of CPR 44. He found that a claim against the MIB in such circumstances was a cause of action for a civil debt which was recoverable independently of any breach of duty or other wrongdoing by the bureau and that accordingly it was not a claim for damages for personal injuries. It is said that although Stewart J. was considering a different regulation and was not considering the issue that I have to determine, his reasoning and reference to the passage from Hallett L.J. are supportive of the argument that I should adopt the Claimant's submissions as to the effect of the passage.

28. In due course an application was made to the Court of Appeal for permission to appeal the original, earlier decision of Stewart J. that had led to the need to consider the costs position. It was heard by LLoyd Jones and Christopher Clarke L.JJ. and cited as *Howe v MIB* [2017] EWCA Civ 302. At para 18, Christopher Clarke L. J. said:

    'It is not self-evident that a claim for compensation under Regulation 13 (2) is an action for breach of duty as opposed to an action sui generis for compensation under the Regulations.'

    Lloyd Jones L.J. agreed. Once again, they were considering a different point to one I need to consider, but they did not consider it to be a resolved point.

29. It seems to me that what I need to do to resolve this issue is to consider what the relevant passage in the judgment of Hallett L.J. was intending to convey. As I read the judgment of Hallett L.J. what it was doing was explaining that the original action under the 2002 Regulations had a different basis (the regulations) to the new proposed claim against the estate and the claimant's mistake had not been as to the identity of

the estate or the insurer so as to fall within s. 35. Any comments about the exact nature of the differences in the claims against the estate and under the 2002 Regulations were not part of the ratio decidendi, but were obiter dicta. I accept entirely that the analysis of the Court of Appeal is entitled to the greatest of respect even if it is obiter. Here, there was agreement by a strongly constituted Court. The reason, however, why obiter dicta are not binding is that where the focus of the court is on a particular point they may say things that appear to decide a tangential point, but which are not really intended to do so and are not based on any proper submissions or analysis of that different point. That, in my view, is the case here. In my view the Court of Appeal in *Nemeti* would be very surprised to hear that they had extended the limitation period to 6 years from 3 for claims against the insurer under the 2002 Reglns and/or were implementing two different limitation regimes for claims in respect of a single accident. They were simply not considering the issue that I now have to decide. Nor were Stewart J. or the Court of Appeal in *Howe v MIB*.

Howe v MIB Court of Appeal 2017

30. Since providing the parties with the above judgment in draft pursuant to CPR PD 40E, the Court of Appeal have delivered judgment in the appeal from Stewart J. in *Howe v MIB* [2017] EWCA Civ 932. Counsel for the parties quite properly drew the authority to my attention promptly. I invited further written submissions. I have now received and considered those submissions.

31. The Court of Appeal allowed the appeal from Stewart J.'s ruling on the QOCS provisions of CPR 44 and the 2003 regulations that I have referred to above. They did so as they considered that taking an interpretive approach in line with the underlying objectives of the directive in that case the claim against the MIB should be considered to be a claim for damages for personal injury within CPR 44. In that case they considered that they needed to go further than the strict wording of CPR 44 pursuant to the positive duty to give effect to the objectives of EU law.

32. For the reasons that I have given above I do not feel that it is necessary to go that far in the present case. If it were necessary, however, then it is plain from the Court of Appeal's reasoning that the court would be justified in so doing.

33. The Court of Appeal did not expressly consider the judgment in *Nemeti* and in my view its latest judgment does not disturb my reasoning set out above, but rather is entirely supportive of the underlying rationale.

Conclusion

34. As I have indicated above, the Claim Form and Particulars of Claim clearly frame the claim against all the Defendants, including the 2nd Defendant as a claim for damages for personal injury. Like Otton L.J. in *Bennett v Greenland* [1998] PNLR 458, 463, 'I start with the way the case is pleaded', although I accept that when it comes to s. 11 'The question whether an action is for damages in respect of personal injuries is one of substance, and not a matter of pleading', per Auld L.J. in *Walkin v South Manchester HA* [1995] 1 WLR 1543, 1551, quoted by Otton L.J. in *Bennett v Greenland* at page 461. In my view the claim against the 2nd Defendant was properly pleaded as a claim for damages for personal injury arising due to the negligence of the 1st Defendant, for which the 2nd Defendant is responsible under the regulations to the extent of its liability to indemnify under the terms of the insurance.

35. It follows also that in my view the decision of the District Judge was correct, this is a claim that falls within s. 11. It was issued outside the 3 year time limit and the District Judge was right to dismiss the claim. That is a result that is consistent with the policy of both the 2002 Reglns and s. 11, and produces a sensible result rather than introducing different limitation regimes for claims against the insured and the insurer. For these reasons, I dismiss the appeal.