

davies arnold cooper  
reviews the year's highlights



insurance &  
reinsurance

top ten 2006

DAVIES ARNOLD COOPER

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# insurance & reinsurance top ten 2006

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## foreword

Welcome to Davies Arnold Cooper's **Insurance & Reinsurance Top Ten 2006**.

As with last year's review we have summarised what are, in our opinion, the ten most important decisions of the year. The choice of the selected cases and the order in which they appear are of course subjective. Also, there is inevitably a degree of overlap between this and our other booklets. For instance, the Court of Appeal's decisions regarding non-disclosure of moral hazard issues in **North Star Shipping v Sphere Drake** and conditions precedent and prejudice in **Shinedean v Alldown Demolition** appear in the **Property & Construction Insurance Top Ten 2006**, whereas the decisions concerning a sub-broker's tortious duty to the insured and the post-placement duties of a broker in **BP v Aon** and **HIH v JLT** respectively appear in the **Professional Indemnity Top Ten 2006**. Similarly, those readers expecting to see the D&O reinsurance dispute of **AIG Europe v Faraday Capital** are referred to our **D&O / Financial Institutions Top Ten 2006**.

However, the courts are only a small element, albeit an important part, of the insurance and reinsurance world. We are pleased to see that the market has generally not faced the natural and not-so-natural disasters which characterised 2005, albeit climate change problems indicate there is every risk that 2005 will become the norm rather than the exception. The legal and commercial fallout from those disasters and from Katrina in particular is still working its way through the system. Litigation is ongoing in the US as to the cause of the Katrina losses; was this as a result of the storm or the poor engineering and maintenance of the levees? The potential impact of such arguments on coverage was highlighted recently when a District Court ruled that most insurers could not rely on a flood exclusion where the damage was caused by breaches of the flood defences. Until these cases have been concluded, the final impact of 2005 will not be known. All the indications are, however, that 2006 saw a strong buoyant market.

London, and in particular Lloyd's, continues to face stiff competition for the title of the pre-eminent insurance and reinsurance market. The market appears to have convinced

the FSA that its work on contract certainty means there is no need for regulation in this field. It will be very dangerous however, if the market, having apparently satisfied the FSA to this effect, becomes complacent. The FSA has already indicated that it will want more details in respect of the non-compliant contracts and it will not be prepared to allow the permitted 15% non-compliant residue to in fact be a significantly higher percentage in value terms. We anticipate that as time progresses, the FSA will demand greater compliance whilst at the same time investigating and probably acting against serial non-compliers.

2006 also saw significant steps being taken with regard to the reform of the Marine Insurance Act, although of course it is still very much early days given the various obstacles challenging the passage of the Law Commission's reviews from reaching the Royal Assent stage. Expect to see further proposals for a more consumer-friendly law developed during the course of 2007 whilst commercial risks remain more strictly regulated. We are confident that London can remain a competitive centre of the global insurance industry with a framework properly suited to the way business is being / will be done in the 21st century.

With the future in mind, let's look at the top ten cases of the past year.

**Davies Arnold Cooper**  
**January 2007**

The Insurance Top Ten 2006 publications are not a substitute for detailed advice on specific transactions and problems and should not be taken as providing legal advice on any of the topics discussed.

# once, twice, three times a viewing

Goshawk Dedicated Ltd and Others v Tyser & Co Ltd  
and Another  
Court of Appeal 7 February 2006

1

## facts

The claimant Lloyd's syndicate claimed that the defendant Lloyd's broker was obliged to allow the syndicate to inspect and copy certain categories of document which had been shown by the broker during the placing of the risks. The broker declined to disclose the information requested without the consent of the insureds.

The syndicate submitted that there was an implied contract based on long-established market custom and practice that brokers would allow underwriters access to documents which underwriters had already seen and relied on and, in respect of policies written after December 2001, that custom was based also on the model terms of business agreement signed by the syndicate and the broker.

To the surprise of much of the underwriting side of the market, Mr Justice Clarke at first instance found that the information in question was not owned by the syndicate; the handing back of the documents did not give rise to the relationship of trustee and beneficiary; in respect of the period before the terms of business agreement was signed, no contract was to be implied obliging the broker to disclose documents to the syndicate; and there was no necessary clear and invariable custom at Lloyd's, as opposed to a common or habitual practice.

## decision

In a unanimous judgment, the Court of Appeal restored underwriters' rights of access to placing and claims documents to reflect what the underwriting side of the market believed to have been established custom and practice for over 300 years. This view was shared and supported by Lloyd's which was allowed to intervene in the proceedings.

Underwriters / Lloyd's successfully argued that underwriters are entitled to see again the documentation under a term implied, as a matter of business necessity, into their contract of insurance with their insured. As a corollary of that right they have a similar right, against the insured's Lloyd's brokers, to inspect those documents in the broker's

hands. Lord Justice Rix held that for relationships in the Lloyd's market, there has always been a term to be implied in the insurance contracts between insureds and underwriters to the following effect:

- placing and claims documents previously shown to underwriters, and premium accounting documents which are necessary to the working out of the premium payable under the contract, where retained by the insured's Lloyd's brokers, should be available to the underwriters in case of reasonable necessity
- "available" includes the right to take copies, with the cost of inspection and copying falling to be met by the underwriters who make the request
- in the absence of bad faith, the motivation of underwriters to view such documents is irrelevant.

Tyser was refused permission by the House of Lords to appeal.

## comment

**Underwriters will welcome this clarification and will feel entitled to continue to rely on brokers to make documents available for inspection. Brokers will have to advise clients of the duties which they are now under, and how that impacts on the client relationship. Whether this ruling could be applied to non-Lloyd's brokers, who have different customs and practices, remains to be seen.**

# is the Lumberman still ok?

Enterprise Oil Ltd v Strand Insurance Co Ltd  
1st instance 26 January 2006

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## facts

Enterprise Oil brought a claim against its captive insurer, Strand Insurance, under a liability policy. The claim arose following two sets of court proceedings in Texas and in England, as a result of which Enterprise and others involved in a North Sea oil drilling venture agreed, under a global settlement, to pay third parties US\$175m. The settlement included the compromise of allegations of tortious interference which had been made in the Texan proceedings. Enterprise's share of the settlement amounted to approximately US\$20m, although the settlement agreement itself did not apportion or allocate that sum to particular heads of damage.

Strand's defence against Enterprise was, in effect, conducted by its London market reinsurers who would ultimately be liable for the payment of any loss. The claim was resisted principally on the basis of what Strand itself acknowledged was the "very controversial" 2005 High Court decision in **Lumbermens Mutual Casualty Ltd v Bovis Lend Lease Ltd**, in which Mr Justice Colman held that in the context of a liability policy, where a settlement agreement does not "ascertain" the insured's loss, it will be fatal to the insured's claim.

## decision

Mr Justice Aikens gave judgment in Strand's favour dismissing Enterprise's action. He decided that Enterprise could recover under the policy only if it could demonstrate that it would have been under an actual liability to the claimants in the Texan proceedings; the fact that allegations of tortious interference had been made – albeit allegations which would ultimately come before a Texas jury with power to award punitive damages – was not enough. The judge made the point that to allow an indemnity on the basis of wrongs "*alleged to have been committed*" would change the basis of indemnity under the liability policy. It would turn the policy from one which paid on the basis of an established liability of the insured into a policy which paid on the basis of allegations made by a third party.

Although for the purpose of the judgment it was not necessary for the court to

consider **Lumbermens**, the judge, recognising the controversy which had been created by that case, offered a critical analysis of its findings. The judge said that the cases relied on in **Lumbermens** did not establish that it is a pre-condition for recovery under a liability policy that the insured must have "*ascertained*" by virtue of the wording of a judgment or award or in a settlement agreement the "*specific cost to the insured of discharging its insured liability*".

In reaching that conclusion the judge cited two particular reasons. First, an insurer always has the right to challenge whether an insured has the right to an indemnity under a policy, including whether the insured was, as a matter of fact and law, liable to a third party. Second, if **Lumbermens** was right, it would lead to great "*commercial inconvenience*" and to artificial statements in judgments, awards and settlement agreements. He observed that "*Commercial law tries to avoid forcing parties to engage in commercially inconvenient and artificial practices*" and the parties to settlements may have very good commercial reasons for not wishing to identify the particular sums that are attributable to particular heads of claim or alleged types of loss.

## comment

**Enterprise Oil** does not overrule **Lumbermens**; both are High Court cases of equal standing. Only the Court of Appeal will be able to do that. The **Enterprise Oil** decision is nonetheless important, as it reflects much of the market criticism that has been levelled against the implications of **Lumbermens**. Further, it highlights the importance which must be attached to the structure and wording of any settlement agreement to ensure it meets the policy requirements in terms of triggering liability, in order that further claims relating thereto may be pursued. Such settlements must be based on a proper analysis of potential actual liability and worded accordingly.

# are innocent insureds still safe?

## facts

GTI is an “umbrella” corporation and part of the Grant Thornton accountancy group. GT Italy was a member using the name Grant Thornton SpA until it was expelled in January 2004. GT Italy was also a member, using the name Grant Thornton SpA, until it was expelled in January 2004. The Grant Thornton group placed professional indemnity insurance with Brit and others, to whom we shall refer to collectively as Brit. GTI was not named in the schedule but an extension provided:

*“Grant Thornton International is included as an Assured Firm but solely in respect of claims made against Grant Thornton International arising from claims made against a member firm of Grant Thornton International insured by the terms and conditions of this policy.”*

In March 2004, GTI notified Brit of the Parmalat claim brought against it and GT Italy in relation to which GTI and GT Italy incurred substantial defence costs. In August 2005, Brit advised GT Italy that the insurance policy had been avoided ab initio due to misrepresentation and non-disclosure. Brit issued proceedings for declarations regarding avoidance, breach of warranty and non-liability. The validity of the avoidance against GT Italy was accepted. Brit consequently asserted that GTI had no cover, under the extension, as GT Italy had never been “insured”.

The first instance court disagreed and in March 2006 awarded summary judgment against Brit. The court held that GTI should not be affected by the conduct of other insureds, of which it was ignorant. Brit appealed, arguing that the effect of avoidance of cover meant that GT Italy must be treated as never having appeared on the schedule.

## decision

The Court of Appeal held that the proper construction of the extension wording was intended to be parasitic upon claims already “covered” by the policy. There had to be a claim within the ambit of the policy, or against a member firm, before GTI could make a valid claim. As GT Italy failed to disclose matters, and the validity of the evidence was not in question, GT Italy was never “insured” or “covered” in the first place. Accordingly the extension offered no cover to GTI.

## comment

At first sight this decision appears to militate against the “composite policy” concept underpinning professional indemnity policies. However, this case turned on its own facts. The Court of Appeal held the extension did offer GTI protection for a claim against an Assured Firm which (i) was within the ambit of existing cover and (ii) Brit was bound to pay subject to compliance by the Assured Firm with the terms and condition of the policy. The reason why GTI’s argument failed was because Brit never came on risk for claims against GT Italy. This resulted in what was acknowledged to be a harsh consequence whereby the “innocent” insured was deprived of cover.

This decision nevertheless highlights that “innocent” insureds may not be as safe as they thought. Insureds under composite PI policies, and their brokers, may wish to look closely at the wording of their policies in the light of this judgment, particularly given the difficulty for worldwide organisations of ensuring that each member conducts itself in a way as to avoid insurance difficulties.

# insurance premiums – brokers and the bottom lien

Heath Lambert Ltd v (1) Sociedad de Correctaje  
de Seguros (2) Banesco Seguros CA  
1st instance 19 June 2006

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## facts

A Venezuelan company used Sociedad de Corretaje (Scort) to place insurance for its fleet with Banesco Seguros CA. Banesco was in turn reinsured in the London market under a marine facultative reinsurance. Heath Lambert (HL) was the placing broker for Banesco's reinsurance. Scort was also involved in obtaining reinsurance for Banesco in the London market.

HL placed the reinsurance as instructed, paid the premiums to reinsurers (or came under a liability to pay such premiums) but neither Banesco nor Scort reimbursed it. HL issued proceedings to recover the premiums against Scort and Banesco. The claim against Scort was that it was the producing broker for the reinsurance and was liable to reimburse HL acting as a sub-agent placing broker. The claim against Banesco was that HL was acting directly as Banesco's broker. Each defendant claimed that the other was liable.

Banesco later pursued a counterclaim against HL for monies received from reinsurers in settlement of a claim under the policy. HL asserted a lien over the monies received from reinsurers under section 53(2) of the Marine Insurance Act 1906 (MIA) for the premiums which remained unpaid. Section 53(2) provides that "*Unless otherwise agreed, the broker has as against the assured, a lien upon the policy for the amount of the premium and his charges in respect of effecting the policy...*". Banesco disputed both the existence of the lien and the extent of the rights afforded by it. Scort simply disappeared from the scene.

## decision

The court concluded, after analysing the case law behind section 53(2), that HL had a lien over the proceeds of the policy both as against Banesco and any other intermediary, whether or not Banesco was under a direct obligation to pay the premium. The court found that that lien might be maintained until the premium was paid or the claim was in some other way satisfied. The court agreed that it would be obviously unfair for HL to be required to hand over the proceeds of the claim under a policy without being able to reimburse itself for unpaid premiums.

## comment

The law is clear and straightforward when it comes to the brokers' lien over premium in the context of marine insurance; a broker placing marine insurance has a lien for premium and commission whether or not there was an intermediary in the chain. There are no decisions applying the same principle to a non-marine insurance contract. However, the case should serve to reinforce the common law principle from which the lien derives. Under the common law, HL would be entitled to a lien, in the nature of holding possession of the policies, and would be entitled to that lien against every person; including against the owner of the goods for whose benefit the policies were effected, and against any intermediaries who might have intervened between the owner of the goods and himself.

The wider implications of this case may emanate from the court's reflections on the role of the broker as the agent of the insured. The court expressed doubts as to the traditional view of the broker as the agent of the insured, noting that it would be preferable to regard the broker as a "common agent", acting in some circumstances as wholly independent of both parties and in others for one or other of the parties. This analysis creates the potential for lack of clarity and confusion on a number of issues and may well be revisited in the coming years.

# ex-gratia = ex reinsurance?

## facts

The “follow the settlements” clause in this reinsurance policy excluded ex-gratia and / or without prejudice settlements by the reinsured. In a settlement agreement, the reinsured agreed that the settlement was without any admission of liability on the part of the reinsured. Reinsurers then denied indemnity on the basis that there was a “without prejudice” settlement. The reinsured argued that the exclusion relating to without prejudice settlements applied only to settlements which were not “full and final” settlements or, as an alternative, settlements where the paying party does not consider itself liable or likely to be liable to pay. The reinsurer’s position was that a without prejudice settlement was one where the reinsured’s liability was not admitted.

## decision

The judge, having considered Lord Mustil’s judgment in *Hill v Mercantile* 1996, concluded that the parties had sought to cut down the ambit of the follow the settlements clause by including the exclusion. He went on to say that the word “settlement” indicated a concluded agreement, not something which could be later reconsidered, and that a “without prejudice” settlement was one where there was no admission of liability on the part of the reinsured. This contrasted with “ex-gratia” payments which were held to be payments where the reinsured believed there was no liability to pay. He therefore found in favour of reinsurers stating:

*“The reinsurers are entitled, in my view, to insist that if the original insurer is not prepared to admit liability under the original policy then, for the purposes of establishing the reassured’s entitlement to recover under the reinsurance, the reassured must prove that there was, in fact, a liability under the original policy. To my mind, the addition of the proviso concerning without prejudice and ex-gratia settlements is an encouragement to the original insurers / reinsured to give proper and business-like consideration to its liability to the original insured and to act honestly in settling the claim.”*

## comment

Terms identical or very similar to that found in the policy, the subject of this dispute, appear in many reinsurances. We now have clear guidance (albeit of first instance authority only) on what constitutes an ex-gratia payment or without prejudice settlement. This does not mean the reinsured cannot recover. It does make that recovery more problematic for the reinsured.

When settling claims, the reinsureds should have at least one eye on their ability to recover from reinsurers. If they have a limited follow the settlements clause as in this case, they will have to be prepared to prove in the reinsurance proceedings they were actually liable on the underlying claim if they decide to settle that claim without any admission of liability on their part.

# yet another sticky jurisdiction problem

Catlin Syndicate Ltd and Others v Adams Land and Cattle Co (ALCC)  
1st instance 20 July 2006

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## facts

ALCC was insured by underwriting members for various Lloyd's syndicates (Underwriters) against the death of its cattle. Underwriters disputed the scope of cover available to ALCC and brought an action in May 2006 in the Commercial Court in London. The slip and cover note clearly stated that "UK law and jurisdiction" was to apply to the contract. However, clause 10 of the policy provided that the insured had the right to require Underwriters to submit to the jurisdiction of a court of competent jurisdiction in the US in circumstances where Underwriters failed to pay any amount claimed to be due under the policy.

In June 2006, ALCC's attorneys notified Underwriters of ALCC's intention to commence suit in Nebraska. ALCC requested that Underwriters submit to the jurisdiction of the Nebraskan court and that the suit before the Commercial Court be dismissed or transferred. The following day ALCC brought proceedings for breach of contract, unjust enrichment and declaratory judgment against Underwriters in the District Court of Hall County, Nebraska.

## decision

Whilst the judge accepted it was clearly the intention to make the contract subject to English law and jurisdiction, and that it was wrong to talk of one clause trumping the other, the insured's right of election to a competent court in the US nevertheless took precedence. Once ALCC had exercised its right of election, the US court was the dominant, appropriate forum. It was ordered that the proceedings in the Commercial Court were stayed on grounds of forum conveniens or dismissed to avoid the duplication of proceedings.

The judge dismissed Underwriters' argument that the US may not apply the proper law of the contract, namely English law. Underwriters would have been aware that there was a risk that a foreign court might have a different view on the applicability of English law when allowing the insured the risk of election. A foreign court applying English law may also differ from English courts in its interpretation.

## comment

Jurisdiction disputes in insurance / reinsurance are far from uncommon, and this was not the only such case to pass through the courts this year. The Court of Appeal decision in **Dornoch and Others v Mauritius Union Assurance and Others** this year highlighted the need for contract certainty in choice of law clauses. In **Dornoch**, the words "jurisdiction clause" and "follow all terms and conditions of the primary policy" (which was subject to Mauritian law) were held, in accordance with long-established principles, to be insufficient to show that a Mauritian jurisdiction and choice of law clause applied.

**Catlin** shows that parties cannot simply look at the jurisdiction and choice of law clause but must also look at the contract as a whole. The parties therefore should at the outset carefully consider where the relevant jurisdiction and choice of law clause is to be and then ensure that the contract, as a whole, is consistent with that aim and is certain.

# another fine mess you've got me into...

ING Re (UK) Ltd v R&V Versicherung AG  
1st instance 29 June 2006

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## facts

ING Re alleged that R&V wrote a quota share protection of ING Re through an agent of R&V, Risk Insurance and Reinsurance Solutions (Risk). R&V denied it was on risk. At an earlier hearing to which ING Re was not a party, the court found that Risk did not have actual authority to enter into the quota share contract. ING Re accepted this finding, leaving the court in this case to decide whether Risk had ostensible authority or if R&V had ratified the quota share contract, and whether therefore R&V was bound.

## decision

The court had to consider the impact of three important documents and the oral evidence of various witnesses. It is clear that the oral evidence, especially the credibility of the witnesses, was an important fact the judge took into account when making his decision. He found that the documents were not sufficient to establish ostensible authority on the part of Risk, and therefore R&V was not bound by its actions.

This left the issue of ratification. The judge decided he had to answer two questions: (i) was it sufficient for R&V to know its agent had entered into an agreement or was it also necessary for R&V to know that in doing so the agent had acted without authority and (ii) whether R&V had subsequently ratified the contract. With the only concession to ING Re, the judge found it was sufficient that R&V knew its agent had entered into the agreement and it was not necessary for R&V to know the agent had acted outside its authority. On analysis, however, he decided R&V had not ratified the contract; in particular he found that silence would not constitute ratification, unless the only reasonable conclusion that could be drawn from the silence was that R&V had ratified the contract.

## comment

Whilst the cases dealing with binding authority are usually dependent on their own facts (and this case is no exception), this decision does highlight the potential pitfalls both sides may face when one party entrusts an agent to underwrite in its name. It is clear that had ING Re seen all of the relevant documents, it would have known that Risk was acting outside its authority. In circumstances where the documents which ING Re did see disclosed potential problems with regard to the authority of Risk, the judge saw no difficulty in suggesting that ING Re should have asked to see more. Perhaps asking to see the document granting authority is the only safe route to take; if the third party (ING Re in this case) subsequently misinterprets the extent of the authority granted to the agent, it will be his own fault.

As an associated issue, the case highlights the need for insurers to act under a properly worded reservation of rights where there may be issues as to the validity of the contract, otherwise an act, or indeed a failure to act, may in certain circumstances constitute ratification of the contract.

# what is condoned is condoned

Zurich Professional Ltd and Others v Karim  
and Others  
1st instance 15 December 2006



## facts

The case concerned a professional indemnity policy issued to a firm called Karim Solicitors via the Law Society's Assigned Risks Pool for the 2002/03 year. Karim Solicitors was intervened by the Law Society in June 2003. The first defendant in these proceedings was the mother of the second and third defendants, who were, ostensibly, the partners of Karim Solicitors. The mother was ostensibly an employee in the practice. Various claims had been made against Karim Solicitors, most alleging failure to account or dishonesty of some kind, on the part of the mother. Zurich, as representative insurers, sought declarations that the claims had arisen *"from dishonesty or fraudulent acts or omissions committed or condoned by the insured"*, in order to allow insurers to escape liability by virtue of a policy exclusion.

The defendants did not attend trial, their application for an adjournment on grounds of illness having been refused. The mother's dishonesty in all the claims was accepted by the judge. The issue was whether there were innocent partners entitled to indemnity. Zurich contended that (i) the son and daughter were either, to a limited extent, implicated in (and therefore committed) the fraudulent / dishonest transactions, or (ii) condoned the transactions by lending their names to a sham partnership which their mother effectively ran, or (iii) specific condonation of acts or omissions was not necessary and condoning of general dishonest practices would suffice.

## decision

On the first point, the judge held, taking account of the evidential burden in relation to dishonesty issues, that it could not be found that the son and daughter were involved in the dishonest transactions. Zurich also failed on the sham partnership ground, on the basis that, although the word "condoned" was to be given its ordinary meaning, any sham element of the partnership was not sufficient to establish that the son and daughter condoned specific fraudulent acts or omissions of which they were unaware. The judge did however find that the son and daughter were "consistently dishonest", and the fact that they condoned *"persistent dishonest handling of money, breaches of the rules, and so forth, which allowed the specific act or omission to take place"* sufficed. Accordingly, Zurich was entitled to the necessary declarations.

## comment

It is rare that the solicitors' professional indemnity wordings, based on the Law Society's approved minimum terms, come before the courts. The exclusion in question is standard across the market, being based on such minimum terms. Given the protection afforded to innocent insureds, the dishonesty / fraud exclusion is often in practice of limited relevance to medium and large practices. The case is important as it confirms that the wording "dishonest or fraudulent acts or omissions" is disjunctive, and it is authority for the proposition that the insureds in question do not, it seems, have to have condoned the specific dishonesty giving rise to the claims in question, but a more general level of dishonesty may suffice. That said, it was a judgment in the insureds' absence, which is, we understand, being sought to be appealed by the insureds, so insurers seeking to rely on it as a precedent will proceed with caution.

The trial also involved an issue of whether there had been an actual or potential conflict of interests between insurers and insured. The Court of Appeal's judgment in **TSB v Robert Irving & Burns** 1998 shows that a failure to appreciate an actual conflict of interest can lead to underwriters effectively being prevented from relying on information passed to a solicitor by the insured under a joint retainer, on the grounds of privilege. This firm acted for the parties in the numerous underlying claims and Philip Murrin's evidence at trial that he believed and advised in relation to the son and daughter and insurer, there was a potential but not actual conflict was fully accepted; there was therefore no such bar on admissible evidence. In such cases, close attention needs to be given from the earliest stage to the issue of actual or potential conflict and the solicitor's role under the joint retainer, and the issue needs to be expressly addressed.

# limitation for brokers: a never-ending worry?

Great North Eastern Railway Ltd (GNER) v JLT  
Risk Solutions Ltd  
1st instance 10 May 2006



## facts

GNER obtained insurance cover with Avon Insurance Plc through its broker JLT incepting on 1 April 1998. GNER and JLT believed this insurance included a narrow exclusion clause dealing with damages and consequential loss, whereas Avon believed the exclusion was in the same terms as a far wider exclusion which had been in place in the previous year's policy. A derailment occurred and significant losses were occasioned which would have been covered by the wide exclusion but not by the narrow one. At the time of the derailment, JLT was still in negotiations with Avon as to the final form of the policy and no policy wording had been produced.

In proceedings against GNER, Avon successfully established that the wider exclusion clause applied which accordingly restricted its liability. Subsequently, JLT accepted that it was negligent in not obtaining the cover which it had advised its clients it had obtained. Following further litigation between GNER and Railcare, GNER sued JLT for the difference between what would have been recovered from Avon had the narrow exclusion been in place and what was actually recovered. These proceedings against JLT were issued on 10 June 2004, after the six-year anniversary of the policy but before the six-year anniversary of the derailment. JLT issued an application for a summary judgment and / or for the proceedings to be struck out on various grounds, the most interesting being limitation.

## decision

On hearing the interlocutory application, Mr Justice Cresswell was not prepared to strike out the claim on the basis that limitation had expired, as there was the possibility of continuing duty of care on the part of the brokers in circumstances where they were still negotiating the terms of the contract. If there was a continuing duty, then the limitation period did not start until the duty finished. Whether, in fact, there was a continuing duty of care and, if so, the extent of that duty were matters

on which the judge believed the court would be assisted by expert evidence in full trial – that evidence was not before the court in this summary judgment application. He did not recognise that even if GNER were to succeed on this aspect, there would be difficult arguments as to causation.

## comment

We understand this matter has since been settled. Perhaps the most important finding is that in appropriate circumstances, the courts are prepared to look beyond the date of the inception of the policy as being the commencement date for limitation purposes insofar as any claim against the broker is concerned. It is also evident that any duties the broker owes after that date must be more than purely administrative in nature; finalising important terms of the contract certainly could fall outside the administrative category.

With the market aiming to reach the FSA's yardstick of 85% "certain" contracts in January 2007, the extent to which the courts will be troubled by disputes of this nature in the future is questionable. It would appear that this type of problem, where the terms have not been agreed prior to inception or a wording produced shortly thereafter, is the core problem the new guidelines are intended to address. It may be that the 15% rump of envisaged non-certain contracts could give rise to another case like this, as the insured would no doubt ask questions about any discrepancy in cover.

# not pursuing the debtor – would you credit it?

Euler Hermes UK Plc v Apple Computer BV  
Court of Appeal 4 April 2006

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## facts

Euler Hermes (Euler) wrote a credit risk insurance of Apple Computer (Apple) which covered Apple in respect of the failure of trade debtors to pay undisputed amounts due from them. The policy terms made it clear that disputed debts were not covered. Apple's distributor in Saudi Arabia, Jeraisy Tech (Jeraisy), withheld payment of invoices from Apple following Apple's decision not to renew its distributorship agreement, with Jeraisy alleging breach of contract. Apple submitted a claim under the policy for the value of the unpaid invoices.

Euler accepted liability in principle on the understanding that legal proceedings were to be commenced immediately. The terms of Euler's proposed acceptance and payment of the claim stipulated Apple accept in advance that:

- *"action being taken to determine the validity of the decision to not renew the distributorship with Jeraisy is concluded in favour of Apple..."*
- a specimen letter of undertaking whereby Apple was to undertake *"to continue to take action against the debtor..."*.

Apple's agent, Aon, forwarded the specimen letter of undertaking to Apple, who signed it. Apple did not see the covering letter which included the point that Apple had to win its dispute with Jeraisy. Settlement between Euler and Apple followed soon after Apple's acceptance of the proposed letter of undertaking. Apple subsequently concluded that it was not in its commercial interests to start proceedings against Jeraisy and dropped all attempts to recover the unpaid invoices.

Euler sued Apple for breach of contract for failing to pursue proceedings against Jeraisy. Apple contended that only the terms of the undertaking letter, which obliged it to *"continue to take action"*, were contractually binding. The judge at first instance found in Apple's favour and that Apple had discharged its obligations under the terms of such letter in line with the terms of the policy, which required it only to take *"all practicable measures to collect ..."*.

## decision

The Court of Appeal concluded that the covering letter was intended to qualify Euler's offer to settle the claim by requiring Apple to accept the three requirements to which it referred, including the requirement to ensure that the dispute was resolved in Apple's favour. Hence it concluded that the settlement agreement obliged Apple to pursue its claim against Jeraisy by legal proceedings if necessary to the point at which it had established its right to recover the debts in question; if it failed to do so, it was in breach of those terms. The court, having reviewed expert evidence, accepted there may be delays enforcing any judgment in Saudi Arabia, but this did not mean there would be no recovery. Euler was entitled therefore to recover damages (in excess of US\$400,000) from Apple for breach of contract.

## comment

**It is clearly important that there is compliance with express terms of settlement between insurer and insured and that conditional bases of settlement are appreciated and met. The case also makes it clear that where the purpose of a policy is to pay only in respect of "undisputed" debts, it is open to an insurer to require its insured to litigate against a third party. Any suggestion that the insurer should do this under its rights of subrogation is, as in this case, unlikely to be looked on favourably by the court.**

# about davies arnold cooper

Davies Arnold Cooper is an international law firm specialising in dispute resolution and real estate. Our dispute resolution capability includes leading teams advising on insurance, construction and product liability matters as well as general commercial litigation.

Our team of more than 80 specialist insurance lawyers advises in relation to fraud, professional indemnity, directors' and officers' liability and property and construction insurance for both insurers and corporate buyers of insurance as well as companies operating in the Lloyd's market, underwriting agents, brokers, intermediaries and risk managers.

## Insurance and reinsurance

We advise on every aspect of insurance and reinsurance liability from straightforward claims to catastrophes, including full subrogated defence and recovery and coverage and complex policy construction issues. We are experienced in the problems of run-off in the Lloyd's and company markets, and also specialise in advising on captive and risk retention products and issues. We advise on policy design and wording, from the relatively simple to full interlocking programmes.

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We have acted in many reinsurance recoveries including large market settlements and legacy broker issues. We have advised in relation to reinsurance disputes involving banks, film finance, terrorist attacks, war exclusion and pension issues. Many are international disputes and multi-jurisdictional involving, in particular, Latin America, Bermuda, Australia and the United States.

## Our network

Our London offices are complemented in the UK by our Manchester office, which has a strong commercial insurance team. Our Madrid office is widely recognised as Spain's leading insurance law specialists. The success of our work in Spain led to the opening of an office in Mexico City in 2003, which is dedicated to providing services to the London, European, Latin American and US insurance markets.

For further details, please visit our website [www.dac.co.uk](http://www.dac.co.uk).

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