Insurance Update February 2016

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Farrar's Building News

John Meredith-Hardy, Editor

Welcome to Farrar's Building's inaugural insurance newsletter which will be biannual. In this edition we look at some of the developments in the law of insurance over the previous year.

Firstly we start with an outline of the Insurance Act 2015, **Ian Ridd** then looks at the interplay between the European Directives in relation to motor insurance and the MIB agreements by reference to the cases of Delaney and Moreno and a case law summary charting a number of cases with outstanding appeals has been prepared by **Aiden O'Brien, Robert Golin, Jake Rowley, Frederick Lyon** and **Joel McMillan.**

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The Insurance Act 2015

The 2015 Act was introduced following the second joint report of the Law Commission and the Scottish Law Commission in the field of insurance contract law: "Insurance Contract Law: Business Disclosure, Warranties, Insurers Remedies for Fraudulent Claims; and Late Payment" (Law Com No. 335, Scots Law Com 238).

There are no accompanying explanatory notes for the 2015 Act but practitioners will be able to refer to explanatory notes which accompanied the Bill albeit with caution, since the explanatory notes have not been endorsed by Parliament. Whether, therefore, they can properly be used as an aid to construction would be a matter for argument.

The Law Commissions have suggested that the reforms reflect best practice and that changes were not introduced "unless strictly necessary".

Commencement

The Insurance Act 2015 ("the 2015 Act") received royal assent on 12 February 2015 and commences eighteen months later pursuant to section 23(2).

Disclosure obligations

The duty of disclosure is retained but recast in the 2015 Act as a duty of fair presentation in a nod to previous caselaw. The overall intention being to discourage underwriters from adopting a passive approach to the placement of the risk with underwriting at the claims stage. This is sought to be achieved by the Act providing that a policyholder will have discharged their duty if

they disclose every material circumstance known to them or disclose enough to put the prudent insurer on notice.

Some will criticise this development as encouraging a policyholder to aim for this lesser standard of disclosure – to provide only enough disclosure that they can argue that the underwriter on notice. However, that would be a dangerous approach for a proposer to take.

However, the new test arguably does not significantly alter the law in this regard since it embraces what would have previously been considered under the old regime as an argument of waiver. Although, doctrinally, there could be criticism for turning waiver from a shield into a sword.

Traditionally, it was difficult for policyholders to successfully argue that an insurer had waived their right to disclosure of a material fact. There is no reason to believe that the judiciary will radically depart from that approach to the issue as a result of the new formulation of the duty of fair presentation.

The 2015 Act retains the prudent underwriter test as the yardstick for materiality. The new regime seeks to prevent the practice of 'data dumping' by proposers by making as aspect of the duty of fair presentation that disclosure must be "in a manner which would be reasonably clear and accessible to a prudent insurer".

Where a policyholder breaches the duty of fair presentation, section 8 introduces a new scheme of remedies which is set out in schedule 1 to the Act. The scheme of remedies mirrors that of the Consumer Insurance (Disclosure and Representations) Act 2012 except that an innocent misrepresentation can amount to a 'qualifying misrepresentation' under the 2015 Act.

There is no doubt that avoidance from inception in all cases provided greater certainty than the scheme of proportionate remedies which has been introduced. However, in this instance most will consider that the uncertainty is justified by the benefit of a range of remedies which seek to place the parties within the position they would have been in but for the breach of the duty of fair presentation.

Going forward, insurers will have to adduce clear evidence of what they would have done had there been appropriate disclosure. For example, by reference to underwriting guidelines where available. It remains to be seen whether the new scheme of proportionate remedies will lead to increased use of expert evidence. It is difficult to see how else policyholders will be able to effectively challenge the subjective evidence of the actual underwriter as to what they would have done where there are no clear underwriting guidelines.

The provisions dealing with knowledge are one of the more controversial aspects of the 2015 Act. In essence, the 2015 Act supplants the common law on attribution of knowledge with a series of factual tests.

Many lawyers will feel that in doing so the 2015 Act has introduced uncertainty which is not justified because the common law relating to attribution of knowledge was not problematic in practice.

The Law Commissions would probably maintain that whilst lawyers may well have been familiar with the law relating to the attribution of knowledge the legal tests were not well understood by policyholders. The new tests introduced are aimed to be more accessible to policyholders in order that they can understand their obligations and how to comply with them. The new regime might therefore be said to provide a test which proposers will be more able to apply but that which will give rise to greater uncertainty in litigated cases.

One consequence of moving from essentially legal tests to factual tests is that disclosure obligations will be increased (with associated cost). Again, there is scope for parties to seek to increase reliance upon experts – in relation to what a reasonable search would include.

The new regime also appears to abolish the concept of the 'agent to know' (see Claire Blanchard QC *Reform of the pre-contractual duty of disclosure of the agent to insure: evolution or revolution?* [2013] LMCLQ 325).

Warranties and other terms

Section 9 of the 2015 Act abolishes basis of the contract clauses for non-consumer insurance. This aspect of the new regime cannot be altered by the parties.

Section 10 alters the effect of a breach of warranty. The new regime essentially puts *Kler Knitwear* and *The Sugar Hut Group* on a statutory footing. Warranties becoming treated as suspensory conditions with cover reattaching once the breach has been remedied.

The Law Commission rejected a pure causation test but were determined to prevent the use of technical defences based upon breach of a term which was unrelated to the loss that eventuated. Section 11 applies to any term which seeks to control loss of a particular kind, location or time "other than a term defining the risk as a whole". An insurer is prevented from relying upon breach of such a term where the policyholder establishes that "non-compliance with the term could not have increased the risk or the loss which actually occurred in the circumstances in which it occurred".

In effect, in an attempt to reduce the uncertainty which would result from a pure causation test, the Law Commissions' intention was that the enquiry should not be into factual causation in the particular case but a more objective consideration of whether the non-compliance could have

increased the risk. The burden is clearly placed on the policyholder to prove that the breach of the term could not have increased the risk of the type of loss which eventuated.

A number of commentators have queried whether the wording of section 11 will lead to the result intended by the Law Commissions and this aspect of the 2015 Act is destined for litigation. Cases of significant value are likely to lead to a dispute under the new test unless the parties reach a negotiated settlement on a pragmatic basis.

Fraudulent claims

The 2015 Act does not define a fraudulent claim for the purposes of the new regime. That is left to the common law. It would seem likely that the Courts will treat fraudulent devices as falling within the scope of a fraudulent claim.

The 2015 Act removes any scope for arguments that the presentation of a fraudulent claim should entitle an insurer to avoid a policy from inception. The 2015 Act provides that an insurer is relieved from all liability on the claim which is tainted by fraud and may terminate the policy from the date of the fraud without prejudice to any rights which had already accrued under the policy.

Contracting out

The 2015 Act provides a regime which is mandatory for consumers in the sense that an insurer is not entitled to contract on terms which are less favourable to a consumer.

For non-consumers, the regime establishes a default position. Parties being free to contract out of the new regime, subject to transparency requirements. The only exception being the abolition

of basis of the contract clauses. It is not possible for the parties to agree to transform any representation into a warranty. If a warranty is intended, it must be specifically contracted.

Overall

Traditionally, an attraction to insurance within this jurisdiction has been the certainty which the law provides.

The Law Commissions have strived to rebalance insurance law. Many aspects of the new regime are relatively uncontroversial (the abolition of basis clauses and the move away from the sole remedy of avoidance). However some will argue that, although well intentioned, the 2015 Act will introduce uncertainty in its pursuit of a greater balance of fairness between policyholders and insurers. In particular, the tests in relation to the attribution of knowledge and the operation of section 11.

Litigation is inevitable once the 2015 Act comes into force. Time will tell whether the courts will be able to reduce the level of uncertainty by providing clear guidance on the operation of the new tests contained within the 2015 Act.

Claims against the MIB and the tentacles of European law

By Ian Ridd

Motor insurance has long been the subject of European Directives aimed at achieving partial harmonisation of national laws. Between 1972 and 2005, five such Directives were adopted. In October 2009, these five directives were codified by the Sixth Directive (2009/103/EC).

The Second Directive (84/5/EC), by Article 1(4), had imposed on member states an obligation to set up or authorise a body to provide compensation to those injured by uninsured or unidentified drivers. As is well known, the relevant body set up to do this in the UK is the Motor Insurers Bureau ('MIB'). Its obligations are governed by the 1999 Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement, made between the Secretary of State for Transport and the MIB. Various Regulations, including the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003, referred to below, have been made to implement the requirements of the Directives.

The two recent cases, discussed below, demonstrate the continuing confusion and difficulty that exist in the interpretation and application of conflicting sources of European law.

Mr Delaney's case

The 1999 Motor Insurers' Bureau (Compensation of Victims of Uninsured Drivers) Agreement contains, at clause 6(1)(e)(iii), an exception to the MIB's obligation to meet a claim against an uninsured driver. This exception applies where a claim is made:

" ….. by a claimant who, at the time of the use giving rise to the relevant liability was voluntarily allowing himself to be carried in the vehicle and, either before the commencement of his journey in the vehicle or after such commencement if he could reasonably be expected to have alighted from it, knew or ought to have known that – .... (iii) the vehicle was being used in furtherance of a crime ...."

The exception at (iii) was new and had been introduced for the first time in the 1999 Agreement. Its predecessor, the 1988 Agreement, had not contained any such exception.

The exception was used to defeat a claim made against the MIB by the unfortunate Mr Delaney. Mr Delaney had been seriously injured in an accident caused by the negligence of the driver of the car in which he was a passenger. The driver was uninsured and a claim was made against the MIB. A substantial quantity of cannabis had been found in the car after the accident. The MIB successfully defended the claim brought against it by Mr Delaney, invoking clause 6(1)(e)(iii), on the ground that he knew or ought to have known that the car was being used in the course or furtherance of crime, namely to transport cannabis for the purpose of drug-dealing. His claim for substantial compensation therefore failed.

Undaunted by this setback, Mr Delaney subsequently brought a claim against the Secretary of State for Transport contending that (1) the exception in clause 6(1)(e)(iii) of the 1999 Agreement was incompatible with the EU Directives, and the UK was thereby in breach of EU law, and (2) that breach was sufficiently serious to give rise to a liability to pay damages.

In the event, Mr Delaney succeeded both at first instance and in the Court of Appeal – see *Delaney v Transport Secretary* [2015] 1 WLR 5177. The Court of Appeal held that on the natural reading of article 1(4) of the Second Directive, the only permitted exclusions from the obligation to provide compensation were those set out expressly in the article itself, the principal one of which is that member states may exclude the payment of compensation in respect of persons

who voluntarily entered the vehicle which caused the damage or injury when they knew it was uninsured, and that there was nothing at all in the text of the article to suggest that any other exclusion was permitted. Thus the Court of Appeal held that clause 6(1)(e)(iii) of the 1999 Agreement was incompatible with the Directive and so the United Kingdom was in breach of its obligations under EU law. The Court of Appeal further held that as the exclusion had been introduced in to the 1999 Agreement in clear breach of EU law, the breach was sufficiently serious to give rise to liability by the Secretary of State to pay damages to Mr Delaney. Victory therefore for Mr Delaney, albeit via an unusual route.

Ms Moreno's case

Where a UK resident is injured in a car accident abroad, in circumstances where the driver to blame for the accident is uninsured, a claim may be made by the injured party against the MIB. The right to make such a claim now derives from Regulation 13 of the Motor Vehicles (Compulsory Insurance) (Information Centre and Compensation Body) Regulations 2003. It is often the case that the assessment of damages for injuries suffered abroad would be higher if made in accordance with the principles of English law, rather than the law of the state where the accident occurred. The law as presently understood makes it clear that the assessment of damages in such a case, where a claim is made under Regulation 13 against the MIB, falls to be made in accordance with English law. This is because the plain words of Regulation create a cause of action enforceable as a civil debt, in which compensation will be assessed on the basis of the law of England and Wales. Authority for this proposition derives from two Court of Appeal cases, *Jacob v MIB* [2011] 1 All ER 844 and *Bloy and Ireson v MIB* [2013] EWCA Civ 1543.

A recent case however, *Moreno v MIB* [2015] Lloyds Rep IR 535, has cast some doubt on this. In that case, Ms Moreno, a UK resident, was very seriously injured in a car accident in Greece. The driver, who was to blame the accident, was uninsured. The Claimant accordingly made a claim against the MIB under Regulation 13, asserting that under the Regulation she was entitled to be

compensated in accordance with the measure of damages in England and Wales. The MIB argued however that by virtue of the Rome II Regulation, (European Parliament and Council Regulation 864/2007/EC) the applicable measure of damages was the Greek one. The MIB argued that *Jacobs* and *Bloy* had been wrongly decided, had misconstrued Rome II and that the true effect of Rome II was effectively to 'trump' the provisions of Regulation 13.

The judge at first instance, Gilbart J, held that he was bound to follow the above two earlier Court of Appeal cases and to hold that the appropriate measure of damages was the English one. Having heard full argument on the point however, he expressed the view that he thought that those cases had been wrongly decided. Accordingly he gave permission to appeal directly to the Supreme Court, and the outcome of that appeal is currently awaited.

The difficulty for Ms Moreno is that Rome II is very clear in its terms. Further, as it is a Regulation, it is to be applied directly, and member states are prohibited, by the provisions of Article 288 of the Lisbon Treaty, from altering or supplementing its scope. Article 4 prescribes that in claims in tort for personal injury the laws of the state where the damage has been inflicted apply to issues of both liability and damages unless (as was not the case in *Moreno*) one of the exceptions in article 4.2 or 4.3 applies. In the simplest terms, the effect of Article 4 appears to be that no claimant making a personal injury claim against a tortfeasor, or the insurer of a tortfeasor, can now expect that any law will apply other than the law of the state where the damage occurred.

Clearly there is a tension between these provisions and Regulation 13 and this is the point the Supreme Court will have to grapple with. An earlier decision of the House of Lords, *Autologic plc v IRC* [2006] 1 AC 118, suggests that where there is an inconsistency between a directly applicable EU law and a provision of UK legislation, the UK legislation must be read and take effect as though it had enacted that it was to be without prejudice to directly enforceable EU rights. The potential consequences for Claimants such as Ms Moreno are plainly serious and

wide ranging if the Supreme Court decides that claims against the MIB for compensation for injuries suffered abroad are to be assessed, not on the English basis, but upon the often far less generous basis applicable in the state where the injury was suffered.

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Case Law Update





Aidan O'Brian **Robert Golin** **Jake Rowley** **Frederick Lyon** **Joel McMillan**

International Energy Group v Zurich [2015] UKSC 33

An insurer (Z) appealed against a decision concerning the extent of its liability to indemnify the respondent company (X) in respect of personal injury damages and costs payable to an employee who had died of mesothelioma.

The employee had worked for X for 27 years. Prior to his death, he issued proceedings in Guernsey against X. The claim was settled on the basis that during the whole period of his employment, X had breached its duty of care to him by exposing him to asbestos without adequate protection. Z had been X's employers' liability insurer for six of those 27 years. X sought an indemnity from Z in respect of the employee's claim.

In England, the Compensation Act 2006 s.2 and s.3 provided that each employer was liable in full for the whole of the damages awarded to a mesothelioma victim rather than being liable only in proportion to his own contribution to the exposure. No equivalent of that Act had been passed in Guernsey, however, the Court of Appeal held that Z was liable to indemnify X for 100 per cent of the compensation and costs awarded to the employee.

The issues on Appeal were:

(i) whether the common law rule in *Barker v Corus UK Ltd* [2006] UKHL 2 still applied in Guernsey (meaning that an employer's liability for exposing an employee to asbestos should be proportionate to the length of its contribution to the exposure)
(ii) whether the proportionate recovery rule applied to X's costs of defending the claim;
(iii) if *Barker* no longer represented the common law, whether an insurer who had covered only part of the whole exposure period bore the whole liability in the first instance and whether there was any right of recourse for such an insurer;
(iv) what the position was where an employer was insolvent.

Allowing the appeal in part, it was determined that:

(1) Guernsey common law should be treated as identical to English common law during the instant appeal. The Act was not inconsistent with the decision in *Barker*. The Act did not have any effect in jurisdictions where the common law position had not been statutorily modified.

(2) There were significant differences in relation to the costs of defending a claim. The costs were incurred by X, with Z's consent, and were covered on the face of the policy wording. There was no reason to construe the policy wording as requiring some diminution in the insured's recovery, merely because the defence costs also benefitted another uninsured defendant. There was no right of contribution in respect of defence costs.

(3) The instant appeal illustrated some of the problems arising from the special rule applied in *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22. The rule allowed a person responsible for exposure to select any year during which he could show that he carried

liability insurance and to pass the whole liability to the liability insurer on risk in that year. It was contrary to principle for insurance to allow an insured to select the period and policy to which a loss attached; liability insurance would cover losses arising from risks extending over a much longer period than that covered by the policy, in respect of which no premium had been assessed or received by the insurer; an insured was able to ignore long periods in respect of which he had not taken out insurance; and an insured had no incentive to take out or maintain continuous insurance cover. Those anomalies required a broad equitable approach to be taken to contribution. A sensible overall result was only achieved if an insurer held liable in such a situation was able to have recourse for an appropriate proportion of its liability to any co-insurers and to the insured as a self-insurer in respect of periods of exposure for which the insurer had not covered the insured. The fact that the parties might not have contemplated or made specific provisions about co-insurance and self-insurance was no obstacle to the court doing so. An employer therefore had a right to contribution against any other person who was, negligently or in breach of duty, responsible for exposing the victim to asbestos. After meeting the insurance claim, the insurer would be subrogated to that right to contribution against the other responsible source of exposure. Z was also entitled to look to X to make a proportionate contribution as a self-insurer.

(4) In cases where the person responsible for the exposure was insolvent, there was a strongly arguable case for treating the language of the Third Parties (Rights against Insurers) Act 1930 s.1(1) as entitling the mesothelioma victim to recover against the insurer.

Milton Furniture v Brit Insurance Ltd [2015] EWCA Civ 671

A company (M) appealed against a decision that it was not entitled to an indemnity from the respondent insurer in relation to a fire at its premises.

M's premises included a warehouse, an area described as "the Link" and a house. The fire had been started deliberately in the early hours of the morning by an unknown person. One of M's owners and an employee had been asleep in the house and the Link. They were awoken by the fire alarm. The burglar alarm had not been set. The insurance policy contained a warranty (PW1) which stated:

"It is a condition precedent to the liability of the Underwriters in respect of loss or damage caused by Theft and/or attempted Theft, that the Burglar Alarm shall have been put into full and proper operation whenever the premises […] *are left unattended ... ".*

A general condition of the policy ('GC7') also stated:

"The whole of the protections including any Burglar Alarm provided for the safety of the premises shall be in use at all times out of business hours or when the Insured's premises are left unattended and such protections shall not be withdrawn or varied to the detriment of the interests of Underwriters without their prior consent".

The judge found that GC7 was a condition precedent to B's liability, but that it was qualified by PW1, so that M was only required to set the burglar alarm if the premises were left unattended, which they had not been. However, he concluded that M had breached GC7 because the company responsible for monitoring the burglar alarm had stopped doing so as a result of M failing to pay its invoices. He held that M had been reckless as to the risk that the monitoring service would be cut off.

M appealed on the basis that

(i) GC7 was not a condition precedent;

(ii) PW1 did not qualify GC7;

(iii) the building had not been left unattended because people were asleep in parts of it;

(iv) it had not breached GC7 by causing or permitting the withdrawal of the burglar alarm monitoring service.

In dismissing the Appeal it was held that:

(1) GC7 was a condition precedent which applied to the burglar alarm. There was no hierarchy conferring precedence on PW1. GC7 applied to all claims, whereas PW1 applied only to claims for theft or attempted theft. M's construction would lead to the commercially unacceptable result that there would be no conditions precedent regarding liability for non-use of the burglar alarm unless the claim was for theft or attempted theft.

(2) PW1 did not qualify the obligations imposed by GC7. GC7 required the whole of the protections provided by the burglar alarm to be in use in two alternative eventualities: at all times out of business hours or when the premises were left unattended. If the purpose was only to ensure that the burglar alarm was operational whenever the premises were unattended, the policy need only have provided that.

(3) The judge's conclusion that the premises had not been left unattended did not reflect the reality of the situation. The natural meaning of the word "attended" was that someone was keeping the property under observation and was in a position to observe any attempt to interfere with it, *Starfire Diamond Rings Ltd v Angel [1962] 2 Lloyd's Rep. 217* applied. The people who were asleep in two small parts of the building could not be said to be attending to the premises.

(4) GC7 imposed a strict obligation on the insured in respect of the monitoring service. There was no basis for interfering with the judge's findings that M was in breach of that aspect of GC7.

Teal Assurance Co Ltd v. (1) WR Berkley Insurance Europe Ltd (2) Aspen Insurance UK Ltd (2015)

[2015] EWHC 1000 (Comm)

QBD (Comm) (Eder J) 23/04/2015

Significance: Liability for the purposes of an indemnity arises as and when payments are drawn down from an escrow account rather than when payment is made into it. In this way the situation is distinguishable from the paying of an interim payment where liability arises as and when payment is made rather than at the conclusion of the case.

Facts: The Claimant (T) provided insurance to a consortium of companies operating an engineering and construction business (B). B had a five layer professional indemnity policy, the top layer (a 'top and drop' policy) was reinsured by the Defendant R. Following a claim made by one of its contractors (X) B reached a settlement, part of which involved paying the sum of $13 million into an escrow account under the terms of an escrow agreement. The judge was asked to decide whether liability for the purposes of B's PII policy arose when a) they paid the money into the escrow account or b) as and when X subsequently became entitled to draw down money from the account. Under the terms of the reinsurance policy the latter option was financially advantageous to T as it would require them to make payment of $11 million to B but would enable them to call on R to indemnify them for their outlay.

T argued that liability could not arise when payment was made into the escrow account because it was not a payment to X. There were conditions in the agreement which meant it was possible that no payment would ever be made to X. R placed heavy reliance on the case of *Cox v. Bankside Members Agency Ltd* [1995] C.L.C 180 where it was held that liability for the purposes of an indemnity crystallised as and when a court order required that an interim payment be made to a claimant.

Held: B had suffered an indemnifiable loss as and when X had become entitled to draw down monies from the escrow account but not when the money was paid into the account. The court distinguished Cox on the basis that a legal liability to pay damages did not arise under the escrow agreement until the money was drawn down, whereas where a court orders an interim payment it is satisfied that liability will be established and assesses the minimum amount of that liability, it is therefore an order for the payment of damages for the purposes of a policy. Secondly it was significant that an order of the court presented mandatory obligations upon a policy holder whereas in B's case the payment was as a result of a voluntary agreement between X and B. Finally there were policy reasons behind the decision in Cox in that an interim payment was liable to cause the insolvency of a paying party if they were unable to call upon their insurers, this was not the case with voluntary payments into an escrow account.

Involnert Management Inc (Claimant) v. Aprilgrange Ltd & Ors (Defendants) (1) AIS Insurance Services Ltc (2) OAMPS Special Risks Ltd (Third Parties) (2015)
[2015] EWHC 2225 (Comm)
QBD (Comm) (Leggatt J) 10/08/2015

Significance: Where an insurance contract was made prior to the coming into force of the Insurance Act 2015 an insurer was able to avoid liability to indemnify entirely where the value of a risk had been materially overstated.

Facts: The Claimant (I) owned a 'super yacht' which they sought to insure for a value of €13 Million. The yacht had in fact been valued at €7 million and indeed, at the time the contract was made, was on sale for the sum of €8 million. I's brokers (AIS) had placed the increased valuation on the yacht without the owners agreement or knowledge. Following a fire the yacht was damaged and was declared a constructive total loss. The Defendant insurers (A) attempted to avoid the policy on the grounds of material non-disclosure, misrepresentation and a contractual

bar to the claim due to it being made out of time. I also sued both their brokers and sub-brokers (OAMPS) in negligence.

Held: What was a significant difference for the purposes of a contract of insurance was a matter of degree. The fact that the valuation was for a value of €7 million was material, it was also material that the asking price at the time of insurance was €8 million. There was therefore material non-disclosure. The judge noted at [186] that he considered the outcome of the decision, that A could avoid liability entirely, to be 'a blot on English insurance law' and noted that under the terms of the Insurance Act 2015 the insurers would still have to pay out the reduced value of the yacht where insurance for a higher value had been taken out. While there had been misrepresentation this had not induced the insurers to insure as they would have provided insurance even if the coverage level was left blank.

AIS had been negligent in filling out the proposal form incorrectly without I's consent or knowledge. OAMPS the sub-broker did not owe a duty directly to I and was not in breach of any duty they owed to AIS.

WESTERN TRADING LTD v GREAT LAKES REINSURANCE (UK) PLC

[2015] EWHC 103 (QB)

(HHJ Judge Mackie QC)

Significance: The Court considered the Claimant's application for a declaration in relation to reinstatement of a property damaged by fire.

Facts: C, a management company administering a large property portfolio owned by a developer, S, applied for a declaration that it was entitled to be indemnified for the cost of reinstating a property which had been damaged by fire. The property in question was two neighbouring buildings – the first an historic listed building which had been granted permission

for conversion into residential units although that conversion had not yet taken place whilst the developer waited for the housing market to improve. During that hiatus, the ground floor was used for storage; the upper floors remained unoccupied. The second building was leased to various tenants including a business owned by S's son who was given preferential treatment and was allowed by C to occupy for some time without rent being demanded. C paid all the building's outgoings and rent to S. An expert for C claimed the cost of reinstating the property exceeded the limit of indemnity.

D, the insurer, argued (i) that C had no insurable interest as it did not have a tenancy over the premises; (ii) the insurance proposal had misrepresented the property was in commercial use having been previously unoccupied and the rental arrangement with S's son a fiction; (iii) S's plan to reinstate the building was commercially absurd and he was concealing his real intention to dispose of the site to a developer and maximise sale of the site

Held: (1) C was an integral part of the family business; its framework was lawful and consistent with the practice of similar businesses. The underlying business model was no concern of the insurers. C paid rent to S and dealt with insurance, rates and the granting of leases. C obviously had an insurable interest. There was no suggestion that some advantage had been obtained by procuring the insurance in the name of one company rather than another.

(2) On the evidence, D's claim that the property had been unoccupied were not made out. There was no reason to doubt the validity of the leases taken subsequently or that those leases had not been entered into in good faith. There was nothing surprising in family-related businesses charging each other uncommercial sums or foregoing payments for a period. There was no evidence of any misrepresentation, either material or relied upon. The proposal form had wrongly stated that there were three tenants rather than two but that was not material in the legal sense. The proposal form did not form the basis for the policy under which the claim was brought; there was no breach of warranty.

(3) There was credible evidence that the fire had increased the development value of the site by a considerable amount, however the market value of the property was irrelevant since it was not for sale. The requirement to reinstate the property did not arise until the insurer had confirmed that it would indemnify. Even a profitable business could not reasonably be expected to take a decision about whether to fund the work until it knew the financial ramifications of such a commitment. There was a contractual right to reinstatement and C had an express right to be indemnified for the cost of that reinstatement. The test of whether the intention to reinstate was genuine was to see what C would do if and when it had the benefit of the declaration sought. Therefore, a declaration would protect the interests of the insurer as well as those of C.

(4) Obiter: If the Court had needed to consider the issue of damages, it would have held that the insurer was liable for the reinstatement costs up to the limit of cover. If there was no reinstatement, the insurer was under no obligation to pay because the relevant contractual commitment would not have been invoked.

The Court granted the Declaration.

MACCAFERRI LTD v ZURICH INSURANCE PLC

[2015] EWHC 1708 (Comm)

(Knowles J)

Significance: The Court considered the correct construction of a notification clause.

Facts: D, who provided C with public and product liability insurance, declined to provide an indemnity in relation to liability C had in respect of an eye injury suffered by a Mr McKenna when he was using a Spenax gun to attach wire caging together. Mr McKenna had sued his

employer, his employer sued the company that hired the gun to them. That hire company had themselves hired the gun from C.

The insurance policy contained a notification clause. The first sentence was in the following terms: "*The Insured shall give notice in writing to the Insurer as soon as possible after the occurrence of any event likely to give rise to a claim with full particulars thereof.*" The second sentence was: "*The Insured shall also on receiving verbal or written notice of any claim intimate or send same or a copy thereof immediately to the Insurer and shall give all necessary information and assistance to enable the Insurer to deal with, settle or resist any claim as the Insurer may think fit.* …".

Held: The phrase "*likely to give rise to a claim*" was describing an event with at least a fifty per cent chance that a claim against C would eventuate (*Layher Ltd v Lowe* [2000] Lloyd's IR 510 at 512 1st col. and *Jacobs v Coster (t/a Newington Commercials Service Station) and Avon Insurance (Third Party)* [2000] Lloyd's Rep IR 506 at [12] and [14], considered).

D had argued that the use of the words "*as soon as possible*" in relation to the requirement to notify the insurer indicated that an obligation to notify arose when an insured could, with reasonable diligence, discover that an event was likely to give rise to a claim, and not before. Such a meaning was supported by the obligation to give "*full particulars*" of the event likely to give rise to a claim, which imported an obligation on the insured to be "proactive" or implied a duty of inquiry. The Court rejected such an interpretation, instead finding that the words "*as soon as possible*" referred simply to the promptness with which the notice in writing was to be given if there had been an event likely to give rise to a claim.

The Court accepted that such interpretation meant there would be cases in which the circumstances described by the first sentence of the clause did not arise and yet a claim eventuated. The point at the heart of the case was what nature of event gave rise to a requirement to give notice.

On the evidence, there had not been an event "*likely to give rise to a claim*" – there were possibilities other than a fault with the gun having been the cause of the injury including operator error and no fault at all. D had been wrong to withhold an indemnity.

An appeal to the Court of Appeal is awaited.

Aspen Insurance UK Ltd v Adana Construction Ltd
[2015] EWCA Civ 176
(Gloster LJ; Christopher Clarke LJ; Vos LJ)

Significance: The Court of Appeal granted a partial declaration of non-liability to an insurer in respect of an insurance policy related to construction works. The court analysed the correct interpretation of the terms *"superstructure"* and *"product"* under the terms of the policy.

Facts: The policy-holder ("D") installed a concrete base for a crane on top of reinforced piles. At the corners of the concrete dowels were inserted into the piles to provide tensile strength. A tower crane was then placed atop the concrete. The crane collapsed, causing serious injury to the crane driver and causing damage to the crane and neighbouring properties.

D had obtained insurance from an Aspen Insurance ("C") which covered, among other things, public liability for faulty workmanship and product liability.

There were, however, a number of exclusions. One exclusion clause stated that C would not indemnify D, *"against any liability … arising in connection with the failure of any Product to fulfill its intended function"* (underlining added). The term "Product" within the policy meant any product or goods manufactured, constructed, installed or supplied by or on behalf of D.

Another exclusion clause covered the *"foundations"* of the works. It provided that D was not covered for loss or damage, *"to any superstructure arising from the failure of the [D's] foundations works to perform their intended function"* (underlining added).

Liability for the collapse of the crane had not yet been established. C sought a declaration of non-liability on the basis that the exclusion clauses applied. At first instance HHJ Mackie QC declined to make such a declaration, questioning the appropriateness of making a declaration in advance of a trial. However, the judge agreed to continue with the hearing and to make findings on the basis that it may serve a useful purpose. The insurer appealed.

Held by the Court of Appeal: Although the Court expressed *"grave reservations"* as to whether it was appropriate to determine coverage issues before the case had been properly pleaded or determined, the Court was prepared to make findings and in the event it made a partial declaration of non-liability.

(1) HHJ Mackie QC had been correct to find that the concrete base as a whole was not a "Product" within the meaning of the policy. Generally a product was a tangible and moveable item which could be transferred from one person to another. D had undertaken concreting works for the purpose of constructing a base for the crane. The fact that the works created something did not mean that it was to be regarded as a Product for the purposes of the clause (see paras. 35 to 44).

(2) However, contrary to the judge's finding, the dowels were "Products" within the meaning of the exclusion clause. The dowels were supplied by D and installed by them in the piles (see paras 46-48). As such, the Court declined to make a declaration of non-liability in respect of the dowels.

(3) The *"foundation"* exemption clause applied in the circumstances. The clause was worded in very general terms and applied to loss or damage to any superstructure. It did not apply only to buildings. The Oxford Dictionary online defined *"superstructure"* as, *"a structure built on top of something else."* In this case, by constructing the crane base, D was carrying out foundation works in relation to a crane – a structure – which rested on top of the base. The temporary nature of the crane did not mean that it could not be a superstructure. The damage to the crane arose from the failure of D's foundation works to fulfil their intended function i.e. to transfer the load of the crane such that it did not topple over. Any liability that might be established against D in respect of the damage to the crane was excluded under the foundation clause (paras 67-73).

AXA Versicherung AG v Arab Insurance Group
[2015] EWHC 1939 (Comm)
(Males J)

Significance: Despite material non-disclosure by a reinsured of historic loss records for energy construction risks, the reinsurer was not entitled to avoid the reinsurance treaty covering those risks. The reinsurer would have written the treaty on the same terms if the records had been disclosed and explained.

Facts: In 1996 C's predecessor (P) had entered into a reinsurance treaty with D. C sought to avoid the treaty, and recover about US$5.15 million paid to D under the treaty, on the basis of non-disclosure of loss statistics relating to D's book of energy construction risks written from 1989 to 1995. There was an alternative claim for misrepresentation, the alleged representation being that there were no historic statistics. C contended that the level of past losses was such that, had it been disclosed by D, P would not have entered the treaty.

Held: Judgment for D (NB: appeal outstanding).

(1) The misrepresentation claim failed. D's statement that the 1996 treaty was a new treaty for the reassured and D therefore did not have a corresponding loss record, did not mean that D had no loss statistics for energy construction risks. It meant that because the treaty was new, rather than a renewal, there were no historic records of losses incurred under the treaty (see paras 124 to 130).

(2) The historic loss records in respect of energy construction risks *were* material and D had failed to disclose a known material circumstance. It was not consistent with the duty of utmost good faith for D to conceal poor loss records from C (see paras 131 to 149).

(3) However, C failed to show that, had the risk had been fairly presented, it would not have written the treaty on the same terms. C had a pre-existing relationship with D, the specifics of which showed a commitment to follow D's fortunes in respect of energy underwriting. There were additional matters which, taken together, suggested that had D had disclosed and explained the loss record C would have written the treaty on the same terms. The non-disclosure had therefore not induced the C to enter the treaty and accordingly C was not entitled to avoid the treaty (paras 151 to 179).

Brit UW Ltd v F & B Trenchless Solutions Ltd
[2015] EWHC 2237 (Comm)
Carr J

Significance: An insurer was entitled to avoid a policy where the assured had it induced it to provide cover through a material misrepresentation and/or the non-disclosure of a material circumstance.

Facts: The assured was a sub-contractor that installed a concrete micro-tunnel under a road at a railway level-crossing. Prior to installation it estimated that the railway line above the tunnel would settle by a total of 2-4mm. In fact, by the time the tunnel was completed the line had settled 11-12mm and this subsequently increased to 15-18mm. In addition, a void appeared in the road.

The assured then took out a contractors' combined liability policy with the insurer, which covered employers' liability, product liability and public liability. Shortly thereafter a freight train derailed on the level crossing as a result of severe settlement of line caused by the installation of the tunnel. The insurer avoided the policy on the grounds that the assured had (i) failed to disclose the settlement of the ground and the void in the road, and also that the railway line was active; and (ii) misrepresented that it did not carry out tunnelling work under active railway lines.

Held: In order to avoid a policy, an insurer had to establish on the balance of probabilities that it had been induced to provide cover by a material misrepresentation or the non-disclosure of a material circumstance by the assured: **Garnat Trading & Shipping (Singapore) Pte Ltd v Baominh Insurance Corp** [2011] 1 All E.R. (Comm) 573 applied. A circumstance or misrepresentation would be material where it would influence the judgement of a prudent insurer in fixing the premium or deciding whether to take the risk.

In the instant case, once settlement significantly exceeded the predicted 2-4mm it was plain the assured was exposed to a claim for the cost of remedial works and future losses from the principal contractor. Such a circumstance would have been important to a prudent insurer, as would the existence of the void and the fact that the railway line was active. There had therefore been material non-disclosure that had induced the insurer to provide cover on the terms agreed. Furthermore, the assured's representation that it did not undertake tunnelling underneath active railway lines was false and had also induced the insurer to provide cover on the terms agreed. The insurer had not subsequently affirmed the policy and had therefore validly avoided it.

Equity Syndicate Management Ltd v (1) Glaxosmithkline PLC & (2) AXA Corporate Solutions Assurance SA

[2015] EWHC 2163 (Comm)

Males J

Significance: A court allowed the rectification of an insurance contract and reduced the scope of cover provided for by the wording of the agreement.

Facts: An insurer (E) entered a contract with a company (G) to provide cover to its employees who were on its car ownership scheme ('the scheme'). The policy extended to covering members of the scheme who used temporary vehicles whilst waiting for their cars to be repaired. G's premiums were calculated by way of a flat rate for each car in the scheme. G sometimes also rented cars for employees who were not part of the scheme. Cover for these vehicles was arranged with a second insurer (A).

An employee (B) outside the scheme negligently drove a car hired by G and caused personal injury to a motorcyclist. A settled the motorcyclist's claim and sought a 50% contribution from E on the basis that the wording of E's policy extended cover to drivers in B's position. E accepted that this was the case but sought rectification of the contract on the grounds that it had never been intended.

Held: Rectification would be permitted where the parties could objectively establish a continuing common intention that existed at the execution of the contract but was mistakenly not reflected in the wording of the agreement: Chartbrook Ltd v Persimmon Homes Ltd [2009] 1 AC 1101.

In the instant case there was sufficient evidence for the court to conclude that the test for rectification had been satisfied. The calculation of the premium with reference to the number of cars in the scheme was the strongest possible evidence that the parties only intended to insure

vehicles within it. In addition, there would have been no point in G having obtained further cover from A. Further, the heading of the agreement provided a clear indication that the subject matter of the policy was the cars within the scheme. There would be no unfairness to any of the parties or the motorcyclist in rectification and it would therefore be allowed.

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