REINSURANCE ROUND UP

AUTUMN 2015

- **Zurich v International Energy Group [2015] UKSC 33 on appeal from [2013] EWCA Civ 39**

It is a principle of asbestos claims that, where an insurer has to cover the whole of a claim where it was on risk only part of the time, it can seek a contribution from other insurers with whom the claimant held policies at the time (s)he was exposed to the asbestos.

This case extended the principle. Where the claimant's employer has gaps in its cover, the insurer can seek not only to recover from other insurers but also from the employer/insured itself in respect of the period where there was no insurance in place.

- **AmTrust Europe Limited v Trust Risk Group SpA [2015] EWCA Civ 437**

Broker Trust Risk Group SpA and insurer AmTrust Europe Limited entered into a Terms of Business Agreement (ToBA) based on a standard London-form "brokering agreement" with an English law and jurisdiction clause. They subsequently entered into a Framework Agreement (appending the ToBA as a Schedule) for an exclusive relationship in Italy which contained an Italian law and jurisdiction clause. The Court of Appeal was required to decide whether there were two agreements in place so that disputes within the scope of the ToBA were still subject to English law and jurisdiction or the ToBA was now subordinated to the Framework Agreement and hence disputes within its scope were now subject to Italian law and jurisdiction.

While the Court of Appeal considered the Fiona Trust "onestop"/" tne jurisdiction" presumption a useful starting point, the question of the construction of contractual agreements which contain two or more conflicting choices of law and/or jurisdiction cannot be approached with a presumption. Rather, it must be determined by a careful and commercially-minded construction to the agreements.

The Court held that the two agreements were separate so that the ToBA's English law and jurisdiction clause still applied to the dispute which had arisen between the parties. The case highlights the need for clarity and consistency when parties enter into agreements which are related or appended to other agreements.

- **Hayward v Zurich Insurance plc [2015] EWCA Civ 327**

Where an insurer has pleaded fraud before settling a claim, that insurer cannot then rescind a settlement agreement upon obtaining new, further evidence of the fraud. The insurer has entered into the settlement agreement "with his eyes open to the possibility of fraud, and there is an important public interest in the finality of settlements".

- **Allied Fort Insurance Services Limited v Ahmed Court of Appeal (Civ Division) 30 July 2015**

Although summary judgment was not precluded in a case involving dishonesty, caution should be exercised before depriving a party of the opportunity of rebutting allegations of fraudulent conduct. There would be exceptional cases where the factual context and legal issues were so straightforward that it would be possible on a summary judgment application to reject a disputed statement of fact where oral evidence would ordinarily be given at trial. However, in the present case and most cases, the amount of written evidence and the length of the hearing challenging the freezing order should have been warning signs to the judge that a full trial was appropriate.

- **Equity Syndicate Management Limited (Equity) v GlaxoSmithKline (GSK) & AXA [2015] EWHC 2163 (Comm)**

Equity and GSK were agreed that a contract between them had mistakenly extended the intended scope of cover and that it should be rectified. AXA resisted the application on the basis that the extended scope of the policy (which meant that there was double insurance in place so it was entitled to claim a 50% contribution from Equity) was a wording freely agreed, on the basis of proper advice, so there was no scope for rectification.

The Court focussed on the intentions of Equity and GSK when they entered into the policy. It was for the party seeking rectification to show that (1) the parties had a common continuing intention, whether or not amounting to an agreement, in respect of a particular matter in the instrument to be rectified; (2) there was an outward expression of accord; (3) the intention continued at the time of the execution of the instrument sought to be rectified; and (4) by mistake, the instrument did not reflect that common intention. In determining whether there was a common intention, an objective test must be applied although the subjective views of the parties would go some way to show that the terms were, in an objective sense, agreed.

The judge noted the unanimous witness evidence and regarded it as evidence of both a subjective understanding and an objective intention. There was no unfairness in permitting rectification to ensure that effect be given to what the parties had actually agreed and understood the position to be.

- **Teal Assurance Co Ltd ("Teal") v W R Berkley Insurance Europe Ltd, Aspen Insurance UK Ltd ("WRB") [2015] EWHC 1000 (Comm)**

Teal were the captive insurers of Black and Veatch Corporation ("BVC"). Teal had written four layers of a programme of insurance, topped by a Top & Drop policy reinsured by WRB. In 2010, BVC had entered into a settlement agreement with Ajman Sewerage (Private) Company Limited ("ASPCL"), under which BVC paid a sum into escrow for subsequent use paying claims.

This raised the issue of the time and order in which losses were suffered for the purposes of whether the Top & Drop policy (and therefore the reinsurance policy) should respond.

Teal argued that BVC did not suffer a loss when it paid the monies into escrow but rather when ASPCL drew down on those monies. It submitted that liability had to be established and the amount of liability quantified to establish a loss. The payment into escrow did not meet those criteria because (i) the payment into escrow was not a payment to ASPCL, (ii) the money was subject to conditions and therefore the money might never be paid to ASPCL and (iii) BVC's liability had not been quantified at the time of the payment into escrow.

Eder J found that, unlike an interim payment order (thereby distinguished from Cox v Bankside), an obligation to pay into escrow is voluntary. BVC did not have to enter into the arrangement so it was quite different from a Court Order compelling payment. A payment into escrow does not involve a determination that the payer is liable to pay damages, nor does it determine the amount of liability.

Elder J felt that (iii) might lend support to points (i) and (ii) but was not alone sufficient to determine the issue.

- **PA(GI) Limited v (1) GICL 2013 Limited (2) Cigna Insurance Services (Europe) Limited [2015] EWHC 1556 (Ch)**

The Court rejected PA(GI)'s suggestion that its liabilities in relation to mis-selling of PPI had been transferred as part of a Part VII Transfer to Groupama in 2006.

The Court said that liability for mis-selling would not arise under an insurance contract, nor would one ordinarily expect such liabilities to pass under a Part VII Transfer. This unusual proposition had not been expressly disclosed; nor had the actuary and the Regulator been informed of it; the independent expert's report did not consider it. Neither the Order nor the Scheme (nor any other contemporaneous documentation) made express provision for the potential
liabilities arising from it.

In interpreting "Transferred Liabilities", one must look at the ordinary, natural grammatical sense of the language used and check this against (a) the other provisions of the contract and its overall scheme and (b) the commercial consequences of accepting any other interpretation.

To accept that the liabilities "attached to" the Transferred Policies would give the language an unnatural meaning. This was especially so since the Scheme also referred to "liabilities relating to" and it was clear that the two expressions were not intended to mean the same thing.

One "would expect liabilities for historic wrongdoing to remain with the wrongdoer unless the converse was expressly spelled out", said Andrews J.

- **Milton Furniture Limited v Brit Insurance Limited 2015] EWCA Civ 671**

Brit's policy for Milton contained what it said was a condition precedent that "the whole of the protections including any Burglar Alarm … shall be in use at all times out of business hours or when the Insured's premises are left unattended and such protections shall not be withdrawn or varied to the detriment of the interests of underwriters …" ("GC7"). It also contained a potentially conflicting Protection Warranty 1 ("PW1") which made it a "condition precedent … in respect of loss or damage caused by Theft and/or Attempted Theft, that the Burglar Alarm shall have been put into full and proper operation whenever the premises referred to in this Schedule are left unattended …". The insured premises were attacked by an arsonist at a time when the burglar alarm was not on but two people were present, albeit asleep, on the premises.

The Court of Appeal held that: (1) the judge had been right to decide that GC7 was a condition precedent. There was no conflict or inconsistency between PW1 and GC7; they merely imposed further obligations on Milton. Further, there was no special hierarchy conferring precedence on PW1 over GC7. (2) differing from the judge, GC7 referred to two alternative eventualities: the setting of the alarm "out of business hours" applied to such parts of the premises where it would be practical to do so. It therefore followed Milton had been in breach of the first limb of GC7. "Attended" required some degree of attention which was not met since the persons present at the premises had been asleep. The Court indicated, in the circumstances obiter, that the wording of GC7 imposed a strict obligation on Milton and its knowledge of a withdrawal of monitoring services was therefore irrelevant.

- **Axa Versicherung AG v Arab Insurance Group (B.S.C.) [2015] EWHC 1939 (Comm)**

The judge rejected Axa's claim to avoid two treaties for nondisclosure and/or misrepresentation. Although there had not been a fair representation of a material circumstance, Axa failed to show that there had

been inducement on the balance of probabilities. The underwriter said that he would not have written the risk had he been in possession of the material information. However, the judge felt that "a healthy scepticism" should be applied when considering such evidence and it should be approached "with caution…, recognising the danger that it is affected by hindsight knowledge … and on occasion by an element of wishful thinking".

- **Flood Re Scheme**

The Scheme, which has been delayed, is now scheduled to go live in April 2016. Developed between the government and insurers, it is designed to assist (most of) those who live in high-risk flood areas in affording flood cover. It covers domestic property only.

Insurance will be placed in the usual way. In the case of properties considered to be within the 1-2% highest risk of flooding, the flood element of the cover will be reinsured into Flood Re, which will be a not-for-profit fund owned and managed by insurers. Mark Hoban (former Conservative MP and Financial Secretary to the Treasury) has been appointed as the first Chairman whilst Brendan McCafferty, Commercial Director of Paymentshield, is the CEO.

The insurance industry will bear the £10 million start-up cost. Premiums and a levy will fund the income of the scheme. The premium rates will be capped based on Council Tax bands. The levy will be the equivalent of the cross-subsidy which already exists in the market, which is around £10.50 on all household insurance.

- **The Budget Provision re ILS**

The March 2015 Budget saw George Osborne pledge to "work with the industry and regulators to develop a new competitive corporate and tax structure for allowing Insurance Linked Securities to be domiciled in the UK".

It is hoped that the decision will assist in addressing the age-old but ever-present concern that the UK, considered a leader in the insurance and reinsurance market, is losing more ground to the likes of Bermuda and others. Of course, there will be issues with timetabling, tax regimes and regulatory concerns, while some brokers doubted the effectiveness of the decision. However, it was, overall, welcomed in the City in the hope that it will attract more reinsurance business to the UK and encourage this key growth opportunity.

- **The Insurance Act 2015**

(Re)insurers will need to consider whether they wish to opt out of the Act (it is not possible to contract out of the provisions regarding 'basis' clauses) or to accept the default position. If they do the latter, they will need to begin considering their current systems and the effect the Act will have on pre-contractual negotiations to ensure that they are up-to-date and prepared for when the Act comes into effect on 12 August 2016.

One of the main areas to which the Act makes significant changes is warranties. An insurer's remedy will now be contingent on relevance; it will no longer be possible to reject liability for breach of any warranty.

The duty of disclosure will now be one only of 'fair representation'. 'Basis of the contract' clauses will be abolished. An insured must disclose every material circumstance which it knows or ought to know or, failing that, the insured must give disclosure which gives the insurer sufficient information to put a prudent insurer on notice that it needs to make further enquiries. Problems may arise in the context of what a prudent insurer is expected to know. In an era where information is available through various sources, online and otherwise, the onus on the insurer to be aware of all accessible information regarding the insured could be substantial. The nature of the alternative test is itself a grey area.

Insurers' remedies for breach will also be affected and will depend on whether the breach was deliberate or reckless. Innocent or negligent breaches will be viewed on a sliding scale, taking into account what the insurer would have done if a fair representation would have been made. This shift into remedies based on proportionality brings English law more into line with civil law.

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