Neutral Citation Number: [2025] EWHC 1342 (KB)

Case No: QB-2022-BHM-000097

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BIRMINGHAM DISTRICT REGISTRY

Birmingham Civil and Family Justice
The Priory Courts
33 Bull Street
Birmingham B4 6DS

Date: 05/06/2025

Before :

Her Honour Judge EMMA KELLY
Sitting as a Judge of the High Court

- -

Between :

Miss Hannah Archer — **Claimant**

- and –

R 'N' F Catering Limited
(t/a Biplob Restaurant)
(In Members Voluntary Liquidation) — **First Defendant**

Riverstone Insurance (Malta) SE — **Second Defendant**

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Nicholas Cobill (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Shail Patel KC (instructed by **DWF Law LLP**) for the **Second Defendant**

Hearing date: **13 May 2025**

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APPROVED JUDGMENT

HHJ Emma Kelly:

1. This judgment concerns a preliminary issue, namely whether Riverstone Insurance (Malta) SE ('the Second Defendant') is potentially liable to Miss Hannah Archer ('the Claimant') pursuant to the Third Parties (Rights against Insurers) Act 2010 ('TPRAI Act 2010'). Such potential liability would only accrue if the Claimant established liability against R 'N' F Catering Limited ('the First Defendant').

Procedural background

2. On 5 July 2022, the Claimant issued a claim against the First Defendant seeking damages for personal injury arising from a gastrointestinal illness she alleges was contracted on her consumption of a meal at the First Defendant's restaurant on 26 July 2019.

3. The First Defendant held a restaurant insurance package ('the Policy') with ArgoGlobal SE covering the period 18 September 2018 to 17 September 2019. The alleged incident thus fell within the period of cover. The Second Defendant is the successor in title to ArgoGlobal SE ('Argo').

4. On 7 December 2022, the First Defendant filed a defence denying liability but has thereafter played no active role in the proceedings. That defence stands struck out as a result of non-compliance with an unless order, dated 3 February 2023.

5. On 14 February 2023, the First Defendant entered members' voluntary liquidation.

6. By consent order dated 9 July 2024, the Second Defendant was added to the proceedings.

7. The Claimant's amended particulars of claim plead at [14C] – [14D]:

    i) Under the terms of the Policy, the First Defendant was entitled to be indemnified by the Second Defendant in respect of its potential liability to the Claimant.

    ii) The First Defendant is a 'relevant person' for the purpose of the TPRAI Act 2010, having been wound up voluntarily.

    iii) By virtue of s.1(2) of the TPRAI Act 2010, the rights of the First Defendant against the Second Defendant to be indemnified under the Policy were transferred to and vested in the Claimant.

8. By defence dated 23 September 2024, the Second Defendant denies that the Claimant is entitled to rely on the TPRAI Act 2010. At [34] – [39] of the defence, the Second Defendant asserts that the First Defendant had no right of indemnity due to its breaches of conditions precedent in the Policy found at General Condition 2 (reasonable care), General Claims Condition 1a (notification of a claim or circumstances as soon as reasonably practicable), General Condition 1e (supply of full details of the claim together with relevant

evidence and information within 30 days of a circumstance or request) and General Claims Condition 6 (claims cooperation). I will return to the details of the conditions of the Policy shortly.

9. In a reply, dated 11 October 2024, the Claimant pleads:

   i) At [10(1)], pursuant to s.9(2) of the TPRAI Act 2010, the Claimant fulfilled the terms of the Policy and her acts of compliance are to be treated as if done by the First Defendant.

   ii) At [10(2)], pursuant to s.9(4) of the TPRAI Act 2010, the Second Defendant is estopped from declining to indemnify the Claimant on the basis that the First Defendant failed to notify the Second Defendant of the existence of the claim.

   iii) At [3(3)(a)], [3(3)(b)], [3(4)], [8] and [9], she relied to her detriment on a letter from the Second Defendant's claims handlers, dated 27 November 2020, advising her to correspond with the First Defendant directly, such that the Second Defendant is now estopped from asserting it can decline to indemnify the Claimant.

10. By rejoinder dated 31 October 2024, the Second Defendant pleads:

   i) At [3] and [8], a denial that the letter of 27 November 2020 stated that the claim had been validly notified to the Second Defendant or otherwise made any 'representation' in a legally relevant sense or that an estoppel could arise.

   ii) At [5], [6] and [12], a denial that the Claimant fulfilled the conditions of the Policy so as to rely on s.9(2) of the TPRAI Act 2010 in circumstances where the transfer of any rights under s.1(2) of the TPRAI Act 2010 did not take effect until 14 February 2023 and the breaches of the Policy pre-dated that time.

   iii) At [13], a denial that s.9(4) is applicable, and avers that the Claimant's reference to an alleged estoppel under s.9(4) makes no legal sense.

11. By order dated 5 November 2024, DJ Dickinson directed that the issue of the Second Defendant's potential liability be determined as a preliminary issue.

Issues

12. The parties did not prepare an agreed schedule of issues in advance of the preliminary issue trial. That was not helpful to the court. At the start of the trial and to ensure everyone was clear as to the issues to be determined, I sought clarification from Mr Cobill as to the basis upon which the Claimant put her case. He stated that the Claimant was no longer seeking to rely on s.9(3) or 9(4) of the TPRAI Act 2010, nor any estoppel argument. However, he indicated that the Claimant wished to argue that the Second Defendant had not exercised its discretion fairly and reasonably when refusing to indemnify the First Defendant. I queried whether that issue had been pleaded. Mr Cobill confirmed it had not,

and that the Second Defendant opposed the late inclusion of this non-pleaded argument. Mr Cobill did not seek to persuade the court that the new argument should be included and indicated he would not pursue the issue. That was plainly a sensible concession. The courts have emphasised the importance of statements of case on multiple occasions. See, for example, Nugee LJ in *Satyam Enterprises Ltd v Burton & another* [2021] EWCA Civ 287 at [35] and Dyson LJ in *Al-Medenni v Mars UK Ltd* [2005] EWCA Civ 104 at [21].

13. The following issues remain live and require determination:

    i) Can the Second Defendant prove that the First Defendant is not entitled to an indemnity under the Policy?

    ii) Does s.9(2) of the TPRAI Act 2010 assist the Claimant to render the Second Defendant potentially liable to the Claimant on proof of the First Defendant's liability?

Assumed Facts

14. For the purpose of the preliminary issue trial, the Claimant and Second Defendant have prepared the following schedule of assumed facts:

> "On 26 July 2019, as a result of a meal consumed at D1's restaurant, C contracted Campylobacter. On 12 August 2019, whilst in hospital, a scan revealed C's powers had perforated. An operation was performed resulting in the removal of most of her large bowel. An ileostomy was performed and C was fitted with a stoma bag. On 23 August 2019, C was discharged from hospital. She has been left with a stoma bag and has severe scarring on her abdomen as a result of the operation. She suffers *inter alia* from stomach cramps and has had further surgery to remove an obstruction due to scar tissue caused by the original operation. The effects of the incident have been traumatic."

Evidence

15. The Claimant relies on her witness statement, dated 20 January 2025, and that of her solicitor, Mr James Blower, dated 6 February 2025. Following discussion between the parties in advance of the trial, those witness statements were redacted slightly into a form that the Second Defendant was prepared to agree. The court did not, therefore, hear oral evidence from either the Claimant or Mr Blower.

16. The Second Defendant relies on the witness statement of Mr Alan Cobbett, a Senior Claims Adjuster employed by Riverstone Management Limited, dated 28 February 2025. Mr Cobbett was cross examined.

17. Following the exchange of witness statements, the Claimant and Second Defendant prepared a helpful schedule of agreed facts. The agreed facts reflect much of the content of the witness statements, which themselves rehearse the chronology of interactions between the various parties.

The Policy

18. The Policy comprises a schedule of insurance ('the Schedule') and a 67-page document titled 'Small Business/SME Package Cover Policy Document' ('the Policy Document'). The First Defendant is identified on the Schedule as the policyholder.

19. Under the section entitled 'Definitions', the Policy Document states:

> "Insured – The person persons or company named in the Schedule including subsidiary companies notified to and agreed as accepted by the Insurer […]
>
> Insurer – ArgoGlobal SE"

20. Under the section entitled 'General Conditions', the Policy Document states:

> "2) Reasonable Care
>
> The Insured shall
>
> a) take all reasonable precautions to prevent or diminish loss destruction damage or injury […]
>
> 8) Observance of Terms
>
> It is a condition precedent to the Insurer's liability that the Insured shall observe the terms of the policy so far as they relate to anything to be done or complied with"

21. Under the section entitled 'General Claims Conditions', the Policy Document states:

> "1) Action by the Insured
>
> On the happening of any event or circumstance which could give rise to a claim by the Insured under the Policy or on receiving verbal or written notice of any claim the Insured shall
>
> a) as soon as reasonably possible give notice to the Insurer […]
>
> e) at their own expense supply full details of the claim in writing to the Insurer together with any evidence and information that may be reasonably required by the Insurer for the purpose of investigating or verifying the claim and if demanded a statutory declaration of the truth of the claim in any matter connected with it within […]
>
> > iii. 30 days of the event or circumstances in the case of any other claim or other request from the Insurer […]
>
> No claim under the Policy shall be payable unless the terms of this Condition have been complied with […]

> 6) Claims Cooperation
>
> The Insured will provide all help and assistance and cooperation required by the Insurer in connection with any claim"

Key events following 26 July 2019

22. The schedule of agreed facts sets out the key interactions between the various relevant parties in the period after the Claimant's illness. The court has been provided with copies of the relevant correspondence.

23. On 29 November 2019, the Claimant sent the First Defendant an email stating that she had contracted Campylobacter following eating a Goan chicken curry at the First Defendant's restaurant on 26 July 2019, she had been severely unwell, and she had her bowel removed.

24. On 10 January 2020, the Claimant's solicitor sent the First Defendant a Claim Notification Form ('CNF') and a covering letter requesting the name, address, and policy number of the First Defendant's insurer. The letter suggested that the First Defendant forward the CNF to its insurer.

25. On 4 May 2020, the Claimant's solicitor sent the First Defendant a letter chasing its insurer's details.

26. On 30 October 2020, the Claimant's solicitor sent the First Defendant a letter of claim. The letter requested the insurer's details by return and requested a copy of the letter be sent to the insurer.

27. On 17 November 2020, the First Defendant contacted its insurance broker, Direct Business Insurance, ('the Broker'), and provided a copy of the CNF, but not the letter of claim. The Broker notified Nationwide Broker Services Ltd ('the Coverholder') of the claim.

28. On 18 November 2020, the Coverholder notified the Second Defendant's claims handlers, Sedgwick International UK, ('Sedgwick') of the claim.

29. On 27 November 2020, Sedgwick wrote to the Claimant's solicitor acknowledging receipt of the letter of 10 January 2020. Sedgwick wrote:

> "Please note that we are instructed by our Principals to investigate policy indemnity as well as the issues pertaining to legal liability on the part of their Insured. In view of this, it will be clear that our investigations into the claim which you make against our Principals' Insured are necessarily being undertaken on a without prejudice basis in relation to both legal liability on the part of the Insured, as well as without prejudice to policy liability. It is also the case that, even when investigations into the circumstances of the claim are complete, we will be unable to make any comment on the part of our Principals or their Insured in relation to their likely legal liability until such time as policy cover is confirmed.
>
> At the point we are instructed that there are no issues in relation to policy response, such that the policy will indeed respond to indemnify the Insured

> against any legal liability which may ultimately be found to attach to them, we will confirm this to you. We will, in the alternative, advise if policy indemnity has been withdrawn such that at that point you may progress your case against the Insured directly as you see fit…"

30. On 27 November 2020, Sedgwick emailed the Coverholder and Broker asking questions about the First Defendant and notification of the claim.

31. On 15 April 2021, the Claimant's solicitor wrote to the First Defendant chasing a response to the letter of claim and for details of the insurer. On 20 May 2021, the Claimant's solicitor sent a further chasing letter.

32. On 4 June 2021, Mr Rokib Ali ('Mr Ali'), the director of the First Defendant, emailed the Broker with a copy of the Claimant's solicitor's letter of 20 May 2021. On the same day, the Broker forwarded the email to the Coverholder, who in turn emailed it to Sedgwick.

33. On 7 June 2021, Sedgwick emailed the First Defendant asking for information about the claim.

34. On 6 July 2021, Sedgwick emailed the First Defendant chasing a response to the email of 7 June.

35. On 20 July 2021, Sedgwick again emailed the First Defendant chasing a response and stating: "failure to assist us with this matter is a breach of policy conditions so if we fail to receive your response your insurer may take the decision to decline indemnity…"

36. On 26 August 2021, Sedgwick emailed the Claimant's solicitor stating that the First Defendant had failed to engage with them despite numerous emails and that they assumed the First Defendant did not wish to be indemnified under the Policy.

37. On 1 September 2021, the Claimant's solicitor emailed Sedgwick asking for confirmation as to whether discussions should continue with Sedgwick or whether the Claimant should approach the First Defendant directly.

38. On 6 September 2021, Sedgwick emailed the Claimant's solicitor, suggesting that they correspond with the First Defendant directly and provided the email address used by Mr Ali on behalf of the First Defendant.

39. On 10 September 2021, 6 December 2021, 14 December 2021, and 3 February 2022, the Claimant's solicitor emailed the First Defendant about the claim, using Mr Ali's email address, but received no response.

40. On 12 May 2022, the Claimant's solicitor wrote to the First Defendant indicating the Claimant was about to issue proceedings. The letter stated it was understood that the First Defendant had not engaged with its insurer and encouraged the First Defendant to notify the insurer.

41. On 9 June 2022, Mr Ali emailed the Claimant's solicitor requesting information about certain aspects of the claim.

42. On 4 July 2022, Mr Ali sent a further email to the Claimant's solicitor requesting the information and stating it was vital he received the information before he appointed a legal team.

43. On 5 July 2022, the Claimant issued proceedings against the First Defendant. The proceedings were served on the First Defendant on 13 October 2022. On 14 October 2022, the Claimant's solicitor also emailed a copy of the claim documents to the First Defendant.

44. On 17 October 2022, Mr Ali emailed the Claimant's solicitor confirming receipt of the claim documents and stating that they had been forwarded to the insurer. The email asked the Claimant's solicitor to address any future communications to Sedgwick. The First Defendant telephoned Sedgwick to report receipt of the proceedings.

45. On 17 October 2022, Mr Ali emailed Sedgwick stating:

> "Further to your telephone conversation yesterday
> As you mentioned, you tryed (sic) to contact me via email
> I just checked my spam files and found 2 email (sic) you sent,
> unfortunately I didn't see them
> Otherwise I would have replied to you…"

46. On 19 October 2022, Sedgwick emailed Mr Ali, alleging a lack of compliance by the First Defendant with the condition of the Policy, and rejecting the excuse that emails had gone into a spam folder. Sedgwick noted that the First Defendant had also failed to action correspondence sent by the Claimant's solicitor. The First Defendant was informed that the matter was to be referred back to the insurer for it to decide whether or not it was prepared to indemnify the First Defendant.

47. By email dated 19 October 2022, Mr Ali replied stating he had not seen Sedgwick's earlier emails, had not received anything by post from Sedgwick, and that he did not know anything about Sedgwick's involvement until Monday. He asserted he had:

> "called few occasions to my broker, and I called insurance company, to find out where I can forward letters and emails, unfortunately I couldn't get through (few occasions I managed to talk with meena insurance broker) but she said most of them working part time and working from home… no one in the office…I'm not willing to take all the blame for not co-operation (sic)..."

48. On 20 October 2022, Sedgwick emailed the First Defendant stating:

> "…It is a condition of the policy issued to you that all claims are reported to us within a reasonable period of time. It is clear that you failed to engage with us regarding this matter, first in the reporting of the claim when it was initially intimated to you and then failing to respond to our emails to you. I'm afraid that the fact that the emails were sent to you (you advise) went into your spam/junk folder is no excuse… Further, we understand that the

> claimant's solicitors have been writing to you and/or the restaurant on numerous occasions and you have failed action that correspondence… I shall refer the matter to the insurers for them to decide whether or not they are prepared to indemnify you in respect of this matter. This will take time…"

49. On 7 December 2022, the First Defendant filed its defence.

50. On 14 February 2023, the First Defendant held a general meeting and passed a special resolution winding up the company.

51. On 22 February 2023, the Second Defendant's solicitor wrote to the First Defendant explaining that the Second Defendant had declined cover ('the Declinature Letter').

Mr Cobbett's evidence

52. Mr Cobbett has no direct knowledge of events prior to his involvement as a senior claims adjuster in August 2023. His evidence is based on his review of correspondence files held by the Second Defendant and parts of Sedgwick's file. Much of that correspondence is exhibited to his statement and is referred to in the agreed statement of facts.

53. The main tenor of the cross-examination of Mr Cobbett involved suggestions that other relevant correspondence from the First Defendant may exist, but that the Second Defendant and/or Sedgwick had failed to disclose the same. Mr Cobbett was criticised for including copies of some emails in the exhibit to his statement that did not include the entire email chain.

54. My assessment of Mr Cobbett was that he was an entirely frank witness who did not try to overplay his knowledge of the index events. He explained that he had no knowledge of the operating practices of Sedgwick and acknowledged that Covid-19 restrictions would likely have impacted on ways of working at that time. He stated that Sedgwick had provided the Second Defendant with a copy of the relevant parts of their file, which the Second Defendant had then disclosed to the Claimant. Mr Cobbett explained that his understanding was that Sedgwick had provided every relevant document on their file, but that there would have been some irrelevant documents that were not provided, such as bills. The reality is that Mr Cobbett's evidence adds very little to the agreed facts, given his lack of firsthand knowledge. The court is equally well placed to assess the cogency of the documents in this case.

Legal Framework

Conditions precedent

55. The purpose and effect of conditions precedent in insurance contracts were considered by Potter LJ in *Pilkington v CGU Insurance plc* [2004] 1 CLC 1059:

    i) At [58] "… the underlying purpose of a clause of this kind, namely to enable the insurer to make timely investigation of the nature and

> genuineness of the claim and to control any proceedings to the mutual advantage of the insurer and insured … In any case where an insurer is entitled to rely on breach of a condition precedent in his policy, there is no requirement for him to establish prejudice as a result of the breach."

ii) At [65] "…provisions in a policy which are stated to be conditions precedent should not be treated as a mere formality which is to be evaded at the cost of a forced and unnatural construction of the words used in the policy. They should be construed fairly to give effect to the object for which they were inserted, but at the same time so as to protect the assured from being trapped by obscure or ambiguous phraseology…"

56. The meaning of a "circumstance which could give rise to a claim" was considered by Cockerill J in *Arch v McCulloch* [2021] EWHC 2798 ('*Arch*'). In that case, an accident occurred at the insured's premises on 26 October 2019, a letter of claim was sent to the insured on 9 June 2020, other letters were sent on 2 and 28 July 2020, and a writ was issued on 7 September 2020. The insured did not notify the insurer until 15 September 2020, some 11 months post-accident, and over 3 months after receipt of the letter of claim. Cockerill J concluded at [9] – [10]:

> "9. … I have referred to the helpful judgment of Teare J in *Aspen Insurance UK Ltd v Pectel Ltd* [2009] Lloyd's Rep. IR 440 [('*Aspen Insurance*')], where he said that the question of a circumstance which may give rise to a claim is one which invokes the dichotomy between real as opposed to fanciful risk, which is familiar to lawyers in other contexts, such as the summary judgment context. That is what one is looking for: was there a real risk of the underwriters having to indemnify the insured or was there a fanciful risk?
>
> 10. Looking at all the circumstances, and applying, as I must, an objective test, taking into account the knowledge that the defendant had of the circumstances of the accident and the surrounding circumstances after the accident, I conclude, without any real hesitation, that the reasonable man with knowledge of the insured and of the circumstances would have realised that the risk that a claim might be brought was not fanciful and it was real and, therefore, there was an obligation to notify."

57. The meaning of a requirement to notify an insurer "as soon as is reasonably possible" was considered in the Scottish case of *Horne v The Prudential Assurance Co Ltd* 1997 SLT (Sh CT) 75 ('*Horne*') at 77H:

> "What is "reasonably possible" necessarily, in my opinion, takes account of the insured's knowledge of the occurrence. It is not "reasonably possible" to report an occurrence of which one is unaware. As I read the first part of cl 7(a) it simply requires that "an occurrence which may result in a claim" be reported by the insured as soon as reasonably possible after the insured learns of the occurrence. Sowpine had been wound up before the pursuer intimated his claim. After Sowpine had been wound up it could not become aware of any occurrence or, for that matter, make any report; so, it was not "reasonably possible" for Sowpine to do either of those things.

Accordingly, as I understand cl 7(a) Sowpine was not in breach of it for that reason.…"

The provisions of the TPRAI Act 2010

58. Section 1 of the TPRAI Act 2010 sets out circumstances in which the rights of an insured person against an insurer may be transferred to a third party:

"*1 Rights against insurer of insolvent person etc*

(1) This section applies if—

(a) a relevant person incurs a liability against which that person is insured under a contract of insurance, or

(b) a person who is subject to such a liability becomes a relevant person.

(2) The rights of the relevant person under the contract against the insurer in respect of the liability are transferred to and vest in the person to whom the liability is or was incurred (the "third party").

(3) The third party may bring proceedings to enforce the rights against the insurer without having established the relevant person's liability; but the third party may not enforce those rights without having established that liability.

(4) For the purposes of this Act, a liability is established only if its existence and amount are established; and, for that purpose, "establish" means establish—

(a) by virtue of a declaration under section 2 or a declarator under section 3,

(b) by a judgment or decree,

(c) by an award in arbitral proceedings or by an arbitration, or

(d) by an enforceable agreement.

(5) In this Act—

(a) references to an "insured" are to a person who incurs or who is subject to a liability to a third party against which that person is insured under a contract of insurance;

(b) references to a "relevant person" are to a person within sections 4 to 7 (and see also paragraph 1A of Schedule 3);

(c) references to a "third party" are to be construed in accordance with subsection (2);

(d) references to "transferred rights" are to rights under a contract of insurance which are transferred under this section."

59. Section 6 of the TPRAI Act 2010 provides for the circumstances in which a corporate body can become a 'relevant person'. It is agreed that the First Defendant became a 'relevant person' under s.6(2)(d) on being wound up voluntarily in accordance with Chapter 2 of Part 4 of the Insolvency Act 1986.

60. Section 2 of the TPRAI Act 2010 sets out the procedure by which a third party can seek to establish the liability of an insurer. That includes by s.2(2)(b) the bringing of proceedings against an insurer for a declaration as to the insurer's potential liability, notwithstanding that liability of the insured is not yet established.

61. Section 2(4) provides that, subject to s.12(1), an insurer can rely on any defence to liability that it could have relied on if proceedings had been brought by the insured. [S.12(1) relates to limitation defences and is not relevant to this claim.]

62. Section 9 contains three exceptions which limit the circumstances in which the insurer can rely on defences arising out of an insured's obligation to fulfil certain conditions. Section 9 states:

"9 Conditions affecting transferred rights

(1) This section applies where transferred rights are subject to a condition (whether under the contract of insurance from which the transferred rights are derived or otherwise) that the insured has to fulfil.

(2) Anything done by the third party which, if done by the insured, would have amounted to or contributed to fulfilment of the condition is to be treated as if done by the insured.

(3) The transferred rights are not subject to a condition requiring the insured to provide information or assistance to the insurer if that condition cannot be fulfilled because the insured is—

[…]

(b) a body corporate that has been dissolved, or

[…]

(4) A condition requiring the insured to provide information or assistance to the insurer does not include a condition requiring the insured to notify the insurer of the existence of a claim under the contract of insurance.

(5) The transferred rights are not subject to a condition requiring the prior discharge by the insured of the insured's liability to the third party. […]"

63. The TPRAI Act 2010 is accompanied by 'Explanatory Notes'. The purpose of the Explanatory Notes is described in the following terms:

> "They have been prepared by the Ministry of Justice in order to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament. The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act…"

64. Paragraph 10 of the Explanatory Notes comments on the approach of the TPRAI Act 2010 to an 'Insurer's Defence' in the following terms:

> "The Act retains the general approach of the 1930 Acts that the rights transferred to the third party will be subject to the defences which the insurer could use against the insured. However, it introduces three exceptions which are designed to ensure that a third party is not prevented from enforcing his or her rights."

65. Paragraphs 42 to 46 of the Explanatory Notes provide the following commentary on s.9 of the TPRAI Act 2010:

> "42. The rights transferred to the third party are subject to all of the defences which the insurer could use against the insured, but for three exceptions in this section. These prevent an insurer from defeating a third party's claim by relying on certain technical defences, based on conditions in the insurance contract.
>
> 43. Subsection (2) relates to conditions in the insurance contract that require the insured to do something. Where such a condition exists and the third party, rather than the insured, has done the thing required by the condition, subsection (2) deems that the thing required has been done for the purposes of the condition. For example, where the insured has not given notice of the claim but the third party has personally informed the insurer of the claim within the period prescribed in the insurance contract, the requirement to give notice is deemed to have been fulfilled and the insurer will not be able to rely on non-fulfilment of the condition as a defence.
>
> 44. Subsection (3) relates to any condition in the insurance contract that requires the insured to provide continuing information and assistance to the insurer once notice has been given of the claim. Where the insured is incapable of fulfilling such a condition because it is no longer in existence (because it is an individual who has died or a company that has been dissolved), subsection (3) provides that the transferred rights are not subject to that condition.
>
> 45. Subsection (4) provides, however, that a condition requiring information and assistance does not include a condition requiring the insured to give notice of a claim to the insurer. But as explained above, if a third party complies with such notice requirements, it will be treated as having been done by the insured.
>
> 46. Subsections (5) and (6) concern "pay-first" clauses, namely provisions in an insurance contract requiring the insured to pay sums due to the third party before any right to indemnity can arise…"

Issue 1: Can the Second Defendant prove that the First Defendant is not entitled to an indemnity under the Policy?

66. The parties agree that the burden of proof rests on the Second Defendant to prove, on the balance of probabilities, its assertion that the First Defendant is not entitled to an indemnity under the terms of the Policy. As it is the Second Defendant that makes this allegation, I will deal with its submissions on this point first.

The Second Defendant's submissions

67. The Second Defendant submits that the First Defendant is in breach of four of the conditions precedent in the Policy Document. It submits that these breaches arise from the same overarching fact pattern, which it considers best described as the First Defendant 'burying its head in the sand' for months and indeed years, before coming up with a 'dog ate my homework' series of excuses.

68. The first breach alleged by the Second Defendant is a failure of General Claims Condition 1(a) to "as soon as reasonably possible give notice to the Insurer". The Second Defendant submits that there are several events that amount to a 'circumstance' triggering the notice requirement, all of which were well before the First Defendant finally provided notice on 17 November 2020. The Second Defendant relies on:

    i) The Claimant's email to the First Defendant on 29 November 2019.

    ii) The Claimant's solicitor's letter and CNF to the First Defendant on 10 January 2020.

    iii) The Claimant's solicitor's chasing letter to the First Defendant on 4 May 2020.

    iv) The Claimant's solicitor's letter of claim to the First Defendant on 30 October 2020.

69. The Second Defendant submits that the delays in notification are similar in length to those seen in *Arch v McCulloch,* and which Cockerill J concluded *'without any real hesitation'* amounted to a breach of a similar condition precedent.

70. The Second Defendant does not accept that there is any evidence of non-receipt of the correspondence by the First Defendant, or that there is reason to suggest that the Sedgwick file is missing relevant documentation. Mr Patel highlights that an email from the Broker to the Coverholder on 18 November 2020 described the information from the First Defendant as a "new notification", which he submits is consistent with that being the first notification.

71. The Second Defendant further submits that an examination of the wider context amply justifies a conclusion that the First Defendant had a pattern of ignoring

correspondence and failing to deal with matters. The Second Defendant points to:

i) The Claimant's solicitor's letter of claim dated 30 October 2020, sent by recorded delivery to the First Defendant, but not provided by the First Defendant to the Broker until 9 months later on 4 June 2021.

ii) The lack of response by the First Defendant to the Claimant's solicitor's recorded delivery chasing letters of 15 April 2021 and 20 May 2021.

iii) The lack of timely response by the First Defendant to the Claimant's solicitor's emails of 10 September 2021, 6 December 2021, 14 December 2021, and 3 February 2022. No response at all was received until 9 June 2022, some 9 months after the first email.

iv) The further silence from the First Defendant to emails sent by the Claimant's solicitor to Mr Ali (using the same address Mr Ali had used) on 14 July 2022, 22 September 2022, 29 September 2022, 3 October 2022, 5 October 2022, and 14 October 2022.

72. The second breach alleged by the Second Defendant is a failure under General Claims Condition 1(e)(iii). The Second Defendant submits that the First Defendant breached both limbs of the condition in firstly, failing to provide full details of the claim in writing within 30 days of the event or circumstance and secondly, failing to provide any evidence and information that may reasonably be required within 30 days of a request from the Second Defendant.

73. As to the first limb said to be breached, the Second Defendant relies on the First Defendant's failure to provide full details of the claim within 30 days of the communications of 29 November 2019, 10 January 2020, and 4 May 2020.

74. As to the second limb said to be breached, the Second Defendant relies on the request Sedgwick made of the First Defendant on 7 June 2021 for a number of documents and further information. The Second Defendant points to the agreed chronology as demonstrating that the First Defendant was chased on 6 July 2021 and 20 July 2021, but did not respond to the original email until 18 October 2022, some 16 months after the request.

75. The Second Defendant submits that Mr Ali's suggestion in his email of 19 October 2022 that he had only found two of Sedgwick's emails in his 'spam files' in October 2022 lacks any cogency. Mr Patel submits that it makes no sense for emails to be in a junk or spam folder, as emails in such folders are automatically emptied after a few weeks or days. He further submits that, when taken with the evidence of wider non-cooperation by the First Defendant, the probability is that the First Defendant ignored Sedgwick's emails, only belatedly engaging when the proceedings were served. The Second Defendant's position is that, even if the emails had ended up in a spam or junk folder, the onus rested on the First Defendant to ensure it had proper procedures in place to monitor its incoming mail.

76. The third breach alleged by the Second Defendant is a breach of General Condition 2, which required the First Defendant to "take all reasonable precautions to prevent or diminish loss destruction damage or injury". The Second Defendant relies on the same factual matrix discussed in the context of alleged breaches 1 and 2. This includes:

    i) An alleged failure to notify the Second Defendant of the claim prior to 17 November 2020.

    ii) Alleged failures to provide the letter of claim to the Second Defendant until nine months after it was sent on 30 October 2020, and to provide copies of the Claimant's other copious correspondence.

    iii) An alleged failure to respond to Sedgwick's request for information on 4 June 2021 for 18 months.

    iv) Alleged failures to respond to any correspondence from the Claimant or her solicitor until Mr Ali's first email to the Claimant's solicitor on 9 June 2022, some 2½ years after the Claimant's initial email on 29 November 2019.

    v) If applicable, alleged failures to check its emails, spam folders, or to collect post.

77. The fourth breach alleged by the Second Defendant is a breach of General Claim Condition 6, namely to "provide all help and assistance and cooperation required by the Insurer in connection with any claim". Again, the Second Defendant relies on the same factual matrix as to failures to provide notification, information, respond to requests for information or to take reasonable care.

78. The Second Defendant does not accept that there are gaps in the disclosure. It points out that the Claimant could have, but has not, sought specific disclosure from either the First or Second Defendant, if it thought there were deficiencies. The Second Defendant does not accept that the consequences of the Covid 19 pandemic on ways of working can save the First Defendant from otherwise fatal non-compliance. It points out that there is no evidence as to the effect of the pandemic on the First Defendant. In any event, it submits that key communications to the First Defendant occurred in November 2019 and January 2020, before the pandemic.

The Claimant's submissions

79. The Claimant does not advance a positive case as to the actions the First Defendant did or did not take in purported compliance with the terms of the Policy. She does, however, submit that the Second Defendant cannot discharge the evidential burden to demonstrate that it is entitled to refuse indemnity to the First Defendant. The Claimant submits that the evidential difficulties include:

    i) The limited value to be attributed to Mr Cobbett's evidence in circumstances where he only became involved in September 2023.

ii) The lack of information on Argo's file, which was said by Mr Cobbett to contain only three documents.

iii) The lack of evidence as to whether Sedgwick checked as to how to correspond with the First Defendant.

iv) Missing extracts from emails exhibited to Mr Cobbett's statement. For example, an email at exhibit AC8, dated 4 June 2021, which does not include the text of the original email sent by Mr Ali to the Broker earlier the same day.

v) The inability of Mr Cobbett to comment on Sedgwick's working practices during the Covid 19 pandemic.

vi) The lack of knowledge of the impact of Covid 19 on the ability of the First Defendant to notify its insurer.

80. The Claimant is critical of what she says are limited steps Sedgwick took to contact the First Defendant for information on 7 June 2021, 6 July 2021, and 20 July 2021. Mr Cobill submits that alarm bells should have rung with Sedgwick when the First Defendant did not respond. The Claimant relies on Mr Ali's email of 19 October 2022, referring to his lack of knowledge of Sedgwick's earlier emails, and the attempts he asserted he had made to call his Broker and insurance company.

81. Mr Cobill submits that there are gaps in the disclosure exercise relevant to the preliminary issue. He points out there has been no disclosure from the First Defendant, and raises issue with the extent of documents provided by Sedgwick to the Second Defendant. He suggests the court should not determine this issue against the Claimant at this stage, but retain the Second Defendant in the ongoing litigation on the basis that further relevant documents may come to light in any disclosure exercise directed in the substantive claim against the First Defendant.

Discussion

82. I will deal at the outset with the Claimant's suggestion that, if the court considered that the evidence before the court supports the Second Defendant's position, it should nonetheless adjourn the question of the Second Defendant's liability pending a further disclosure exercise in the substantive claim against the First Defendant. In my judgment, such an approach is misconceived for the following reasons.

83. Firstly, this preliminary issue trial is not a rehearsal. It is the occasion on which the court is tasked with determining the preliminary issue. It would be wholly contrary to the overriding objective for the preliminary issue not to be determined. It would cause the parties to incur additional time and expense, delay would be occasioned, and it would not be an appropriate use of the court's resources.

84. Secondly, disclosure in the substantive claim against the First Defendant would be unlikely to yield documents relevant to the preliminary issue. The First Defendant's actions in notifying and providing information to the Second Defendant would not be relevant to the Claimant's claim against the First Defendant. Further, the First Defendant has not engaged in these proceedings since filing its defence. It is unknown whether the First Defendant's liquidators will even have access to information relevant to this claim.

85. If the Claimant took the view that the Second Defendant had failed to discharge its disclosure obligations in respect of the preliminary issue trial, or that the First Defendant had relevant documents to disclose, it was open for the Claimant to apply for specific disclosure. She failed to do so. Nor did she apply to adjourn the trial of the preliminary issue. Taking into account the aforementioned factors, it would not be appropriate for the preliminary issue to remain undetermined.

86. In any event, I am not persuaded that there are any material deficiencies with the disclosure provided by the Second Defendant. To the extent that some of the exhibits to Mr Cobbett's witness statement do not provide a complete email chain, his explanation that the exhibit reflects the form of the hard copy document supplied by Sedgwick was credible. Moreover, the disclosure hearing bundle and supplementary correspondence hearing bundle provide fuller versions of some of the documents. The overall progression of the documents through time is logical, and there is nothing to suggest that there are any material missing documents.

87. The Claimant does not challenge the Second Defendant's case that the Claimant's email of 29 November 2019, the Claimant's solicitor's letter and CNF of 10 January 2020, the Claimant's solicitor's chasing letter of 4 May 2020, and the letter of claim of 30 October 2020, each amounted to a "circumstance" triggering the notification requirement. That is a sensible concession. The content of each of those four pieces of correspondence would plainly put a reasonable man with the knowledge of the First Defendant on notice that there was a real as opposed to fanciful risk that the Second Defendant may have to indemnify the First Defendant: per *Arch* and *Aspen Insurance*.

88. Further, the Claimant does not challenge the assertion that the conditions relied on by the Second Defendant are conditions precedent to liability. Again, that is a sensible concession given the wording of General Condition 8 of the Policy Document, which imposes conditionality between obligations to observe terms relating to anything to be done or complied with, and liability. General Condition 2 and General Claim Conditions 1(a), 1(3), and 6 all require the First Defendant to do or comply with various things.

89. The standard of proof the Second Defendant must establish on this issue is the balance of probabilities, namely whether the position is more likely than not. At times, the Claimant's submissions ventured into matters which might be relevant to the criminal standard of proof but which went beyond that required for the civil standard.

90. Whilst I consider it appropriate to take judicial notice of the fact that the Covid 19 pandemic had wide-ranging impacts on society, and the restaurant industry in particular, I have no evidence as to the precise effects on the First Defendant. Moreover, I am not persuaded that the general effects of the pandemic are relevant to the determination of issue 1. Firstly, the Claimant's email notification on 29 November 2019, and the Claimant's solicitor's letter and CNF of 10 January 2020, both pre-dated the pandemic. Secondly, the pandemic did not mean that email could not be used. Indeed, Mr Ali communicated by email on 17 November 2020 and again on 4 June 2021.

91. Standing back and looking at the evidential picture as a whole, and rather like Cockerill J in *Arch*, I have no hesitation in concluding that, on the balance of probabilities, the First Defendant was in breach of conditions precedent contained in the Policy Document for the reasons that follow.

General Claims Condition 1(a) – notification as soon as reasonably possible.

92. It is not in dispute that the Claimant, whether by herself or her solicitor, sent material correspondence to the First Defendant on 29 November 2019, 10 January 2020, 4 May 2020, and 30 October 2020. Any one of those four communications should have prompted the First Defendant to notify the Second Defendant of the "circumstance". There is no suggestion that the email address or postal address used by the Claimant and her solicitor was incorrect. Indeed, it is known that the First Defendant did receive the letter and CNF sent on 10 January 2020, and the letter of claim of 30 October 2020, as it belatedly provided the documents to the Second Defendant on 17 November 2020 and 4 June 2021, respectively.

93. The Claimant's suggestion that there might have been an earlier notification that is not apparent from the documents before the court is mere speculation. Such a theory is inconsistent with evidence that points strongly to the First Defendant's first notification to the Second Defendant's agents not being until 17 November 2020. The email from the Broker to the Coverholder of 17 November 2020 refers to "a new notification". The Coverholder's onward email to Sedgwick on 18 November 2020 refers to a "new public liability claim". [My emphasis.] If the First Defendant had provided earlier notification of the possible claim, it made no sense for the authors of those emails to describe the notification as a new one.

94. Moreover, the apparent lack of engagement by the First Defendant in relation to the four material items of correspondence has to be seen against the wider picture. The events summarised in paragraph 71 above, which are documented in the correspondence, depict a First Defendant who is thoroughly disengaged with the threatened claim, maybe hoping that by ignoring it, it will go away. It is inherently improbable that the First Defendant was ignoring repeated correspondence from the Claimant's solicitor whilst at the same time engaging diligently with its insurer. When one adds to the mix the evidence that Sedgwick also struggled to get a response from the First Defendant, and that the Broker and Coverholder understood the November 2020 notification to be a new one, a very clear picture is painted of a First Defendant who is disengaged from the process.

95. On the balance of probabilities, I am therefore persuaded that the First Defendant did not notify the Second Defendant of the "circumstance" until 17 November 2020. The period of delay from each of the four material pieces of correspondence differs being around 12 months from 29 November 2019, 10 months from 10 January 2020, 6 months from 4 May 2020, and 18 days from 30 October 2020. In an era of telephone and email communication, none of those time periods equates to action taken as soon as reasonably possible. I therefore find that the First Defendant is in breach of the condition precedent in General Claim Condition 1(a). That alone is sufficient for the Second Defendant to decline to indemnify the First Defendant. For the sake of completeness, I will, however briefly deal with the other alleged breaches.

General Claims Condition 1(e) – provision of full details/evidence and information within 30 days.

96. The first part of General Claims Condition 1(e) requires full details of the claim to be supplied in writing to the Second Defendant within 30 days of the circumstance in the case. The effect of my findings as to the time it took for the First Defendant to even provide initial notification, let alone full details in writing, in respect of the communications of 29 November 2019, 10 January 2020 and 4 May 2020 means that it follows that the First Defendant is also in breach of General Claims Condition 1(e).

97. The second aspect of General Claims Condition 1(e) requires the First Defendant to provide any evidence and information that may reasonably be required by the Second Defendant, within 30 days of the request being made. The Claimant does not suggest that Sedgwick's requests for information in its emails of 7 June 2021, 6 July 2021, and 20 July 2021 were unreasonable. In its emails of 18 and 19 October 2022 (ie 15-16 months after the requests), the First Defendant implicitly accepts that it did not provide the information requested by Sedgwick. If there was a cogent reason for non-receipt of a request for information, that may provide valid grounds for not providing the evidence and information within 30 days. The reason proffered by the First Defendant was that the email requests landed in a 'spam' folder. However, the evidence before the Court indicates that, on the balance of probabilities, the First Defendant did or ought to have received Sedgwick's requests for information and had no good reason for failing to respond to the requests:

i) The failure of the First Defendant to respond to Sedgwick's emails has to be seen against the wider picture of non-cooperation in responding to multiple requests for information from the Claimant's solicitor.

ii) The timing of the First Defendant's belated engagement in October 2022 is against the backdrop of the claim form having just been served. It is consistent with the First Defendant panicking that its prior tactic of ignoring the threatened claim had failed. The timing undermines the cogency of the 'spam folder excuse'.

iii) The explanation that Sedgwick's emails were diverted to a 'spam' folder to resurface some 15-16 months later lacks credibility or explanation. There is no evidence from the First Defendant. Neither party has chosen

to summon Mr Ali to give evidence. There is no evidence before the court from either party as to when emails are diverted to a spam folder or how long they remain there afterwards. [I ignore the submissions made by Mr Patel as to how long emails remain in spam or junk folders on a Yahoo email account before being automatically emptied; the submission ventures into the giving of evidence in circumstances where no witness addressed the topic.]

iv) Even if the emails had been automatically diverted into a 'spam folder', that is no excuse for failing to liaise with Sedgwick. A business should have procedures in place for checking spam or junk folders for important emails. Further, Mr Ali had emailed the Broker on 4 June 2021, so it should have been expecting contact from the Second Defendant or someone acting on its behalf. The First Defendant should have monitored its email inbox for contact and been more proactive in contacting the Second Defendant. This was particularly so after September 2021, when the Claimant's solicitor started to email the First Defendant directly. Even those numerous emails did not prompt the First Defendant to reach out to the Second Defendant to seek guidance on how to respond.

98. Accordingly, the First Defendant's failure to provide the evidence and information requested by the Second Defendant within 30 days of the emails in June and July 2021 does amount to a further breach of the condition precedent at General Claim Condition 1(e).

General condition 2 – taking of all reasonable precautions to prevent or diminish loss etc.

99. In the context of General Condition 2, the loss or damage referred to is the existence and extent of the First Defendant's liability to the Claimant. The Second Defendant has an obvious interest in trying to prevent or minimise such liability. In my judgment, the taking of all reasonable precautions in the context of an insurance contract encompasses the engagement by an insured with its insurer, including in the ways provided for in other express conditions of the Policy.

100. A breach of this condition is parasitic on the findings I have already made as to the First Defendant's failures in respect of General Claims Conditions 1(a) and 1(e). The First Defendant's failure to provide timely notification of the claim, to forward relevant documents to the Second Defendant, to respond to requests for information from the Second Defendant, to deal with correspondence from the Claimant and her solicitor in a timely way (if only by forwarding it to the Second Defendant to deal with) and to actively monitor and respond post and email, do not equate to the taking of reasonable precautions. On an objective assessment of the situation, ignoring the threatened claim increased the risk of an adverse finding on liability; the passage of time likely making it more difficult to investigate liability. Moreover, a protracted claim risked increasing the exposure to costs. The First Defendant is therefore also in breach of General Condition 2.

General Claims Condition 6 – Provide all help and assistance and cooperation.

101. This obligation is also parasitic on the findings I have made as to breach of General Claims Conditions 1(a) and 1(e). It adds nothing factually, but also amount to a breach of General Claims Condition 6.

Summary of conclusion on issue 1

102. The First Defendant is in breach of conditions precedent to liability under the Policy. The effect of the non-compliance is that the Second Defendant is entitled to refuse to indemnify the First Defendant. By the letter of 22 February 2023, the Second Defendant has exercised that right. Accordingly, the Second Defendant has proved that the First Defendant is not entitled to an indemnity under the Policy.

Issue 2: Does s.9(2) of the TPRAI Act 2010 assist the Claimant to render the Second Defendant potentially liable to the Claimant on proof of the First Defendant's liability?

The Claimant's submissions

103. The Claimant submits that, even if the Court finds against the Claimant on issue 1, the Claimant is nonetheless entitled to an indemnity from the Second Defendant, relying on s.9(2) of the TPRAI Act 2010. The essence of Mr Cobill's submission is that:

i) S.9(2) of the TPRAI Act 2010 provides that anything done by a third party (here the Claimant) is to be treated as if done by the insured (here the First Defendant).

ii) The Second Defendant did not issue the letter declining indemnity to the First Defendant until 22 February 2023.

iii) The First Defendant had already entered voluntary liquidation on 14 February 2023 and became a 'relevant person' on that date within the meaning of s.6(2)(d) of the TPRAI Act 2010.

iv) As of 14 February 2023, the rights of the First Defendant under the Policy transferred to and vested in the Claimant.

v) From 14 February 2023, the Claimant stood ready to comply with all the conditions precedent in the Policy. She thereafter complied with the Policy, notifying and corresponding with Sedgwick and, following Sedgwick's guidance, with the Second Defendant's solicitor.

vi) Pursuant to s.9(2), the actions of the Claimant in complying with the Policy are to be treated as if done by the First Defendant such that she is entitled to an indemnity under the Policy.

vii) It was impossible for the Claimant to comply with the conditions precedent prior to 14 February 2023, given her rights under the TPRAI Act 2010 only arose then. Where compliance with a condition precedent to notify a claim "as soon as reasonably possible" was impossible, it could not be complied with: Per *Horne.*

viii) The purpose of the TPRAI Act 2010 is to protect third parties in circumstances where the insured is insolvent and the Claimant's interpretation is consistent with the policy behind the Act.

The Second Defendant's submission

104. The Second Defendant does not accept that the Claimant can rely on s.9(2). Mr Patel submits:

i) It is fundamental to the TPRAI Act 2010 that the rights transferred are the insured's rights – whatever they may be.

ii) It is common ground that s.9 of the TPRAI Act 2010 cannot apply until the First Defendant became a 'relevant person'. That did not occur until 14 February 2023, and thus no acts carried out by the Claimant before then can be relevant for the purposes of s.9(2).

iii) The conditions precedent under the Policy Document required steps to be taken within specific timeframes. The notification under General Claim Condition 1(a) was to be made "as soon as reasonably possible" and under 1(e) "within 30 days". It is not open for the Claimant to ignore the requirements as to timing. The importance of timing is supported by the wording of para. 43 of the Explanatory Notes to the TPRAI Act 2010.

iv) The Claimant did not take the steps required by the First Defendant within the timeframe imposed by the Policy. Her actions after 14 February 2023 are too late, and nothing she did after that time, however reasonable, is capable of leading to a conclusion that the Claimant complied with the conditions of the Policy.

v) Even if the Claimant's actions before 14 February 2023 were relevant, she did not comply with the conditions in terms of notifying the Second Defendant "as soon as reasonably possible" or providing the information sought by Sedgwick in June and July 2021 "within 30 days".

vi) The absurdity of the Claimant's logic is demonstrated by taking an extreme example. If an insured company defended a claim without notifying its insurer and lost the claim at trial after, say, three years of litigation, a claimant may seek to wind up the insured when it could not pay the judgment liabilities. Applying the Claimant's logic, on the winding up of the company, the claimant in the example could then seek to rely on s.9(2) to provide a first notification of the claim to the insurer at that stage. Such an approach would make a mockery of an insurer's contractual rights to be notified of a possible claim as soon as reasonably possible.

Discussion

105. The Claimant does not seek to argue, rightly on the evidence, that the Second Defendant expressly or implicitly waived compliance with the conditions precedent in the Policy. The effect of my findings on issue 1 is that the First Defendant has lost its right to indemnity in respect of the Claimant's claim. The conceptual difficulty with the Claimant's submission on issue 2 is that it requires the 'resurrection' of a right to indemnity already lost through a failure by an insured to comply with a condition precedent, and in circumstances where the third party did not, in lieu of the insured, comply with the notification conditions at the material time. The Claimant offers no authority in support of that proposition. In my judgment, the submission does not bear scrutiny.

106. The starting point under s.2(4) of the TPRAI Act 2010 is that the Second Defendant is entitled to rely on any defence available to it against the First Defendant. Limited exceptions to that principle are contained in s.9. At s.9(2): "anything done by the third party, which if done by the insured, would have amounted to or contributed to fulfilment of the condition is to be treated as if done by the insured".

107. The actions relied on by the Claimant are the steps she took after 14 February 2023 to cooperate with Sedgwick and the Second Defendant's solicitor. If those actions had been "done by the insured" (adopting the s.9(2) wording) rather than the Claimant, the actions would not have fulfilled the conditions precedent of the Policy. General Claim Condition 1(a) and 1(e) required compliance within specific time frames, respectively, "as soon as reasonably possible" and "within 30 days". Any action taken by the First Defendant after 14 February 2023 would have been far too late to meet its obligations under the Policy.

108. In other words, the Claimant's argument requires the court to accept that the conditions precedent she is subject to are fundamentally different (as to timescale for compliance) from the conditions precedent the First Defendant was subject to. She offers no authority in support of the position that the nature of the conditions precedent changes in that way. Such a construction is at odds with the express wording of s.9(2) which envisages the act of the third party and insured being mirrored: "anything done by the third party which, if done by the insured…"

109. Furthermore, the commentary on s.9(2) at paragraph 43 of the Explanatory Notes to the TPRAI Act 2010 provides an example of how s.9(2) may work in practice:

> "For example, where the insured has not given notice of the claim but the third party has personally informed the insurer of the claim within the period prescribed in the insurance contract, the requirement to give notice is deemed to have been fulfilled and the insurer will not be able to rely on non-fulfilment of the condition as a defence." [My emphasis added.]

It is telling that the example expressly references the need for the third party to have acted "within the period prescribed by the insurance contract". If the time of compliance could be relaxed for a third party, the example given in the Explanatory Notes would be wrong as a matter of law.

110. Whilst the Claimant's submission is that her construction is consistent with the policy behind the TPRAI Act 2010, it is telling that it is at odds with another of the exceptions found in s.9(3) and s.9(4). S.9(3) provides that transferred rights are not subject to a condition requiring an insured to provide information or assistance where the condition cannot be fulfilled because the insured has died or been dissolved. However, s.9(4) excludes from the exception in s.9(3) a requirement that the insured notify the insurer of the existence of the claim. In other words, the TPRAI Act 2010 is not as generous to third parties when it comes to the insurer being notified about a claim. Whilst it allows a third party to provide the notification under s.9(2) in lieu of the insured, it does not obviate the need for notification completely. The Claimant's submission as to the interpretation of s.9(2) seeks to go behind the enhanced protection that notification entitlements are afforded under s.9(4). The wording of s.9(4) no doubt reflects the importance attached to notification provisions, which enable an insurer to manage the risk they have insured.

111. The Claimant's submission that she should not be held to the terms of the conditions precedent on the basis that it was impossible for her to comply earlier is equally unsupported by authority. In *Horne*, the insurer refused indemnity on the basis that the insured had failed to report the accident "as soon as reasonably possible". The insured company, Sowpine, had already been wound up at the time the claim was intimated. The injured party sought to assume rights under the 1930 predecessor version of the TPRIA Act 2010. It will be readily apparent that the facts of *Horne* are distinguishable from the index claim. Unlike Sowpine, the First Defendant was still trading when the Claimant's claim was first intimated and when subsequent communications were sent. Indeed, around 3 years and 3 months passed between the first relevant circumstance in November 2019 and the winding up occurring in February 2023. No impossibility prevented the First Defendant from fulfilling its obligations under the Policy. *Horne* is not, therefore, authority for the proposition that a third party who found it impossible to earlier comply with conditions precedent can nonetheless take the benefit of rights lost by an insured who was not faced with impossibility.

112. In conclusion, s.9(2) of the TPRAI Act 2010 cannot come to the Claimant's aid to resurrect the right of indemnity that the First Defendant has lost through its breach of the conditions precedent.

Conclusion

113. Whilst one has very considerable sympathy for the Claimant's predicament, the Second Defendant is not potentially liable to the Claimant on proof of the First Defendant's liability. The preliminary issue is accordingly determined in favour of the Second Defendant. The claim against the Second Defendant stands to be dismissed.