

(Re)Insurance Cases Important Decisions 2010

Key Contacts

Ling Ong
Partner
London Market Team
+44 (0)20 7822 1985
ling.ong@weightmans.com

Colin Peck
Partner
London Market Team
+44 (0)20 7822 1984
colin.peck@weightmans.com

Important

These notes have been prepared as a general guide. They are not a substitute for professional advice which takes account of your specific circumstances and any changes in the law and practice; at the time of preparation of these notes various changes to the relevant provisions may be pending. The subjects covered constantly change and develop. No responsibility can be accepted by the firm or the author for any loss occasioned by any person acting or refraining from acting on the basis of these notes.

London Birmingham Leicester Liverpool Manchester

Weightmans LLP is a limited liability partnership registered in England & Wales with registered number OC326117 and its registered office at India Buildings, Water Street, Liverpool L2 0GA. A full list of members is available at the registered office. The term "partner", if used, denotes a member of Weightmans LLP with equivalent standing and qualifications. Regulated by the Solicitors Regulation Authority.

(Re)Insurance Cases

Important Decisions 2010

Index

Page number

After the Event (ATE) Insurance

Avoidance

- Persimmon Homes Ltd & Persimmon (City Developments) Ltd v Great Lakes Reinsurance (UK) Plc 1

Contractual Indemnity

- Greene Wood McLean LLP (in Administration) v Templeton Insurance Ltd 3

Costs

- Kris Motor Spares Ltd v Fox Williams LLP 5

Brokers

Duty of Care

- Nicholas G Jones v (1) Environcom Limited (2) Environcom England Limited and Miles Smith Insurance Brokers 7
- Crowson v HSBC Insurance Brokers Ltd 10

Negligence, Wrong Defendant

- Lockheed Martin Group v Willis Group Ltd 12

Contractors All Risk

Limitation

- City & General (Holborn) Ltd v Structure Tone, and City & General (Holborn) Ltd v Royal Sun Alliance Insurance Plc 14

Employers Liability Insurance

- EL Policy Trigger Litigation 16

Insolvency

Cover holder, proprietary claims, estoppel

- Smith & others v QBE Insurance (Europe) Ltd & others 18

Settlement Agreement, Doctrine of Anti-deprivation

- Mayhew v King and Chaucer Insurance Plc v Towergate Stafford Knight Co Ltd (t/a Folgate London Market Ltd) 20

Jewellers Block

Unexplained loss exclusion

- Widfree Limited (trading as Abrahams & Ballard) v Brit Insurance Limited 22

Marine Insurance

Frustration, illegality

- Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd 24

Material non-disclosure, breach of implied warranty

- Garnat Trading & Shipping (Singapore) Pte Ltd v Baominh Insurance 26

Motor Insurance

Contribution proceedings

- Jubilee Motor Policies Syndicate 1231 v Volvo Truck & Bus (Southern) Ltd 28

Motor Warranty Insurance

Fraudulent Misrepresentation, Agency

- Templeton Insurance Ltd v Motorcare Warranties Ltd & Others 30

Professional Indemnity Insurance

Arbitration Clause, disclosure

- Travelers Insurance Company Ltd v Countrywide Surveyors Ltd 32

Fraud

- Goldsmith Williams (A Firm) v Travelers Insurance Co Ltd 33

Privilege, Notification

- Quinn Direct Insurance Ltd v The Law Society of England and Wales 35

Property & Business Interruption Insurance

Agreement to Reinstate / Repudiation

- French v Groupama Insurance Company Ltd 37

Causation

- Orient-Express Hotels Limited v Assicurazioni General S.p.A (UK Branch) Trading as Generali Global Risk 39

Double Insurance

- The National Farmers Union Mutual Insurance Society Limited v HSBC Insurance (UK) Limited 42

Fraud

- Yeganeh v Zurich Plc 44

Non-disclosure / Misrepresentation

- Sugar Hut Group Ltd v Great Lakes Reinsurance (UK) Ltd Plc 45
- Synergy Health UK (Ltd) v CGU Insurance Plc (t/a Norwich Union) 47

Notification

- Loyaltrend Limited v Brit UW Limited 49

Previously fraudulent/exaggerated claims

- Joseph Fielding Properties (Blackpool) Ltd v Aviva Insurance Ltd 51

Public/Products Liability Insurance

Arbitration Clause

- William McIlroy Swindon Limited (1) & Rannoch Investments Limited (2) v Quinn Insurance Limited 53

Contractual liability, exclusion clause

- Omega Proteins Ltd v Aspen Insurance UK Ltd 56

Renewal, Terrorism Exclusion

- AXA Corporate Solutions SA v National Westminster Bank Plc 58

Pure Economic Loss

Beneficial (not legal) owner

- Colour Quest Ltd v Total Downstream UK Plc 60

Scottish Law

Avoidance, Misrepresentation

- Mitchell v (1) Hiscox Underwriting Limited (2) Syndicate 33 at Lloyd's, managed by Hiscox Syndicates Limited 62

Third Parties (Rights Against Insurers) Act 1930

- Clare Horwood & Others v Land of Leather Limited (in Administration), Zurich Insurance PLC & Others 64

XOL Reinsurance

Conflict of Laws

- Gard Marine & Energy Ltd v Tunncliffe 67
- Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange 69

Follow Settlements

- IRB Brazil Resseguros SA v CX Reinsurance Company Ltd 71

ATE Insurance

Avoidance, Waiver, Inducement, Affirmation

Persimmon Homes Ltd & Persimmon (City Developments) Ltd v Great Lakes Reinsurance (UK) Plc
[2010] EWHC 1750 (Comm)

Persimmon claimed against Great Lakes, the after the event (ATE) insurer of a company, CPH Enterprises (CPH), under the Third Parties (Rights Against Insurers) Act 1930 after CPH became insolvent. Great Lakes purported to avoid the ATE policy on the basis of non-disclosure and misrepresentation by CPH.

A dispute concerning a property transaction arose between Persimmon and CPH resulting in CPH commencing legal proceedings against Persimmon seeking damages in the region of £650,000.

CPH had the opportunity to purchase a development site owned by National Car Parks Limited (NCP) but did not have the funds to do so. However, CPH carried out some preliminary work relating to the site and incurred professional fees, which it was unable to pay. CPH entered into discussions with Persimmon about the possibility of it acceding to CPH's negotiation position with NCP.

It was CPH's case that there was an "understanding" agreed during a series of telephone conversations, that Persimmon would pay CPH's professional fees and a 2% introduction fee. Persimmon's version of events differed in that it submitted that there was a binding agreement that, on completion, Persimmon would discharge CPH's professional fees.

CPH consulted junior counsel, who advised that the prospects of proving the contract were 60% and the prospects of success on a quantum merit claim were 70%. CPH also instructed Edwin Coe, solicitors, who acted under a conditional fee agreement with a success fee set at 68%.

An application was made to Great Lakes for ATE cover. Amongst other things, the proposal form stated that a "successful outcome" was anticipated and that there was a 51% – 60% chance of achieving the level of damages sought by CPH. The costs up to trial were estimated at £90,000. The proposal form expressly stated that there was a requirement to disclose all material facts.

The trial judge held in Persimmon's favour against CPH on the basis that the evidence showed that CPH directors had lied in business correspondence and the evidence of a co-director should be treated "with enormous caution". The judge made a costs order on an indemnity basis and an order for a payment of £175,000 on account of costs.

In October 2008, CPH was wound up and Persimmon claimed against Great Lakes under the Third Parties (Rights Against Insurers) Act 1930. Great Lakes denied indemnity on the basis of a breach of the duty of utmost good faith by its insured, CPH, with regard to the dishonesty of the directors and material non-disclosure.

Persimmon's original case was that the misrepresentations and non-disclosures were not material in the context of ATE insurance. This was abandoned after expert evidence agreed that it was material. Persimmon's case therefore focussed on two issues, inducement and waiver. Persimmon argued that the underwriters were not induced to enter into the policy by the alleged misrepresentations or non-disclosure. Persimmon contended that the judge's finding that the claim by CPH was effectively fraudulent should be disregarded.

Persimmon also argued that the underwriters had affirmed the policy and sought to rely on pre-trial correspondence between the underwriters and Edwin Coe and the fact that, despite the directors'



dishonesty being outlined in Persimmon's skeleton argument, the underwriters did not seek to avoid the policy at the time.

Held:

Mr Justice David Steel rejected Persimmon's arguments on the basis that the underwriters had no knowledge of the dishonesty involved in the case and made no representation that this would not be relied on to avoid the policy.

For the underwriters' conduct to amount to an affirmation of the policy, they would have needed to have actual or constructive knowledge of the facts giving rise to a right to avoid. The underwriters had no such knowledge. Also, the affirmation would have needed to have been communicated to Persimmon, which it was not.

Similarly, the conduct of the underwriters and their correspondence with Edwin Coe did not amount to an election to affirm.

Persimmon had also argued that there had been negligent underwriting in relation to the material that had been disclosed. This argument was also rejected by Mr Justice David Steel.

The underwriters were entitled to exercise their common law right of avoidance and their contractual rights to reject the claim.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

ATE Insurance Contractual Indemnity

Greene Wood McLean LLP (in Administration) v Templeton Insurance Ltd [2010] EWHC 2679 (Comm)

A group of miners received compensation from the Department of Trade and Industry (DTI) for compensation for respiratory diseases and vibration white finger. The DTI's compensation schemes were supposed to operate at no cost to the claimants but monies had been deducted from the compensation by the unions and solicitors involved in handling the claims. A number of the claimants instructed Greene Wood McLean LLP (GWM), a firm of solicitors, to recover the monies deducted from their compensation. Templeton agreed to provide after the event (ATE) insurance for those claimants represented by GWM under conditional fee agreements and GWM guaranteed their clients they would not incur any costs.

Each of the claims were small so GWM, on the advice of counsel, applied for a Group Litigation Order (GLO). The application was dismissed by the court and costs were awarded against the applicants (the miners). Templeton alleged that the ATE policy was void and refused to pay these costs. When the miners subsequently intimated that they may claim against GWM, GWM's E&O insurers reached a settlement.

GWM then brought proceedings against Templeton seeking to recover on the basis that it was an implied term of the agreement between Templeton and GWM that Templeton would meet valid claims under the policy. Alternatively, GWM claimed an indemnity or contribution. Templeton cross claimed alleging GWM had breached the duty of care they owed to them by applying for a GLO.

Held:

- There was no implied term in the arrangement between GWM and Templeton that Templeton would meet valid claims under the policy. There was no need to imply an obligation to the solicitor that the insurer would honour the policy, nor would an officious bystander consider such a term inevitable.
- GWM had given a guarantee to their clients that they would not incur any costs. As GWM, through their insurers, had indemnified the miners they were able to rely on a principle of law that where a person discharges the indebtedness of another because he is obliged to do so, he can claim to be indemnified by that other person. It was expected that Templeton would pay the miners their adverse costs, and it was this which allowed GWM to give their guarantee.
- GWM were equally entitled to rely on s.1 of the Civil Liability (Contribution) Act 1978 as both the ATE insurance and solicitors' guarantee covered the same potential economic loss. The amount of the contribution was 100%.
- Templeton could not claim that GWM, or counsel who advised them, owed a duty of care to Templeton in respect of the application for a GLO. Cooke J held that the stance taken by the solicitors in relation to the group litigation had been justified. He noted that it was hard to see how the Judge hearing the GLO was justified in reaching his conclusion.

Templeton were ordered to pay the ATE policy limit plus interest to compensate GWM/their E&O insurers.



The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

ATE Insurance Costs

Kris Motor Spares Ltd v Fox Williams LLP [2010] EWCH 1008 (QB)

After the event (ATE) insurance premiums may be recovered as part of a party's costs even when the policy is taken out at a late stage in proceedings.

Fox Williams LLP (FW), a firm of solicitors, acted for Kris Motor Spares Limited (KMS) in litigation against a firm of stock brokers under a Conditional Fee Agreement (CFA). FW raised a bill for its fees, which KMS contended was excessive. KMS subsequently applied for a detailed assessment of costs. The costs Judge ordered determination of a preliminary issue as to whether there were 'special circumstances', within the meaning of s.70 of the Solicitors Act 1974, for an assessment. A hearing was scheduled over four days, commencing on 16 December 2008.

On the day the hearing commenced, FW served KMS with a notice of funding, informing KMS that FW had taken out ATE insurance in respect of the trial of preliminary issue.

KMS was ordered to pay FW's costs of £249,208 which included the ATE premium of £95,550 to obtain cover for £130,000 (with a rate of 73.5%). KMS appealed, claiming the premium was excessive and disproportionate, and it was unreasonable for FW to have taken out the policy at such a late stage in proceedings. The appeal was dismissed and KMS was ordered to pay costs of the appeal.

Held:

- ATE insurance premiums are recoverable as part of a party's costs pursuant to s.29 of the Access to Justice Act 1999.
- There was no basis, on the facts of the case, for concluding that FW should not be able to recover the premium because insurance was taken out at a late stage. FW was entitled to obtain insurance cover, particularly in light of the fact that KMS had instructed Leading Counsel and the possibility this would increase its exposure to costs. The timing of the policy may indicate the premium was an unreasonable cost, but there is no principle of law stating that a late policy is an unreasonable policy. Whether or not it is reasonable to insure at a late stage will depend on the facts of the case.
- In relation to the reasonableness of the size of the premium, there is no presumption that a premium is reasonable. There is therefore an evidential burden on the paying party to advance at least some material in support of the contention that the premium is unreasonable (**Rogers v Merthyr Tydfil CBC [2007]**). KMS did not deploy any evidence or make any further requests to FW for further information. This was not to discourage challenges to ATE premiums, but issues should be identified promptly and properly pleaded.



The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Brokers

Duty of Care, Non-Disclosure, Causation

Nicolas G Jones v (1) Environcom Limited (2) Environcom England Limited and Miles Smith Insurance Brokers [2010] EWHC 759 (Comm)

Environcom Limited (“Environcom”) was in the business of recycling white goods, mainly refrigerators. Part of this recycling process involved the extraction of CFC chemicals which are used as a coolant in refrigerators, although more modern refrigerators use alternative chemicals to CFCs including pentane which is highly flammable.

The first stage of the refrigerator recycling process involves the removal of the compressors which contain the coolant chemicals. On occasions, when the nuts and bolts attaching the compressors to the bottom of the refrigerators are difficult to remove, they are cut off using plasma cutters. The plasma cutters heat metal to a high temperature, causing it to melt before a high velocity gas is applied which removes the melted part.

There was an inherent risk that, when using plasma cutters, the sparks or molten metal could ignite pentane refrigerators.

In early 2004, Environcom approached Miles Smith Insurance Brokers (“MS”) to arrange insurance cover. During the initial discussions, Environcom’s business was described as being concerned with the recycling of ozone depleting substances and a plant for degassing CFCs. No mention was made of other chemical coolants nor the method or tools used to remove the compressors.

MS arranged coverage with Woodbrook which commenced on 24 May 2004. On the proposal form the business was described as “Recycling White Goods” but no description of the recycling process was required. There was also a declaration which was signed by Environcom’s chairman which stated:

“I have not withheld any material facts. I understand that non-disclosure of a material fact will entitle the Underwriters to void the insurance.

(N.B A material fact is one likely to influence acceptance or assessment of this proposal by Underwriters)”

At Woodbrook’s request, a survey was carried out at Environcom’s premises.

In November 2004, Mr Hamilton (“Mr H”), an employee of Environcom, became responsible for the company’s insurance matters and approached MS for a summary of cover. Mr H also reported a break-in during which a generator and plasma cutter were stolen.

A few days later, MS wrote to Mr H to discuss the renewal of Environcom’s insurance policy. The letter focused on the need to update the description of the business to take account of any acquisitions or developments and included the following provision:

“Material Facts

You are under a continuing obligation to notify Insurers of any material alterations to risk, for example:

- Change in business activities / acquisitions or disposals
- Additional premises / Risks / Insurable Items”

On 27 October 2005, a fire broke out on the recycling line causing the line to be shut down. Woodbrook instructed a specialist forensic fire investigation firm which found that the fire was caused by the ignition of pentane, although the source of ignition was unclear.

The insurance policy was renewed annually. Several site visits and risk assessments were carried out over the years. None of these noted the use of plasma cutters. In March 2006, Environcom produced a description of the recycling process in which the use of plasma cutters was not mentioned. There were several fires at the recycling plant although Environcom only reported the most serious of these, neglecting to report any fires that it did not make a claim in respect of.

In May 2007 Woodbrook informed MS that it did not intend to renew Environcom’s policy due to the experience of adverse claims. MS eventually persuaded Woodbrook to renew the policy; however, this was on more onerous terms than previously offered.

There was another small fire on 6 September 2007 which Environcom did not report. This was followed by a more serious fire on 16 September 2007 for which Environcom made a claim under the policy. Woodbrook declined the claim on the grounds of material non-disclosure relating to the use of plasma cutters and small fires which had occurred.

Woodbrook commenced proceedings seeking a declaration of non-liability. Environcom counterclaimed for an indemnity under the policy and joined MS as a third party on the grounds that they had acted negligently in the brokering of the policy.

In November 2009 there was a mediation during which the dispute between Environcom and Woodbrook was settled.

In the claim by Environcom against MS, Mr Justice David Steel held:

1. There was no dispute as to the broker’s duty, namely a duty to:
 - advise clients of their duty to disclose all material circumstances;
 - explain the consequences for failing to disclose;
 - give an indication of what matters ought to be disclosed;

- take reasonable care to elicit matters which the clients might not think are necessary to mention;
 - ensure that the policy is suitable for the clients' needs.
2. On the facts, MS had breached its duty as it had failed to ensure that Mr H understood the disclosure obligation and had provided no explanation of what might be material or the consequences of any failure to disclose.
 3. Where an incomplete explanation is given by a broker to its clients in relation to their obligations, there is a higher standard of care on the broker when eliciting material information for disclosure.
 4. However, even if MS had complied with its obligations as broker, the use of plasma cutters would probably not have been disclosed by Environcom, although the small fires probably would have been disclosed.
 5. If full disclosure had been made the chances of Environcom obtaining insurance cover, or adequate insurance cover, or accepting the terms of that insurance cover, were remote.
 6. Accordingly, despite the breach of duty by MS, Environcom's claim was dismissed as not being causative and the loss claimed was not of the kind or type which MS ought fairly to accept liability.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Brokers

Duty of Care, Directors' and Officers' Liability Insurance, Third Party Rights

Crowson v HSBC Insurance Brokers Ltd (2010) unreported

In *Crowson v HSBC*, Hughes Brickworth Limited (“HBL”) had entered into an arrangement with HSBC Insurance Brokers Ltd (“HSBC”) who agreed to put into effect insurance policies identical to policies that had been arranged by HBL’s previous brokers. The previous insurance policies had included a director’s and officer’s liability insurance policy which HSBC failed to renew or replace.

HBL’s managing director, Mr Crowson, who had sought to rely on the policy, brought a claim against HSBC in his own name for negligence and breach of contract, relying on the Contracts (Rights of Third Parties) Act 1999.

HSBC applied to have the claim struck out on the grounds that it did not owe Mr Crowson a duty of care at common law and that it was not in a contractual relationship with him.

Since this was an application to strike out, the judge only had to assess whether he agreed with HSBC that the case “disclosed no reasonable grounds for bringing the claim”.

Master Bragge held that:

It was at least arguable that Mr Crowson had a valid claim against HSBC even though it was HBL, not Mr Crowson, who had contracted with HSBC.

1. There are two situations where it is arguable that a broker could be liable in tort to a person who had not appointed him, namely:
 - (i) Where a broker is instructed to arrange insurance for the person instructing him and for others;
 - (ii) Where a policy is intended to benefit a third party.
2. HSBC knew that Mr Crowson was the managing director of HBL and that he and the other directors required a director’s and officer’s insurance policy. HSBC also knew that such a policy would be for the benefit of the company and the directors. Mr Crowson gave instructions to HSBC on behalf of HBL and himself and was at least arguably acting as an agent for the other directors. There is arguably a contract between the broker and those for whose benefit the policy is effected.
3. In any event, the situation falls within the Contracts (Rights of Third Parties) Act 1999 and Mr Crowson has a right to enforce the contract on two grounds.

- (i) Under section 1(1)(b) of the Act as the contract confers a benefit on him, namely insurance as a director; and
- (ii) Under section 1(3) of the Act as he is expressly identified as a member of a class or answers to a particular description.

The application to strike out Mr Crowson's claim was dismissed.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Brokers

Negligence, Wrong Defendant, Substitute Defendant

Lockheed Martin Group v Willis Group Ltd [2010] EWCA Civ 927 (CA)

Lockheed applied for permission to appeal against a decision refusing to substitute the respondent, Willis Group ('WG'), for the originally named defendant, Willis Group Holdings Limited ('WGHL'), on the claim form.

Lockheed had entered into a US\$124 million settlement with London market insurance companies. US\$8.124 million was attributed to "unknown ship building London Market Insurers" and the sum paid to Lockheed was reduced by this amount because the insurers remained unknown.

Shortly before the limitation period expired, proceedings were brought by Lockheed alleging that their brokers were negligent in failing to maintain proper records of those London market companies subscribing to the policies.

It was believed by Willis that service had not been properly effected as WGHL, Bermuda, had been named instead of WG in the UK. By then, the limitation period had expired.

WG submitted that there was no mistake by Lockheed as to the name of the party sued but rather that insufficient thought had been given about who to name on the claim form. WG also argued that they had misled them.

Lockheed submitted that they had at all times intended to issue proceedings against the senior UK company in the group and not the Bermudian company and had made a mistake as to the name; that mistake had not misled WG.

Rule 19.5 of the Court's Civil Procedure Rules (CPR) provides that a party to legal proceedings can be substituted only if the original party was named "in mistake".

In the Court of Appeal decision of **Adelson v Associated Newspapers** [2007], Lord Phillips laid down certain requirements before an amendment could be made, including:

1. "The mistake must not have been misleading... as to the identity of the person... intended to be sued"
2. The mistake must be as to the name of the party and not as to the identity of the party. In other words, the claimant must identify the correct person but merely misname them, rather than identifying the incorrect person

The Judge allowed WG's application preventing substitution. Under CPR r.19.5(3) the mistake must be the name of the party, not the identity. Given the generous test of mistake, the Judge concluded that Lockheed made a mistake as to name rather than identity when suing the holding company. However, the same did not apply to the trading and broking company. It was clear that there was no intention to sue this party when the claim form was issued. The second limb of **Adelson** was not satisfied, Willis Limited was not a holding company. The mistake was misleading to the other party, causing reasonable doubt as to the identity of the party who was intended to be sued. The failure to identify the correct entity to be sued was largely due to the inexplicable late actions of Lockheed near the end of the limitation period. As a matter of discretion, the Court would not have allowed the substitution.

Lockheed appealed to the Court of Appeal.

Lockheed argued that the Judge was wrong to have imposed a second test requiring that the true intended party to be sued be reasonably apparent to the original defendant. Lockheed satisfied the Court that the original party was named in mistake.

However, permission to appeal was rejected on the grounds that it cannot be necessary in the sense of Part 19.5(3)(b) to substitute WG for WGHL where Lockheed had no cause of action against the WG, which was a holding and not a broking company.

Lockheed's application was refused.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Contractors All Risk Insurance Limitation, Extension of time

City & General (Holborn) Ltd v Structure Tone

City & General (Holborn) Ltd v Royal & Sun Alliance Insurance Plc [2010] EWCH Civ 911

City & General (Holborn) Ltd (CGH) was a contractor which carried out redevelopment of a building in London, and made claims against Royal Sun Alliance (RSA) on its insurance policies for contractors' all risk and property damage.

The claims related to damage allegedly suffered as a result of flooding in the basement discovered in 2002, the collapse of a crane in 2003, and the infestation of the water system with bacteria in 2004.

The claim form was not issued until 2009, thus any cause of action in respect of the flooding was likely to be statute barred, any cause of action in relation to the crane was just in time and the cause of action in respect of the infestation was in time if it was a separate cause of action.

The Judge set aside the order for an extension of time for service of the claim form on the basis that there was no good reason for failing to serve the claim form, and that it was arguable that if an extension was granted RSA would be deprived of a limitation defence.

CGH appealed against the decision to set aside the order. They argued that:

- the Judge should have considered the three claims separately;
- the Judge was wrong to hold the flood claim was statute barred because a new cause of action arose every time more water entered the basement; and
- RSA had acknowledged the flood and crane claims for the purpose of s.29 of the Limitation Act 1980 by a letter in which they had made offers in relation to those claims. CGH argued that these letters amounted to acknowledgement of those claims and so the limitation period started again from the date of acknowledgment.

RSA relied upon a limitation defence, arguing that 6 years had gone by and the contractual claim was time barred.

CGH's appeal was dismissed by the Court of Appeal.

Held:

- The Judge could not be criticised for not considering the three claims separately. Both parties had contended for an all or nothing approach and the Judge was never asked to consider the heads of claim separately. It was too late on appeal to ask the court to do this for the first time and it would have been a complicated and unjustified approach. In any event, it was enough for RSA to show that they might be deprived of a defence of limitation if time for service of a claim form was extended.
- The Judge did not purport to come to any conclusion on the issue of whether successive water ingress causing fresh damage would give rise to successive causes of action against a tortfeasor and its insurers. CGH was therefore not precluded from raising this argument

in any future action in respect of water ingress if RSA took the limitation point in any such action.

- In 2007 RSA had offered £25,000 in respect of the water ingress claim of £1,197,638.89, and an open offer in respect of the crane damage of £552,291. It was not immediately obvious that an open offer of a small amount, in response to a claim of a much larger amount, was an acknowledgment of a claim in that much larger amount. It might be said that it was at least an acknowledgement of a claim in the smaller amount, but the question remained whether it would be right to extend time for service of a claim form merely to enable that much smaller amount to be claimed.
- Further, s.29(5) of the Limitation Act 1980 only applies “where a right of action has accrued to recover any debtor other liquidated pecuniary claim”. Longmore LJ said that the claims against the insurers were not, on the face of it, claims for a debt or other liquidated claims. Not only were they not currently quantified, but there was also considerable case law authority that claims under a policy of indemnity are claims for unliquidated damages.

It would not be appropriate to extend the time for service of a claim form in the instant case so as to enable a doubtful response to the limitation defence. CGH could always bring a second action, if time-bar was raised, for damages suffered within the limitation period.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Employers Liability Insurance

Trigger Litigation – Partial appeal success adds to policy wording confusion

The Court of Appeal handed down Judgment on the 8 October in six related actions collectively referred to as the ‘Employers Liability Trigger Litigation’. The issues in this case concern the construction of wordings in insurance contracts made many years ago which are rarely (if ever) used in present employer’s liability policies.

The Court of Appeal Judgment applies to current and future cases made for mesothelioma consequent to asbestos exposure and determines whether claimants can recover or whether insurers are entitled to decline in their indemnity on the basis of policy wording. The result is a partial success for those insurers whose policies were historically underwritten on an ‘injury sustained’ basis. The Judgment however throws up more questions than it answers and it is thought will lead inevitably to a Supreme Court Hearing in 2011.

Background

In 2006, the Court of Appeal was asked to consider in **Bolton Borough Council v Municipal Mutual Insurance and Commercial Union Insurance** (“Bolton”), when a public liability insurance policy was triggered, having heard agreed medical evidence that mesothelioma “occurred” not at the date of exposure of inhalation of asbestos fibres, but when the malignancy developed which was thought to be around 10 years prior to symptom manifestation.

After the Court of Appeal decision in Bolton four insurers in ‘run off’ declined indemnity under their employers’ liabilities policies which had similar though not identical wordings. These policies varied though referred to an injury or disease “being sustained” or “being contracted” during policy period.

Litigation at first instance before Mr Justice Burton resulted in a defeat for the run off insurers on the following basis:

- The commercial purpose behind the policies was for cover to be provided at the date of inhalation of the asbestos fibre or the date when the negligent act occurred.
- Mr Justice Burton was able to distinguish Bolton on the grounds he was considering employers’ liability rather than public liability wordings.
- Consequently, those policies in force at the time of inhalation would be those policies which would respond.
- Although obiter, the date when the injury was sustained for mesothelioma was a period of 5 years, not 10 years prior to symptom manifestation.

The Court of Appeal Judgment – 8 October 2010

The Court was divided. In broad terms, Lady Justice Smith followed the reasoning of Mr Justice Burton at first instance and refused the appeal. Lord Justice Stanley Burnton adopted the reasoning of the appellants (the run off insurers) holding that the policies should mean what they say.

Lord Justice Rix gave the leading Judgment, holding that:

- Policies underwritten on an ‘injury sustained’ basis, should be applied as per the decision of the Court of Appeal in Bolton, namely that the policy would only trigger if it was still in force at the date the tumour developed (probably 5 years prior to the manifestation of mesothelioma symptoms).
- Policies underwritten on an ‘injury/disease contracted’ basis should be interpreted on the basis that the policy in force at the date of inhalation/exposure of asbestos would be the policy to trigger.
- There is clear indication that Lord Justice Rix would have preferred to find that all policies were triggered on the basis of inhalation or exposure to asbestos, but felt himself constrained by the Court of Appeal decision in Bolton.

Comment

It appears likely that leave for appeals and cross appeals will be granted, if not by the Court of Appeal themselves, but by the Supreme Court, given the dissension between the Court of Appeal themselves in this Judgment.

This case is of considerable importance, both to Insurers and claimants. If the decision is allowed to stand, it is likely that we will see:

- An increased number of mesothelioma claimants who go uncompensated, given the long latency between exposure and onset of symptoms coupled with the insolvency of many companies.
- The decision will add further confusion for mesothelioma claims handlers as it is likely that many organisations will have changed insurers over the years. They are likely to have had policies in force with different wordings. This may lead to situations, either where there is dual insurance in force or alternatively no insurance whatsoever.
- Those organisations insured prior to 1974 by MMI will (subject to any appeal) have no cover in force for mesothelioma claims.
- Lord Justice Rix refers in paragraph 273 of the Judgment to possible implications for other long-tail disease/conditions. It is likely that this may result in further litigation.
- Some solvent Insurers presently have policies written on an ‘injury sustained’ basis. Should they choose to follow the Court of Appeal’s decision in this case, indemnity for future claims will not be given.
- The Judgment will add weight to governmental pressure for an Employers Liability Insurance Bureau.

For further information or to discuss any of the above issues, please contact:

- Jim Byard – Partner at Weightmans on 0116 253 9747 or at jim.byard@weightmans.com
- David Tuck – Partner at Weightmans on 0121 200 8117 or at david.tuck@weightmans.com
- Judith Peters – Partner at Weightmans on 0151 242 7962 or at judith.peters@weightmans.com

Insolvency

Cover Holder, Proprietary Claims, Estoppel

Smith & others v QBE Insurance (Europe) Ltd & others [2010] EWHC 3172

Surety Guarantee Consultants (SGC) was authorised by QBE Insurance (Europe) Ltd (QBE) and Markel International Insurance Ltd (Markel) to act as cover holder and to issue performance bonds on the terms contained in formal Binding Authority Agreements.

One of the principal shareholders of SGC was Mr Brunswick who was also a director of Templeton Insurance Ltd (Templeton). Templeton, like QBE and Markel, also underwrote performance bonds.

In the course of a fraud investigation it was discovered that Templeton paid to SGC US\$371,498 representing commission on a bond issued by Templeton. The bond never took effect, and consequently no commission was ever due from Templeton to SGC. Templeton therefore claimed it was entitled to the immediate return of US\$371,498, but claimed no proprietary claims or tracing remedies over that sum. SGC admitted the claim and on 11 May 2007 Templeton obtained judgment for the US\$371,498 plus interest.

On 22 May 2007 Templeton informed QBE that it was a judgment creditor of SGC and would be presenting a winding up petition. The next day SCG was wound up. By August 2009 joint liquidators had £1.3 million available for distribution among the creditors. Markel and QBE claimed it was trust money under the terms of the Binding Authority Agreements. Templeton then decided that it was not an unsecured creditor, claiming it too had a proprietary claim under a constructive trust.

In light of the competing interests, the liquidators sought the directions of the court. The court directed that the issue of whether the funds collected by the liquidators belonged to the company or someone else should be fought out between Markel, QBE and Templeton.

Templeton pleaded a proprietary interest that was not the same as that previously asserted by it. After having examined its own books, Templeton claimed that the sum of US\$371,498 was a fraudulently diverted premium. QBE and Markel took the point that a cause of action of estoppel arose by virtue of the judgment obtained by Templeton in 2007. In response, Templeton sought an order that the judgment entered against SGC on 11 May 2007 be set aside.

Master Foster set aside the part of the order dated 11 May 2007 as it related to the claim for US\$371,498 plus interest and adjourned the claim relating to the sum of US\$371,498 generally with liberty to restore. QBE and Markel made applications for Master Foster's order to be set aside. Further, QBE and Markel submitted that the existence of the May 2007 judgment estopped Templeton from advancing a different case in the Companies Court.

Held:

It would be wrong to exercise any power to set aside any part of the final judgment obtained in May 2007 for the following reasons:

- The principles on which final judgments may be varied or set aside are limited and well founded on public policy. A truly exceptional case would be required to extend such principles, and this was not such a case.

- Templeton was seeking to set aside a judgment in their favour. Templeton got what it wanted in 2007, but later asked for something different.
- The form Templeton's claim took was determined by its desire to obtain a judgment before an order winding up SGC was made, and in consequence it did not check its own records which clearly disclosed the true position. Templeton's mistake was its own.
- It makes no difference that the final order, which disposed of the action, was made without adjudication of the merits by a Judge.

In addressing the strike out application Mr Justice Norris stated that Templeton could not set up an inconsistent case in the Companies Court. It could not say in its Points of Claim that the sum of US\$371,498 was a fraudulently diverted premium, having obtained the 2007 Judgment on the footing it was wrongly paid commission.

The question is whether there is a real prospect of success in showing the 2007 Judgment was obtained by the fraud of SGC, and that the issue could be raised in the Companies Court proceedings. Templeton did not obtain its favourable judgment because of the fraud of SGC, it decided for tactical reasons to proceed on the footing that SGC's book entry was correct and pleaded its case accordingly. Further, fraud needed to be established by fresh evidence not available at the time of the 2007 Judgment. In this case reasonable due diligence would have brought to light the material within Templeton's own records which it now seeks to rely on for its alternative account of how SGC received \$371,498. Templeton had no real prospect of success.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Insolvency

Settlement Agreement, Doctrine of Anti-Deprivation

Mayhew v King

Chaucer Insurance Plc v Towergate Stafford Knight Co Ltd (t/a Folgate London Market Ltd)

[2010] EWHC 1121 (Ch)

The first claimant, Mr Justin Mayhew (Mayhew), was injured when the load carried on a lorry owned by Milbank Trucks Limited (Milbank) slipped and struck his car.

Milbank's insurer, Chaucer Insurance Plc (Chaucer), declined to provide an indemnity as Mayhew's claim fell within a general exemption under the policy.

Mayhew obtained judgment against Milbank who, in turn, brought proceedings against Towergate Stafford Knight Company Limited (Towergate), the broker who had arranged the policy, on the ground that it had been negligent in the broker services given.

Milbank and Towergate entered into a Settlement Agreement whereby Towergate agreed to pay £99,646.69 (equivalent to 85% of the payments that Milbank had made to Mayhew) and to indemnify Milbank in respect of its liability to Mayhew to the extent of 85% of any sum up to £1 million and 100% of any sum in excess of £1 million.

The Settlement Agreement contained a clause (clause 11) which stated that if "Milbank is placed in liquidation, administration or a receiver is appointed or a voluntary arrangement is proposed...Milbank's right to indemnity from Towergate will cease...and Towergate will be released from all and any further obligation...".

Subsequently, Milbank went into administration and Chaucer was joined as a defendant to the proceedings in its capacity as insurer. Milbank assigned its interest in the Settlement Agreement to Chaucer and ceded the conduct of the defence of Mayhew's claim.

Chaucer commenced Part 20 proceedings against Towergate, seeking to enforce the Settlement Agreement. Towergate filed a defence, stating that clause 11 released it from any liability.

Chaucer submitted that clause 11 went against the common law principle of "anti-deprivation", a principle of insolvency law that a court will not give effect to contractual provisions which distribute property in a way contrary to insolvency legislation.

Towergate counter-argued that clause 11 amounted to a mere time limit on the indemnity and so the principle of "anti-deprivation" did not apply.



Held:

1. Towergate's undertaking to indemnify Milbank contained in the Settlement Agreement was an asset of Milbank which would be available for the benefit of its creditors.
2. There is an essential difference between a time limitation by reference to a date or defined period and a time limitation with reference to the commencement of insolvent administration which a court would conclude had been deliberately fixed to remove the asset from creditors.
3. The assignment did enable Chaucer to step into the shoes of the administrator and take advantage of arguments based on public policy in the administration of Milbank's affairs.
4. Chaucer was able to rely on the Settlement Agreement and seek indemnity from Towergate.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Jewellers Block

Unexplained Loss Exclusion, Condition Precedent, Breach of Warranty

Widfree Limited (trading as Abrahams & Ballard) v Brit Insurance Limited [2009] EWHC 3671 (QB)

The claimant was a jewellery shop owned and run by a husband and wife, Mr and Mrs Abraham, which had taken out an insurance policy (the Policy) with the defendant, dated 15 February 2008.

On 9 October 2008, two women who were behaving erratically came into the jewellery shop. Mrs Abraham showed the women some items of jewellery but they left without purchasing anything.

On 22 October 2008, Mr Abraham tried to find one of the shop's most expensive items, a diamond ring valued at over £100,000, to show to a customer. A search of the display cabinets and safe revealed that the item was missing. Mrs Abraham thought back to the incident with the two women and concluded that they had stolen the ring. Mr Abraham reported the missing ring to his insurance brokers and the police.

Two police officers attended the shop and watched the security footage from the incident in question. Although the shop had five CCTV security cameras in operation at the time of the incident, the officers felt that the footage from only one camera was useful, although this did not clearly show the women stealing the ring. Mr Abraham arranged for this footage to be downloaded from the hard drive onto a DVD by the CCTV system operator, Nationwide Security. All security footage on the hard drive was retained for a period of at least a week.

The defendant appointed a loss adjuster who visited the claimant on 6 November 2008. The loss adjuster's report was later shown to contain numerous inconsistencies and inaccuracies. In a letter to the claimant, dated 21 January 2009, the defendant denied liability on the basis of the Fidelity and Unexplained Loss Exclusions in the Policy.

The defendant later accepted that there was no basis for relying on the Fidelity Exclusion but denied that they were liable to indemnify the claimant on three grounds, namely:

1. That the loss of the ring fell within the Unexplained Loss Exclusion in the Policy. This exclusion stated that any insured items which are found to be missing during stocktaking, where the Insured is unable to prove the date and circumstances of the loss, will not be covered by the Policy.
2. That there was a breach of a General Condition of the Policy, namely a condition precedent that the Insured provide the Insurer with such information and evidence as the Insurer may reasonably require. The defendant claimed that this Condition had

been breached as the claimant had not provided it with security footage taken from all five cameras.

3. That there was a breach of a warranty which stated that a security guard would be in attendance at all times. The security guard had, in fact, been outside the shop watching through the window. The defendant later abandoned this ground in their closing submissions.

Held:

Mr Peter Leaver QC, sitting as a deputy High Court Judge, held that in relation to the Unexplained Loss Exclusion, the definition of stocktaking was to be given its ordinary meaning, i.e. a structured and organised process which is undertaken at regular intervals. The defendant's argument that when looking for the missing ring Mr and Mrs Abraham could be described as stocktaking was therefore rejected. Also, it was held that on the balance of probabilities, the claimant could prove the date and circumstances of the loss.

In relation to the breach of the General Condition, it was held that the loss adjuster had never asked for the footage from the other cameras and should have known that such footage was not retained indefinitely. It was not for the claimant to attempt to guess what evidence the Insurer might want to see. In light of the advice from the police officers, it was satisfactory that Mr Abraham only downloaded the footage from the one camera.

Judgment in favour of the claimant.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Marine Insurance Frustration, Illegality

Islamic Republic of Iran Shipping Lines v Steamship Mutual Underwriting Association (Bermuda) Ltd [2010] EWHC 2661 (Comm)

The court found that a financial restrictions order made against Iran, and a licence made under it, had not rendered the provision of insurance cover illegal nor had the contract been discharged by reason of the doctrine of frustration.

The insured claimant, the Islamic Republic of Iran Shipping Lines (IRISL), is an Iranian ship owner. The defendant, Steamship Mutual Underwriting Association (Steamship Mutual), is a Protection & Indemnity Club (P&I Club) which provided cover to ship owner members, including IRISL.

On 20 February 2009, 28 vessels owned by IRISL were entered with the club (Steamship Mutual), including the vessel ZOORIK. During the period of insurance, HM Treasury, under powers granted by the Counter Terrorism Act 2008, adopted the Financial Restrictions (Iran) Order 2009 ('the Order') which came into force on 12 October 2009. The Order prohibited transactions and business relationships with designated Iranian entities including IRISL, but was subject to derogation by licence where appropriate.

HM Treasury issued a licence permitting the club to continue to provide insurance cover for a period of three months starting 30 October 2009. However, Steamship Mutual terminated cover as it took the view that the terms of the licence meant it was no longer permitted to provide insurance cover for IRISL. On 31 October 2009, the ZOORIK suffered a casualty in Chinese waters, which led to bunker oil pollution. A claim was made against Steamship Mutual by IRISL.

Steamship Mutual asserted that the correct interpretation of the licence meant it was not permitted to provide insurance to IRISL. It argued that all that was permitted under the licence was to meet claims brought directly against it pursuant to Article 7(10) of the Convention. In the alternative, Steamship Mutual argued that the contract with IRISL had been discharged by the doctrine of frustration and/or supervening illegality when it became unlawful for Steamship Mutual to insure IRISL in respect of all other risks.

IRISL argued that the terms of the licence issued by HM Treasury on 30 October 2009 had been exempted from the prohibition.

Held:

- On its proper construction, the licence permitted Steamship Mutual to continue to provide IRISL with insurance cover in respect of the risks required to be insured and meet claims made in respect of those risks, and not only claims made by third parties pursuant to the direct right of action in Article 7(10) of the Convention.

- The Order and licence did not frustrate the contract of insurance between Steamship Mutual and IRISL. The effect of the licence was not to render the club's obligations radically different so as to frustrate the contract. The scope of the permitted cover was narrower, but its nature remained the same. It remained indemnity insurance.
- Since the contract of insurance was not discharged by reason of frustration, IRISL was entitled to be indemnified in respect of its costs and liabilities arising out of the casualty, and Steamship Mutual was not entitled to an indemnity from IRISL in respect of any liabilities that it incurs to third parties under Article 7(10) of the Convention.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Marine Insurance

Material Non-Disclosure, Breach of Implied Warranty

Garnat Trading & Shipping (Singapore) Pte Ltd v Baominh Insurance Company [2010] EWHC 2578

Insurers alleged the Insured was not entitled to claim under the policy due to material non-disclosure and breach of the implied warranty of seaworthiness contained in s39 Marine Insurance Act 1906. The Judge found for the Insured on both points.

Garnat Trading & Shipping (Singapore) Pte Ltd (“Garnat”) owned a floating dock that was to be towed from Vladivostock, Russia to Vung Tau, Vietnam. The floating dock was insured for this voyage by Baominh Insurance Company (“Baominh”) under a policy dated 12 June 2006.

In April 2006, Garnat engaged a shipping company to supervise the repair and preparation of the floating dock for the towage. During this time, a Towage Plan was prepared which included limitations as to the height of waves that the floating dock was certified to withstand.

On 26 June 2006, the floating dock commenced the voyage. The dock was powerless and was towed by two tugs. Sixteen days into the voyage, the floating dock encountered a force 6 typhoon where there were waves of up to 6 metres, well in excess of the limitations specified in the Towage Plan. The dock suffered some minor damage, but was able to continue after repairs to the lashings which tied the pontoon to the deck. The dock continued on its voyage but on 13 July, encountered a tropical storm where waves reached 10 metres and was caught by a near direct hit. The floating dock was seriously damaged and sank.

On 17 April 2007, Baominh purported to avoid the insurance for alleged material non-disclosure and a breach of warranty of seaworthiness under s39 of the Marine Insurance Act 1906. Both defences were dismissed.

Held:

As regards the allegation that the Insured had failed to disclose a material document forming part of the Towage Plan, which showed the maximum wave height the dock could withstand, Baominh could not avoid the policy for three reasons.

- Disclosure had been waived by Baominh’s agreement that it would insure without seeing the Towage Plan as long as it was approved by a Classification Society. The Towage Plan was prepared and approved by the Classification Society, Global Marine Bureau.
- Earlier drafts of the policy had contained a Towage Plan warranty, which did not render disclosure unnecessary under s18(3)(d) Marine Insurance Act 1906, but did render disclosure superfluous given the short period of time between the deletion of the warranty and the issue of the policy.

- The Insurers were not induced by any failure to disclose. The evidence was that Baominh would, in any event, have insured on the same terms that were actually agreed.

As regards the allegation that Garnat had breached the implied term of seaworthiness pursuant to s.39 of the Marine Insurance Act, the most significant allegation was the deficiency of the pontoon securing arrangements. After hearing the factual and expert evidence, the court held that the Insurers failed to establish that the floating dock was unseaworthy at the commencement of any part of the voyage.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Motor Insurance

Contribution proceedings

Jubilee Motor Policies Syndicate 1231 v Volvo Truck & Bus (Southern) Ltd [2010] EWHC 3641 (QB)

The insurer, Jubilee Motor Policies Syndicate 1231 (Jubilee), brought proceedings against Volvo Truck & Bus (Southern) Limited (Volvo) to obtain a contribution to damages paid following a road traffic accident (RTA). Volvo made an application for the proceedings to be struck out. Volvo's application was granted.

Jubilee had been ordered to pay damages, following an RTA, arising out of a settled claim between the party responsible for the RTA and the victim. Jubilee alleged Volvo had breached its contract with regard to the maintenance of the vehicle responsible for the accident. Jubilee therefore instigated proceedings under the Civil Liability (Contribution) Act 1978 against Volvo to obtain a contribution to the damages paid.

The court was required to determine whether Jubilee was entitled to a contribution by way of:

- subrogation;
- the Civil Liability (Contribution) Act 1978 generally;
- s.1(4) of the Civil Liability (Contribution) Act 1978 by reference to the settlement.

Volvo submitted that Jubilee was not a person liable in respect of the "same damage" suffered by the victim of the accident, and that liability as an indemnifier did not entitle Jubilee to bring a claim to the "same damage" under the Civil Liability (Contribution) Act 1978.

Held:

- The issue of subrogation was not properly pleaded in Jubilee's particulars of claim.
- The issue of whether Jubilee was entitled to a contribution depended on the court's interpretation of the terms "same damage" and "in respect of" in s.1(1) of the Civil Liability (Contribution) Act 1978. On reviewing past judgments, it was clear that both terms had to be construed narrowly.
- Jubilee was not entitled to a contribution under s.1(1). Unlike any potential liability Volvo might have owed the accident victim, Jubilee's liability was contingent on its policy of insurance. The Road Traffic Act 1988 did not render Jubilee liable for the victim's personal injuries as such but rather to satisfy a judgment resulting from his suffering of personal injuries. Jubilee did not cause the accident victim to suffer injuries, was never liable or vicariously liable for their injuries, was not a wrongdoer and was never liable for physical injuries caused to the accident victim for the purposes of the Civil Liability (Contribution) Act 1978.

The provision of s.1(4) of the Civil Liability (Contribution) Act 1978 had to be read alongside the other provisions of the Act. On that basis, s.1(4) could not be read as having a meaning beyond the court's definition of "same damage" in s.1(1) of the Act. Accordingly, Jubilee's claim was destined to fail.



The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Motor Warranty Insurance Fraudulent Misrepresentation, Agency

Templeton Insurance Ltd v Motorcare Warranties Ltd & Others [2010] EWHC 3113 (Comm)

The court ruled that Templeton Insurance Ltd (Templeton) was entitled to be paid outstanding premiums arising out of the sale of Mechanical Breakdown Insurance (MBI) from its agent as the agent had dishonestly represented the loss ratio in a prospective agreement.

Templeton agreed with Motorcare Warranties Ltd (Motorcare) that it would act as Templeton's agent in selling MBI in the UK in four successive annual agreements. The MBI covered consumers against the cost of mechanical breakdown after the expiry of their manufacturers' warranty.

The MBI contracts gave rise to heavy losses to Templeton, and the relationship between Templeton and Motorcare came to an end. Templeton sought to recover premiums allegedly owing to it, and also asserted that it had been induced into entering the final contract by fraudulent misrepresentation as to loss ratios.

It was agreed between the parties that if premiums were due to be paid by Templeton in accordance with the slips, Templeton was entitled to an additional payment from Motorcare of approximately £2,307,450.

The remaining issues related to:

- the scope of the contractual claims;
- whether Templeton had waived the right to enforce the terms of the slips by settling the claims;
- how policies in respect of which no premium was specified, or the risk was excluded, were to be accounted for; and
- whether there was fraudulent misrepresentation in respect of the slips, particularly the third slip.

Held:

- Claims for underpaid premiums against Motorcare should succeed. There had not been an agreement between Templeton and Motorcare to split premiums on a 60:40 basis. Templeton had not agreed to extend cover to taxis, or sell policies with a claims value of up to the retail price of the vehicles, as asserted by Motorcare. There was also no credible evidence that Templeton had agreed to a large-scale change to the rates on which it was prepared to underwrite the business.
- Templeton was not estopped from relying on the terms of the contracts, as it was unaware that Motorcare was binding it to policies falling outside the terms of the slips and failing to account for the correct premium
- Templeton had been denied the opportunity to set premiums for policies sold in respect of excluded vehicles. The appropriate way to calculate damages for breach of agreement was to load high-risk vehicles at 250%.

- It had been represented to Templeton that the loss ratio on the third slip was 101%. A later report which referred to a loss ratio of 110% was not passed onto Templeton, and it was Motorcare's intention to conceal what it had known was a large projected loss on that slip. The claim in misrepresentation therefore succeeded against Motorcare and two of the individual defendants in control of Motorcare. However, claims against the other individual defendants failed as those defendants had little to do with the running of Motorcare and nothing to do with the breaches which were the subject of Templeton's claim.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Professional Indemnity Insurance

Arbitration Clause, Disclosure

Travelers Insurance Company Ltd v Countrywide Surveyors Ltd [2010] EWCH 2455 (TCC)

The court refused to order pre-action disclosure in support of arbitration as it had not been given specific powers to do so.

The defendant (Countrywide) was a firm of surveyors. They took out a policy of professional indemnity insurance on 25 May 2008 in which the claimant (Travelers) was lead underwriter.

It transpired that hundreds of potentially fraudulent valuations had taken place by up to three of Countrywide's employees. As a result of this, there was a possibility that Travelers may have sought to avoid the policy for misrepresentation and/or non-disclosure. The policy provided that any dispute regarding fraud or misrepresentation was to be referred to arbitration.

Travelers applied for pre-action disclosure, pursuant to CPR 31.16, in order to assess the extent of the suspected fraud. They argued that the court had appropriate jurisdiction as a result of s.44(3) of the Arbitration Act 1996. Countrywide argued the court did not have the necessary jurisdiction to make an order for pre-action disclosure because the dispute between the parties was to be referred to arbitration.

Held:

- Pre-action disclosure cannot be ordered under CPR 31.16 where the underlying dispute will be decided by arbitration. Arbitration is an entirely separate form of dispute resolution in which the courts have limited powers of intervention subject to the Arbitration Act 1996.
- The scope of the court's power to make an order for the purpose of preserving evidence is an exceptional power to be used where there is a danger of evidence permanently being lost or tampered with. It was not deemed appropriate to be used in standard cases such as this where there is a lack of express evidence that documents are at risk.

The Judge refused the application with a "certain amount of regret" as the early provision of documentation would have narrowed the issues and reduced costs.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Professional Indemnity Insurance Fraud, Exclusion Clause

Goldsmith Williams (A Firm) v Travelers Insurance Co Ltd [2010] EWHC 26 (QC)

The defendant had insured under a professional indemnity insurance policy a firm of solicitors, Joshua & Usman Legal Services Limited (“J&U”), against civil liability arising from its practice.

It was alleged that the directors of J&U had either been engaged in or had condoned mortgage fraud and that the defendant was therefore entitled to repudiate liability under the policy. This argument was based on the fact that there was an exclusion clause in the policy which provided that the defendant was not liable in the event of directors' fraud or dishonesty.

The directors of J&U were Mr Atikpakpa and Ms Usman. Mr Atikpakpa had applied to a mortgage provider (“Mortgages 5”) for a loan to purchase a property. Mortgage 5 instructed Goldsmith Williams to act in relation to the proposed transaction. Ms Usman had assisted with the documentation for Mr Atikpakpa to obtain the loan.

The loan was granted but Mr Atikpakpa did not purchase the property, instead stealing the money. Mr Atikpakpa's wife subsequently applied for a second loan from Mortgage 5 to purchase a property owned by Mr Atikpakpa. The mortgage company again appointed Goldsmith Williams. Mr Atikpakpa, in his capacity as vendor, appointed J&U. Mortgage 5 advanced the sum of money to Mr Atikpakpa's wife, which was then transferred to J&U, but the transaction was never completed. Mr Atikpakpa stole the money. J&U were subsequently investigated by the Office of the Supervision of Solicitors and struck off the register.

By deed of assignment, Mortgage 5 assigned its claim against J&U to Goldsmith Williams. They in turn proceeded against J&U, claiming the total sums advanced by Mortgage 5. They relied upon their rights as assignee under the deed and the right to be indemnified under the Civil Liability (Contribution) Act 1978.

Goldsmith Williams obtained judgment against J&U (J&U did not defend the proceedings). Goldsmith Williams then brought proceedings against the defendant under s.1 of the Third Parties (Rights Against Insurers) Act 1930.

The defendant argued that it was not bound to indemnify J&U and therefore also not liable to Goldsmith Williams. The defendant argued that it was entitled to repudiate liability under the policy based on an exclusion clause which provided that insurers “shall not be liable under the policy in respect of fraud or dishonesty” although “no such dishonesty, act or omission will be imputed to a body corporate unless it was committed or condoned by, in the case of a company, all directors of that body corporate”.

The defendant argued that the evidence established Goldsmith Williams' claim against J&U arose from the dishonest and fraudulent acts of Ms Usman and Mr Atikpakpa.

Goldsmith Williams did not dispute that Mr Atikpakpa had acted dishonestly or fraudulently but denied that Ms Usman had condoned the activity and therefore argued that the exclusion clause did not apply.

Mr Justice Wyn Williams, finding in favour of the Defendant, held that:

1. The defendant was correct in its submission that Mr Atikpakpa was guilty of extensive dishonesty and fraud during his time as director.
2. There was evidence that Ms Usman had made fraudulent mortgage applications in her own right. She had additionally helped a further colleague to engage in fraudulent applications. It was not credible that Ms Usman was engaged in mortgage fraud herself but yet had known nothing of the other fraudulent activities going on in and around J&U. On the evidence Ms Usman had known of Mr Atikpakpa's mortgage fraud and had aided and abetted Mr Atikpakpa's crime and had condoned his dishonest and fraudulent mortgage application, enabling him to obtain the loan.
3. If an insured condoned a course of conduct which was dishonest or fraudulent and that course of conduct led to or permitted the specific acts or omissions upon which the claim was founded, the insurer was entitled to repudiate liability (**Zurich Professional Ltd v Karim** (2006) EWHC 3355 (QB)).
4. The claim in respect of the first mortgage fraud had arisen from Ms Usman's dishonesty in conducting the fraudulent acts on the part of Mr Atikpakpa.
5. Ms Usman had known of Mr Atikpakpa's fraud relating to the second mortgage fraud (the apparent sale of Mr Atikpakpa's property to his wife). The fraud would not have taken place had Ms Usman not condoned the fraud. Therefore both Ms Usman and Mr Atikpakpa had engaged in or condoned dishonest or fraudulent activity.
6. The defendant was therefore entitled to repudiate liability under the exclusion clause.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Professional Indemnity Insurance Privilege, Notification

Quinn Direct Insurance Ltd v The Law Society of England and Wales [2010] EWCA Civ 805

The court found that neither the terms of a professional indemnity policy, nor the regulatory scheme, could subvert the principle that privilege in a solicitor's file belongs to the client, and he alone can waive it.

Quinn Direct Insurance (Quinn) provided professional indemnity insurance to a firm of solicitors under which the solicitors were entitled to be indemnified in respect of civil liability, except where the claim arose from dishonesty or fraud.

In January 2007, the two partners in the firm were interviewed by investigating officers from the Law Society and disciplinary proceedings were commenced. One of the partners of the firm was found to have been involved in mortgage fraud and Quinn subsequently avoided his cover on the ground that the fraud provision had been engaged.

Quinn wrote to the Law Society requesting access to relevant files in order to establish whether it was obliged to indemnify the other partner in the firm, who was vicariously liable for his partner's fraud. This request was refused by the Law Society on the grounds of preserving client confidentiality. Quinn subsequently commenced proceedings against the Law Society to seek an order to allow it to inspect all documents under the Law Society's power and control. This application was dismissed and Quinn appealed.

Quinn contended that the claims co-operation and notification clause contained in the Quinn policy required the insured to produce all documentation that Quinn required. Quinn also argued that the regulatory scheme, set out in the Solicitors' Indemnity Insurance Rules and the Qualifying Insurers Agreement, obliging Quinn to report suspicions of fraud by its insured to the Law Society meant that they should therefore be allowed to inspect documentation in the possession of the Law Society. Quinn argued this would not infringe confidentiality owed by the solicitors firm to their client. These arguments had been rejected at first instance and were rejected again by the Court of Appeal.

Held:

- Documents and information are held by a solicitor subject to the right of privilege of the client requiring them to be kept confidential. The insured solicitor is not entitled to ignore his client's privilege.
- Although the insured solicitor owes a duty of good faith to the insurer, this is not overridden by the entitlement of the client.
- Even if the regulatory scheme, or insurance policy, entitled or required the insured solicitor to disclose clients' privileged material to Quinn, there was no obligation on the Law Society to disclose to Quinn privileged material. On an intervention the Law Society was under no obligation to disclose privileged material.
- The Law Society has a public function to perform for the protection of the public and clients of solicitor's firms. If insurers are 'meshed in' to the regulatory system it is as providers of indemnity insurance to solicitors and information to the Law Society, not as recipients of information.

- Quinn's objective in seeking information from the Law Society was to justify the refusal of an indemnity, not to advance any public or regulatory purpose.
- In some circumstances a circle of confidence may exist, but there is no reason it should include the qualifying insurer. There is no reciprocity between the functions of the qualifying insurer, its insured and the Law Society. Further, it is not only the insurer who is bound to inform the Law Society of misconduct by a solicitor, each solicitor is obliged to do so subject to his client's consent. It would be absurd if that entitled every solicitor to information subject to the privilege of the client of another for use for private purposes. There is no reason a qualifying insurer should be treated differently.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Property Insurance

Agreement to Reinstate, Repudiation

French v Groupama Insurance Company Ltd [2010] EWHC 2827

Miss French sought damages against Groupama Insurance Company Ltd (Groupama) for breach of an alleged agreement to complete specified works to her property. Judgment was given in favour of Miss French.

Miss French's flat was part of a building managed by a property services company. The property services company entered into a contract with Groupama for insurance against physical damage to the building. It was a condition of the policy that Groupama would replace, reinstate, or repair any damage to the property. Miss French had agreed to purchase the residue term of the lease on the flat, in spite of the discovery of structural damage to the flat and its yard, on the understanding that the property services company would assume responsibility for structural repairs.

Groupama sent Miss French a letter giving notice that, at the expiry of 21 days, it would proceed to exercise the option in the policy to instruct contractors to carry out works and seeking her agreement to that. Miss French moved out of the property and into alternative accommodation, paid for by Groupama, while the works were taking place.

Works were estimated to take 12 weeks and commenced on 24 January 2003, but there were a number of problems and significant delays. Miss French was not happy with the attitude of the contractors and was not prepared to afford them access without her express agreement. By October 2003 Groupama had refused to continue with the specified works, instead offering to pay Miss French a lump sum. This offer was not acceptable to Miss French and she commenced legal proceedings.

The issues for the court to decide were:

- Whether there was an agreement between Miss French and Groupama that Groupama would reinstate the flat and pay reasonable costs of alternative accommodation.
- Whether Miss French had committed a repudiatory breach of the contract by refusing access to the contractors.

Held:

- Miss French had not sought to be entitled to the benefit of the policy but had advanced her claim on the basis of acceptance of the offer contained in the letter from Groupama.
- On a proper construction of that of agreement, Groupama had undertaken to have the flat and yard reinstated by repairing the damage to the standard required under the policy. Otherwise there would have been no point in Groupama providing Miss French with notice that it would proceed to instruct contractors and requesting her agreement. Even though the letter did not contain a schedule of intended works, Groupama was under an existing liability in respect of damage albeit not owed to Miss French. Liability arose under the policy and once Groupama determined to replace, reinstate or repair damage to the property, it became liable to do so to the standard required by the policy.
- It was an implied term of the agreement between Miss French and Groupama that Miss French would afford access to the contractors required to carry out the specified works.

While Miss French had said that she was not prepared to afford access without express agreement, she had not made it plain to Groupama that she did not intend to perform the agreement by affording access to the flat. She was in fact anxious for the work to be carried out, but was concerned that the builders appeared to have no interest in carrying out the works. To repudiate the agreement, Miss French would have had to make it plain that she was not prepared to afford access to the contractors engaged by Groupama in any circumstances, and she had not done this.

- Even if there had been repudiation by Miss French, Groupama had elected not to treat it as bringing the contract to an end. Groupama had agreed to pay Miss French the reasonable costs of alternative accommodation and storing her possessions while the works were being carried out, and continued to make such payments after Miss French's alleged repudiations.

Damages were assessed in the sum of £126,963.53 which included: the costs of the repairs, alternative accommodation, loss of opportunity to rent a room, future losses over the period when the works would be carried out, pain and suffering and loss of enjoyment.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Property & Business Interruption Insurance Causation, 'But For' Test

Orient-Express Hotels Limited v Assicurazioni General S.p.A (UK Branch) Trading as Generali Global Risk [2010] EWHC 1186 (Comm)

The claimant, Orient-Express Hotels Limited ("OEH"), owned a luxury hotel in New Orleans (the "Hotel"), which suffered significant wind and water damage due to Hurricane Katrina and Hurricane Rita in 2005.

The Hotel was forced to close during September and October 2005 and re-opened, although not fully repaired, on 1 November 2005. The area of New Orleans surrounding the Hotel was also devastated. A mandatory evacuation of the city was ordered on 28 August 2005 and the city was not re-opened until the end of September 2005.

OEH claimed under its combined property damage and business interruption loss policy (the "Policy") with the defendant ("Generali"). There followed a dispute as to OEH's right to indemnity for the business interruption loss under the Policy which was referred to arbitration.

The arbitration tribunal (the "Tribunal") applied the "but for" test of causation and held that under the Policy's Insuring Clause, OEH could only recover in respect of business interruption loss which it could show would not have arisen had the damage to the Hotel not occurred. This involved a hypothetical analysis of putting OEH in the position of "an undamaged hotel in an otherwise damaged city".

The Tribunal held that even if the damage to the Hotel had not occurred, the Hotel would have still suffered the same loss, as the city was closed and no one would have been able to visit it. It therefore followed that OEH was not entitled to an indemnity from Generali for business interruption loss under the Policy's Insuring Clause.

OEH did recover an indemnity under the Policy's Prevention of Access and Loss of Attraction clauses but this was for a significantly lower amount than would have been recovered under the Insuring Clause.

OEH appealed against the decision of the Tribunal under section 69 of the Arbitration Act 1996 on two questions of law:

1. whether the Policy provided cover in respect of loss which was concurrently caused by both the physical damage to the property and the loss of attraction of the surrounding area; and
2. whether the same event(s), which gave rise to the business interruption loss, were also capable of giving rise to 'special circumstances', allowing an adjustment of the business interruption loss within the scope of the Trends Clause?



The Policy contained the following clauses:

The Insuring Clause:

“... The Insurers... agree... to indemnify the Insured...

b) under the Business Interruption Section against loss due to interruption or interference with the Business directly arising from Damage...”

Damage was defined as “direct physical loss destruction or damage” and the cover for business interruption loss was defined as “loss due to interruption or interference with the business directly arising from the Damage”.

The Trends Clause:

“... Adjustments shall be made as necessary to provide for the trend of the Business and for variations in or special circumstances affecting the Business either before or after the Damage or which would have affected the Business had the Damage not occurred so that the figures thus adjusted shall represent... the results which but for the Damage would have been obtained during the relevant period after the Damage.”

Justice Hamblen held that:

1. The Tribunal had not excluded the recovery of losses caused concurrently by damage to the Hotel and damage to the vicinity. It had only excluded losses which would have been suffered despite the damage to the Hotel as such losses should not be regarded as caused by the property damage.
2. The Tribunal was right to apply the “but for” test for causation in the way that it did. This is although OEH had not raised this issue during the arbitration which made it difficult for the court to determine whether the Tribunal had erred in law.
3. The same event, which gave rise to the business interruption loss, was also capable of giving rise to “special circumstances”, allowing an adjustment of the business interruption loss within the scope of the Trends Clause. However, the Tribunal’s interpretation and application of the Trends Clause was correct. It was not necessary “to go behind the Damage and consider whether the event which caused the Damage also caused damage to other property in the City.”

Appeal dismissed.



The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Property Insurance

Double Insurance, Damage to Property Between Exchange and Completion

The National Farmers Union Mutual Insurance Society Limited v HSBC Insurance (UK) Limited
[2010] EWHC 773 (Comm)

This case concerned a property (the “Old Hall”), which was sold for £1.81 million. The seller and the buyer exchanged written contracts on 10 October 2007 and completion was scheduled for 7 November 2007. A clause of the sale contract provided that the risk of damage to or destruction of the Old Hall passed to the buyer on exchange.

The seller had an insurance policy with HSBC Insurance (UK) Limited (“HSBC”) and before exchange the buyer took out a policy with the National Farmers Union Mutual Insurance Society Limited (“NFU”).

There was a fire at the Old Hall on 27 October 2007, between the dates of exchange and completion, where under the terms of the sale contract the Old Hall was at the risk of the buyer.

The sale was finally completed on 21 March 2008. The buyer made a claim under its policy with NFU. NFU sought a contribution from HSBC on the basis that at the time of the fire the buyer was covered by both the NFU and HSBC policies and therefore there was an issue of double insurance. HSBC denied liability on the basis that on the proper construction of their policy the buyer was not covered by HSBC at all.

The terms of the HSBC policy stated:

“WHAT IS COVERED

The buildings for physical loss or physical damage... the insurance also covers ... anyone buying your home...until the sale is completed.”

“WHAT IS NOT COVERED

We will not pay... if the buildings are insured under any other insurance.”

The NFU policy contained the following clause:

“Other insurance

If when you claim there is other insurance covering the same accident... we will only pay our share.”



The trial focused on three preliminary issues, namely:

1. Did the HSBC policy provide cover to the buyer for damage due to fire?
2. Did the NFU policy contain only a general pro rata clause where there is other insurance covering the same damage?
3. Was the cover for buyers in the HSBC policy limited to assisting in the event that the buyer did not complete?

Mr Gavin Kealey QC, sitting as a deputy High Court Judge, held that on the proper construction of the two policies, the HSBC policy did not extend to cover the buyer pending completion of the sale.

The Old Hall was only covered by the NFU policy and therefore no question of double insurance arose.

HSBC were not liable to make a contribution.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Property Insurance

Fraud, Exaggerated Part Taints Whole Claim

Yeganeh v Zurich Plc [2010] EWHC 1185 (QB)

The case related to a claim under a buildings and contents insurance policy following a house fire. The claimant, Yeganeh, sought to claim under the policy the cost of reinstating the building and contents which were destroyed following a large fire in 2007. The defendant insurance company, Zurich, denied liability on the basis that Yeganeh had deliberately caused the fire and made a fraudulent claim.

Zurich's policy stated that if any part of the claim was found to be fraudulent, the whole policy would be void.

Zurich submitted that Yeganeh, or someone on his behalf, had deliberately started the fire and that the contents claim was overstated particularly in regard to claims for clothing.

Yeganeh submitted that as there were a number of possible causes of the fire, the law did not permit or require the Court to simply choose the one it considers most likely. The judge had the alternative of finding that the party with the burden of proof, in this case Zurich, had not discharged that burden. Given the seriousness of the allegation of arson, it was for Zurich to show clearly how the fire had started. Yeganeh argued that Zurich had failed to produce direct evidence to show that he had started the fire.

As to the contents claim, Yeganeh argued that the Schedule of contents was prepared as an estimate from recollection and may have contained errors but did not amount to fraud.

Held:

1. It was for Zurich to show clearly that Yeganeh had started the fire but there was insufficient evidence of a motive for Yeganeh to start the fire deliberately and Zurich had failed in this respect.
2. However, Yeganeh's approach to his contents claim was unsatisfactory and at best careless. Yeganeh did not hesitate to be untruthful when he had seen it in his financial interest to do so. This habit did not in itself make the insurance claim fraudulent, but makes the assurances of innocence given to the Court more difficult to accept.
3. On the evidence, it was shown that Yeganeh had not originally given his best honest estimate when preparing the schedule of contents. Zurich had established that the contents claim was partly fraudulent and/or false and as a result, the entire claim failed.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Property Insurance

Non-Disclosure, Avoidance, Warranties, s.18 MIA 1906

Sugar Hut Group Ltd v Great Lakes Reinsurance (UK) Ltd Plc [2010] EWHC 2636 (Comm)

The Court ruled the defendant insurers, Great Lakes, were entitled to avoid liability on the grounds of material non-disclosure, but in any event they would have been excused liability by virtue of the Claimant's breaches of warranties.

Great Lakes provided insurance for four nightclubs including one in Brentwood where a fire occurred on 13 September 2009, causing substantial loss in respect of which the Claimants, Sugar Hut, were seeking indemnity.

The issues which were required to be resolved fell into four categories:

1. Whether Great Lakes were entitled to avoid the insurance policy for material non-disclosure;
2. Whether Great Lakes had established and were entitled to rely on, breaches of warranty by reference to the "Frying and Cooking Equipment Warranty" ("The Kitchen Warranty Issue");
3. Whether Great Lakes had established and were entitled to rely on, breach of a warranty that a central monitoring station alarm was installed and operational, and failure by Sugar Hut to comply with a notice issued by Great Lakes whereby the burglar alarm should be upgraded ("The Burglar Alarm Issue");
4. Whether Great Lakes had established and are entitled to avoid liability as a result of the "Waste Condition Precedent" ("The Wheelie Bin Issue").

On 3 February 2009, three of the subsidiary companies of Sugar Hut went into administration, but three further companies were subsequently interposed.

Great Lakes argued that three undisclosed facts were material at the stage of the original slip. These undisclosed facts were as follows:

- That on or about 3 February 2009 the "old companies" (Sugar Hut Brentwood Ltd, Sugar Hut Fulham Ltd and Newplex Trading Ltd (Basildon)) had gone into administration.
- That these "old companies" went into administration because of financial difficulties.
- That the purpose of the amendments made by a contract endorsement were not merely to record a change in name of the operating companies, but to substitute the new companies in the place of the old companies which were in administration.

Held:

1. The Non-Disclosure Issue: the three undisclosed facts were plainly material. The Judge accepted the underwriter's submissions that Great Lakes would not have insured at all, or not on the same terms if they had been disclosed. Sugar Hut relied on the fact that what

the proposer is invited to do is disclose “any other facts not covered by the questions”, but the Judge held that Sugar Hut could not rely on factors not being “covered by the questions” if the reality is that they were not covered by the answers which might allow the underwriter to follow up any issues deemed unsatisfactory.

2. The Kitchen Warranty Issue: two warranties arose; the first regarding the contact of the kitchen ducting with combustible materials and the second concerning the inspection of the extraction ducts every six months. The warranty as to ducting was held to bear materially on the risk of loss and so the insurers were entitled to regard it as important protection. It was also a warranty as to the state of affairs. It was held that although the warranty as to the inspection of the extraction ducts every six months could have been interpreted as a suspensive condition, the fact that the inspection had not occurred by the time of the fire meant cover would still have remained suspended at the time of the fire.
3. The Burglar Alarm Issue: the Judge held that the Burglar Alarm Warranty was a true warranty as a burglar alarm compliant with the warranty was of fundamental importance to theft insurance and significantly material to the risk of loss. The fact the absence of such an alarm was clearly not causative of the loss suffered by the fire was not material. This warranty was not waived by the requirement of a Risk Improvement Notice as it was inconceivable that there can be construed to have been running in parallel a true warranty, breach of which automatically discharged insurers from liability, and a suspensive condition/an extension of time. The circumstances were distinguished from **Kler Knitwear Ltd v Lambard General Insurance Ltd** [2002] as the upgrade work was never carried out. It was thus concluded that there was no insurance in place at the date of the fire.
4. The Wheelie Bin Issue: Great Lakes expressly specified metal be used for skips, but did not specify metal for the lidded and lockable containers. It was therefore concluded that Sugar Hut was not in breach of this particular warranty.
5. For the above reasons Great Lakes were entitled to avoid and if they had not been entitled to avoid, they would have been excused from liability by virtue of Sugar Hut’s breaches of warranty in respect of the kitchen warranty and burglar alarm warranty.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Property & Business Interruption Insurance Non-Disclosure, Misrepresentation

Synergy Health UK (Ltd) v CGU Insurance Plc (t/a Norwich Union) [2010]
EWHC 2583 (Comm)

The court allowed the insured's claim for an indemnity against the insurers on the basis that although there had been material non-disclosure or misrepresentation, the insurers could not show that this underwriter had been induced.

Synergy Health UK Ltd (Synergy) provided laundry services to the NHS. On 3 February 2007, there was a fire at Synergy's Dunstable premises. The premises, plant and equipment were insured by CGU Insurance Plc (CGU) under a Combined Commercial Policy which was valid for a year, running from 30 April 2005 – 29 April 2006. This policy was subsequently renewed to cover the period up until 29 April 2007. Following the fire Synergy claimed on its insurance for material damage and business interruption losses. CGU repudiated liability and sought to avoid the contract for alleged material non-disclosure and/or misrepresentation by Synergy before and at the time of renewal of the insurance as at 30 April 2006.

The alleged misrepresentation/non disclosure arose from the fact that on 28 December 2005, Synergy had stated that the premises would be protected by an intruder alarm by the end of the year. That statement was inaccurate, but had been made innocently and in reliance on incorrect information. CGU argued that, as the letter stating the premises would be protected by an alarm had not been withdrawn or corrected prior to renewal, that amounted to misrepresentation at the time of renewal. In the alternative, CGU contended that there was a material non-disclosure of the fact that there was no intruder alarm installed at the Dunstable premises.

Held:

- There was a misrepresentation to Synergy on 28 December 2005, and by not correcting the representation made in the letter sent to CGU on that date, Synergy was impliedly repeating that representation which was a misrepresentation.
- There was non-disclosure of the fact the premises were not protected by an intruder alarm. Disclosure was necessary under s.18(3)(b) of the Marine Insurance Act 1906 as CGU were not aware that the alarm had not been installed. The fact that there was no warranty in the policy relating to intruder alarms did not excuse non-disclosure.
- The fact in question was material. However, CGU were not entitled to avoid the insurance and Synergy was entitled to an indemnity under the policy as there was no inducement. CGU failed to show that faced with an innocent explanation for what had happened about the Dunstable alarm, they would have done anything differently which may have endangered Synergy renewing their policy.
- The brokers would not have been liable to the Synergy as any failure on their part to alert them to the duty of utmost good faith was not a breach that had caused loss. The brokers' fall back position would be that any loss that Synergy suffered was caused in large measure by its own contributory negligence for which a 90% deduction would have been made.



The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Property & Business Interruption Insurance Notification, Date of Material Damage

Loyaltrend Limited v Brit UV Limited [2010] EWHC 425 (Comm)

The claimant, a fashion retailer, brought a claim for property damage and business interruption under an insurance policy arising from subsidence affecting its retail premises in Notting Hill (“the Shop”).

Structural problems with the Shop arose from mid 2003 and continued until at least 2006. During this time the claimant’s brokers arranged insurance coverage which, unbeknownst to the claimant, was with three separate companies who each insured the premises over separate periods.

The claimant discontinued the proceedings against the companies who had insured it at the beginning and end of this period and decided to pursue only the defendant, Brit UV Limited (“Brit”), which had insured the claimant from 11 December 2003 to 10 December 2004.

The main issue in dispute was when the event causing damage had occurred.

Signs of subsidence were first reported to the Shop’s landlord in the summer of 2003 while the claimant was insured by Creechurch Dedicated Limited. The landlord’s agent, Farley, inspected the Shop and found cracks to the front of the building and movement to the public pavement in front of the shop. By November 2003, the situation had deteriorated significantly. The landlord’s insurer, AXA, was notified but the claimant did not notify its own insurer.

Over the next three years, the subsidence continued to worsen and led to considerable water damage and dampness within the Shop. Various repairs were undertaken to the exterior by the landlord and to the interior by the claimant.

In August 2004, the claimant made a claim under the Brit insurance policy for the repairs to the Shop interior, business interruption loss and damaged stock. Brit denied liability due to a breach of a condition precedent by the claimant namely General Condition 5 which provided that the claimant must, “give immediate notice to the Insurers... on the happening of any injury or damage in consequence of which a claim is or may be made”.

The claimant argued that it did not have a duty to notify Brit until the subsidence damage became serious and had the potential to cause loss. It claimed that this did not occur until August 2004 and at this time Brit was informally notified.

Judge Mackie QC held that:

1. The test for whether a claim ‘may be made’ was objective.

2. There was no evidence to support the claimant's assertion that notice was given to Brit in August 2004.
3. In any event the claimant's obligation to notify Brit arose in November 2003 as the seriousness of the damage was apparent at this time.
4. Brit was not liable under the insurance policy as the claimant had failed to comply with the condition precedent as to notice.

Judgment for the defendant.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Property Insurance

Previous Fraudulent/Exaggerated Claims, Avoidance

Joseph Fielding Properties (Blackpool) Ltd v Aviva Insurance Ltd [2010] EWHC 2192 (QB)

The trial related to the liability of the defendant insurer, Aviva (formerly Norwich Union), to indemnify the claimant, Joseph Fielding Properties (JFP), in respect of a fire at its property which occurred on 26 November 2008. The principle shareholder and director of JFP was a Mr Leonard.

The insurance policy contained the following fraudulent claims clause (condition 7):

“We will at our option avoid the policy from the inception of this insurance or from the date of the claim or alleged claim or avoid the claim:

- (a) if a claim made by you or anyone acting on your behalf to obtain a policy benefit is fraudulent or intentionally exaggerated, whether ultimately material or not or
- (b) a false declaration or statement is made or fraudulent device put forward in support of a claim.”

Aviva denied liability and sought to avoid on three grounds:

1. During the currency of the policy, JFP had made a fraudulent claim for which Aviva paid £9,870 in respect of damage to a drain; and/or
2. JFP failed to disclose to Aviva at inception the fact that Mr and Mrs Leonard had made fraudulent claims against a prior insurer in respect of water damage to a lodge owned by them in February 2007; and/or
3. JFP failed to disclose to Aviva at inception the fact that Mr Leonard had made misrepresentations and/or non-disclosures on numerous occasions when presenting to other insurers in the past.

Aviva not only refused to indemnify in relation to the current fire claim, but also sought to recover the £9,870 in respect of the previous drain claim, and a further £37,624 paid to JFP in respect of an earlier fire which took place in June.

In respect of the previous drain claim, loss adjusters were told that the drain had collapsed and a contractor had given a quote of £8,000 to carry out the necessary repairs. The loss adjusters were later sent an invoice for £8,400 plus VAT (totalling £9,870). The invoice was marked “Paid in full with thanks”. Aviva paid the claim. Aviva now alleged the invoice was bogus and/or the amount claimed was exaggerated so they were entitled to avoid the policy from inception.

Aviva also alleged that the policy taken out by Mr and Mrs Leonard on 16 February 2007 with a previous insurer was only taken out after they discovered their lodge had been affected by flood damage.

Aviva also contended that JFP had made material non-disclosures/misrepresentations as it failed to disclose:

1. That it had made a fraudulent claim to the previous insurers in relation to the lodge;
2. That Mr Leonard, or one of his businesses, had made false statements to other insurers – there were said to be 10 such instances;
3. When adding the lodge to another policy in December 2007, that it had suffered water damage.

Held:

1. In relation to the previous drain claim, the Court agreed the claim was fraudulently exaggerated as on any view, JFP had not paid more than £6,700 to anyone. The claim was thus both fraudulent and exaggerated within the meaning of condition 7. The wording “Paid in full with thanks” was designed to show the moneys claimed were properly due and had been paid which was a false declaration. It was no defence for JFP to say that a lesser claim could have been made in a non-fraudulent manner, nor could JFP rely on a concept of proportionality to the effect that it had paid out most of the sum claimed.
2. The evidence pointed to a telephone call on 14 February as notifying the Leonards of a leak and a decision by them thereafter to try to get cover and then make a claim. Aviva were accordingly entitled to avoid the policy on the grounds this false claim was not disclosed and recover earlier sums paid in relation to the fire and drain claims.
3. It was accepted by JFP that if the claim regarding the lodge was found to be fraudulent, the fact should have been disclosed to Aviva and was not. Aviva were therefore entitled to avoid on this ground alone.
4. Aviva must prove that the non-disclosures of which they complained were material and induced their underwriter to write the policy on the terms provided. Even if it was possible to conclude that one false statement in isolation was relatively insignificant, together the collection of facts not disclosed was significant. On the question of whether or not the policy would have been underwritten, the bigger picture regarding moral hazard of this insured would have been sufficient to dissuade Aviva from writing cover. On the evidence, inducement was clearly made out.
5. There was no obligation on JFP to disclose to Aviva the fact of the previous conviction when it was “spent” under the Rehabilitation of Offenders Act 1974, but the Court held that the non-disclosure of that criminal conviction to an earlier underwriter of a different insurer remained a material fact for Aviva.

For all of the above reasons, Aviva were entitled to avoid.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Public Liability Insurance Arbitration Clause, Incorporation, Limitation

William Mclroy Swindon Limited (1) & Rannoch Investments Limited (2) v Quinn Insurance Limited
[2010] EWHC 2448 (TCC)

At a trial of preliminary issues, the Technology & Construction Court upheld the application of an arbitration clause in an insurance policy which required that any dispute between insurers and insured has to be referred to arbitration within nine months, failing which the claim was deemed abandoned.

Quinn provided public liability cover to Lenihan. In earlier judgments in separate proceedings, Lenihan were held liable to the claimants for a fire which occurred on 5 September 2006. The amount of damages payable was assessed on 11 December 2009 and 13 January 2010 respectively for the two claimants. Lenihan went into voluntary liquidation shortly afterwards and the claimants issued proceedings against Quinn under the Third Parties (Rights Against Insurers) Act 1930.

Liability under the policy for any claim arising from the fire was denied by Quinn on grounds of breach of policy terms and conditions. In addition, Quinn argued that because there had been no reference to arbitration within the time required under the arbitration clause, any claim under the policy was deemed to be abandoned and was not recoverable.

The main issues before the Court were:

1. Whether the arbitration clause excluded the right to pursue a claim by litigation
2. Whether the arbitration clause was incorporated into the policy
3. Whether the time for referring the matter to arbitration had expired

Edwards–Stuart J **held**:

1. On a proper construction of the clause, the wording was clear and prescribed a mandatory mode of dispute resolution. The language made it “abundantly clear” that the clause was intended to provide an exclusive remedy.
2. The arbitration clause was contained in an “off-the-shelf” policy. It was not written specifically for Lenihan nor Lenihan’s type of business.

The judge rejected argument that the arbitration clause was not incorporated for the following four reasons:

- a. The insured had the policy wording in their possession for two years prior to the inception of the policy year in question (i.e. the 2006/2007 policy year). They had the opportunity of studying the policy terms and this was not a case of incorporation by reference.
- b. Quinn’s covering letters sending the policy documents specifically asked the insured to read the policy carefully to ensure that it met with the insured’s particular needs.

- c. The insurance was arranged through brokers who could be expected to be familiar with Quinn's standard form of policy and to give relevant advice to Lenihan. The brokers should have been aware in general terms of any unusual terms on Quinn's policy and advised Lenihan accordingly.

- d. The provisions of the arbitration clause were not unduly onerous. A requirement to resolve disputes by arbitration cannot be regarded as onerous just because it is unusual and possibly inconvenient. The nine month time limit is shorter than the statutory six year limitation period but that does not make it onerous.

Both Lenihan and the brokers were aware of Quinn's refusal to indemnify by February 2009. The judge expected them to look at the policy for the provisions which Quinn had relied on. He said also, that the brokers at least, if not Lenihan also, should have looked at the policy to see what provisions there were for dispute resolution; there was no shortage of time within which to do this.

In reaching the above finding, the judge commented that, with one possible exception, insurers are not required to draw to the insured's attention every term in an insurance policy that might prove onerous. The only exception identified is that of terms concerning claim notification.

- e. It was common ground that the arbitration clause referred to a dispute in respect of a claim by the insured under the policy, as opposed to a claim by a third party against the insured.

However, there was an issue as to when such a dispute arose.

The claimants argued, by reference to **Post Office v Norwich Union** [1967], that insurers had no liability to the insured until the insured's liability to the third party had been determined and quantified and as such, the earliest date the dispute could arise was when Lenihan's liability was established and ascertained by orders of 11 December 2009 and 13 January 2010. On this basis, the nine month limit had not expired.

The judge held that where insurers have notified an insured that indemnity would not be granted and the refusal to indemnify is unjustified, then insurers are in breach of contract. It follows that once Lenihan had notified Quinn of a claim under the policy of a potential liability to a third party and Quinn had notified Lenihan that they were refusing indemnity, then there was a dispute between Quinn and Lenihan within the meaning of the arbitration clause.

The judge commented that the **Post Office** case did not prevent an insured from seeking declaratory relief where it is alleged that insurers are in breach.

On the facts, the judge found that the dispute between Quinn and Lenihan arose at latest by end of February 2009 and any arbitration had to be commenced by the end of November 2009.

The claimants had also sought to rely on paragraph 2.5.3 of the Insurance Conduct of Business Sourcebook (“ICOB”) which stated that “A firm must not in any written or oral communication to a customer seek to exclude or restrict, or rely on any exclusion or restriction of, any duty or liability ... unless it is reasonable for it to do so”. The judge decided that Quinn were not under any obligation to advise Lenihan of the existence of the nine month time limit in a policy that Lenihan have had for some years; and that Quinn had acted within their rights and reasonably in relying on the arbitration clause.

The appeal is due to be heard by the Court of Appeal in May 2011.

Quinn Insurance Limited were represented in these proceedings by Ling Ong, partner in the London Market Insurance & Reinsurance Team at Weightmans.

Please refer any queries to Ling on +44 (0) 20 78221985 or ling.ong@weightmans.com.

Public / Products Liability Insurance

Contractual Liability, Exclusion Clause

Omega Proteins Ltd v Aspen Insurance UK Ltd [2010] EWCH 2280 (Comm)

Where a liability insurance policy contained an exclusion of any liability arising under a contract, unless such liability would have attached in the absence of the contract, a judgment that the insured was liable for breach of contract did not prevent the insured from showing that there would also have been tortious liability.

Omega Proteins Limited (Omega) conducts business processing by-products from animal carcasses used in the meat industry which it then supplies to pet food manufacturers. Northern Counties supplied Omega with contaminated animal carcasses which Omega, unaware of the contamination, supplied to JG Pears. Omega became liable to pay damages to Pears for breach of contract and Northern Counties was held contractually liable to indemnify Omega for that liability. Northern Counties went into liquidation.

Aspen provided Northern Counties with insurance under a combined liability insurance policy. As Northern Counties was in liquidation, Omega claimed against Aspen under the Third Parties (Rights Against Insurers) Act 1930.

The insurance policy contained an exclusion in respect of any liability arising under any contract or agreement unless such liability would have attached to Northern Counties in the absence of such contract or agreement.

Aspen submitted that Omega could not bring a claim against them as insurers on the basis of the earlier judgment because it conclusively determined that the liability of Northern Counties was in contract and did not find liability on any other basis.

Held:

The earlier judgment did not preclude the Court from considering what liability there would have been in the absence of the contract between Northern Counties and Omega had the facts of the case remained the same in every other respect.

Northern Counties, as part of its duty of care, ought to have kept itself up to date on what constituted contaminated matter and would therefore have been liable in negligence had there been no contract.

Northern Counties would have been liable in tort for allowing material to be supplied that was only fit for disposal without warning, an action that could foreseeably cause damage to Omega.

As to the liability of the Aspen, the insured had to establish loss had been suffered which was caused by a peril which came within the scope of the policy (**West Wake Price & Co v Ching** [1975]). The previous judgment established that Northern Counties had suffered a loss, but it was open to either party to show what the cause of the loss was. Aspen were at liberty to show the loss was not an insured loss or fell within an exception (**MDIS Ltd v Swinbank** [1999]).

In this case Aspen failed to show there would have been no liability on their insured, Northern Counties, in negligence, and therefore failed to bring itself within the relevant clause. Omega was entitled to be indemnified by Aspen.



The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Public/Products Liability Insurance Renewal, Terrorism Exclusion

AXA Corporate Solutions SA v National Westminster Bank Plc [2010] EWHC 1915 (Comm)

Axa CS insured Nat West banking group from 1998 to 2004. Liability insurance was placed annually from 31 March each year in primary and excess layers. Axa CS underwrote 100% of the primary layer of cover.

Proceedings were brought in the United States against Nat West for damages under the US Anti-terrorism Act.

The issue in question was whether the insurance issued by Axa CS contained an express term excluding liability for terrorism.

Following the 11 September 2001 terrorist attacks, Axa CS introduced a terrorism exclusion. Axa CS relied on its fax renewal indication dated 20 March 2002 which proposed terms including renewal of the primary liability cover at the same limits as the expiring policy, but with the addition of a terrorism exclusion excess of £10 million for employers' liability cover and £5 million cover for public/products liability. It stated: "Terrorism exclusion (wording to be agreed)".

Axa CS contended this clause was accepted by or on behalf of Nat West. Nat West and their brokers, Marsh, argued that the renewal indication was not agreed and therefore did not form part of the parties' agreement.

Held:

Judgment was granted in favour of Axa CS.

The renewal terms, save to the extent that they were amended by agreement, were set out in the 20 March 2002 fax and were accepted by the order to place cover on 28 March 2002. The fact that Nat West may not have been made aware of the terms of the fax made no difference in law.

Mr Justice Hamblen was not satisfied that the facts relied upon by Nat West and Marsh showed agreement that the terrorism exclusion should not be included. The overwhelming probability was that the terrorism exclusion was not even discussed, let alone negotiated out. The Judge therefore found that there was no agreement that the terrorism exclusion would not be included. The renewal went through without anyone questioning the proposed terrorism exclusion and the exclusion was thereby agreed in the following terms: "Terrorism exclusion (wording to be agreed)".

Nat West and Marsh sought to rely on a further argument to the effect that even if the terrorism exclusion clause had been agreed, it did not amount to an effective agreement in the absence of wording being agreed. Nat West pointed to the fact that the wording was "Terrorism exclusion" rather than "Terrorism excluded" as stating the subject matter but not what the exclusion is. This argument was rejected. The words "Terrorism exclusion" were held to be words of substance and content on their own and did not require the inclusion of some clause. They state and identify that which is excluded from cover.

It was noted that it is a common feature of the London market that parties contemplate a fuller wording to follow the slip or short-form statement of their agreed terms. However, it was not appropriate for the Court to construe the term agreed in the abstract and try to lay down what it meant.



The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Pure Economic Loss Beneficial (Not Legal) Owner

Colour Quest Ltd v Total Downstream UK Plc [2010] EWCA Civ 180

On 11 December 2005, there was a huge explosion at the Buncefield Oil Storage Terminal caused by the negligent overfilling of a fuel storage tank which led to the creation of a hydrocarbon vapour cloud which ignited.

Part of the Buncefield site was occupied by Hertfordshire Oil Storage Limited (“HOSL”), a joint venture company owned 60% by Total Downstream UK Plc (“Total”) and 40% by Chevron Ltd (“Chevron”).

Substantial claims by a number of claimants, including Shell UK Limited (“Shell”), were brought against HOSL and Total. Total, in turn, brought Part 20 proceedings against Chevron.

In October 2008, there was a trial of preliminary issues in the Commercial Court, the main focus of which was the dispute between Total and Chevron as to who was the relevant defendant liable for the negligence and the division between the two companies under the Part 20 proceedings. Justice David Steel held, amongst other things, that:

1. Total and not HOSL was vicariously liable for the negligence.
2. Total was not entitled to a contractual indemnity against HOSL or Chevron as the relevant agreements did not provide for Total to be indemnified in respect of its own negligence.
3. Chevron was precluded from claiming for property damage and consequential economic loss against Total under the terms of the agreements between the two.
4. Shell, who had suffered damage to neighbouring tanks and pipelines as a result of the explosion, could not claim damages for consequential economic loss. This was because Shell was deemed not to have the necessary legal ownership or right of possession of the pipeline, which was held, for its benefit, on trust in a vehicle company.

An appeal was brought by Total, Chevron and Shell in relation to the following issues.

1. Total appealed on the applicability of the indemnity provisions arguing that it did have a right to be indemnified even where the loss was caused by its own negligence.
2. Chevron cross-appealed on Total’s role arguing that at the time of the explosion Total was not a “participant” within the meaning of the relevant agreements and therefore

Chevron was not precluded from making a claim against Total and Total was excluded from relying on any indemnity between the parties.

3. Shell appealed on the ground that while the right to sue for negligent damage to property was confined to the person who had legal ownership or a possessory title to the property, this did not exclude the equitable owner if it joined the legal owner in the proceedings as Shell had.

Held:

Lord Justice Walker, Lord Justice Longmore and Lord Justice Richards in the Court of Appeal held that Total was not entitled to an indemnity under any of the provisions on which it sought to rely, therefore Total's appeal failed.

Total was a "participant" within the meaning of the relevant agreements and therefore Chevron's appeal also failed.

However, Shell's appeal was successful as it was held that a duty of care was owed to the beneficial owner just as much as it was owed to the legal owner. In joining the legal owner in the proceedings Shell could recover as beneficial owner for economic losses regardless of whether it was in possession of the property.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Scottish law

Avoidance, Misrepresentation

Mitchell v (1) Hiscox Underwriting Limited (2) Syndicate 33 at Lloyd's, managed by Hiscox Syndicates Limited [2010] CSIH 18

The defenders (“Hiscox”) appealed against the decisions of the Sheriff and the Sheriff Principal that they were not entitled to avoid a policy with the Pursuer (“Mitchell”) on the basis of misrepresentation.

Mitchell had entered into a contract of insurance with Hiscox in respect of a motor boat called the “Dot Dash”. As part of the insurance application process Mitchell made a number of representations which were later proven to be false, namely:

1. That the purchase price of the boat was £25,000. It was in fact less than this.
2. That he had a no claims bonus of 5%. Mitchell had not actually had his own insurance policy prior to this and had only been covered as a driver for the boat for third party liabilities on a policy in the name of his then girlfriend.

In July 1999, the Dot Dash was stolen from the marina where it was moored. Hiscox refused to make payment under the insurance policy.

The Sheriff held that although the misrepresentations of the purchase price and the no claims bonus were both material, they had not induced Hiscox to enter into the contract of insurance.

The Sheriff did find, however, that the misrepresentation about the no claims bonus had induced Hiscox to adjust the premium to be paid.

Despite this it was held that Hiscox were not entitled to avoid the policy.

Hiscox appealed to the Sheriff Principal who refused their appeal.

Hiscox appealed to the Inner House of the Court of Session on the basis that there was a contradiction in the finding that the misrepresentation of the no claims bonus had induced Hiscox to adjust the premium to be paid but had not induced them to enter into the contract of insurance.

Hiscox submitted that the correct test was that a policy can be avoided if a misrepresentation induced the insurer to enter into the policy on the terms which it did, in particular as to the premium.

The Court of Session opinion, allowing the appeal, was delivered by Lord Osborne who stated that:

1. The appropriate test was whether the misrepresentation led to different terms being offered by the insurer. If so, that was sufficient to avoid the policy.
2. The Sheriff had misdirected herself in law and therefore her decision was flawed.
3. The contract of insurance was induced in the relevant sense by the misrepresentation about the no claims discount.

Hiscox were entitled to avoid the policy for misrepresentation.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

Third Parties (Rights Against Insurers) Act 1930

Breach of Condition By Insured A Bar To Third Party Claims

Clare Horwood & Others v Land of Leather Limited (in Administration), Zurich Insurance PLC & Others [2010] EWHC 546 (Comm)

In September 2007, Land of Leather Limited (“LOLL”) received a number of complaints from customers who had suffered skin allergies from sofas which had been supplied to LOLL by Linkwise. LOLL sought compensation from Linkwise and in November 2007 the two companies reached an oral agreement (the “November Agreement”). The terms of the agreement stated that Linkwise would give LOLL USD900,000 in credit against future orders.

LOLL sent its product liability insurer, Zurich Insurance PLC (“Zurich”), a copy of an invoice prepared for Linkwise outlining the terms of their agreement. LOLL stated that it would be made clear to Linkwise that any payment did not include compensation in respect of the impending personal injury claims. Zurich confirmed that the wording in the invoice was fine.

LOLL sent the invoice via email to Linkwise outlining the terms of their agreement and stating that the invoice was for “Immediate settlement”. Linkwise replied summarising the key points of the agreement as follows:

“The payment of \$900,000 was in full and final settlement of all matters relating to alleged allergic furniture problems.

Linkwise to issue a credit note for \$900,000, payment to be made over 6 months at the rate of \$150,000 per month starting December.

Land of Leather to guarantee \$20,000,000 of purchases over the 12 months from 1 Dec 2007.”

LOLL replied to this stating that the terms of the settlement were on the invoice and that LOLL did not want to guarantee the purchases from Linkwise.

On 16 November 2007, Linkwise issued a credit note to LOLL. However, credit was refused when LOLL made its next payment for sofas supplied by Linkwise. This refusal of credit occurred at a difficult time for LOLL which had suffered damage to its reputation and a 50% drop in its share price. The need for the USD900,000 became more pressing.

In February 2008, LOLL made demands on Linkwise to honour the November Agreement but Linkwise wanted to renegotiate. A second agreement was reached (the “February Agreement”) which included the following provision:

“Land of Leather also confirm they will make no further claim on Linkwise in respect of alleged allergic reactions to their products...”



LOLL went into administration which led its customers to bring their personal injury action directly against Zurich under the Third Parties (Rights Against Insurers) Act 1930.

Zurich argued that it was not liable to indemnify LOLL, and was therefore not liable to the claimants, as the general words of release in the February Agreement were in breach of General Condition 3 of the policy.

General Condition 3 stated that:

“The Insured shall not, except at his own cost, take any steps to compromise or settle any claim...”

Zurich further argued that the February agreement was in breach of an implied term of the policy to act reasonably and in good faith with due regard to Zurich’s interests.

The customers counter-argued that:

1. The words “no further claim” in the February Agreement had to be read in their context as “no further claim of the type identified in the invoice” and as Zurich had agreed to the wording of the invoice there had been no breach of General Condition 3 or breach of an implied term of the policy.
2. The prohibition on settling claims under General Condition 3 of the policy only applied to claims against the insured and not claims by the insured.
3. There was no consideration given for the February Agreement which meant that it was not a valid contract.

Mr. Justice Teare held that:

1. The February Agreement was a complete statement of the parties’ respective rights and should not be read with reference to the invoice. Likewise a reasonable person would not think that the February Agreement should be interpreted as referring to the invoice.
2. The prohibition under General Condition 3 of the policy relates to both claims against and by the insured.
3. The February Agreement did provide a commercial benefit to LOLL in that prior to this agreement it did not know when it would receive payment. This was satisfactory consideration and therefore the February Agreement was a valid contract.



The personal injury claim by the customers was dismissed.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

XOL Reinsurance

Conflict of Laws, Lugano Convention

Gard Marine & Energy Ltd v Tunncliffe [2010] EWCA Civ 1052 (CA)

Glacier Reinsurance AG (Glacier) appealed against the decision of Mr Justice Hamblen permitting Gard Marine and Energy Ltd (Gard), a Bermudian company, to bring proceedings in England in respect of a contract of excess of loss reinsurance.

Gard participated in the insurance of Devon Energy Corporation (Devon) covering Devon against property and business interruption risks.

Gard purchased excess of loss reinsurance on the London market for the whole of its line, with Glacier underwriting 5%.

Devon sustained damage to its interests in the Gulf of Mexico following Hurricane Rita. Claims were presented by Gard to its reinsurers; two agreed to settle but the other two and Glacier did not, disputing the way the claims had been calculated.

Gard commenced proceedings in England against Glacier and the two other reinsurers who disputed the claim. Glacier issued proceedings in Switzerland and also applied to the English Court for dismissal of the action brought against it on the basis that Switzerland had jurisdiction pursuant to the Lugano Convention.

The Swiss Courts held they did not have jurisdiction as Gard was not domiciled in Switzerland. The English Court held that it had jurisdiction over Glacier under the Lugano Convention 1988 Article 6(1).

Glacier submitted that Swiss law governed the reinsurance contract so there was no risk of an irreconcilable judgment, provided the term was given its proper meaning.

Held:

In **Kalfelis v Schröder, Münchmeyer Hengst & Co** [1988], the European Court of Justice held that the equivalent provision under the Brussels Convention of 1968 applied only where “it was expedient to hear and determine them together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings”. When the Judgments Regulation was made in 2001, additional wording was added to Article 6(1) to codify the condition that the ECJ had stipulated in **Kalfelis**.

Glacier argued that the approach the English Court should take was modified by the decision taken in **Roche Nederland BV v Primus** [2006], and the term “irreconcilable” should therefore be given a narrow meaning. That submission was rejected.

The European Court of Justice returned to Article 6(1) again in **Freeport Plc v Arnoldson** [2008]. The ECJ had ruled that it was for the national Court to assess whether there is a ‘close connection’ between the claims brought, that is to say a risk of irreconcilable judgments if those claims were determined separately.

In the light of judgments from the ECJ, particularly **Freeport Plc v Arnoldson** [2008], the Court of Appeal held that the English Court should approach the matter in the light of the policy of the Convention to produce predictable results. On that principle the general rule is that jurisdiction is based on the defendant's domicile.

In seeing whether an exception exists, the Court must assess the connection between claims to see if there is a risk of irreconcilable judgments arising out of separate proceedings and in doing so a national Court must consider all the factors.

Gard established sufficiently for present purposes that the proper law of the Glacier slip is English law, as it demonstrated with reasonable certainty a real choice by the parties of English law under Article 3:

- The reinsurance was participated in as part of a London market placement, not a separate placement on the Swiss market. The fact that a broker approaches a reinsurer in another state does not indicate the broker is placing risk in a different market.
- There is no commercial sense for one part of the reinsurance to be governed by a different system of law.
- The underlying policy was governed by English law.
- The form of slip used in the London market was used for the main slip and the Glacier slip. Its terms were London market terms and the differences between the two slips were minor and immaterial. Significance was not attached to the fact the Glacier slip did not incorporate an express choice of law clause.

Even if there had not been a demonstrable choice of English law for the purposes of Article 3, the contract had its closest connection with England.

As the participation of Glacier in the excess of loss reinsurance is governed by English law, there would be a risk of irreconcilable judgments if the primary issue, the construction of the excess of loss reinsurance, was decided by different Courts, namely in Switzerland. This is also true of the secondary issue as the defences raised by Glacier arise out of what happened during the placement.

The determination of issues by one tribunal in England and Wales is not only expedient for the purpose of avoiding irreconcilable judgments, but also just.

Appeal by Gard dismissed

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

XOL Reinsurance

Conflict of Laws, Implied Choice of Law

Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange [2010] EWHC 2279 (Comm)

OMEX is a Canadian not-for-profit insurance exchange which insures various municipalities in Ontario. Jardine Lloyd Thompson Canada Inc (JLT Canada) arranged Excess of Loss reinsurance cover for two of the risk pools in the OMEX programme.

The reinsurance cover was obtained from the London market and placed by JLT London. The XOL reinsurance policy was on a Lloyd's slip brokered through a Lloyd's broker with Lloyd's Syndicate 990 for the 2001 and 2002 years of account. The contract itself used Lloyd's market clauses. There was no express choice of law.

The dispute concerned the refusal of the reinsurer Stonebridge (now XL London Market Ltd) to pay sums OMEX alleged were due. Stonebridge denied cover on the basis of its interpretation of the annual aggregate deductible provisions and also because of breach of the claims notification clause which it maintained was a condition precedent.

OMEX commenced proceedings in Ontario claiming damages, and asserted that the contract was governed by Ontario law. Stonebridge brought proceedings in England for negative declaratory relief. OMEX applied for an order to set aside service of the English proceedings on it on the grounds that England was not the proper jurisdiction for the case between the parties to be heard.

Christopher Clarke J **held**:

1. Stonebridge had a much better argument in saying that the parties to the reinsurance contract had impliedly chosen English law given that the policy was on a Lloyd's slip, and the contract referred to Lloyd's market clauses.
2. The fact the parties had impliedly chosen English law was of considerable significance for a number of reasons:
 - a. The only choice of alternative venue may deprive Stonebridge of the benefit of English law;
 - b. The chief subject matter in dispute, the proper construction of the excess/deductible provisions, is particularly suited to the English Court as it has considerable experience and expertise in reinsurance matters particularly those concerning Lloyd's;
 - c. Evidence as to the facts and matters which ought to have been known to the parties is likely to be located in London where the underwriters and placing brokers are located.
3. The same decision would have been reached had it been concluded that English law was likely to be the applicable law only because England was the place of characteristic performance. This is because of the disadvantage of Stonebridge running the risk that the Ontario Court would apply a different law thereby denying Stonebridge of a defence otherwise available to it under English law.
4. The fact OMEX was the first to commence proceedings in Ontario, held little weight as jurisdiction had not been determined and English proceedings were further advanced.

5. The issue of proceedings by OMEX against JLT Canada for breaches of the insurance brokerage contract, had not been ignored but it would be open to OMEX to join JLT Canada as a proper party to the English proceedings. Even if the two proceedings continued in tandem, it was not considered that overlap would be great.
6. There was nothing sufficiently special about the circumstances to mandate Canadian jurisdiction.

OMEX's application was refused.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.

XOL Reinsurance

Follow Settlements, Burden of Proof

IRB Brasil Resseguros SA v CX Reinsurance Company Ltd [2010] EWHC 974 (Comm)

The Commercial Court was asked to consider the appeal from the award (“Award”) of an arbitration tribunal (the “Tribunal”) in relation to six different individual cases concerning various reinsurance claims arising from the participation of IRB Brasil Resseguros SA (“IRB”) in an excess of loss reinsurance programme. All of the underlying claims concerned class actions against US companies and related to US liability insurance.

The first two claims related to bodily injuries suffered due to silicon breast implants manufactured by AHS and 3M.

The third and fourth claims, against Baxter and Revlon, concerned the production of products derived from blood contaminated by HIV and Aids.

The fifth claim was against Corning, a company engaged in the use of asbestos.

The last claim, against Stauffer, a manufacturer of chemical and agricultural products involved an environmental pollution claim.

Each of these claims was settled by the insurer, CX Reinsurance Company Ltd (CX Re), by way of a compromise agreement.

The Tribunal considered whether the sums paid under the compromise agreement were recoverable by CX Re against IRB as reinsurer. The Tribunal found against IRB who appealed on the ground that the Tribunal had erred in law in its Award.

The four questions for the court to consider were:

1. What is the standard of proof necessary for a reinsured to prove their case under a “double proviso” follow settlements clause? Is it on the balance of probabilities or arguability? This question arose in respect of the claims against AHS, 3M, Baxter and Revlon.
2. When considering whether, in considering the proof of loss of a compromised settlement, is it appropriate to look at the underlying facts of the original claim or simply to look at the basis of the claim as compromised? This question arose in respect of the claims against AHS, 3M, Baxter and Revlon.
3. In relation to a reinsurance contract containing a follow settlements clause, what is it necessary to prove in relation to a “losses occurring during” clause? This question arose in relation to the claims against AHS, 3M, Corning and Stauffer.

4. What is the test for determining whether a loss ‘arises out of’ an event? This question only arose in relation to the claim against Corning.

The first two questions involved the policies’ “NOTICE OF LOSS CLAUSE”, effectively a “double proviso” follow settlements clause. The two provisos of the clause being:

- (i) that the insurer must settle losses within the terms and conditions of the underlying policies, and
- (ii) the settlement must be within the terms and conditions of the reinsurance.

The third question related to the policies’ “Period” clause, which stated:

“This reinsurance covers all losses as herein defined occurring during the period commencing with and ending with, both days inclusive...”

The clause relevant to the fourth question was the “EACH AND EVERY LOSS” clause, which stated:

“... The term “each and every loss” shall be understood to mean each and every loss and/or occurrence and/or catastrophe and/or disaster and/or calamity and/or series of losses... arising out of one event.”

Mr Justice Burton held that:

1. Compliance with both provisos in the “double proviso” follow settlements clause had to be proven on a balance of probabilities. Although the Tribunal may have expressed itself erroneously in the award, it had in fact applied the correct burden of proof.
2. The evidence required to discharge the burden of proof varies from case to case. Where there is a compromise settlement, the relevant facts are those on which the compromise was reached, not the facts of the loss as it happened.
3. It was not necessary for the Tribunal to spell out the Period clause in its award. Under US law the “triple trigger theory”, by which once a defect has been identified liability can be found on one of three different occasions, brings into play different periods of cover. Under this theory, it was possible that the insurers could have been found liable for 100% of the loss. The insurers had reached a settlement compromise by calculating what percentage of losses could be attributed to their period of cover. This was a mere mathematical calculation but there was nothing to stop a court or arbitrator from relying on such to reach a conclusion. The Tribunal had reached a reasonable and business decision and had made no error of law.

4. To determine whether a loss ‘arises out of’ an event it is necessary to consider the contractual context, including the type of peril insured against and the loss in question. The Tribunal was right to conclude that the single event was the decision of the company, Corning, to engage in business involving the use of asbestos.

The Tribunal had not erred in law in reaching its conclusions.

Appeal dismissed.

The above is intended only as a summary of developments and not as a definitive statement of law.

If you require any further information on the way in which these developments may affect your business please contact Colin Peck (Partner) or Ling Ong (Partner) in the London Market Team at Weightmans on +44 (0)20 7822 1900.