



reinsurance law update

newsletter of the reinsurance & insurance group

CASE NOTES *by Andrew Rose and Matthew Line*

December 2008

Misrepresentation

Limit No. 2 Limited v Axa Versicherung

The Court of Appeal decided that a misrepresentation in a broker's presentation had not been a continuing one and, therefore, it was not part of a subsequent presentation to underwriters.

The case involved two fac/oblig energy reinsurance treaties covering construction and operating risks for oil rigs. Lloyd's syndicates were the reassured and the reinsurer was Albingia, which was acquired by Axa.

The first treaty was written in 1996 for a period of twelve months. A later endorsement extended this by seven months. The second treaty was written in 1998 and it was also for twelve months.

Newman Martin and Buchan Limited ("NMB") was the broker for the reassured. Prior to the agreement of the first treaty, NMB sent a fax stating that: "As a matter of principle they [the reassured] retain high standards and would not normally write construction unless the original deductible was at least £500,000 and preferably £1,000,000." The contents of this fax were unknown to the reinsured, although it did supply detailed placing information through NMB.

The treaties did not perform well for the reinsurers, so they inspected the records and discovered that most of the relevant risks ceded by the syndicates had deductibles considerably lower than £500,000. The treaties did not contain any clause requiring the ceded risks to have any particular deductible, but the reinsurers still sought to avoid the treaties on the basis of alleged misrepresentations in NMB's fax.

The Court of Appeal decided that the fax constituted a representation that the reassured did not intend to write energy construction business unless the deductibles were generally above £500,000. The question was whether this representation of intention

constituted a continuing representation that should be deemed to have been repeated at the time when the 1997 extension endorsement and/or the 1998 treaty were agreed. The Court of Appeal held that the representation of intention was not a continuing one. There was a misrepresentation of intention in 1996, which following the decision that the representation was not continuing, meant that the later presentation of the risk for the 1998 treaty was fair. However, the Court also held that as the 1996 treaty could be avoided, then the 1997 extension endorsement could be avoided as well. The endorsement was an amendment to the existing contract, rather than a new contract.

It is clear from this decision that not all representations of intention will continue to be representations for the purposes of later endorsements to, or renewals of, a policy, particularly where there has been a considerable lapse of time.

Non-Party Costs Orders

1 Equitas Limited v Horace Holman & Company Limited ("HH")

The Court provided guidance on the requirements for obtaining non-party costs orders.

In September 1996 Equitas took an assignment of rights from most of the members of the 1992 Lloyd's Syndicates and earlier years, regarding their reinsurance and retrocession contracts for all non-life business as part of the Reconstruction and Renewal Programme. In October 2002 Equitas brought proceedings against HH for breaches of contractual, tortious and fiduciary duties. HH was a Lloyd's broker, which had been in run-off since January 2003.

At a hearing in February 2007, the Judge stated that the second defendant (HH's director) should be warned about any potential application for costs against him. The Second Defendant was not so

warned before the subsequent hearing, or before he gave evidence.

By April 2007 the key issue between the parties was who should pay for the proceedings. With the exception of some costs for a certain period, the Court ordered HH to pay the costs of Equitas. HH failed to pay. By June 2007, HH was in a creditors' voluntary liquidation.

In October 2007 Equitas applied for an order that HH's director should be added as a party to the proceedings for the purpose of making a non-party costs order ("NPCO") against him. Equitas claimed that:

- i the director controlled HH's conduct of the proceedings;
- ii he had effectively funded the proceedings;
- iii he would benefit from them; and
- iv he had caused the proceedings to continue in order to safeguard his personal position.

Equitas argued that he was using his position as a director improperly.

The Court determined that NPCOs would only be granted in exceptional circumstances. Equitas had a cause of action against HH's director and could have joined him as a party to the original proceedings. He should have been warned of a possible application for costs against him, then he would have had the chance to make an application to be joined in the proceedings. The Court found that the director had not been acting for his own benefit and had not been funding the proceedings. He had only controlled HH in his role as its director. For these reasons the application by Equitas had to be refused. The failure to warn the director about the application was another reason for refusing to make such an order.

2 Palmer v Palmer

The Court of Appeal granted a costs order against the defendant's insurers and set out the criteria for making such orders against insurers.

The claimant was severely injured in a car accident. The defendant's motor policy was avoided for non-disclosure. The claimant joined the Motor Insurers Bureau ("MIB") to the proceedings in order to recover any judgment from the MIB under the Uninsured Drivers Agreement ("UDA").

The MIB required the claimant to bring an action against any other person responsible for the loss, so that the MIB could deduct the sum recovered from

the amount payable under the UDA. The MIB instructed the claimant to claim against a company named PZP, which had manufactured a safety device on the claimant's seatbelt. The MIB alleged that the device had design defects and that if it had not been used then the claimant would not have been injured. The judgment on liability went against PZP and the damages to be awarded to the claimant were likely to exceed £2m.

Royal and Sun Alliance ("RSA") provided PZP with product liability cover, which had an aggregate limit of indemnity for both liability and costs of £500,000. The claimant's judgment would not be satisfied in full by that policy, so the MIB applied for an order for costs against RSA under Section 51 of the Supreme Court Act 1981. The MIB argued that, although RSA had not been a party to the proceedings, RSA had defended the claim for its own benefit.

The trial Judge decided that the defence of the claim had been entirely for the benefit of RSA because RSA had managed the litigation and RSA had known throughout that PZP was near insolvency. RSA had been the defendant in all but name. The Court of Appeal agreed and stated that the criteria for making such orders included the following factors:

- i the insurer decided that the claim would be pursued;
- ii the insurer paid for the defence;
- iii the insurer had conduct of the litigation;
- iv the insurer defended the claim solely for its own interests; and
- v the defence failed completely.



The question to ask was whether the insurers were motivated entirely, or mostly, by their own interests in defending the litigation. RSA had rejected an offer from the claimant without notifying PZP and without investigating PZP's financial status. RSA was funding, controlling and directing the defence for its own interests.

This case illustrates that insurers who provide policies with limits of indemnity likely to be exceeded by a successful claim against the insured should give serious consideration at an early stage to the merits of the defence: this may include difficult discussions with an insured who may be keen to defend the action.

Non-Disclosure

Laker Vent Engineering Limited ("Laker") v Templeton Insurance Company Limited ("Templeton")

The Court decided on the facts that a dispute between a contractor and an insured sub-contractor did not have to be disclosed to underwriters for renewal purposes, unless some objective aspects of the relationship demonstrated that there was a real risk of the dispute escalating to the point where it would require a formal method of dispute resolution.

Laker twice renewed a Constructor's Protection Service Policy, which included legal expenses cover. As a specialist sub-contractor, Laker had contracted to manufacture, supply and install piping for a project at a power station. Laker notified Templeton of a claim for legal expenses in an arbitration against the main contractor. The claim was rejected on the basis that Laker had failed to disclose a dispute between it and the main contractor, which constituted a material circumstance known to Laker prior to the renewal. Templeton claimed the policy was void for material non-disclosure.

The policy stated *"It is important to note that on any renewal declaration to the Insurers, the Insured must advise the Insurer of any potential claims, not already advised by the Insured and received by the Insurers"*. The Court held that this clause simply reminded the insured of the duty to disclose any material potential claim. A material claim was one that would influence the judgment of a prudent underwriter in fixing the premium or deciding whether to take the risk.

The Court considered that an insurer providing legal expenses cover under this type of policy must be presumed to know that construction contracts nearly always involve disputes that may lead to legal action. If every dispute was material, then almost every aspect of a major construction contract would have to be the subject of disclosure. For disclosure to be required, there had to be some objective aspects of the

relationship that demonstrated a real risk of the dispute escalating to formal procedures for dispute resolution.

The relationship between Laker and the main contractor was *"par for the course"* and communications between them as at the date of the renewal had been amicable and constructive. The fact that the relationship subsequently deteriorated was irrelevant. The Court found that there had been no material non-disclosure.



Subrogation

Tyco Fire and Integrated Solutions (UK) Limited ("Tyco") v Rolls Royce Motor Cars Limited ("RR")

The Court of Appeal decided that the contract between the parties stated that RR's property policy should cover contractors and other persons, so that if a disaster struck RR would be able to reinstate the property. The contract did not provide Tyco with the benefit of such cover and did not provide for insurance of losses caused by any negligence on the part of Tyco.

In November 2002 Tyco contracted to design, install, commission and complete a fire protection system at a new assembly plant for RR. Tyco completed their works on 26 November 2003. The plant itself was completed on 31 May 2004. In July 2004 water escaped from a pipe installed by Tyco.

In accordance with its contract, Tyco indemnified RR and repaired the pipe. The outstanding dispute was regarding damage to other parts of the plant and other losses caused by the escape of water. Tyco applied for a declaration that it was not liable (even if they had been negligent). Clause 13.5 of the contract between Tyco and RR stated that:

"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 ... against the risks covered by the Employer's insurance policy referred to in Schedule 2 (i.e. the Specified Perils) subject to the terms, conditions, exclusions and excesses (uninsured amounts) of the said policy".

The Court had to decide whether this clause relieved Tyco of liability for risks which fell within the cover that RR was required to obtain, but had not in fact done so. Did the clause require RR to insure against the losses that had occurred? If there was no such obligation, then Tyco would still be liable. If there was such an obligation, then did it amount to a waiver of any cause of action that RR might have against Tyco? Did it operate as an implied promise by RR to claim on their insurance rather than against Tyco if the loss was covered by insurance?

The Court of Appeal reversed the trial Judge's decision and concluded that Tyco was still liable. Under clause 2.3 of the contract Tyco was required to indemnify RR against any loss suffered by RR, or incurred by way of liability to a third party, following any breach of contract or negligence by Tyco. Clause 2.3 meant that unless the insurance provision removed that liability, RR would be entitled to recover from Tyco. Other clauses in the contract indicated that Tyco would remain responsible for loss arising from defective water pipes.

The Court of Appeal held that clause 13.5 was merely a statement that RR's own property policy covered contractors and other persons, so that if a disaster struck then RR would have sufficient reinstatement cover and work could continue. The wording did not provide Tyco with the benefit of any such insurance cover and did not embrace losses caused as a result of any negligence by Tyco.

The relationship between insurance policies and complex construction contracts, often involving multiple parties, continues to give rise to difficulties. The best solution is ensuring at the commencement of the project that the insurance arrangements are co-ordinated with the contractual documentation. The Court of Appeal's decision makes it clear that the availability of rights of subrogation will depend on the terms of the commercial contracts and not on the insurance policy.

Loss Adjusters' Costs

Cuthbert v Gair

The costs Judge held that the insurers' costs of instructing loss adjusters could not be recovered by the insurers.

After the conclusion of legal proceedings Gair successfully claimed, as part of a legal costs claim, for the insurers' costs of instructing loss adjusters. The costs had been claimed as a disbursement in the billed costs. Cuthbert appealed on the basis that the loss adjusters were engaged by the insurers prior to the instruction of the solicitors, so it was not a disbursement.

The costs Judge held that, if instructed first, the solicitors would have completed the investigations carried out by the loss adjusters. The loss adjusters' fees would not have been incurred and so should not be recoverable.

The insurers argued that their costs of instructing the loss adjusters should be treated as the insured's costs in accordance with the doctrine of subrogation. The costs Judge held that the cause of action had not been assigned from the insured to the insurer as a result of the subrogation clause in the policy. The insured was not liable for the loss adjusters' fees, so the insured had not suffered a loss for which the insurer could bring a subrogated claim.

Based on this case, instructing a solicitor early with a view to them instructing a loss adjuster may improve the prospects of recovering the loss adjusters' fees. The sub-contract could also be argued to be more cost effective so that it should, therefore, be recoverable.



Professional Negligence

Moore Stephens ("MS") -v- Stone & Rolls Limited ("SRL") (In Liquidation)

The Court of Appeal held that a Court must apply the principle that it will not assist a party that bases its cause of action on an illegal or immoral act.

MS appealed against a decision not to strike out a negligence claim brought against them by SRL's liquidator. The liquidator claimed against MS because MS had failed to expose a fraud by Mr Stojevic, who solely owned and controlled SRL. Mr Stojevic had caused SRL to engage in a letter of credit fraud against certain banks. One bank successfully claimed against both SRL and Mr Stojevic. SRL was unable to pay the damages awarded and went into liquidation.

The Court of Appeal made a distinction between where a fraud was committed against a third party (such as a bank) and where a fraud is committed by a director against his own company. In the former

case, the company was deemed to be the perpetrator of the fraud (even though the fraud was committed by its director). In the latter case, the company was deemed to be the victim of the fraud. When the company is the victim, the fraudulent acts of its directors are not attributed to the company, so the company can still bring claims that arise from the fraud.

The Court of Appeal held that the *ex turpi causa* principle (i.e. no Court will assist a party that founds its cause of action on an illegal or immoral act) is not subject to the Court's discretion. The claim was linked with the fraud perpetrated on the banks and SRL's liquidator could not bring the claim without relying on the illegality. The illegality principle applied and the claim was barred. SRL was not the target or the victim of Mr Stojevic's fraud, but was itself the fraudster (through its agent Mr Stojevic), even though the fraud ultimately caused harm to SRL.

An argument was raised that MS should not have the benefit of the principle because they were retained to prevent fraud and they failed to do so. The Court of Appeal held that there was no authority to support this proposition.

HLB Kidsons (a firm) ("Kidsons") v Lloyd's Underwriters subscribing to Lloyd's Policy No. 621/PK1D00101 ("Underwriters")

The Court of Appeal examined several notifications to insurers in order to determine which ones triggered cover under the policy. The Court of Appeal held that the requirement in this policy to give notice "*as soon as practicable*" was a condition precedent, even though it was not expressly described in the wording as a such.

Kidsons, who were chartered accountants, held three "claims made" professional indemnity insurance policies. General Condition 4 of the policies extended the cover to claims brought after the end of the policy period on the condition that Kidsons gave Underwriters notice "*as soon as practicable*" of any circumstance Kidsons became aware of during the policy period that might give rise to a loss or claim against them.

Some time after the expiry of the policy period, claims were made against Kidsons regarding their ownership and management of a company that marketed tax avoidance schemes and provided fiscal engineering services. Some clients claimed that they had been negligently advised to enter into flawed schemes.

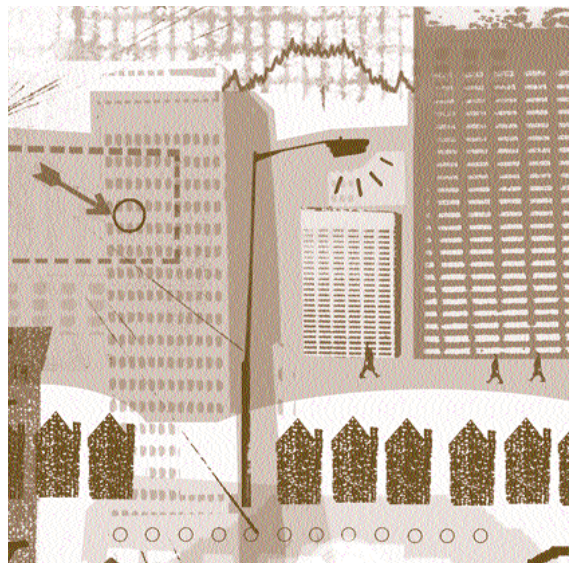
A Kidsons' employee had previously questioned the schemes including the implementation of a discounted option arrangement. Kidsons' insurance brokers had made four presentations to Underwriters regarding

these concerns. The first presentation was a letter from the broker to the Underwriters, which Kidsons relied on as notification for the purposes of General Condition 4.

At first instance it was held that the letter was not an effective notification and neither was a second presentation consisting of the same letter with some further documentation. A third presentation had been effective, but only to notify the lead Underwriter and the company market, and was also limited to claims arising from the implementation of the discounted option arrangement. It was also held that a fourth presentation to the following Lloyd's market was ineffective because it had not been made "*as soon as practicable*" as required by the policies.

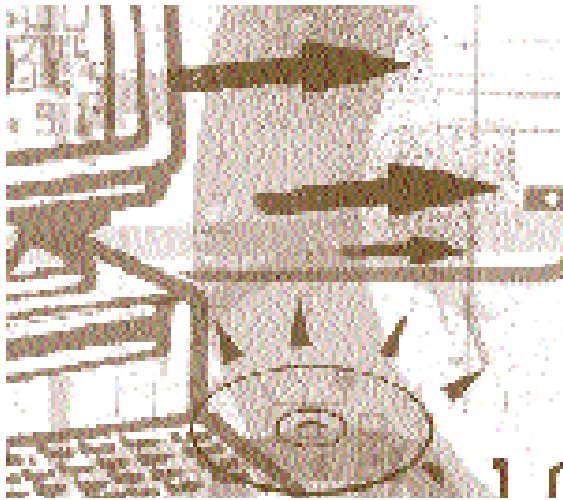
Kidsons appealed and the appeal was allowed in part. The second presentation had been intended to be a notification of circumstances. It was accompanied by a claims bordereau and referred to "*possible tax errors in fiscal engineering work*". The Court of Appeal held that the Judge should have accepted Underwriters' concession that the presentation was effective, but limited to a notification of circumstances concerned with the implementation stage of the discounted option schemes. A reasonable person would consider that the only concern which was being notified to Underwriters was the view that the Inland Revenue could be critical of procedures in the implementation of some products. The second presentation successfully notified Underwriters that the implementation of certain of the tax products might be criticised and that this might give rise to possible claims or losses.

The third presentation was held to be an effective notification to the company market as well as to the lead Underwriter of possible problems arising out of the implementation of the tax products generally and was not limited to the discounted option scheme.



The Judge at first instance was right that the fourth presentation to the following Lloyd's market was not made "as soon as practicable". The clause requiring Kidsons to give notice "as soon as practicable" was not expressed to be a condition precedent, but both the trial Judge and the Court of Appeal held that the timing of the notification was a condition precedent and that the fourth presentation was ineffective for failing to comply with it.

It is reasonably clear from the judgment that the Court of Appeal regarded Kidsons as being somewhat economical with the information in the notifications, given the firm's claims history.



Seele Austria GMBH & Co ("Seele") v Tokio Marine Europe Insurance Limited ("Tokio")

In this case the Court of Appeal considered the meaning of the word "Damage" in the context of an extension to an all risks policy.

Seele claimed on their all risks policy for "access costs" incurred while fixing defective windows in a development. Memorandum 18(3) to the policy provided an indemnity for "intentional damage necessarily caused to the Insured Property ... to enable the replacement or rectification of Insured Property ... which is in a defective condition".

The Judge rejected the claim on the basis that an element of fortuity was required as well as consequential damage to the insured property. The costs incurred in rectifying defective work alone were not enough to trigger the cover. The Judge held if there was no damage, then there would be no indemnity. Damage did not mean a defect in the works, but an adverse physical effect to the works as a result of the defect.

The Court of Appeal came to a different conclusion. The Memorandum was a separate extension to the policy coverage. There was no need for it to be dependent on physical damage to

the insured property. Seele was entitled to an indemnity for the costs of removing and replacing external cladding and plasterboard ceilings to enable a repair to defective sealing membranes. The Court of Appeal emphasised that, in this the plain and ordinary meaning of the policy's words took precedence over their commercial or business use.

Public Liability

Bedfordshire Police Authority ("BPA") v Constable

The Court considered the meaning of the phrase "as damages" in a public liability policy. The Court came to the conclusion that, in this case, it could not apply the principle that parties to a commercial contract are considered to have contracted on the basis of previous decisions on the interpretation of similar contracts.

In February 2002 there was a riot at the Yarl's Wood Immigration Detention Centre, which caused property damage and other losses. The property owners and their insurers submitted claims to the BPA under the Riot (Damages) Act 1886 ("RDA"). The RDA states that when a riot damages property, the owner is entitled to compensation from the local police authority. The BPA had a primary and excess public liability policy.

The primary insurer accepted that the liability of the BPA under the RDA was covered by its policy, but the excess insurer did not. The policy contained the clause: "The Company will indemnify the assured in respect of all sums which the assured may become legally liable to pay as damages ... for ... (b) accidental damage to property ... occurring within the Geographical Limits during the Period of Insurance arising out of the Business".

The Court held that the BPA was entitled to cover under the excess policy for any liability to compensate under the RDA. The purpose of the policy included the protection of the police fund from claims by third parties for damaged property. "Damages" in the policy included compensation under the RDA because the parties would think that liability under the RDA would be covered. The parties would not have expected the policy to cover private liability arising from private contractual obligations. The parties would have expected the BPA's liability under the RDA to be covered. The policy consisted of various standard form provisions put together to meet the BPA's policy needs. The content of the policy and the way it was assembled suggested that the parties had not given a great deal of thought to it. The Court decided that the niceties of language should, in this case, give way to a commercial construction because

this was more likely to give effect to the intention of the parties. The words “as damages” had not been chosen by the parties with a view to adopting the definitions of these words used in previous case law.

The principle that parties to a commercial contract are taken to have contracted against the background of previous decisions upon the construction of similar contracts could not be applied in this case. The parties had apparently not given detailed thought to the wording in the policy, so they could not reasonably be expected to have been aware of the previous relevant case law.

The Court also held that “*arising out of the business*” should include general policing, or the cover would be ineffective for most purposes. The phrase had to be interpreted to give effect to the purpose of the policy. The policy did not exclude claims made under the RDA. The fact that Parliament used the words “damages” in the title of the RDA (a statute providing compensation) indicated that there was no difference in principle between a damages award and an RDA compensatory payment.

The decision should be contrasted with *Royal and Sun Alliance v Bartoline*, where a liability to pay statutory clean-up costs following pollution damage was held not to constitute “damages” under the relevant public liability wording.



Premium Payment

Allianz Insurance Co Egypt (“Allianz”) v Aigaion Insurance Co SA (“AIC”)

The Court examined the formation of a reinsurance contract and considered whether it was still in force.

Allianz alleged that AIC had agreed to reinsure 30% of the cover provided by Allianz in respect of a fleet of tugs. A marine hull slip contained the proposed reinsurance terms and conditions including the term “*Deferred [sic] Premium Clause*” (“the Clause”). Negotiations between Allianz, its broker and AIC led to the revision of the slip, but the Clause remained. An email from AIC to the broker dated 2 April 2005

stated “*cover is bound with effect from 31.3.05 as we had quoted ... our documents to follow*”. The reinsurance policy issued by AIC on 15 April 2005 included a warranty that premiums were payable by 31 March 2005 and 30 June 2005. There was no reference to the Clause.

A debit note issued by AIC stated that the instruments were payable within 60 days of the same dates shown in the policy document. The policy and debit note were not acknowledged by the broker. Neither document was forwarded to Allianz. Allianz paid two premium instalments to the broker, but the broker did not pay them on to AIC.

One of the insured tugs became a constructive total loss and Allianz sought an indemnity from AIC. AIC considered that the policy had automatically lapsed on 31 May 2005 due to non-payment of the premium. AIC argued that the Clause in the slip was so uncertain as to be of no contractual effect in itself and was also so uncertain as to vitiate the entire contract. AIC asserted that there had been no concluded agreement before the reinsurance policy was issued and the failure of the brokers to respond confirmed a contract including the premium payment warranty.

The Court found that an agreement had been concluded between Allianz and AIC by the email dated 2 April 2005. The reinsurance contract was not made ineffective by the Clause in the slip, because the meaning of the Clause could be determined by how the phrase was used in the underlying insurance. The failure to notify AIC of its terms did not matter. The silence of the broker did not impose obligations on Allianz that did not exist under the 2 April 2005 agreement. Cancellation of the reinsurance for non-payment of premium would have required service of a cancellation notice and AIC had not served one. AIC was liable for its share of the loss.

In the matter of Whiteley Insurance Consultants (“W”) (a partnership now in liquidation)

The Court considered the rights of policyholders who held policies that had been unlawfully issued by a broker.

W unlawfully issued policies, which they purported to issue on behalf of certain underwriters. W were not authorised to do so and in some cases the underwriters referred to did not even exist. The policies were issued before and after 14 January 2005 (the date when insurance intermediaries were first required to obtain authorisation from the Financial Services Authority under the Financial Services and Markets Act 2000 (“FSMA”). W’s liquidators applied for directions on numerous issues.

The Court concluded that W had retained premiums as well as assessing and paying claims, so W was

effecting and carrying out insurance as a principal. W was liable to the holders of those policies. W was carrying on a regulated activity as defined by the FSMA, so the contracts could be enforced against it.

Prior to 14 January 2005, W did not require FSA authorisation. Section 26 FSMA provided that policies issued by W were enforceable against W, but not by him. Policyholders could choose between enforcing their policies or recovering their premiums (plus compensation for any loss due to paying the premiums, such as loss of interest and possibly any actual costs of borrowing). Where the policyholder would otherwise have paid premium to another insurer (which was assumed to be the case in this instance), no loss would have been incurred so no compensation would be due. The Court decided that any policyholder who had made, or wished to make a claim, regarding a pre-liquidation event should be assumed not to claim a return of premium (other than in respect of any unexpired portion of the policy).

Section 28(3) FSMA provided the Court with discretion to allow the premium to be kept if it was "*just and equitable in the circumstances of the case*". The policyholders had been covered by W during the policy period and they could enforce the policy, but the Court did not consider these points to be sufficient justification for it to exercise the discretion.

After 14 January 2005, W was FSA authorised as a broker but failed to comply with certain FSA requirements. This did not make the policies void or unenforceable. There was no statutory entitlement to the return of premiums that had been paid, so the Court considered whether the policyholders would be entitled to the return of premiums as damages. The Court concluded that the policyholders would not be entitled to the return of premiums because they had enforceable policies and any claims that might have arisen since then would be provable in the liquidation.

The Court held that the Insurers (Winding Up) Rules 2001 applied to the valuation of the policies and the claims. Sums owed prior to the liquidation date would be the subject of proof in the liquidation in the normal way. Claims arising from events before the liquidation date, but not yet due for payment, did not require the application of any actuarial principles. However, it was still necessary to take account of post-liquidation events to quantify the claims.



If their policies were still current at the date of the winding up, then policyholders could claim back their premiums if the policy period ran from one defined date to another. If the policy was extendable in the case of unavoidable delay, the proportion of the premium to be repaid could not be calculated so there could be no claim for repayment.

Service of Suit Clauses

Ace Capital Limited ("Ace") v CMS Energy Corporation ("CMS")

The Commercial Court considered how a policy containing both an arbitration clause and a service of suit clause should be construed. The Court decided that the two clauses were not inconsistent and that in this case the arbitration clause should take precedence.

Ace was the lead underwriter of political risk policies for CMS. The policies contained a London Court of International Arbitration clause and a service of suit clause. Service of suit clauses are required in many US states to render out of state insurers amenable to the local jurisdiction in the same way as locally licensed insurers. The clauses usually provide that the insured can request the insurer to, and the insurer will, submit to the jurisdiction of a Court of competent jurisdiction within the United States.

CMS suffered a loss and sought to claim on the insurance. CMS commenced proceedings in the USA against Ace. Ace applied for an injunction in England to prevent CMS continuing the American proceedings. The English Court had to decide whether the service of suit provision entitled CMS to commence proceedings in the USA, or whether the arbitration clause should operate instead.

The Court granted the injunction on the basis that the bulk of the American cases did not treat arbitration and service of suit clauses as inconsistent with each other. There were some exceptions to this general rule, but the Court was able to distinguish them. The policies were to be read in the context of American legal policy in favour of arbitration. The service of suit clause could still be used by the insured to compel arbitration, to declare the validity of an award or to enforce an award in a US Court. This was the principal purpose of such a clause.

Lloyd's Syndicate 980 v Sinco

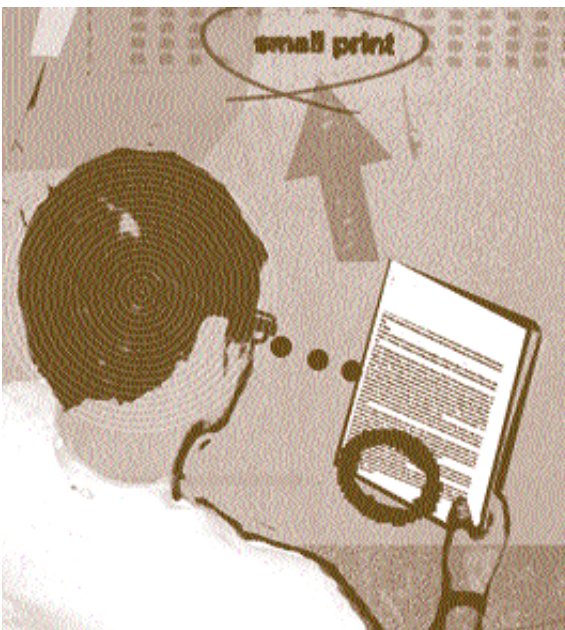
The Court decided that a European Regulation (requiring proceedings involving the same cause of action between the same parties brought in different member states to be stayed by all courts, except the one first seised, until the jurisdiction of the first seised court has been established) was not applicable in this

case because the claims and issues in the proceedings in England were different from those in the proceedings commenced in Greece.

The claimants entered into binding authority agreements with Sinco (a Greek insurance broker). The binders contained exclusive jurisdiction clauses in favour of England. In November 2006, the claimants purported to terminate the binders. In January 2007 the claimants commenced proceedings in England for fraudulent retention of policy premiums and misrepresentation of the amounts of claims brought under the binders. Sinco began proceedings in Greece in April 2007 for unlawful termination of the binders.

The claimants challenged the Greek Court's jurisdiction on the basis that the claims in Greece fell within the English jurisdiction clause in the binders. The Claim Form in the English proceedings was amended in June 2007 to state that the English Courts had jurisdiction pursuant to Council Regulation (EC) 44/2001 ("the Regulation"). This was served on Sinco at the end of June 2007.

In March 2008, Sinco applied for the English proceedings to be stayed. The Court held that the claimants' jurisdiction clause claim was only included after the Greek proceedings had been commenced. The additional claim had a different "cause" to the rest of the claim in the English proceedings. This was because the facts giving rise to the jurisdiction claim (i.e. the institution of the Greek proceedings) had not taken place when the Claim Form was issued. As the English Court was not seised of the entire claim (including amendments) in January 2007, the application for a stay could not be dismissed on the ground that the English Court was first seised.



Under Article 27 of the Regulation where proceedings "involving the same cause of action" and between the same parties are brought in different member states, any Court other than the one first seised shall stay proceedings until the jurisdiction of the first seised court has been established. The aim of Article 27 was to avoid irreconcilable judgments.

The Court looked at the proceedings as a whole and concluded that the substantive claims advanced and the issues were different in the English and Greek proceedings, so Article 27 did not apply. It was not enough that the jurisdiction issue could arise in both actions, so Sinco was not entitled to a stay.

Anti-Suit Injunctions

West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA

The Advocate General ("AG") of the European Court of Justice ("ECJ") has published an opinion that anti-suit injunctions issued by courts of EU member states in support of arbitration agreements are precluded by Council Regulation (EC) 44/2001 ("the Regulation"). The ECJ is not bound by the opinion of the AG, but the ECJ normally follows the AG's view.

A vessel owned by West Tankers ("WT") was chartered to Erg Petroli (ERG) and damaged ERG's jetty in Syracuse, Italy. The charterparty was governed by English law and provided for London arbitration. ERG claimed on its insurance and started arbitration proceedings in London against WT for its uninsured losses.

ERG's insurers (Allianz and others) brought subrogated claims in their own name against WT in Syracuse for the sums they had paid ERG. The liability issues in the Italian proceedings were essentially the same as those in the London arbitration. The Syracuse Court had jurisdiction under the Regulation (because the damage occurred there), subject to its obligation under the New York Convention to refer to arbitration claims that are subject to a valid arbitration agreement (if requested to do so by a party to the claim).

WT began proceedings in England for an injunction requiring the insurers to discontinue the Syracuse proceedings. WT argued that the dispute arose out of the charterparty and the insurers were bound by the arbitration clause contained in it. The English Court held that the insurers' claim was subject to the arbitration clause and issued the injunction.

The insurers obtained permission to appeal directly to the House of Lords, which referred to the ECJ the question of the compatibility of anti-suit injunctions in support of arbitration agreements with the Regulation.

The AG accepted that arbitration was excluded from the Regulation. However, in her opinion the question was whether the proceedings against which the anti-suit injunction proceedings were directed fell within the Regulation. The AG considered that the subject matter of the claim in the Syracuse proceedings was a tortious, and possibly, contractual claim, which fell within the Regulation. The arbitration clause was just a preliminary issue for the Syracuse court when it considered whether it had jurisdiction.

According to the AG, an anti-suit injunction restraining a party from pursuing a claim before a member state's court (in this case the Syracuse court) interfered with proceedings within the Regulation. The AG's opinion was that this should not be permitted even in support of an arbitration agreement.

If the ECJ follows the AG's opinion, then parties will no longer be able to rely on the English court being able to enforce an agreement to arbitrate under English law in England when proceedings have already been commenced in another EU country. It would be for the court in the EU country in which the proceedings had been commenced to determine whether it has jurisdiction, even where there is an arbitration clause purporting to grant jurisdiction to a court in another EU country.

Asbestos - "The Employers' Liability Policy 'Trigger' Litigation"

The High Court decided the correct "trigger" date for mesothelioma claims under employers' liability (EL) policies in six test cases.

Insurers have traditionally settled mesothelioma claims on EL policies according to the date at (or period during) which the sufferer was exposed to asbestos fibres (the "date of exposure"). However, a 2006 judgment in the case of **Bolton MBC v Municipal Mutual Insurance** determined that in relation to public liability (PL) policies, the correct trigger was the "date of injury" which is often not until 30-40 years after the date of exposure.

The Claimants in the Trigger Litigation submitted that EL policy wordings must be construed, as they had always been prior to **Bolton** in 2006, so that the EL policies should respond by reference to the date of exposure. Conversely, the Defendants argued that the policy wordings should not provide cover where no injury was present during the period of insurance.

The court determined that the correct trigger was the date of exposure thus, (preserving the traditional approach of EL insurers). The court recognised that EL policies are usually based on "causation" wordings and PL policies on "occurring" or "happening" wordings. The correct EL policy to respond was the policy during which the "cause" of the injury had occurred - i.e. the exposure to asbestos fibres.

The judgment has averted a policy gap which the court termed a "black hole". The potential impact is demonstrated by the fact that in the four test cases brought on behalf of individuals, there would have been no insurance cover had the court found that the trigger date should be the date of injury. The "black hole" is principally created by the common situation that at the date of injury (typically some 30-40 years after the date of exposure) the employer has gone out of business.

The judgment will also impact on the sharing arrangements between insurers where the date of exposure covers policy periods for more than one insurer. Previously, insurers have shared liability for claims on a pro-rata "time on risk" basis subject to the assumption that the injury arose ten years before the symptoms of mesothelioma were apparent. Based on evidence given during the trial, the court now accepted that a tumour which has caused an "injury" is usually only present five years before the symptoms. Therefore, the period over which insurers will share the liability will change.

Permission to appeal the judgment was given by the trial judge, and it seems likely that the case will be taken to the Court of Appeal.

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