

JOINT NAMES INSURANCE - RELIEF FROM LIABILITY?

Tyco Fire and Integrated Solutions (UK) Ltd (formerly Wormald Ansul (UK) Ltd) v Rolls Royce Motor Cars Ltd (formerly Hireus Ltd) 2008 EWCA Civ 286 ("Tyco v Rolls Royce")

The Court of Appeal judgment in Tyco v Rolls Royce, handed down on 2 April 2008, highlights the importance of precise wording in construction contracts containing a provision for joint names insurance. Further, it calls into question whether the existence of a joint names insurance policy overrides a contractor's liability to an employer for damage caused by the contractor's negligence.

Facts

Rolls Royce Motor Cars Ltd ("Rolls Royce") built a new manufacturing plant in West Sussex, and employed Tyco Fire and Integrated Solutions (UK) Ltd ("Tyco") to provide fire protection services including a sprinkler system, under a contract dated 14 November 2002.

On 30 July 2003 a mains water pipe burst, causing a flood which damaged both the works being carried out by Tyco and other parts of the plant. Tyco repaired the damage to the works, but argued that it was not liable for the damage to the other parts of the plant, known as the existing structures, because of the existence in the contract with Rolls Royce of a provision for joint names insurance. Clause 13.5 stated:

13.5 "The Employer shall maintain, in the joint names of the Employer, the Construction Manager and others including, but not limited to, contractors, insurance of existing structures, and in the name of the Employer, the Construction Manager, the Contractor and

his sub-contractors of any tier, insurance of the Works...against the risks covered by the Employer's insurance policy referred to in Schedule 2 (i.e. the Specified Perils)"

For the purposes of resolving this dispute, Tyco admitted negligence and Rolls Royce's failure in practice to maintain the joint names insurance was ignored. It was common ground between the parties that the damage was caused by the Specified Perils.

In an adjudication before proceedings, Tyco was ordered to pay Rolls Royce £433,428.08 in respect of the damage caused to the existing structures. Tyco commenced proceedings to recover this sum, arguing that the contractual provision for joint names insurance relieved it of its liability for negligence.

Tyco also relied on the comments of Lords Hope and Bingham in *Co-operative Retail Services Ltd v. Taylor Young Partnership Ltd* [2002] UKHL 17 ("CRS"), that one joint named insured could not recover from another joint named insured (and neither could the insurer by way of subrogation) in respect of the same loss. In CRS the provision for a joint names insurance policy meant that the contractor was relieved of its liability to the employer for damage caused by its negligence and the employer was obliged to recover instead from the insurer.

Rolls Royce relied on the terms of its contract with Tyco under which Tyco was obliged to

indemnify Rolls Royce against any loss or damage caused by Tyco's negligence. Further, Rolls Royce relied on a clause which provided that the rights and liabilities of Rolls Royce were in addition to 'any other rights and remedies it may have against the Contractor including... any remedies in negligence'.

At first instance in the Technology and Construction Court, Judge Gilliland QC gave judgment for Tyco, and ordered Rolls Royce to repay the sums paid under the adjudication.

Rolls Royce appealed.

Decision

Rix LJ identified two issues for determination, the construction of the contract and whether the provision for joint names insurance was overriding.

1. The issue of the construction of the contract

Rix LJ determined that, as a matter of interpretation of clause 13.5, Tyco's liability to Rolls Royce for negligence was not excluded for the following reasons:

The wording of clause 13.5 in relation to existing structures did not include the contractor in the group of "others including, but not limited to, contractors". The wording in relation to insurance for existing structures was in marked contrast to the provision for insurance for works, which included the defined term "Contractor". This was deemed to be significant. Rix LJ said that it was not

natural to refer to the contractor as one of a group of others when in the remainder of the contract, reference to Tyco was made by means of the defined term "Contractor". This point alone was deemed sufficient to decide the appeal, but Rix LJ went on to make other observations.

First, the purpose of the opening section of clause 13.5 was to reassure the various contractors that the employer had sufficient resources to reinstate if this should be necessary. Its purpose was not to provide separate liability insurance to Tyco in respect of existing structures.

Second, clause 13.5 had to be considered in the context of the rest of the contract, in which there was nothing expressly excluding Tyco's obligations to indemnify Rolls Royce in respect of loss or damage caused by its negligence. In this respect, Rix LJ distinguished the present case from CRS and Scottish & Newcastle Plc v GD Construction (St. Albans) Ltd. [2003] EWCA Civ 16 ("Scottish & Newcastle"), in which there were express exclusions of the contractor's liability for negligence.

Third, Rix LJ relied on the judgment in London Borough of Barking & Dagenham v Stamford Asphalt Company Ltd [1997] 82 BLR 25 ("Barking & Dagenham"), that, in the absence of clear language to the contrary, a contractor was not protected by a joint names insurance policy if the damage was caused by his negligence. In both CRS and Scottish & Newcastle there was clear language indicating a "special regime" of insurance which supplanted the contractor's usual obligations to the employer. There was no such express language within the present contract.

2. Does a provision for joint names insurance override provisions that one joint named insured is liable to another for negligence?

Rix LJ said that this issue was not determinative of the appeal but commented that it is possible for joint names insurance to override a contractor's liability for negligence. Ultimately the effect of a clause providing for joint names insurance will depend on the construction of the individual contract.

Counsel for Tyco submitted that CRS created a rule of law preventing one joint insured from making a claim against another in respect of an insured loss. Rix LJ commented that the obiter comments in CRS should not be elevated to a "rule of law" and that it is possible for claims to be made against a joint insured by another joint insured or by an insurer via subrogation.

The appeal was allowed.

Comments

It is noteworthy that the contract in the present case was not a JCT or other standard form contract, and the interpretation of standard form contracts is likely to remain unchanged by this judgment. Many standard form contracts provide for a waiver against subrogation which explicitly prevents insurers from seeking to recover from insured contractors, or any party recognised as an insured under the joint names policy.

However, it is essential to look carefully at the contract provisions, in particular for bespoke contracts, as it appears from this case that insurers may be able to pursue contractors for negligence, despite provisions for a joint names insurance policy, where previously a recovery might not have been considered possible.

Finally, a contractor intending to rely on a contractual provision for a joint names insurance policy must ensure that the wording of the provision is sufficiently clear to ensure that the contractor is included within those parties protected by the joint names policy.

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