

STATUTORY LIMITATION PERIOD FOR A COURT ACTION TO BE FILED AGAINST INSURERS RUNS FROM THE DATE OF THE LOSS, NOT THE DATE OF DECLINATURE

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Legal Briefings - By **Mark Darwin and Brendan Donohue**

KEY TAKEAWAYS

- The New South Wales Court of Appeal has held that a policyholder's cause of action against an insurer arises when the insured event occurs, not when indemnity is declined and, as a result, a policyholder's court proceedings which were commenced more than 6 years after the date of the relevant damage were statute barred, leaving the policyholder with no rights to pursue the declined claim.
- Any policyholder who hasn't had their claim paid within 6 years of the event should already be seriously questioning why court proceedings haven't been commenced. For those who are in extended negotiations with insurers over difficult or declined claims, written comfort should be sought that insurers will not rely on a limitations defence. Otherwise, court proceedings must be filed within 6 years¹ of the loss, failing which the right to pursue a claim is barred by relevant statutes of limitation.

FACTS

In *Globe Church Incorporated v Allianz Australia Insurance Ltd* [2019] NSWCA 27 (26 February 2019), Globe Church Incorporated (the **policyholder**) had an ISR (property damage and BI) insurance policy for the period from 31 March 2007 to 31 March 2008.

In September 2009, the policyholder first notified its insurers of a claim for damage to the pier footings and car park of a building owned by the policyholder, which was said to have resulted from rainwater and flooding between 8 June 2007 and 31 March 2008.

The insurers did not accept that the damage occurred as alleged, and denied indemnity on 5 April 2011. After several years of unsuccessful negotiations to settle the claim, the policyholder commenced court proceedings against the insurers on 4 November 2016.

The statutory limitation period for breach of contract is 6 years from the date the cause of action arises. The court proceedings had been commenced within 6 years of the insurers' declination of the claim, but more than 6 years after the occurrence of the damage.

The question was whether the policyholder's proceedings were filed too late and therefore statute barred, which depended upon when the insurers breached any obligation each insurer may have had to indemnify the policyholder. Was it (a) when the damage occurred (as argued by the insurers) or (b) when the claim was declined?

DECISION

The New South Wales Court of Appeal favoured the insurers' argument by a narrow 3-2 majority. The majority held that, given the policy wording in question:

- the policyholder's loss which the insurers agreed to indemnify arose on the occurrence of the property damage in question;
- as a result, absent a policy provision making lodgement of a claim a condition precedent to the insurers' liability to pay (which was not present here), the insurers' obligation to indemnify the policyholder for the loss was enlivened when the property damage was suffered;

The 2 minority judges disagreed, opining that an insurer's breach of a policy arises after the policyholder had claimed under the policy and a reasonable time had elapsed, with one stating that it '*flouted business common sense*' to conclude that an insurer breaches a promise by the mere happening of an insured event. The other minority judge stated that '*neither the reasonable commercial expectations of the parties nor the language of the policy suggested that the [insurers'] payment obligation was to be performed immediately upon the happening of the relevant damage*'.

ENDNOTES

1. Note: The statutory limitation period may be less than 6 years in some jurisdictions. Care should be taken to understand the local limitation period and to commence court proceedings within that timeframe.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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