Neutral Citation Number: [2024] EWHC 2063 (TCC)

Case No: HT-2023-000254

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
KING'S BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 06/08/2024

Before:

MR ANDREW MITCHELL KC

SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

PEABODY TRUST	**Claimant**
- and –	
NATIONAL HOUSE-BUILDING COUNCIL	**Defendant**

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- -

Mr Noel Casey KC and Mr Mek Mesfin (instructed by **Devonshires Solicitors LLP**) for the Claimant
Mr Thomas Grant KC and Mr Harry Smith (instructed by the Defendant in-house solicitors)

Hearing dates: 7 June 2024. Further written submissions 10 and 11 June 2024. Judgment circulated in draft 30 July 2024

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Approved Judgment

This judgment was handed down remotely at 10.30am on 6th August 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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MR ANDREW MITCHELL KC

Andrew Mitchell KC (sitting as a Deputy Judge of the High Court):

Introduction

1. This is an application by the Defendant insurer ("NHBC") for summary judgment on, alternatively for the striking out of, the Claimant's claim on the ground that it is time-barred. The issue on the application concerns when time started to run for the purposes of the six year limitation period under section 5 of the Limitation Act 1980.

2. The claim is made under policies of insurance by which NHBC agreed to insure Catalyst Housing Limited ("Catalyst"), to whose rights the Claimant ("Peabody") has succeeded, against certain risks associated with the construction of 88 affordable/social housing units at the former RAF Stanbridge site in Bedfordshire ("the Policies"). Vantage Design & Build Limited ("Vantage") was engaged as the contractor under an amended JCT Design & Build Contract 2011 dated 20 November 2015, pursuant to which 175 new dwellings (including the 88 social housing units) were to be built. The total contract sum was £23,878,482. The contract sum for the 88 insured units was £10,358,510 (the "Contract Price").

3. Vantage commenced work on or around 14 December 2015 and ceased work on 17 June 2016. Administrators were appointed in respect of Vantage on 29 June 2016.

4. Following the administration of Vantage, pursuant to an amended JCT Construction Management Agreement 2011 dated 18 January 2017, Catalyst's subsidiary CHL Developments Ltd engaged Stack London Ltd ("Stack") to perform the role of Construction Manager in respect of the works, and participate in the procurement of individual Works Contracts, so as to complete the works. Practical completion of the relevant units occurred on 19 January 2021.

5. The terms of the Policies are set out in a document called "Buildmark Choice – Your warranty and insurance cover". The relevant cover for present purposes appears under the heading "Option 1 - Insolvency cover before practical completion". The detail of the terms is important and discussed below but, in very broad terms, the insured had the benefit of cover if it "ha[d] to pay more to complete [the units]" because of Vantage's insolvency. It is common ground that the administration amounted to an event of insolvency under the terms of the Policies.

6. Peabody's claim was issued on 24 July 2023. Its Particulars of Claim were subsequently served on 24 November 2023 claiming £913,555.36 plus interest. This is broken down in Schedule A to the Particulars of Claim as comprising (a) some £815,500 for extra costs said to have been incurred over and above what would have been paid to Vantage; (b) legal and other fees and expenses, totalling some £98,000, which includes a claim (to be pro-rated so as to relate to the 88 insured units) for "site security" costs in the total sum of £56,350.

The Policies

7. The Policies provide, relevantly, as follows. I have added [A] – [E] for ease of later reference; they do not appear in the original. A number of words appear in bold in the original, being definitions, including "insolvent"; but otherwise I have not generally included the bold below:

"[A] Option 1 – Insolvency cover before practical completion

*[B] **When the section applies***
*This section applies if you lose the amount paid to the contractor in accordance with the building contract or have to pay more to complete the building of the home(s), because the contractor is **insolvent** or commits fraud.*

*[C] **When you can claim***
You can only claim under this section up to the date of the Buildmark Choice certificate.

Contact us and tell us if you have lost the amount you paid to the contractor or the contractor has not completed the home(s).

*[D] **What we will do***
We will pay you the reasonable extra cost above the contract price including professional fees, for work necessary to complete the home(s) to the NHBC requirements; or

We will reimburse the amount paid to the contractor in accordance with the building contract which cannot be recovered from them.

[D1] In addition, we will pay the cost of reasonable precautions to secure the work defined in the building contract against unauthorised entry, theft and vandalism until work resumes.

*[E] **Conditions and limitations***
This option will only apply if included on the quotation and the additional premium has been paid to and accepted by us.

There are limits to how much we will pay (as explained on pages 14 & 15)

Some things are not NHBC's responsibility under Buildmark Choice (as explained on page 16)"

8. NHBC was to pay the "reasonable extra cost" (not the actual extra cost, if different) above the "contract price". The Policies contained a financial limit of Option 1 cover as "10% of the original contract price". This was a reference to the original contract sum of £10,358,510 for the insured units. Therefore, NHBC agreed to pay the reasonable extra cost over the £10,358,510 contract sum that it cost to complete the homes, subject to a limit of 10% of the original contract sum.

9. The definition of "insolvent" for the purposes of the Policies was a wide one. It unsurprisingly included the contractor entering liquidation; but it also included the appointment of an administrator (as occurred in this case); or administrative receiver; or a receiver or manager over *any* or all of its property, assets or undertaking; or it being subject to any other insolvency procedure. I observe immediately, therefore, as a matter of construction that the event of insolvency (as defined) might be one which would have no, and certainly no necessary, impact on either the contractor's ability to complete the works,

or the cost of them doing so; let alone whether more would have to be paid to a replacement contractor(s) for completion.

The Scope of the Application

The Insolvency Point

10. NHBC's summary application is brought by Application Notice dated 18 January 2024, supported by the witness statement of Ms Alabi of the same date.

11. Ms Alabi is a solicitor employed by NHBC as Senior Litigation Counsel, and she took over day to day conduct of the matter in late May/early June 2023 following the departure on maternity leave of the previous in-house solicitor dealing with the claim.

12. Having reviewed the matter, Ms Alabi considered that the claim had become statute-barred under section 5 on 29 June 2022, by virtue of six years having passed since Vantage went into administration on 29 June 2016. She took this point on behalf of NHBC by a letter to Peabody's solicitors on 3 July 2023, which asserted that the cause of action 'based on the insolvency of Vantage' would in principle have accrued on the date of insolvency.

13. It is worth emphasising that NHBC's position in its letter of 3 July 2023 was based solely on a contention that time had started to run from, i.e. the cause of action in contract accrued on, the administration of Vantage on 29 June 2016. I will call this the *Insolvency Point*.

14. No limitation defence had been suggested by NHBC prior to 3 July 2023. To the contrary, the letter of claim under the pre-action protocol was sent on 17 November 2022. NHBC's response dated 13 January 2023 rejected the claim on the basis that there were no extra costs over and above the original contract sum payable to Vantage which are covered by Option 1; but it indicated a willingness to review its position upon the receipt of further information and its further assessment as to whether there were any extra costs covered under Option 1. No limitation defence was taken, but on what is now NHBC's case, any claim to such extra costs became time-barred in June 2022.

15. As I have mentioned, Peabody issued its Claim Form on 24 July 2023, which included two anticipatory pleas concerning limitation. First, a denial of the Insolvency Point that time started to run on the date of insolvency; and second, a contention that the cause of action accrued on the date on which Catalyst had to pay more for the relevant units to be completed. In a letter dated 7 August 2023, Peabody's solicitors stated that this date "was significantly later [than the date of insolvency], and within six years of today's date. For example, our client's total expenditure on the affordable housing at the site exceeded the original Contract Sum under the original contract in June 2020".

16. Secondly, Peabody contended in the Claim Form that NHBC had agreed not to take any defence to liability and/or was estopped from doing so or taking any limitation defence. However, I need not say anything more about that aspect, since Peabody does not pursue those arguments on this Application, nor does it suggest that the failure to take a limitation point prior to 3 July 2023 (although the subject of criticism in correspondence) prevents any good point being taken now.

17. Consistent with the letter of 3 July 2023, and further correspondence from NHBC e.g. dated 31 August 2023 and 3 October 2023, the Application was brought on the sole ground of the Insolvency Point. It did not seek summary disposal of the claim on any alternative basis, for example on the basis that (if it was wrong on the Insolvency Point) the time at which Peabody had 'to pay more to complete' occurred more than six years before the Claim Form. NHBC did not therefore seek to counter the anticipatory plea by Peabody in that Claim Form and the subsequent correspondence to which I have referred.

18. Peabody's evidence in response to the Application correctly acknowledged that the Insolvency Point was the only basis of the Application (see Mr London's witness statement dated 20 May 2024, para. 7).

19. This hearing was listed for half a day, which was NHBC's estimate given in the Application Notice. That was a demanding but not unreasonable time estimate for the resolution of the Insolvency Point, which is essentially a discrete point of law and construction. It was not however an adequate time estimate to deal with any alternative case for summary disposal, as I will explain, and the time taken to discuss the alternative case meant that many of the submissions on the Insolvency Point were rushed too.

An alternative case?

20. Despite the Application being restricted to the Insolvency Point as Mr London pointed out, Peabody did to some extent elaborate, through Mr London's witness statement, on the "factual basis for the cause of action accruing post-insolvency", i.e. its case as to when Peabody incurred the extra costs of completing the homes; or, to frame this using the language of Option 1, when it "had to pay more" over and above the sum due to Vantage. Mr London put forward three alternative ways, in principle, of ascertaining the point in time when Peabody "had to pay" extra costs. The first would be to conduct a deductive exercise from the dates of final accounts (the earliest of which is July 2017); Peabody alleges that this has always been NHBC's position, that it could not finalise what it had to pay until final accounts were prepared. The second would be to analyse cumulative costs over time as the work progressed. The third would be to instruct an independent expert quantity surveyor to retrospectively analyse the letting of the individual works contracts packages, and individual interim applications for payment, and compare the outputs of those analyses with a hypothetical analysis where Vantage did not enter insolvency.

21. Mr London's essential point is that, at the time of insolvency, only some £1.5m had been paid to Vantage, and that there was approximately £8.8m left in the tank, as it were, before the Contract Price for the units (c. £10.3m) would be exceeded. And that it is at the least realistically arguable that, depending on what approach is taken, the moment of "having to pay more" did not arise before March 2020, alternatively June 2020, alternatively certainly not prior to July 2017 (being six years prior to the Claim Form).

22. It was in response to Mr London's statement that, by Ms Alabi's second witness statement dated 31 May 2024 (as clarified in her third statement dated 4 June 2024), NHBC sought to develop an alternative case for summary judgment, if it were wrong on the Insolvency Point. First, NHBC contended that the reasonable extra costs of completing the homes were capable of assessment "by putting the work out to competitive tender" or "by arranging for an assessment by an independent quantity surveyor". Second, that time would run from the date on which "the risk" that more was needed to be paid arose.

23. Various dates and events were suggested as a matter of evidence, in a period from around December 2016 to early 2017, with the focus placed on the date of the contract with Stack in January 2017 which it was submitted contained an estimate or target cost for the development (the project cost plan) which, if that cost materialised, would exceed the sum payable to Vantage in respect of the relevant insured units. The forecast final cost was stated as £25.644m as compared to the £23.878m due under the Vantage contract (for the whole development), and in an email dated 10 February 2017 Catalyst had referred to the estimated build cost for the relevant units as being some £14.3m, as opposed to £12.85m under the Vantage contract. The Stack contract also provided for a new substantial construction management fee (of around £1.04m) which would not have been paid to Vantage.

24. NHBC had referred the month before (22 December 2016) to there being only a "potential claim". However, it submitted that (even though the costs were only forecasts or estimates under the Stack contract) this meant that, by this stage at the latest, the costs for the relevant units would exceed the relevant original contract sum, and that (although the cause of action did not depend on knowledge) Catalyst knew that the costs would exceed it.

25. In response, Peabody does not accept either of these propositions as a matter of fact. These were estimates only, and other parts of the Stack contract provided for savings to be achieved, such that the target costs were adjustable and, as Mr Casey KC (appearing for Peabody) put it, tentative. On the separate management fee, which was adjustable, Mr Casey submitted that NHBC assumes that a management charge was no part of the overall contract price with Vantage; but Vantage would have included an element of uplift to cover its management time and the risk of subcontractor default. Mr Casey also submitted that the project cost estimates in the Stack contract were for all units, and the Court could not determine how much of that related to the 88 affordable units. I cannot resolve such factual issues on this application.

26. In support of its contention that time had started running before July 2017, NHBC contend a claim was formally notified in August 2017 (and this is in fact what Peabody itself alleges in the Particulars of Claim), which NHBC acknowledged in correspondence on 8 August 2017. This is said to be inconsistent with any suggestion that a claim did not accrue until 2020. Peabody submitted that notification of a circumstance was made in August 2017, by which I understand it to say that it gave notice of factual circumstances which might give rise to a claim. Despite the position currently on the pleadings, there may be a dispute in due course as to what was precisely notified. The notification is not in evidence, save in the form of a short electronic note dated 3 August 2017 (which I understand is a note of a telephone conversation) which is inconclusive as to what was notified, and appears to record that the insured would need to confirm the information and actions required by email.

27. In a short response to Ms Alabi's second statement, by his second witness statement dated 3 June 2024, served shortly before the hearing, Mr London relied upon statements made by NHBC or its agents to the effect that without the final costs for the works, NHBC was unable even in 2021 accurately to establish and ascertain the true value of "any" claim. I also remind myself that NHBC's letter dated 13 January 2023 (to which I referred at paragraph 14 above) rejected the claim on the basis that there were no extra costs over and above the original contract sum payable to Vantage.

28. Standing back, a real issue arises in my view as to whether or not this alternative case is capable of being determined summarily and fairly as part of (or more accurately, by way of extension to) the Application, including at a half day hearing.

29. In fairness to NHBC, the problem may well be said to have started with Mr London volunteering a position on accrual, if Peabody were successful on the Application. Nevertheless, it is plain from the context that Mr London was not purporting in his evidence to set out definitively what Peabody's case at trial will be on the issue as to when the insured "had to pay more", let alone the evidence which would be relied upon. As Mr London explains, none of this work or analysis has been done, and it seems to me that, to the extent that it proves necessary, any such exercise will in due course be both a factually intensive and very extensive exercise, and the Court may require expert assistance, as Mr London says.

30. It is also apparent from Mr London's evidence (and Ms Alabi's contentions) that issues arise, or may arise, as to the true meaning, construed in the factual context at the time the Policies were agreed, of 'has to pay more', as well as issues of fact as to when that moment arose. "Has to pay" suggests a test of necessity, and Peabody submits that there must be some form of positive obligation to pay more. But, by way of example, is this when the insured incurred a *legal* liability to pay more; and if so, *when* was this? How is that to be determined if it is not clear at the time of contracting with the alternative contractors (in the event, Stack and then individual sub-contractors) whether the costs will turn out to be more than under the Vantage contract; and specifically so in respect of the relevant units? Or does the time of "having to pay more" arise at an earlier stage when it was likely or foreseeable or estimated (or, as NHBC appeared to contend, there was a risk) that more would or might have to be paid? Or was it at some later point when the works are well underway? Or is it when the final accounts are agreed, before which the final costs might be said to be unknown and/or not due? All these possibilities, and there may be others, arise from the evidence.

31. Mr Casey invited the Court to determine the Application on the basis of the Insolvency Point only, submitting that all Mr London had done was to identify on a broad-brush basis, and subject to expert evidence, when the cause of action might have accrued; and only did so as part of an explanation showing why further investigation and evidence would be required in due course, if Peabody were correct on the Insolvency Point.

32. I have concluded that I am not prepared on a summary application, and in a factual vacuum or at least with only limited evidence, to determine the complex issues raised by the alternative argument, and the question when extra costs "had to be paid", whether in principle or on the facts, and whether that was more than six years before the Claim Form was issued. It is unsatisfactory that these aspects of the case developed in evidence served late in the application process, in some respects not long before the hearing. NHBC has criticised the complexity of Mr London's approach, with its "rather involved calculations", and I agree with the description of complex. In turn, NHBC has raised factually intensive submissions as to when it says time would run on the facts. There was insufficient time for these points to be properly addressed before the Court, in a half day hearing fixed to determine the Insolvency Point, and it was unsatisfactory to receive rushed submissions along the lines that these were the headline points, and key references, but there was insufficient time for the Court to be taken to the materials.

33. If it were necessary to go further, the correct answer to the alternative case does not appear obvious. Albeit on the basis of limited material and submissions, I would be far from satisfied at this summary stage that Peabody does not have a claim which is at least reasonably arguable to be in time. However, since these are issues for trial or at least further evidence, I will leave matters there.

34. It was said by Mr Grant KC appearing for NHBC that I was required as a matter of *law* to resolve these issues on this summary application. He submits that once a defendant has raised limitation as a defence, the claimant must show that the action is not barred, citing paragraph 21.016 of *McGee on Limitation Periods* (9th edition). Mr Casey accepted that the general proposition for which McGee is cited, which concerns the burden of proof, is correct. That, ultimately, it is for a claimant to show its claim is in time.

35. However, it is still for a defendant properly to identify and give fair notice of the points which are taken, and this applies as much to a limitation defence as with any other. A defendant who brings a summary application on one basis, then attempts to run an alternative argument, may well find that the Court is not prepared to deal with the alternative on the application. Just as at trial, a defendant may find that the Court will not entertain an alternative argument if it has not been raised in a satisfactory manner. I do not therefore accept the submission that as a matter of law, on a summary application, a claimant (or indeed the Court) must necessarily grapple with all the points which might arise, as opposed to answer the points properly raised by a defendant. On the contrary, the law requires that I must deal with applications in accordance with the overriding objective; and that includes bearing in mind the time allocated for the application; the extent to which the arguments have been properly or adequately addressed in the time available and materials; the practical question as to whether they can be dealt with satisfactorily; and whether arguments, and the manner in which they have come before the Court, make them suitable for summary disposal on that occasion.

36. Similarly, whilst I accept that it is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial (rather than simply saying that further evidence will or may be available later, especially when that evidence can be expected to be in the possession of the respondent already: *Korea National Insurance Corp. v Allianz Global Corporate & Specialty AG* [2007] EWCA Civ 1066 at [41]), the respondent's burden is to respond to the application on the basis which it is brought; and it is a matter for the Court to consider whether other bases are suitable for fair resolution at a summary stage.

37. For these reasons, although the evidence has to some extent travelled away from the Insolvency Point, that is the basis of the Application, and I would add the time estimate.

<u>Site security costs – a further alternative case</u>

38. In its skeleton argument, though not foreshadowed in the evidence, NHBC sought to run a further alternative argument that Peabody's case seeks an indemnity for some costs which had been actually incurred in 2016. It is said that this means the whole claim is time-barred. I deal with this below (at paragraph 63ff). Mr Casey did not specifically object to me doing so but, as will be seen, the lateness of the point makes its resolution at a summary stage difficult, at least in favour of NHBC.

The approach to summary disposal

39. There is no dispute as to the legal test which must be applied on the Application. Where there is an application for reverse summary judgment or strike-out of a claimant's case, the Court must consider whether the claimant has a realistic prospect of success. The issue raised by the Application is whether time ran from the insolvency of Vantage. If it did, Peabody accepts that the claim is time-barred and has no prospect of success. Both parties accept that the Insolvency Point is capable of summary disposal and does not involve any question of fact. Although I was not addressed on them, I have in mind the principles summarised in, for example, *Easyair v Opal Telecom* [2009] EWHC 339 (Ch).

40. NHBC submitted (and Peabody did not dispute) that if an application gives rise to a short point of law or construction then, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and the parties have had an adequate opportunity to address it in argument, it should "grasp the nettle and decide it": *Global Asset Capital Inc v Aabar Block SARL* [2017] EWCA Civ 37 at [27]. NHBC submitted that it does not invite the Court to decide any factually contentious issue in its favour and against Peabody. Insofar as those submissions were directed at the Insolvency Point, I agree, and there is no dispute that I can and should resolve the Insolvency Point at a summary stage. But a determination of the alternative case would have required a decision on material which is factually contentious, as well as being incomplete, and which in any event (for the reasons I have explained) comes before the Court in a way which is unsatisfactory and not conducive to a fair summary disposal.

The Insolvency Point

41. I now turn to the Insolvency Point directly. The claim on the Policies is one subject to section 5 of the Limitation Act and, therefore, as a contractual claim it must be brought within six years from breach. The question as to when there was a breach requires an analysis of the contractual terms. But subject to those terms, time in contract does not run from the date of loss, or the date when a claimant might know it had a claim or the date on which it could assess or quantify the extent of its loss. None of this is in dispute.

42. It is also common ground that a claim on an insurance policy, being a claim under a contract of indemnity, is a claim for unliquidated damages for breach of the insurer's obligation to hold the insured harmless against an insured peril. As soon as the insured peril occurs, the insurer is in breach, because it had agreed to hold the insured harmless against it.

43. In *Callaghan v Dominion Insurance Co Ltd* [1997] 2 Lloyd's Rep 541 (a fire insurance case), Sir Peter Webster said at p.544, after referring to a number of authorities including *The Fanti* [1991] 2 AC 1 at [35] per Lord Goff (a liability case):

> *"It may be helpful to define as precisely as may be the nature of indemnity insurance. Expressions such as "to insure against" or to "save harmless from" loss may be capable of misleading. It seems to me that the best way to 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."(emphasis added).

44. NHBC contend that this is accurately summarised in *Colinvaux & Merkin's Insurance Contract Law* at C-0236 in these terms:

"…it is established that—in the absence of wording to the contrary—a claim arises under an insurance policy as soon as the event which directly results in the loss has occurred, and not when the loss is manifested, and the position would seem to be that it is the occurrence of the event which is the key factor."

45. This passage, as I interpret it consistent with *Callaghan* upon which it is based, confirms that time runs from when insured loss is suffered, and this occurs *by* the happening of the event insured against.

46. This general principle is not in dispute, namely that it is necessary to determine the event which is being insured against. The parties referred to a number of authorities which illustrate the principle:

(1) In property damage cases, where the insurance is against physical damage to the property, the insurer is in breach as soon as the damage occurs. Subject to wording to the contrary, a fire insurer is in breach when the fire breaks out causing damage; not when, for example, it learns of the fire having occurred, or when it wrongly refuses a subsequent insurance claim seeking compensation for or restoration of that damage. See *Sveriges Angfartygs Assurans Forening (The Swedish Club) v Connect Shipping Inc, The Renos* [2019] UKSC 29 at [10], per Lord Sumption.

(2) Option 3 of the Buildmark policy provides property damage cover in respect of physical damage caused by a defect. NHBC agreed to pay for or arrange for work to be carried out at its expense to put right damage caused by a relevant defect. In *Harrison v (1) Shepherd Homes Ltd, (2) NHBC, (3) NHBC Building Control Services* [2010] EWHC 1398 (TCC), Ramsay J found that time for the claim against NHBC ran from the moment of damage [30], that being when the relevant loss was suffered. Similarly, see *Griffiths v Liberty Syndicate 4472* [2020] EWHC 948 (TCC) at [14-15], where there was insurance cover for the cost of repair, replacement and rectification of construction defects, broadly similar in nature to Buildmark.

47. However, these are merely illustrations. The loss under Option 1 is a financial loss. The present claim is not one of property damage insurance, and NHBC accepts that the cover under Option 3 is materially different from Option 1.

48. A further helpful illustration is *British Credit Trust Holdings v UK Insurance* [2004] EWHC 2404 (Comm). In that case, the insured provided credit for vehicles to borrowers under hire-purchase contracts. It insured the risk of there being a shortfall between the loan outstanding and the value of a repossessed vehicle:

"this insurance shall apply solely in respect of losses sustained by the Insured as a result of the early termination of any Customer's Agreement/s, such termination to be as a consequence of any act or default or breach of the terms of the Agreement/s by a Customer or insolvency of a Customer and then only for:

> *In the case of any vehicle which is repossessed the difference between:*
>
> *(a) The sum due in respect of the Net Outstanding Balance under an Agreement and;*
>
> *(b) The sale value of any such re-possessed vehicle realised at auction, such vehicle to be sold within 90 days of termination of an Agreement. Otherwise on day 91 after termination then the value of the vehicle at the date of termination of an Agreement will be determined by reference to Glass's Guide Trade Value, adjusted for mileage or other similar point of reference agreed with the Insurers.*
>
> *If the vehicle is not repossessed within such 90 day period and provided the Insured confirms in writing that the Insured has made all reasonable efforts to recover the Vehicle then the Insured's loss shall be a sum equal to (a) above."*

49. Morison J had to consider when the cause of action accrued. As a matter of construction, he held that the insured loss was for the sum of the outstanding loan less the recoveries (actual or hypothetical), and not the earlier date of termination of the hire-purchase agreements. At [25] he described the termination of the agreement as being the trigger for potential recoverable loss, but not the moment at which the loss occurred. Time ran from the date of sale if there was one within the 90 days, otherwise it ran from day 91. Adopting that language, Peabody says that the contractor insolvency (or fraud) is the trigger for potential recoverable loss, but loss under Option 1 is the having to pay more to complete because of that insolvency (or fraud).

50. The issue therefore raised by the Application is, essentially, what was the insured peril (or the "event insured against") for the purposes of Option 1, in respect of which NHBC had promised to hold the insured harmless. Was the insured event or peril the mere insolvency of the contractor, as NHBC contends? Or was it the loss of the amount paid to the contractor or, in this case, the having to pay more to complete the works, in each case caused by the insolvency, as Peabody contend? This is a matter of construction of the Policies.

51. In my judgment, NHBC are wrong to say that time runs from insolvency. Taking their arguments in turn.

52. First, the heading to the relevant part of the Policies (which I have labelled [A] above) describes Option 1 as "insolvency cover". That is of course true. However, Option 1 indemnified Catalyst/Peabody if (a) it lost money paid to Vantage or (b) if it had to pay more to complete the buildings, in both cases because the contractor (i) is insolvent or (ii) commits fraud: see the passage at [B]. Peabody's claim is not of course brought on the basis that it lost money paid, but rather on the ground that it had to pay more to complete the project, and it claims the reasonable extra cost of doing so. It says the extra costs arose because of the contractor's insolvency. It does not allege the cause to be contractor fraud. Nonetheless, as a matter of construction, it is quite apparent in my judgment that the heading to Option 1, and similar expressions such as "contractor insolvency cover" (in e.g. the Policy Confirmation/cover sheet dated 2 March 2016), are very much a shorthand for the cover in fact provided by Option 1.

53. Secondly, NHBC submitted that the fact of insolvency necessarily meant that an insured would have to pay more to complete the buildings than under the original contract. I do not accept that necessarily follows either as a matter of fact or, more relevantly, construction.

54. As far as the facts are concerned, Peabody disputes this, and say there is no evidential basis for NHBC's assertion, which it is for NHBC to prove, that the insolvency meant that it was impossible to complete the development without paying more. Peabody also points out, if only forensically at this stage, that NHBC's case on the merits is understood to be that the insolvency and the Stack contract did not give rise to extra costs over and above what would have been paid to Vantage.

55. As to construction, this has to be determined as at the date of the contract, without knowledge of the actual subsequent facts. It is not in dispute that an insurance policy, like any other contract, must be interpreted objectively by asking what a reasonable person, with all the background knowledge which would reasonably have been available to the parties when they entered into the contract, would have understood the language of the contract to mean. See *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 at [47].

56. As I have already remarked (paragraph 9 above), an insolvency as that term is defined (particularly if it were merely the appointment of a receiver or manager over certain property) might not lead to more having to be paid at all, or the loss of a payment made; nor would a contractor fraud necessarily result in the loss of money paid, or more having to be paid to complete the units. An administration, for example, might be successful, and allow the completion of the project without undue difficulty, and much might depend on when and in what circumstances the administration or other insolvency event occurred. It is also possible that the works might be abandoned and not completed, with the result that no extra costs would be incurred. At times, Mr Grant appeared to accept that it was possible that an insolvency might not have the consequence of extra costs, though he said it was very unlikely not to do so.

57. In my judgment, Option 1 cover does not apply (i.e. is not triggered) if the insured did not "have to pay more to complete" the units, or if the insured did not lose any money paid to the contractor, despite the contractor going insolvent. The event insured against is not the insolvency (or fraud of the contractor) *per se*, but rather the insured being required to pay more above the contract price to complete. The requirement to pay more must have been caused by the insolvency (or fraud) of the contractor, but the insolvency (or fraud) itself is not the risk which is covered. Peabody is correct therefore in its submission that the insured losses (the extra costs, or lost payments) are an essential and definitional part of the insuring clause itself [B], and not matters which simply go to the delineation of quantum [D]. It would have been easy enough to draft [B] to make clear that the claim arose on insolvency itself, regardless of whether any extra expense (or lost payment) was caused by it, if that had been intended.

58. Further, I agree with Mr Casey that it is not a commercially sensible construction of the Policies to say that an insurer would be liable to indemnify at the moment of the insolvency (as defined), regardless of whether there was in fact any loss caused by it. I do not accept Mr Grant's submission that at the point of insolvency, a claim arises, an estimate of 'reasonable extra cost' [D] must be calculated and paid. That is an uncommercial outcome,

in circumstances where no loss may arise at all, or any actual costs which 'have to be paid' will crystallise later. The limitation under the Policies to 'reasonable extra cost' is intended as no more than a cap on a claim based on actual costs.

59. NHBC invokes the language of the passage in *Colinvaux*, to which I referred at paragraph 44 above, to say that the insolvency was the event which "directly results in the loss". In my judgment, this submission conflates the identity of the insured peril or event insured against, and issues of causation. The insured peril is the having to pay more (or the loss of a payment made); extra construction costs (or damages reflecting any lost payment) can be claimed if those extra costs (or lost payment) are caused by insolvency (or fraud).

60. NHBC also relies on the '*When you can claim*' language [C]. This provides a cut-off date, being that of the Buildmark Choice Certificate, but does not, in my judgment, state at least in clear terms the start or accrual date. The wording does tell the insured to "*Contact us and tell us if you have lost the amount you paid to the contractor or the contractor has not completed the home(s)*". However, it is not NHBC's case that the non-completion of the homes is the accrual point. Furthermore, it is significant that this wording does not require the insured to notify the contractor insolvency (or contractor fraud) itself. I take the point that [C] does not require contact where extra costs have been or necessarily have to be paid (Peabody's case as to when accrual occurs), but notification clauses (which I consider [C] to be an example of) often require early notification of circumstances from which a claim might arise. I accept Peabody's submission that the relevant part of [C] is a notification or information provision. It is not an "entitlement" clause, as Mr Grant put it. For those reasons, [C] does not assist NHBC.

61. For completeness, I note that NHBC submits that it would be a rare outcome that a court would conclude that a claimant can itself dictate (or choose to defer) when time starts running for a breach of contract claim: see *Legal Services Commission v Henthorn* [2012] 1 WLR 1173 at [31] (Lord Neuberger) and HHJ Pelling KC's discussion of that principle (and the Court of Appeal decision in *Manchikalapai v Zurich Insurance* [2019] EWCA Civ 2163), in *Griffiths* (supra) at [15]. I respectfully agree with that observation, although it remains a question of construction in any particular case what the insured peril is. It is not Peabody's case on the Insolvency Point that it can dictate or defer the timing. Mr Grant is right though to say that the judgment of Coulson LJ in *Manchikalapai* (supra) may well be of some importance in relation to the alternative case in due course.

62. For these reasons, in my judgment NHBC are wrong on the Insolvency Point.

Site Security Costs

63. That leaves the site security costs, to which I referred at paragraph 38 above. NHBC submits that:

    (1) There is a separate head of indemnity available under the Policies for protecting the site. This is the cover at [D1], which appears as part of the "*What we will do*" text:

> *"… In addition, we will pay the cost of reasonable precautions to secure the work defined in the building contract against unauthorised entry, theft and vandalism until work resumes".*

(2) There were trespassers on the site in 2016, and "site security" costs in the total sum of £56,350 (to which I have referred in paragraph 6 above) were incurred at the time in clearing them off. NHBC rely on a letter written by Catalyst dated 18 January 2018 (which I note incidentally refers to a *potential* claim under the Policies) in which it was stated that the site was secured immediately on Vantage's administration by Catalyst and Silver, the employer's agent; Vantage workers were found to be using overnight accommodation and a Court order was obtained to prevent this.

(3) As appears from the Appendix to the Particulars of Claim, a claim is made for a pro-rata share of these costs, and perhaps other costs paid to Silver, which were incurred in around 2016.

(4) Since those costs are time-barred, the whole claim under Option 1 is time-barred, on the basis that there is a unitary cause of action, i.e. a single claim for breach of contract.

64. In support of its case of a unitary cause of action, in the week following the hearing NHBC provided an extract from *Colinvaux* (paragraph C-0242) and sought to rely on *Bann Carraig Ltd v Great Lakes Reinsurance UK plc* [2021] NIQB 63, a decision of the High Court in Northern Ireland. The insurance in that case covered the insured in respect of physical damage to property including consequent business interruption caused by that damage. Having construed the policy wording, the Court found that the business interruption claim did not give rise to a freestanding cause of action, separate from the claim for physical damage; there was a single cause of action or claim for an indemnity which accrued when the insured peril occurred. The insured peril was physical damage, both for the physical damage claims and the consequent business interruption claim.

65. However, under Option 1, as I have already found, the insured peril under the main cover [B] is the 'having to pay more' to complete the units (or the loss of a payment made to the contractor). The cover at [D1], which is additional cover, is not triggered by either of those insured perils. It is additional cover which arises independently of those perils. It is unlike the business interruption cover for the consequences of physical damage which accrues at the time of that damage, as in *Bann Carraig* (supra). In my judgment, the additional cover [D1] is separate cover from the main claims. I therefore do not accept that, if any [D1] cover is time-barred, that means the main claim is time-barred.

66. As to whether the [D1] claim is time-barred, on the basis that the costs were incurred more than six years before the Claim Form, the Court is faced with the difficulty that, no doubt because this point did not appear as part of the Application or the evidence, Peabody did not address it either in its evidence or its skeleton argument. There is limited evidence about the costs in question. For example, the letter of 18 January 2018 relied upon by NHBC stated that the costs were incurred to secure the site and to remove squatters. But the detail of the costs was set out in Section E of the claim document, which is not in evidence.

67. Furthermore, Peabody submitted that the costs of removing squatters is not claimed under this additional cover [D1] at all (which it submits concerns preventative measures only) but forms part of the claim for extra costs incurred over and above those payable to Vantage. That does not appear to be the basis on which the claim is currently pleaded. However, if that is or will be in dispute as a matter of fact, as I apprehend it may be, I cannot resolve it on the evidence as it currently rests. In the circumstances, I am not satisfied on the current material that the claim for £56,000 odd (or part of it) is time-barred. But if it is, for the reasons I have explained, that does not mean that the main claim is time-barred; and if it turns out at trial that the £56,000 claim is time-barred it will not have taken undue time and expense for that to be resolved, as part of the wider issues. NHBC did not request a ruling that this part of the claim be struck out, save as a stepping stone for its attack on the main claim brought under [B].

68. For completeness, Mr Casey also submitted (in written submissions after the hearing) that to the extent that there was a claim for the cost of preventative measures (under the additional cover), which was separate from the main claim for the extra costs to complete the units, the costs identified would be mitigation costs. In *Euro Pools Plc v Royal and Sun Alliance Insurance Plc* [2018] EWHC 46, such costs were treated as giving rise to a separate cause of action and were treated as time-barred notwithstanding the fact that the principal claim for an indemnity was within time: see [144-147]. This may well be reasonably arguable, but in circumstances where I did not have NHBC's submissions on this point, and it was raised after the hearing (understandably, given that it was a response to NHBC's post-hearing submissions), I decline to rule on this. For the reasons set out above, it is not necessary for me to do so.

Conclusion

69. I therefore dismiss the Application, on the basis that time did not start running on the insolvency of Vantage on 29 June 2016 but at a time (to be determined at trial) when Peabody had to pay more to complete the units, as a result of that insolvency.

70. Since I am handing down this Judgment in vacation, I will adjourn the hearing of all and any consequential matters, unless the parties have been able to agree an order dealing with them.