CLYDE&CO

(Re)insurance end of year review 2012

Apportionment

Whether payments by the insured to its customers were mitigation costs/ apportionment/interpretation on an aggregation clause

The insured operated a fund which suffered a one-day 4.8% fall in value. It subsequently estimated that a majority of its customers would have valid claims against it (essentially for mis-selling). It made certain payments (to customers and into the fund) which it sought to recover under the Mitigation Costs section of its professional indemnity insurance policy. The insurers denied cover. Eder J considered the following issues in this case:

(1) The policy provided cover for Mitigation Costs "reasonably and necessarily incurred by the Assured in taking action to avoid...or to reduce a third party claim". Insurers argued that the payments were not covered because they were made for the (dominant) purpose of avoiding or reducing reputational damage. The judge rejected that argument. The motive behind the payments was immaterial. The insured needed to show that the payments were made in taking action to avoid or reduce a third party claim. It did not matter if one motive of the insured was also to avoid or reduce reputational damage – that did not affect the insured's entitlement to cover. The insured also did not need to show that the payments were made to discharge a particular liability to a particular third party claimant.

(2) On the facts, the payments did fall within the scope of the Mitigations Costs clause. The insured was able to show on the facts that the fall of 4.8% was outside the reasonable expectations of any customers because of some inadequacy in the marketing literature which rendered the insured potentially liable.

(3) Insurers had also sought to argue that if there were two genuine and equally dominant purposes in making the payments (namely, to avoid or reduce reputational damage and also to avoid or reduce potential third party claims) there should be an apportionment of the Mitigation Costs. This was a novel claim in respect of a non-marine liability policy.

The judge accepted that the insurers had made "powerful" submissions but rejected the argument for apportionment. He was "at the very least, very doubtful" that there could be a general principle of apportionment in a liability policy, although he saw "much less objection in principle to the possible application of apportionment in the specific context of costs incurred by way of mitigation". However, the issue would turn on the particular wording of the clause in question and there was nothing in the wording of the Mitigation Costs clause in this case to support the apportionment argument. In particular, the words "solely" or "exclusively" did not appear in the clause.

(4) The policy contained an aggregation provision which provided (in relevant part) that "all claims...arising from or in connection with...any one act...or originating cause... shall be considered to be a single third party claim for the purposes of the application of the Deductible". Insurers argued that there was no one originating cause in this case because there was a wide variety of different types of complaints from customers. That argument was rejected by the judge.

The aggregation clause in the policy was "very wide wording". There is prior caselaw to support the view that "originating cause" opens up "the widest possible search for a unifying factor" (see *Axa Re v Field* [1996]). Furthermore, the phrase "in connection with" is extremely broad "and indicates that it is not even necessary to show a direct causal relationship between the claims and the state of affairs identified as their "originating cause or source," and that some form of connection between the claims and the unifying factor is all that is required".

The judge said that there was no difficulty here in aggregating the claims - the originating cause was that the fund had been marketed as a safer investment than it in fact was and that had been a continuing state of affairs even though the fund had been marketed in a number of different forms and through a number of different channels over the years.

The insurers subsequently appealed on point (3) above (apportionment). The Court of Appeal held that, as a matter of construction of the policy, the insured was entitled to all its Mitigation costs provided one purpose behind the payment was covered under the policy. It did not matter if the payment also achieved another "incidental objective".

Although not strictly required to do so, the Court of Appeal also considered the insurers' wider argument that the

cover of mitigation costs is analogous to a sue and labour provision traditionally found in marine insurance policies and so a principle of apportionment should be implied into liability insurance policies as well.

That argument was rejected by the Court of Appeal. It held that marine insurance policies are different from liability policies in that the adjustment of losses under such policies proceeds on the assumption that the subject matter insured is fully covered by insurance. Where there is under-insurance (and so the insured is "his own insurer" for the uninsured balance) apportionment is required in order to ensure that insurers only contribute to the extent of their interest in the property. The Court of Appeal found that the extension of the apportionment principle to liability insurance, where the extent of the liabilities to be incurred is unknown when the policy is agreed, would be "irrational and unprincipled".

The Court of Appeal also cast doubt on the view of Rix J in *Kuwait Airways Corporation v Kuwait Insurance Company* [1996] that apportionment could apply in a non-marine context – specifically in that case, aviation insurance. Tomlinson LJ said: "It may be that aviation property losses are traditionally adjusted in the same manner as marine property losses, but there is no finding to that effect in the *Kuwait Airways* case, and thus no immediately discernible rationale for the extension of the rule from marine property insurance to aviation property insurance".

COMMENT: This appears to be the first case in which an argument has been run for apportionment in the context of a non-marine, non-property insurance policy. Although both the first instance court and the Court of Appeal have now reached the same conclusion, at first instance the possibility was mooted that the use of the words "solely" or "exclusively" in the clause might have supported a conclusion that there should be apportionment. There was no reference to that point, though, in the Court of Appeal

This also seems to be the first case in which the phrase "in connection with" (in an aggregation clause) has been judicially considered. The case confirms that this phrase is considerably wider than other, more common, wording in aggregation clauses (such as "arising out of or from"/"resulting from"/"originating from") and this should be borne in mind when drafting policies. It remains to be seen whether the decision will be appealed to the Supreme Court.

Standard Life v Ace European Group & Ors [2012] EWHC (Comm) 104 and [2012] EWCA Civ 1713

Conditions precedent

Fraudulent claim and joint/composite policy/ breach of condition precedent

It was undisputed that the property owned by the first claimant (Mrs Parker) was substantially damaged by fire in December 2009. She sought to claim under an insurance policy which was taken out in July 2009 in her name (which was then Mrs Cooke). In September 2009, the second claimant (Mr Parker) was added as an assured to the policy. At the time of the fire, the claimants were living together (although not at the property) and they later married in April 2010.

The insurers denied liability on several grounds:

(1) They were entitled to avoid the policy because of two earlier fraudulent claims by Mr Parker (in 2002 and 2007). Teare J found, on the facts, that one of the earlier claims was not fraudulent but the other was. However, he also concluded that Mrs Parker was unaware that this dishonest claim had been made.

The judge went on to find that the fire had been caused by Mr Parker's wilful misconduct. The insurer did not allege that Mrs Parker was party to any conspiracy to set fire to the property. He therefore held that the insurer was entitled to avoid its obligation to indemnify Mr Parker (and in any event Mr Parker could not recover because of his involvement in the fire). Mr Parker was also liable to pay the insurer the costs of its investigation, plus simple interest and the insurer was entitled to restitution of the sums paid out, plus compound interest.

(2) Could the insurer also avoid against Mrs Parker? Although the schedule to the policy described Mr Parker as a "joint policyholder", the judge concluded that this was in fact a composite policy. That was because Mr and Mrs Parker had different interests in relation to the property. She was the owner but the judge said it was difficult to identify any interest at all of his in the property. Accordingly, her right to claim was not affected by Mr Parker's wilful misconduct.

(3) Could the insurer rely on a condition precedent in the policy? It was undisputed that it was a condition precedent that the insured provide all written details and documents which the insurer asked for. During its investigation, the insurer asked for copies of the claimants' bank statements, in order to verify a statement by Mr Parker that he had sufficient money in his bank to pay for the demolition and reconstruction of the property. The claimants refused to comply with this request and instead sent a letter from their bank (which confirmed there were sufficient funds for a rebuild).

Teare J held that this was a breach of the condition precedent (since the letter did not confirm how much was actually in the account) and it did not matter that no reliance was placed on this breach until service of the defence – he held that there had been no waiver of the right to rely on the condition precedent.

(4) Could Mrs Parker rely on the Unfair Terms in Consumer Contracts Regulations 1999 and/or the Insurance Conduct of Business Sourcebook ("ICOBS") to avoid the consequences of breaching the condition precedent? Teare J held that she could not. The condition precedent was not an "unfair term" – it is the assured, rather than the insurer, who will be in possession of relevant documents. Furthermore, the insurer had not rejected the claim unreasonably. The breach of the condition precedent was connected to the claim – the bank statements were

relevant to the question of motive. Furthermore, the insurer's solicitors had given the insured a "clear warning" as to the consequences of the breach by drawing attention to the relevant term in the policy and by reserving the insurer's rights.

(5) Although unnecessary to decide the point, Teare J added that where (a) the right to subrogation arises on payment; and (b) Mr Parker would be liable to Mrs Parker for the damage which he caused to her property; and (c) the making of a declaration would avoid the need for fresh proceedings to be issued by the insurer against Mr Parker, it would be just and convenient to make a "pre-payment declaration of entitlement to be subrogated".

Finally, although it was unnecessary to decide the amount which the claimants could have claimed, Teare J gave his opinion on this matter. Under the terms of the policy, where the property was not replaced but instead a larger house was built on the site, the measure of indemnity would be the lesser of the cost of replacement and the loss in market value. Here, the reduction in market value was said to be the difference between £1,050,000 (the midway between two valuations) and £625,000 (the value of the plot, taking into account the possibility that a private buyer might be willing to pay more than the "residual valuation"). Since that was less than the agreed costs of reconstruction, that would have been the measure of indemnity.

Parker & Anor v National Farmers Union Mutual Insurance Society [2012] EWHC (Comm) 2156

Damages

Whether claimant insurer could fully recover the cost of repairs from the defendants' insurers

The claimants in this case were drivers whose cars had been damaged by the defendants. The claimants' insurer ("A") indemnified the claimants by paying for the repairs to the cars. The insurer then brought subrogated claims against the defendants' insurers ("B") seeking declarations as to their liability. The claimants in this case had all elected to use A's system for repairing their cars. Under this system, A engaged one of its subsidiaries to undertake the repairs but the repairs were actually carried out by subcontractors. B objected because the subsidiary charged higher rates than those paid by it to the subcontractors and the interposition of the subsidiary had the effect of increasing the costs of the work done by around 25%. A responded that the amount charged by the subsidiary was no more than any individual policyholder would have had to pay had he arranged for the repairs himself. Cooke J considered the following issues:

(1) Where a car is negligently damaged, is the measure of the claimant's loss (if the car is not written off) the reasonable cost of repair? Having reviewed prior caselaw, the judge concluded that loss is suffered by the victim as soon as the damage occurs. The usual rule is that the diminution of the value of an asset is measured by reference to the repair cost. However, the victim does not have to have his car repaired and, if he chooses not to, he can instead provide estimates for repair or expert evidence to establish the extent of his recoverable loss. In other words, the wrongdoer must pay the cost of repair even if that cost has never actually been paid. Applying those principles to this case, the judge said: "If he [*the victim*] can get a knock-down price for repairs by virtue of a particular relationship that he has, it is still open to him to claim the diminution in value of the car by reference to the market cost of repair". He also added: "Nor can it be said that there is a rule of law that where repairs are effected, the cost of repair has to be taken subject to mitigation arguments". Thus A was entitled to claim the reasonable cost of repair – which was not necessarily the repair costs actually incurred.

(2) Where a claimant's insurer arranges the repairs, is the reasonableness of the repair cost to be judged by reference to what a person in the position of the claimant could obtain in the open market or by reference to what his insurers can obtain? Cooke J concluded that the loss was suffered by the policyholder and so there was no room for the argument that the insurer's options fell to be taken into account. Accordingly, it was "neither here nor there whether the insurers put in place a repair company such as [*A's subsidiary*], which subcontracts to repair garages, or whether they subcontract further to other specialist repairers, or whether [A] contracts directly with a garage or repairs the cars itself. The only issue is the reasonable cost of repair to the individual claimant, which can be established by any form of admissible evidence in a court".

Finally, although not required to decide the point, Cooke J noted the distinction drawn by the authorities between a claim for diminution in value of an asset (eg repairing a car) and a claim for loss of the use of that asset (eg hiring a replacement car). Although the cost or repairing the vehicle "must be treated in the round" (so that an overall figure for the reasonable costs of repair may be justified even if individual items are not reasonable), the judge indicated that an item such as "collection/delivery" of the car may amount to a claim for loss of the use of the car (for which general damages might run).

COMMENT: This case provides useful confirmation that the general principle that a victim can recover the reasonable cost of repair even where those repairs are not actually carried out (for whatever reason), or are carried out for a lower actual cost, applies in an insurance/subrogation context. The practical effect of the decision, though, is that the claimants' insurer (and not the car owner) received, in effect, a windfall from the defendants' insurers.

Coles & Ors v Hetherton & Ors [2012] EWHC (Comm) 1599

Interpretation

Supreme Court decides mesothelioma claims under EL policies are triggered by exposure/ considers causation issues

The issue in this appeal to the Supreme Court was whether the Court of Appeal was right to find (on the basis that it was bound by the earlier Court of Appeal decision in *Bolton MBC v MMI* [2006]) that, in mesothelioma cases, injury is not "sustained" (as required in the wording of certain employers' liability ("EL" policies)) until the onset of the disease (and not at the date of original exposure to asbestos).

The Supreme Court has now held unanimously that mesothelioma sufferers "sustain" injury on exposure. In reaching this decision, the Supreme Court relied on various arguments, including:

(1) The importance attached to the employment which is current during the policy period for EL policies;

(2) Weight should be given to the recent Supreme Court decision in *Rainy Sky v Kookmin* (2011) and the principle that "where a term of a contract is open to more than one interpretation, it is generally appropriate to adopt the interpretation which is most consistent with business common sense";

(3) The general commercial purpose of the policies;

(4) The conclusion which gives proper effect to the protective purpose of the Employers' Liability (Compulsory Insurance) Act 1969 is that insurance is required to be on a causation basis;

(5) *Bolton* involved a public liability policy and different considerations apply to EL policies. The Supreme Court pointed out, though, that "this does not involve any view about the correctness or otherwise of *Bolton*, but only that it is unnecessary to consider what the position generally may be under public liability policies" which "operate on different bases".

The Supreme Court also addressed the definition of causation. It held (Lord Phillips dissenting) that exposure to the risk of mesothelioma can satisfy the test of causing an injury (even though it cannot be proven which particular inhalation of asbestos resulted in the development of mesothelioma), provided that the victim does suffer from mesothelioma: "In ordinary language, the cause of action is "for" or "in respect of" the mesothelioma, and in ordinary language a defendant who exposes a victim of mesothelioma to asbestos is, under the rule in *Fairchild* and *Barker*, held responsible "for" and "in respect of" both that exposure and the mesothelioma" (as per Lord Mance, who concluded that "for the purposes of the insurances, liability for mesothelioma following upon exposure to asbestos created during an insurance period involves a sufficient "weak" or "broad" causal link for the disease to be regarded as "caused" within the insurance period").

COMMENT: It was arguably unsatisfactory to link cover to the date of onset in the case of mesothelioma (as the Court of Appeal did), since victims would often only learn that they were suffering from mesothelioma once they have started to experience symptoms (which may be many years after onset). Conversely, the date of causation can be fixed with relative certainty and (more importantly) there is more likely to be a policy in place than if a later date was chosen (because an employer may no longer be in business or insurers may refuse to issue cover). For those reasons, it was highly predictable that the Supreme Court would overturn the Court of Appeal decision.

It might be of concern to insurers, though, that in reaching its conclusion, the Supreme Court placed reliance on *Rainy Sky v Kookmin*. It will be recalled that in that case, the Supreme Court favoured a commercial approach where a word was ambiguous or capable of more than one possible meaning. However, it was stated that "where the parties have used unambiguous language, the court must apply it". The concern is that, in this case, there was no apparent view that the meaning of "sustain" was (in isolation) ambiguous – just that it did not make sense to use that word in the wider context of the policy. Lord Mance cautioned against "over-concentration on the meaning of single words or phrases viewed in isolation" and said that a "broader approach" was necessary: "On this basis, I consider that, although the word "sustained" may initially appear to refer to the development or manifestation of such an injury or disease as it impacts employees, the only approach, consistent with the nature and underlying purpose of these insurances both before and after the ELCIA, is one which looks to the initiation or causation of the accident or disease which injured the employee." The case therefore continues the recent trend to move towards a more purposive (rather than literal) approach to interpretation, which in turn might increase uncertainty and lead to a greater number of disputes before the courts.

Employers' Liability Insurance "Trigger" Litigation: BAI (Run Off) Ltd v Durham & Ors [2012] UKSC 14

Meaning of "exposed to acts of piracy" in a marine insurance policy

A term in a charter provided (broadly) that a vessel should not be required to continue to take a route if it appeared "in the reasonable judgment of ... the Owners" that the vessel and her cargo "may be, or are likely to be" exposed to certain defined War Risks (including piracy). The owners refused to proceed via Suez and the Gulf of Aden on account of a risk from pirates. An arbitral tribunal held that the charterer should bear the extra costs of that decision and the charterer appealed pursuant to section 69 of the Arbitration Act 1996 (ie an appeal on a point of law). Teare J held (inter alia) that the award should be remitted to the arbitrators to determine whether a 1 in 300 chance of being hijacked by pirates was a serious risk of exposure to piracy.

However, since that decision, a dispute arose between the parties as to the meaning of "exposed to acts of piracy". Did it mean (as the charterer contended) "being in contact with pirates" or "being exposed to acts of piracy having an actual effect on the vessel" (including actual and failed attempts by pirates to attack the vessel) or did it mean (as the owners contended) merely being exposed to the risk of piracy.

Teare J held (having regard to the rest of the clause and the Oxford English Dictionary) that "the phrase "exposed to War Risks" should properly be construed as referring to a situation which is "dangerous"....Thus the question to be addressed by an owner or master, when ordered to go to a place, is whether there is a real likelihood that the vessel will be exposed to acts of piracy in the sense that the place will be dangerous on account of acts of piracy" (thus agreeing with the owners).

The charterer also argued that remission to the arbitrators would serve no useful purpose, since the arbitrators could not properly find that there had been a "real likelihood" that the vessel would be exposed to acts of piracy where the owners' case had been that there was about a 1 in 300 chance of hijack. That argument was also rejected by the judge. Whilst a bare possibility is not a real likelihood, the judge did not know how the 1 in 300 figure had been assessed and the outcome of the remission was not inevitable.

Pacific Basin v Bulkhandling Handymax [2012] EWHC (Comm) 70

Whether loss fell within the terms of a motor insurance policy and the meaning of "arising out of" in the context of a policy exclusion

A father and son were killed when the tractor which they were reversing along a towpath toppled into a canal. They were independent contractors retained by the claimant to carry out hedge-cutting services. The tractor belonged to the claimant. The claimant pleaded guilty to an offence under the Health and Safety at Work Act 1974 and thereafter reached a settlement with the the deceased men's estates. The claimant sought to recover the amount of that settlement (and other amounts) from the defendant insurers who insured his tractor. Burton J held as follows:

(1) On the facts, the claimant had been liable to the deceased both under common law and statute (the Provision and Use of work Equipment Regulations 1998).

(2) The policy provided cover for "legal liability incurred for damages...in respect of accidental death of...any person... in connection with the use of the Insured Vehicle". The judge rejected the argument that the policy, like the Road Traffic Act 1988, should be construed as excluding the driver or user of the vehicle. Furthermore the clause should not be construed so that cover was for "legal liability...in connection with the use" of the vehicle. Instead it meant that liability had to have been incurred for damages in respect of the accidental *deaths* of the two men in connection with such use.

(3) The judge then considered the scope of the following policy exclusion: "The insurers shall not be liable for liability arising out of... the operation as a tool of the insured vehicle". On the facts, the judge was not satisfied that the tractor was being used to cut hedges at the time of the accident. The key issue, though, was whether the deaths (rather than the liability) "arose out of" the operation of the tractor as a tool.

Burton J conducted a review of the meaning of "arising out of" in an insurance context. He found that there have been a series of conflicting decisions, with some cases interpreting "arising out of" as meaning the proximate cause and some applying a wider test which contemplates more remote consequences than those envisaged by the words "caused by". Does a stricter test apply in the context of a policy exclusion? Burton J concluded that it does: "I have the inevitable feeling that a court may in fact have a different approach to concluding whether there is cover for an event from where the court is being asked to conclude that an insurer can exclude cover, even though the words the court is considering may be identical". He concluded that in this case, the exclusion did not apply because the proximate cause of the tractor toppling into the canal was its being reversed too close to the bank and not the use of the tractor to cut hedges.

COMMENT: In *Beazley v Travelers* [2011], Clarke J found that, in the context of the policy in that case, "arising out of" did not dictate a proximate cause test and instead allowed "a somewhat weaker causal connection". This case, involving an exclusion rather than an aggregation clause, again underlines the importance of considering the meaning of "arising out of" in context. It adopts textbook analysis (and the reasoning in two Scottish cases) to support the view that a more stringent approach is needed where the words are used in a policy exclusion.

British Waterways v RSA [2012] EWHC (Comm) 460

Whether theft by employee fell within scope of an insurance policy/construction of insurance policies

The insured discovered that one of its employees had been stealing stock from its warehouse and sought an indemnity from its insurers. The relevant insurance policy had a number of discrete sections including a Theft section which contained an endorsement providing that "the insurance by this Section extends to cover loss...resulting from theft or any attempt thereat but the Insured shall be responsible for the first £1,000...which does not involve entry to or exit from the Premises by forcible and violent means".

One of the sections of the insurer's standard wording - the Theft by Employees Section ("TES") – was not selected by the insured and did not form part of the policy issued to the insured. Nevertheless, Eder J held that there was cover under the Theft section of the Policy "and the wording should be given its plain meaning, namely that theft means theft, including theft by employees as this is not otherwise excluded".

The judge further held that there was no customary usage of the expression "theft or any attempt thereat" and underwriters' subjective views as to how cover should work were inadmissible. He also rejected an argument that something had gone wrong with the wording because the insured's construction was contrary to business commonsense or that market practice assisted the insurers' arguments. He held that *Rainy Sky v Kookmin* did not apply to this case because there were not two competing constructions of the words used.

The judge acknowledged that in *Mopani Copper Mines v Millennium Underwriting* [2008] Clarke J had held that it was possible to look at deleted words in a policy in certain circumstances. However, he concluded that in this case the policy was clear and so it was not permissible to take into account the insured's non-selection of the TES as an aid to construction of the Theft section of the policy. In any event, the TES could not have been selected without amendment in this case and so, even if the non-selection was taken into account, it would not have helped insurers.

Ted Baker Plc v Axa Insurance UK [2012] EWHC (Comm) 1406

Jurisdiction

Governing law and scope of arbitration agreement/whether a binding obligation to mediate first

At first instance Cooke J granted the continuation of an anti-suit injunction restraining the insured from pursuing proceedings in Brazil (in which it sought a declaration that it was not bound to arbitrate the dispute in London). The insured appealed and the Court of Appeal has now held as follows:

(1) The governing law of the arbitration agreement. The policy contained an express choice of Brazilian law as the law governing the policy and an exclusive jurisdiction clause in favour of the courts of Brazil. Moore-Bick LJ (having reviewed prior caselaw) agreed that, in the absence of any indication to the contrary, an express choice of law governing the substantive contract is a "strong indication" of the parties' intention in relation to the arbitration agreement (which is separable from the rest of the contract). However, in this case, two important factors pointed the other way:

(a) the parties had expressly chosen England as the seat of the arbitration. That choice "invariably imports" an acceptance that English law and the Arbitration Act 1996 will apply to any arbitration commenced under the policy: "This tends to suggest that the parties intended English law to govern all aspects of the arbitration agreement, including matters touching on the formal validity of the agreement and the jurisdiction of the arbitrators"; and

(b) if Brazilian law were to govern the arbitration agreement, it would arguably be enforceable only with the consent of the insured. That was a "powerful" factor since there was nothing to indicate that the parties had intended to enter into a one-sided agreement of that kind. Accordingly, the choice of Brazilian law would significantly undermine the arbitration agreement. The Court of Appeal concluded that the system of law with which the arbitration agreement had the closest and most real connection was English law.

(2) Whether there was a binding obligation to mediate before arbitrating. The policy contained a mediation clause by which the parties had agreed to "seek to have the dispute resolved amicably by mediation", failing which the dispute could then be referred to arbitration. The insured argued that this was an enforceable obligation and that compliance with its terms was an essential pre-condition to arbitration. The Court of Appeal accepted that the parties intended the mediation clause to be enforceable and the court should be slow to hold that they had failed to achieve that objective. Nevertheless, each case must be considered on its own terms and, in this case, the clause was not effective in law because it failed to define the parties' rights and obligations with sufficient certainty. In particular, the clause did not set out any defined mediation process and nor did it refer to the procedure of any specific mediation provider. Instead, it merely contained an undertaking to seek to have the dispute resolved amicably by mediation. At most, therefore, the clause imposed an obligation on a party contemplating arbitration to invite the other side to an ad hoc mediation, but even that was not an enforceable obligation here.

(3) The scope of the arbitration agreement. This provided that if the parties failed to agree "as to the amount to be paid under this Policy" through mediation, the dispute would be referred to arbitration. The insured sought to argue that the dispute between the parties – essentially, whether the insurers are liable to indemnify the insured under the policy – fell outside the scope of this provision which is limited to disputes about quantum. The Court of Appeal rejected that argument. It agreed with the finding of Cooke J. that as a matter of language, a failure to agree "as to the amount to be paid under this policy" includes disputes about whether any sum is due under the policy at all, and thus includes matters of liability and coverage. It also said that it would be very surprising if the parties had intended to limit the scope of the agreement in this way: "It would be unusual for parties to a contract of this kind to establish separate and distinct procedures for resolving what in many cases are likely to be different aspects of the same dispute, and there is no indication that they had that in mind".

COMMENT: This case therefore highlights that the courts will strive to ascertain the intention of the parties where clauses in a policy potentially conflict with each other or are uncertain. In the case of mediation, it again stresses the importance of setting out a clear mediation process in order to ensure that the mediation clause in a contract will be enforceable.

Sulamerica CIA v Enesa [2012] EWCA Civ 638

Whether English court had jurisdiction to hear insureds' claim

The claimants were domiciled in the jurisdiction (Wales) when they entered into a unit-linked life insurance policy with the defendant, a Luxembourg entity. When their investment went disastrously wrong, they claimed that they were forced to sell up and move to Spain. They then commenced proceedings against the defendant in this jurisdiction.

Regulation 44/2001 provides that defendants should be sued in the courts where they are domiciled. However, Article 9 of the Regulation provides that an insured can also sue its insurer in the country where the insured is domiciled.

Insureds are protected against attempts by insurers to remove that advantage from them under Article 13. Article 13.2 provides that the general position can be departed from only by an agreement which allows the insured to bring proceedings in another court. Article 23 provides that if the parties have agreed in writing that the courts of a member state shall have jurisdiction (exclusive or permissive), then that court shall have jurisdiction (exclusive unless the parties have agreed otherwise), in which case the court selected has "additional" jurisdiction. The Court of Appeal has held as follows:

(1) Article 23 is of "less relevance" since "any agreement for the exclusive jurisdiction of one jurisdiction would necessarily run foul of Article 13.2's protection of the choice of jurisdictions sanctioned in article 9". Thus none of the exclusive jurisdiction clauses set out in the various documents between the parties "survived" Article 13.2.

(2) In any event, (and obiter to the decision) the Court of Appeal noted that "An insurance contract is a contract of the utmost good faith, and I do not think it is consistent with that required good faith that an insurer should present to an insured an alteration in the previously agreed law and jurisdiction provisions of their proposed contract without making that clear to the insured".

(3) The judge at first instance had found that the claimants' domicile was now in Spain. It could not be argued that the change of domicile to Spain had been only temporary. Nor could it be argued that what counted was the claimants' domicile at the time the relevant contract was entered into. The Court of Appeal concluded that the English courts did not have jurisdiction to hear the case. It did not matter that the claimants were therefore unable to take advantage of a conditional fee agreement which they could have entered into with their solicitors in England and which would not be available to them in Spain or Luxembourg: "the costs advantage available here to the [claimants] was neither a relevant nor a legitimate reason for departing from the strict requirements of the Judgments Regulation".

Sherdley v Nordea Life [2012] EWCA Civ 88

Application for a stay of proceedings brought by reinsurers/judge's discretion

In 2008, a passenger cargo vessel capsized off the coast of the Philippines after it sailed into the midst of a typhoon. The cargo owners sued the shipowner and brought a direct claim against the shipowner's Philippine cargo liability insurer too. The insurer had entered into a reinsurance contract with English reinsurers and both policies contained a Typhoon Warranty (which warranted that the vessel would not sail where there had been a typhoon warning in the relevant area). The reinsurance contract was subject to the exclusive jurisdiction of England and Wales (and was governed by English law). The English reinsurers commenced proceedings in England seeking a declaration that they were not liable in view of the Typhoon Warranty in the insurance and reinsurance contracts. The reinsured sought a stay of the English proceedings pending the outcome of the Philippine actions. At first instance, Smith J dismissed that application and the reinsured appealed.

The Court of Appeal has now unanimously dismissed that appeal (although Tomlinson LJ and Rimer LJ did so "with little enthusiasm". That was because they felt the reinsured was being forced to adopt a stance in the English proceedings (ie that there had been no breach of the warranty) when that stance might undermine its credibility in the Philippine proceedings (where they were seeking to argue that there had been a breach of the warranty)).

The Court of Appeal held that the judge had used the correct test when exercising his discretion to dismiss the application for a stay. Reinsurance was no exception to the general rule that a stay should be granted only in "rare and compelling" cases. The follow the settlements clause found in the reinsurance policy here did not negate or relevantly impinge on that general rule.

The presence of an exclusive English jurisdiction clause was just one factor which the judge should bear in mind when exercising his discretion regarding a stay. A long delay in the foreign proceedings (here, it was estimated that it might take up to ten years to reach judgment in the Philippines) could also be a consideration militating against a stay (especially since the projected trial date in England was June 2013). The judge had also correctly taken into account the risk of inconsistent decisions in the English and the Philippine courts.

Tomlinson LJ also noted that "If this were proportional reinsurance it would not be immediately apparent that reinsurers were following the fortunes of their reinsured. As it is, it is excess of loss reinsurance and perhaps the considerations are different. However that may be, we are not ourselves market professionals, we have no evidence of market practice and we should be very wary of pronouncing on what is and what is not appropriate conduct in the market.

COMMENT: Although this is a procedural decision, it could affect the outcome of the case, too – had the English action been stayed pending the Philippines action, any findings of fact would have been binding.

Amlin v Oriental Assurance [2012] EWCA Civ 1341

Non-disclosure/ misrepresentation

Basis of the contract clauses in insurance proposal forms and the test for belief

If a prospective policyholder signs a statement on a proposal form stating that the answers given form the "basis of the contract", this has the effect of converting all the answers into warranties. In this case, when completing a proposal form for a policy covering a building contract, the name of the building contractor was mistakenly put as "TT Construction" rather than "TT Bedford". The proposal form contained the following clause: "I/we declare that to the best of my/our knowledge and belief, the information I/we have given is correct and complete..this proposal and the statements made therein shall form the basis of

the contract between me/us and the insurer". Following a review of prior caselaw, Akenhead J concluded as follows:

(1) "Basis of the contract" clauses are enforceable. An insurance contract will be void or unenforceable if the proposal form contains such a clause and the contents of the form are untrue. The basis of the contract clause can be modified either in the policy or in any other documents such as the quotation or certificate of insurance.

(2) Prior caselaw suggests that where a statement is said to be true "to the best knowledge or belief" of the representor, reference can be be made to the honesty of a representor in the case of an individual. However, Akenhead J said that: "in determining particularly whether a corporate organisation making a declaration as to various statements being true to the best of its knowledge and belief is wrongful, the Court must determine what it corporately is likely to have known when it made the declaration. There does not have to be dishonesty as such on the part of the organisation but, if that organisation actually knows that something said to be true on the declaration is in fact wrong, then it is making a statement which is not true to the best of its knowledge or belief".

In this case, the error on the proposal form had been entirely innocent but the individuals signing the proposal form on behalf of their company would have known that it was wrong, had they thought about it. They "knew and must have known" the correct name for the builder. Thus the insured had breached the basis of contract clause and so was in breach of warranty.

COMMENT: Basis of the contract clauses have been the subject of some academic criticism and (in relation to consumer insurance contracts) are to be outlawed when the Consumer Insurance (Disclosure and Representations) Act 2012 becomes law next year. The Law Commissions have also mooted the abolition of basis of the contract clauses in business insurance (although insurers will still be able to contract out). However, this case makes it clear that the courts are still willing to enforce such clauses in a non-consumer context.

The judge's comments regarding belief and the corporate insured are also of interest. Section 20(5) of the Marine Insurance Act 1906 provides that a representation as to a matter of "expectation or belief" is true if it is made in good faith. In the case of *Economides v Commercial Union* [1998], the court rejected the insurers' argument that there should be an implied representation of fact that the insured had reasonable grounds for his belief - an insurer could only avoid if the insured had wilfully closed his eyes to the truth, or made a "blind guess". Akenhead J has drawn a distinction between *Economides* and the case of a corporate insured – the test for the latter is not one of honesty but rather actual (and possibly even objective) knowledge (although he does not discuss this in detail, nor who in the organisation must have the relevant knowledge). This appears to be the first time that the courts have suggested a different test for corporate insureds in relation to representations of belief. However, it might be argued that the statement as to the identity of the builder could be categorised as one of fact rather than belief, notwithstanding the clause at the end of the proposal form

Genesis Housing Association v Liberty Syndicate [2012] EWHC (TCC) 3105

Materiality of allegations of non-disclosure/ meaning of "want of due diligence" in marine insurance context

Following a motor breakdown, vessel owners sought an indemnity under a Loss of Hire insurance policy (this was separate from the Hull and Marine policy for the vessel but responded in the event of an insured peril under the H&M policy). Insurers raised various arguments and Blair J has now held as follows:

(1) Material non-disclosure: One prior hull claim was disclosed to insurers but not another one. The judge held that although it might be good broking practice to disclose such claims: "the materiality of the hull incidents is linked to the extent to which they caused loss of hire". It was not material that there had been 10 days loss of hire in 2004 when the excess under the [relevant] 2008 policy was 21 days: "The fact is that this was not a particularly long period of offhire, it was nearly four years previous to the placing of the policy with the defendant, it did not result in a claim, and it did not come close to the excess period".

Furthermore, when the broker told the underwriter that there was an "excellent hull record", that was held to have been a statement of opinion which, since it was made in good faith, was true (see section 20(5) of the Marine Insurance Act which provides that "a representation as to a matter of expectation or belief is true if it be made in good faith").

(2) It had been appropriate in this case, where the original underwriter had since left the insurer, for his junior to give evidence of a telephone conversation which the original underwriter had had with the broker. Nevertheless, that evidence had not proven inducement (even assuming that there had been a material non-disclosure).

(3) The policy contained a so-called "Inchmaree" clause, which provided cover for breakdown of machinery so long as this did not result from wear and tear or "want of due diligence" by the insured. The insured sought to argue that the insurer must prove recklessness, rather than just negligence, by the insured to fall within "want of due diligence". The insured's argument was that insurance policies are intended to protect insureds even in the event of their own negligence and the policy cannot grant an indemnity with one hand and take it away with the other. That argument was rejected by the judge. Marine insurance policies are different from property insurance. It is the negligence of specified persons (eg the crew and master) which is covered, and not the negligence of the insured itself.

Nevertheless, on the facts, the insurers were unable to prove that the insured had been negligent.

(4) Aggregation: The judge held that a practical approach must be taken to causation. The insurers had sought to

argue that there had a break in the chain of causation between the first and subsequent breakdowns, when substitute motors also failed. However, the judge found that "one thing led to another". The insured had reasonably tried to deal with the initial breakdown by installing a substitute motor and when that failed, another motor was installed (which also failed): "So, in my view, in principle the whole period counts" and the excess applied only once. Nor could the insurers claim a discount because certain repairs unconnected to the breakdown would have had to be carried out at the same time as the breakdown repairs (they had sought to argue that a certain period of downtime would therefore have occurred anyway).

The case was subsequently appealed on the aggregation issue, but the Court of Appeal held that the judge had been correct in reaching the factual conclusion on causation. The work which led to the second motor's failure "was closely and reasonably related to the owners' efforts to mitigate" and so told strongly against the suggestion that this was a new intervening act which broke the chain of causation.

COMMENT: This appears to be quite a generous decision for the insured. In general, prior losses of the type for which insurance is being sought will be material (even if they did not result in a claim under a policy). Similarly, although it can be hard to distinguish between a statement of fact and one of opinion, the representation that there was an "excellent hull record" could arguably be viewed as a representation of fact (although – and this was not discussed in the judgment – it may be that the judge felt that the use of the term "excellent" was more of a subjective assessment).

Sealion Shipping v Valiant [2012] EWHC (Comm) 50 and [2012] EWCA Civ 1625

Notification

Whether claim fell within scope of a public liability policy and notification condition

The claimant insurer sought a declaration that it was not liable to the defendant insured (an English company). The insured had taken out a Commercial Combined insurance policy with the insurer (which included a public liability ("PL") section). The insured designed and installed some basements in a development in Ireland. The main contractor (an Irish company) commenced proceedings against the insured in Ireland for breach of contract and negligence arising out of its work. After the insured went into liquidation the main contractor advised the insurer that it intended to join it to the Irish proceedings (pursuant to the terms of an Irish statute which is the equivalent of the Third Parties (Rights against Insurers) Act 1930). The insurer therefore sought a declaration from the English courts that it was not liable under the policy. Brown J held as follows:

(a) The PL section provided cover for damages which the insured became legally liable to pay as damages in respect of accidental "loss or damage to material property". The policy excluded loss or damage to "property comprising the permanent…works undertaken by the Insured in the course of any contract…" The judge agreed with the insurer that on a true construction of this section, the insurer was liable to indemnify the insured against all sums which it was liable to pay as damages for accidental injury to third parties or for accidental damage to property other than that being constructed by the insured. The indemnity did not extend to liability for economic loss.

(b) The territorial limits of the policy did not include the Republic of Ireland and an extension for EC countries did not apply because the damage did not arise "in connection with temporary visits undertaken in the course of the Business" by the insured.

(c) The claim was never notified by the insured. It had taken the view that only its separate professional indemnity policy would respond to any claims against it. Several years after leaks in the basement were first discovered (and over a year after proceedings in Ireland were commenced against the insured) the solicitors for the main contractor wrote to the insurer seeking confirmation of cover under the policy. Brown J held that such notification would not suffice because the policy required notification by the insured itself: "The recent trend of authorities suggests that the formal requirements of notification are fairly undemanding but that where they do impose specific requirements they have to be met".

In any event, there had been a breach of the requirement to give immediate notification. Although that requirement was not expressly stated to be a condition precedent, a separate clause in the policy provided that due observance of the conditions of the Policy is a condition precedent to the liability of the insurer. The judge noted that "It is well-established that such general provisions in insurance contracts are effective to create conditions precedent".

Accordingly, the insurer was entitled to the declaration which it sought.

COMMENT: There have been conflicting views on whether a notification under a policy must be made by the insured itself. In *Barrett Bros v Davies* [1966] the Court of Appeal held that notice from a third party (the police) absolved an insured from giving notice and Lord Denning has also stated that "the law never compels a person to do that which is useless and unnecessary". However, other cases have held that the insurer can rely on the breach of a condition precedent even if it suffers no prejudice. This case is therefore interesting in that it has found that only the insured itself can give notice to the insurer.

Although the insured here could have given notice before going into liquidation, the case highlights the problems for third parties seeking to bring a claim under the 1930 Act if the courts insist on notice being given by the insured and not a third party. The 2010 Act was intended to address this issue (it specifically provided that if an act by a third party fulfils a policy condition, it is to be treated as if done by the insured (see section 9(2)) but that Act is not yet in force and, indeed, may now never come into force.

AXA Insurance v Thermonex [2012] EWHC (Mercantile) B10

Premium

Whether partner of solicitor firm liable to pay premium for professional indemnity policy

The appellant (a limited partner in an LLP) appealed against a decision that he was liable to pay the premium for a professional indemnity insurance policy issued to the LLP by the respondent (the manager of a scheme providing PI cover for firms of solicitors which could not otherwise obtain such cover on normal terms). The appellant was not the partner who had arranged the PI cover.

Rule 10.3 of the Solicitors' Indemnity Insurance Rules 2009 provides that the firm, and any principal of the firm, shall be jointly and severally liable to pay the premium if an application for cover under the scheme is made. The appellant argued that this rule might found a disciplinary complaint against him but did not amount to a contract between himself and the insurers.

Strauss QC held that he was not satisfied that the appellant was personally liable for the premium: "What one would expect to find here is something in the contractual wording which makes it clear that the members of the LLP are parties to the contract, and are obliged to pay the premiums". In this case, though, there was no evidence of any such contractual provision (and no cover note or policy was produced in evidence). Nor was the judge convinced that there was an implied contract between the principals of the firm and the insurers. Accordingly, there was a "genuine dispute as to the existence of the debt" and a statutory demand obtained by the insurers was set aside.

Zeckler v Assigned Risk Pool Manager [2012] ALL ER (D) 24

Law Commission proposals

The Consumer Insurance (Disclosure and Representations) Act was the first Act to come out of the Law Commissions review of Insurance Contract Law. It received royal assent on 8 March 2012 and it is anticipated that it will come into force in spring 2013. The Act covers consumer insurance contracts and, in essence, provides that consumer insurance contracts will no longer be contracts of utmost good faith and there will be no requirement for the consumer to volunteer information to the insurer. The consumer must take reasonable care when answering the insurer's questions (or when choosing to volunteer information) and an insurer will be entitled to different remedies depending on whether a non-disclosure/misrepresentation is made (a) carelessly; or (b) deliberately or recklessly.

In June 2012, the Law Commissions published a further paper on proposed reform of the law relating to a business insured's duty of disclosure (although insurers will be able to contract out of the proposed changes), as well as the law on insurance warranties. They plan to complete their project (and produce a draft bill) by the end of 2013. Actual reform may therefore be several years off and it is possible that the provisions which are finally adopted by Parliament will differ to some degree from the Commissions current proposals.

Litigation costs reform

On 14 January 2010 Lord Justice Jackson published his final report in his review of civil litigation costs. This resulted in the Legal Aid, Sentencing and Punishment of Offenders Bill which received royal assent on 1 May 2012. Most of the changes relating to civil costs will come into effect on 1 April 2013. The main changes will be as follows: (1) success fees in conditional fee agreements (CFAs) and after-the-event (ATE) insurance premiums will no longer be recoverable from unsuccessful opponents in civil litigation; (2) awards of general damages (no matter what the cause of action is) for pain, suffering and loss of amenity will be increased by 10 per cent; (3) damages based agreements (DBAs), whereby if the claim is successful, the fee paid by the claimant to his lawyer is calculated as a percentage of the sum recovered, will be permitted (although their terms will be subject to regulation); (4) where a defendant fails to beat a claimant's Part 36 offer, the claimant will be entitled to (a) an additional 10% on damages up to £500,000; (b) an additional £50,000 plus 5% on damages between £50,001 and £1 million; and an additional flat amount of £75,000 on damages over £1 million. The court will have a discretion to award lower amounts too.

Further information
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