

## Update

# Disclosure of insurance details revisited

A practical issue frequently encountered by defendants, their insurers and those representing them in litigation is to what extent there is an obligation to disclose to a claimant details of a defendant's insurance cover. The recent High Court decision in *Dowling v Bennett Griffin* (2013) provides confirmation that such details are, generally speaking, unlikely to be disclosable, absent insolvency on the part of the insured. However, for some defendants additional considerations may come into play.

The issue arose in the *Dowling* case in the context of considering whether a firm of solicitors ("Bennett Griffin"), who had acted for the claimants ("the Dowlings") in litigation, had acted negligently in failing to make an application for details of the insurance position of the defendants to that litigation, in circumstances where the judgment obtained by the Dowlings at the end of the litigation had proved of little worth as it transpired that the defendants had no effective insurance cover.

The absence of cover arose because the defendants had failed to notify their insurers of the claim against them in a timely way and in accordance with the policy requirements, and the judgment also contains consideration of the insurers' entitlement to avoid the policy in these circumstances.

### The facts

The claim in *Dowling* was a professional negligence action against Bennett Griffin arising out of their handling of earlier litigation in which the Dowlings were pursued for unpaid fees by an architectural

practice ("APAL") and brought a counterclaim alleging professional negligence. Although the Dowlings were successful in the litigation against APAL, they encountered difficulties in enforcing the judgment. This was because APAL only notified their professional indemnity insurers of the counterclaim after judgment. As a result, insurers avoided the policy for non-disclosure, misrepresentation and late notification, and APAL was put into insolvent liquidation. The Dowlings managed to enforce part of their judgment against one of APAL's directors personally, but the balance remained unenforced.

### The judgment

#### Disclosure of insurance details

The Dowlings argued that Bennett Griffin had acted negligently in, amongst other things, failing to apply to the court for disclosure of details of APAL's insurance cover during the course of the proceedings.

Although the judge (Kevin Prosser QC) recognised that Bennett Griffin and the Dowlings had concerns about APAL's ability to satisfy any judgment and doubts concerning their

insurance position (including whether they had notified their insurers), he rejected the Dowlings' argument. He considered that the court would have had no jurisdiction to make an order for disclosure of insurance documents or information. It would not have been possible to obtain this information by way of an application against insurers for pre-action disclosure because insurers were not "likely to be a party to subsequent proceedings", since the Dowlings would have no rights against APAL's insurers under the Third Parties (Rights against Insurers) Act 1930 ("the 1930 Act") unless and until APAL became insolvent. Nor would an application against APAL for disclosure under Part 31 or further information under Part 18 of the Civil Procedure Rules have succeeded, since although insurance details were relevant to the commercial wisdom of continuing with the litigation, they were not relevant to the issues in the proceedings. The judge noted that his conclusions in this regard were consistent with *West London Pipeline & Storage Ltd v Total UK Ltd* (2008), in which the court dismissed an application by a defendant in the Buncefield explosion litigation for information and disclosure in respect of the insurance details of a third party against whom the defendant was pursuing contribution proceedings, and also with the previous authorities of *Bekhor v Bilton* (1981) and *Cox v Bankside Members' Agency* (1995).

#### **Avoidance for late notification**

In the course of the judgment, the judge also made comments on the entitlement of APAL's insurers to avoid the policy for late notification. The judge found that insurers should have been notified by the end of April 2004, being the end of the 2003/2004 policy year, during which the counterclaim was made. In fact, insurers were not notified until early 2006, after judgment had been entered against APAL.

The policy in this case expressly provided that insurers would not exercise their right to avoid the policy for non-disclosure, misrepresentation or late notification if they were satisfied that any such breaches were "innocent and free of any fraudulent conduct or intent to deceive". In this case, insurers had not been notified because APAL's director was confident that they would successfully defeat the counterclaim and took a commercial decision not to notify so as to avoid the risk of increased premiums. The judge said that "a failure to disclose that a claim has been made, when the insured is well aware of the claim but decides not to disclose it in order to avoid an increase in premiums, would not be "innocent"". He therefore considered that the insurers had "certainly" been entitled to avoid the policy.

#### **Comment**

##### **Late notification**

The judgment therefore provides a steer as to what will not amount to an "innocent" breach of disclosure or notification

obligations. However, this particular feature will be of less interest to some areas of the market - such as the solicitors' professional indemnity market, where late notification does not provide a ground for avoidance but is only remediable by an action for damages for prejudice (if any) caused by the lateness in notification - than the more general issues around disclosure of insurance details.

#### **Disclosure of insurance details**

As to those issues, the confirmation provided in this decision that details of a defendant's insurance are, generally speaking, unlikely to be disclosable absent insolvency on the part of the insured, is likely to be of widespread general interest. The issue of disclosure of insurance arrangements has been debated in several court decisions in recent years, and in the personal injury case of *Harcourt v Griffin* (2007) the court had ordered that information be provided, on the basis that this would allow the parties to deal efficiently and justly with the matters in dispute. The decision in *Dowling* lends support to the contrary view taken in the *West London Pipeline* case (2008), in which *Harcourt* was not followed, that details of insurance are, generally speaking, a private matter between an insurer and an insured, orders for production of which would encourage speculative "deep pockets" litigation.

#### **Insolvent insureds**

The position is, of course, different if the insured is insolvent. In this situation a duty arises under section 2 of the 1930 Act to disclose to a third party claiming that the insured is liable to him "such information as may reasonably be required" to ascertain whether any rights against the insurer have been transferred to him under the 1930 Act and for the purpose of enforcing any such rights. That duty is imposed in the first instance on the insured or the insolvency practitioner acting in the insolvency, and then, if the information provided by these entities discloses reasonable grounds for supposing that rights against an insurer have been transferred to the third party under the 1930 Act, the insurer is also subject to the same duty of disclosure.

The position of third parties seeking disclosure of an insolvent insured's insurance arrangements will be strengthened further by the new Third Parties (Rights Against Insurers) Act 2010 (s.11 and Schedule 1), when it comes into force. For example, the new Act widens the category of people who can be asked to provide information to include any person who is able to provide it, which will include insurers, brokers and others authorised to hold policy information. It also imposes a time limit of 28 days for the recipient of a notice requesting information to respond to that notice. Further, a clear list of the information which will be required to be disclosed is set out in Schedule 1, and includes whether the insured has been

informed that the insurer has claimed not to be liable under the policy. It is not known when the new Act will come into force.

### **The Provision of Services Regulations 2009**

Further, it is important particularly for those in the professional liability field to keep in mind that for some defendants additional considerations may come into play. Where professional liability insurance is compulsory, as is the case for many professions in the UK, the Provision of Services Regulations 2009, Regulation 8(n), requires the professional to make available to EU users of their services certain information, specifically the contact details of the insurers and the territorial coverage of the insurance. It should be noted that the Regulations are expressly disappplied from financial services. Professional and regulatory bodies may also make specific rules in this regard: for example, paragraph 18 of the SRA Indemnity Insurance Rules 2013 requires a firm to give a claimant details of the participating insurer in relation to the compulsory layer of insurance, the insurer's contact details and policy number.

It therefore remains extremely important, if a request for disclosure of insurance information relating to a defendant is received, for the request to be considered in light of any provisions applying to the specific type of defendant concerned. However, it is unlikely that detailed information such as the details of an insured's notification and an insurer's response will be disclosable, absent the insured's insolvency.

### **A negligent failure to seek information?**

For the same reasons, a number of considerations will arise for solicitors who find themselves faced with claims from disappointed litigants such as those in *Dowling*, alleging that further

information about a defendant's insurance position should have been sought. It will be necessary to consider in detail what useful information could actually have been obtained from the particular defendant in issue in the underlying proceedings.

Consideration should also be given to whether, on the facts, there was anything to put the solicitors on notice that the other side may be without effective insurance cover. In *Dowling*, the focus was on whether the court would have had jurisdiction to order disclosure of the relevant information, seemingly because the judge accepted that Bennett Griffin were conscious that there were uncertainties as to whether APAL had duly notified (although he rejected the claimants' contention that there were "strong reasons to believe" that notification had not taken place). However, in many cases there may be no reason for solicitors reasonably to suspect that the other side may have failed to comply with its obligations under an insurance policy, in which case a further line of defence may be available.

Conversely, it should also be noted that in *Dowling* it had been shown that the claimants were very much aware of the potential issues in relation to APAL's insurance position, and Bennett Griffin did take repeated steps to enquire of APAL's solicitors in this regard: this was not a case where the insurance position had been completely ignored by the professional advisers. There may of course be some cases where different considerations will apply, and the case does therefore underline the need for solicitors acting in litigation to take care in considering and advising upon the likely enforceability of any judgment and any enquiries which can reasonably be made into such matters.

### **Further information**

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