

The BILA cyber risk mock trial

By Laura Crowley, barrister, 4 Pump Court

Introduction

On 22 June, the British Insurance Law Association (BILA) and the Professional Liability Underwriting Society (PLUS) joined forces to stage a mock trial which focused on the highly topical issue of cyber risk. The mock trial took place in Court 4 at the Royal Courts of Justice, Strand, before Lord Justice Aikens and was attended by a full-capacity audience. The counsel involved were Michael Douglas QC and James Leabeater of 4 Pump Court and Tom Weitzman QC and Nicholas Hill of 3 Verulam Buildings.

Cyber crime

Cyber crime is the fastest growing area of organised crime and the insurance industry has reacted rapidly in response to this. “Cyber is one of the key transformational areas of insurance in that its growth is being driven by generational changes in commerce and our social environment”, observed Rick Welsh, Cyber Liability Underwriter at ANV insurance, and one of the participants in the event. “The way we have globally embraced technology to communicate and facilitate commerce means that cyber is emerging as a class of insurance with great growth potential. A once in a generation opportunity, if you like, for the insurance market.”

While there have been a number of high-profile breaches such as the Sony hack, as yet there have been no reported claims in this country which have gone to trial. The event was designed to educate and inform attendees, in an entertaining format, about some of the main issues arising in relation to insurance policies covering this type of risk, both on the underwriting and claims sides. The audience included a number of experts in the field but there were also many who were new to this area and who were there to learn.

Cyber liability and cover

The event began with a preliminary afternoon session in the auditorium at Freshfields Bruckhaus Deringer LLP, It was chaired and guided through by Stephen Lewis of Clyde & Co, the Chairman of BILA. This was designed to explain the basic nature of cyber liability and cover. Ken Munro of PenTest Partners used a Playstation 3 to demonstrate some of the techniques commonly deployed by hackers. This was followed by a panel discussion on the underwriting of cyber risks. Rick Welsh and Pat Donnelly, the Chief Operating Officer of AON Broking Financial Services Group, looked at the product from a real-life perspective and highlighted a few aspects where it differs from the facts in the mock trial scenario. For example, the underwriter would have employed his own cyber expert to examine the risk at the underwriting stage, rather than simply relying on the policyholder’s disclosure. David Nayler, the Head of UK FSG Legal & Claims Practice at Aon Financial Services Group, discussed the product from the claims perspective.

The scenario for the mock trial

The scenario for the mock trial was introduced in a role play session in which several experienced lawyers and insurance professionals gamely agreed to participate. The nature of the product and the risk were explained in a broker pitch and the placing broker gave an insight into the information an underwriter would be looking for when writing this type of business.

The scenario was based around several real claims and so was particularly instructive in illustrating the sort of issues that arise. It involved a claim brought by “JustCard,” a small pre-paid card processing business against its insurer, “Cybersafe,” for indemnity under a Cyber-Policy for losses caused as a result of a cyber attack. The cyber attack involved 50 counterfeit prepaid cards being used to withdraw £15.8 mill from ATMs in 30 countries. The method used by the cyber gang was a variant of the so-called “buffer overflow” technique. The losses included the initial £15.8 mill cost of reimbursing customers for sums taken from their cards and £24 mill crisis management costs, with £5 mill in long-term remediation costs and £3mill other potential liabilities. Such losses would be quite typical.

The role of the CEO of the policyholder was played by Christine Williams, a barrister working as a claims specialist at Xchanging Claims Services; the risk manager by Jacquetta Castle, a partner in insurance law at Fishburns and a former chairman of BILA; the underwriter was played by Rick Welsh; and the broker by Patrick Donnelly.

The mock trial

The event culminated in a mock trial in a packed courtroom in the Royal Courts of Justice in London, attended by about 160 delegates, at which Lord Justice Aikens presided. JustCard was represented by Michael Douglas QC and James Leabeater of 4 Pump Court and Cybersafe was represented by Tom Weitzman QC and Nicholas Hill of 3 Verulam Buildings.

The arguments in the case raised issues which could potentially arise in such policies. JustCard had chosen not to upgrade its security software to the most recent version for purely financial reasons. It was not asked and did not inform the underwriter that this was the case, although it provided the technical documentation about the software it owned.

CyberSafe argued that it was entitled to avoid the policy for material non-disclosure. It argued in the alternative that it was entitled to decline indemnity on the basis of an exclusion clause which required JustCard to “use best efforts to install commercially available software product updates and releases”. (Interestingly, in the panel discussion Pat Donnelly had said that he would never have allowed this exclusion clause to pass through as it was). Arguments were also raised as to the recoverability of specific types of cost, based on the policy wording, if cover as a whole could not be resisted.

Some lively and persistent cross-examination of the witnesses, played by Rick Welsh, Christine Williams and Jacquetta Castle, ensued. This provided an engaging and entertaining means of exploring the facts of this particular case. In the course of evidence, it became clear, for example, that information about upgrades did not, on the evidence of the underwriter, influence him. Counsel delivered closing submissions, interspersed with searching questions from Lord Justice Aikens.

The outcome

At the close of proceedings, Lord Justice Aikens delivered a clear and concise judgment, an approved transcript of which appears at page 34. The judge held that, based on the underwriter's evidence, CyberSafe was not entitled to avoid for material non-disclosure. However, since JustCard had made no attempt to upgrade their software or explore alternatives, cover was excluded by the exclusion clause. A victory for insurers on this occasion, which greatly pleased the audience! The evening rounded off with a garden party at Gray's Inn.

Comment

This was an extremely informative event about an area which is likely to increase in significance. "The key to this great potential is understanding how cyber insurance is as relevant to our clients as insurance for tangible property", concluded Rick Welsh. "The BILA/PLUS Cyber Mock Trial was useful in helping to do that. Recent attacks such as the Sony data breach have so much relevance to this new class and the event was a useful forum to help articulate that."

From a BILA/ PLUS perspective, it was also a very successful collaboration, which brought together the underwriting, broking and legal communities.

The event was filmed for educational purposes. Video clips of the event at Freshfields, the mock trial and the judgment are accessible on the websites of BILA and PLUS .

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