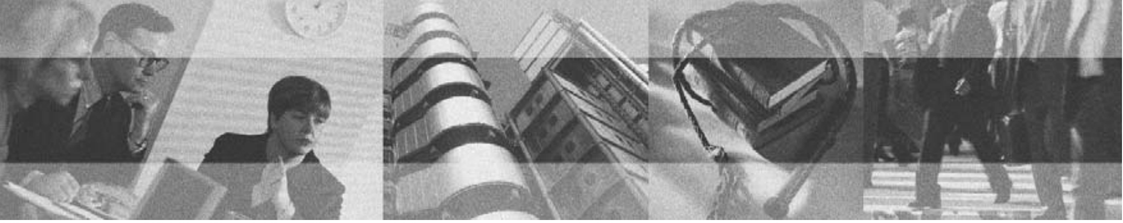

INSURANCE CASES IN 2009

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This update on current insurance case law was first presented at the BILA Half-Day Conference, held at Lloyd's on 11 September 2001.

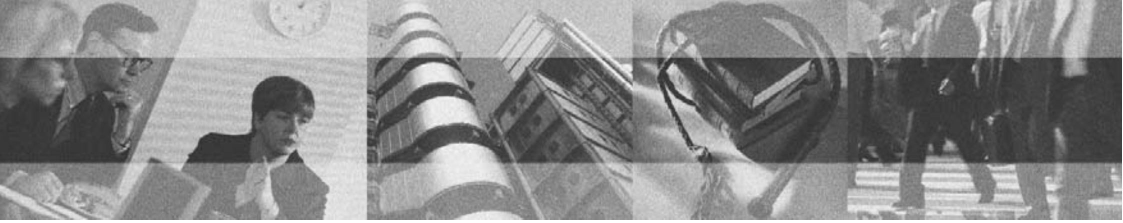
Utmost Good faith

Lewis v Norwich Union Healthcare Ltd [2009] EW Misc 2 (EWCC)

On 1 January 2000 the assured was issued with an income protection health policy. The proposal form was completed by his agent. The assured did not disclose a visit to his GP during which he complained of a stiff knee, although nothing untoward was found. In 2002 the assured was forced to give up work, and the insurers relied upon non-disclosure. The underwriter responsible for writing the risk did not give evidence. The Court found that the visit was material, that information in respect of it had not been waived (given that the assured's agent was aware of what had to be disclosed) and that the insurers were unaware of the visit. However, the Court further ruled that the insurers had not proved inducement. In the absence of evidence from the underwriter in question, the court was not satisfied, from the evidence of another underwriter and of the insurers' general practice, that the underwriter in question would have refused the risk or imposed an exclusion, particularly as it had been shown that the underwriter had not in other respects acted prudently (eg, by not awaiting the results of an allergy test before issuing the policy).

Laker Vent Engineering Ltd v Templeton Insurance Ltd [2009] EWCA Civ 62

LVE, a firm specialising in the fabrication and installation of pipework and pumps, was insured by Templeton against legal expenses, inter alia. The policy was renewed on 17 January 2005, but retroactive to 19 December 2004. The policy made it a condition precedent to Templeton's liability that Templeton were notified in writing immediately LVE became aware of any cause, event or circumstance which had given or was likely to give rise to a construction claim. In June 2004 LVE entered into a contract with GWUG, under which LVE was to act as sub-contractor for the installation of piping at a major engineering project in Nottinghamshire. Various disputes arose between the parties. On 17 February 2005, LVE made a claim against Templeton in respect of pending legal expenses in an arbitration that LVE intended to pursue against GWUG. Templeton argued that it was entitled to avoid the policy for non-disclosure of the pre-existing dispute, or alternatively that LVE had known of the likelihood of arbitration but had failed to notify immediately, in breach of the claims condition. The Court of Appeal, upholding the rulings of HHJ Hegarty QC, dismissed both defences. (1) The issues were factual and the Court of Appeal should be slow to overturn inferences drawn by the trial judge from factual findings. (2) There was no non-disclosure. The judge had concluded that the outstanding dispute was not one which had at the time of renewal showed a real risk of escalating into a need for formal dispute resolution procedures, and in any event Templeton had produced no evidence from their underwriters and so had been unable to establish inducement. (3) The claims condition had not been broken. There had to be an objective likelihood of a claim to trigger the notification obligation, and on the facts there was no such likelihood.



Claims

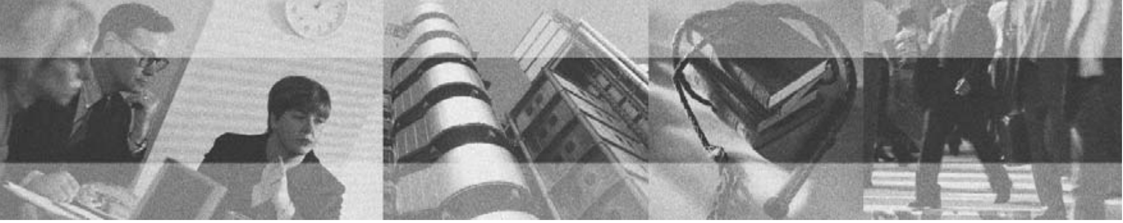
Jones v Environcom Ltd [2009] EWHC 16 (Comm)

The claimant represented insurers who had insured Environcom's recycling facility under two policies covering the period 25 May 2007 to 24 May 2008. The premises were destroyed by a major fire in September 2007, and the facility had to be demolished. In the present proceedings the insurers sought a declaration that the policies could be set aside on the basis that Environcom had failed to disclose the use of plasma guns on the premises, that fact being material because those tools had been associated with small fires. Environcom's response was that the insurers had surveyed the premises in 2006 and again after the policy had incepted, and were aware of the use of plasma guns. There was also a counterclaim in the amount of some £2.9 million, representing property damage and third party claims. The insurers, in September 2008, applied to the court for an order for security for their costs in defending the counterclaim in accordance with CPR r 25.13. The amount of security sought was £147,001.46, which was an estimate of the insurers' total costs in the proceedings and not simply those relating to the counterclaim. The basis for the application was that there was reason to believe that Environcom would not be able to pay the insurers' costs if it was ordered to do so (see CPR r 25.13(2)(c)). Gloster J held that an order for security for costs should be made. (1) The question to be asked was whether it was just for an order for security for costs to be made. (2) The counterclaim had a vitality of its own, in that if the insurers had not sought negative declaratory relief then Environcom would have commenced its own action – once the counterclaim had been made, the insurers' own action became irrelevant. (3) There was no objection in principle to an order for security for costs which encompassed the entirety of the insurers' costs of defending the counterclaim, even though the issues were the same as those raised in the claim itself.

Porter v Zurich Insurance Co [2009] EWHC 376 (QB)

Mr Porter, insured his house and possessions with Zurich, for 12 months from 12 September 2000. The policy excluded loss caused by "any wilful or malicious act by a member of the family". The policy also contained a claims co-operation clause following a loss. Mr Porter suffered from a persistent delusional disorder. On 27 March 2001 he had been drinking heavily, and decided to commit suicide by setting fire to his house. Having set a fire, he changed his mind and escaped, but the house was seriously damaged. The house had to be boarded up, but in the following months there were three thefts of possessions from the house. Claims were made for the fire damage and also for the thefts. The insurers relied upon public policy and the "wilful act" exclusion to defeat the fire claim, and they relied upon Mr Porter's failure to co-operate with loss adjusters – by not producing documents and refusing to allow access to the house – as a defence to the theft claims. Coulson J held as follows.

(1) The insurers were not liable for the fire claim. An assured could not at common law recover for a loss deliberately caused by his own criminal act, or under the policy for his own wilful act, if he had intended to cause the loss or if he acted with reckless disregard to the consequences of his actions. The assured could nevertheless recover if he could prove insanity within the legal test laid down by the M'Naghten Rules (see M'Naghten's Case (1843) 10 Cl & Fin 200), namely that he was so insane that he was not legally responsible for his actions. That test had not been satisfied on the facts: the assured knew exactly what he was doing.



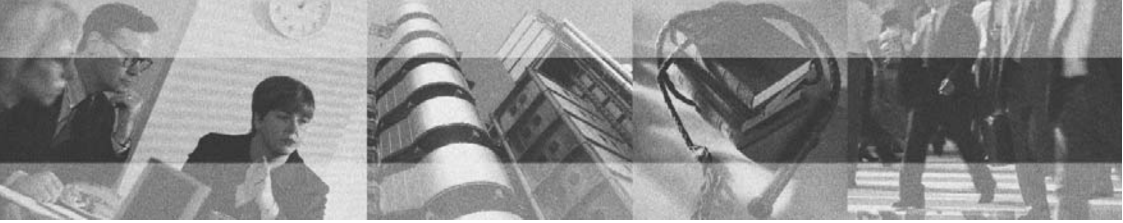
(2) The theft claims could go ahead to a hearing on quantum. Although the assured was in clear breach of the claims co-operation clause, the insurers had not shown that those breaches caused any loss recoverable by way of damages. The insurers had merely alleged that some of the goods claimed to have been stolen were also said to have been fire-damaged for the purposes of the fire claim, but such duplication did not give any automatic defence: the insurers had to prove actual loss flowing from the failure to co-operate.

Direct Line Insurance plc v Fox [2009] EWHC 386 (QB)

The defendant's property policy contained the usual fraudulent claims clause: "If any claim or part of a claim is made fraudulently or falsely, the policy shall become void and all benefit under this policy will be forfeited." The assured suffered a fire at his house, and was paid about £32,000 in respect of damage to contents and on finding alternative accommodation pending rebuilding work. On 7 June 2007 he reached agreement with insurers under which he agreed to accept the sum of £46,524.50 in full settlement and discharge of all claims for the buildings: an initial payment of £42,412.00 was to be paid, followed by a final payment of £4,112.50 for VAT subject to the defendant providing invoices demonstrating the outlay for VAT. The defendant subsequently submitted an invoice from a builder, which showed that VAT had been paid. Further investigation showed that the invoice had probably been forged and that the work had not been carried out by that builder. The insurers sought to recover all sums paid by them under the policy, in reliance on the fraudulent claims clause. The court ruled that they were unable to do so, on the ground that the assured had not made a fraudulent claim at all. The settlement agreement resolved the claim and replaced it with a new agreement: there was no challenge to the validity of the agreement, and all that had happened was that the assured had failed to produce valid evidence that he had paid VAT, so that the only consequence was that he could not recover the sum payable for VAT. If that was wrong, then the court rejected the assured's alternative arguments that: (1) fraud could be retracted – the court's view was that fraud could not be retracted, but even if that was wrong any retraction in the present case was after the fraud had been discovered; and (2) the fraud clause was void under the Unfair Terms in Consumer Contracts Regulations 1999 – the court held that the clause did not operate to avoid the policy ab initio but merely precluded recovery for losses occurring after the fraud, so that it reflected the common law.

Shah v Wasim Ul-Haq [2009] EWCA Civ 542

S negligently drove her car into the rear of a car being driven by WUH with his wife ZP and two children as passengers. A claim was brought by WUH and ZP, and a claim was also made by WUH's mother-in-law, SK, who claimed that she had been in the car at the same time. S asserted that SK had not been in the car, that she had been encouraged by WUH to make a fraudulent claim and accordingly that all three claims – including the genuine claims of WUH and ZP – should be struck out under CPR3.4(2) on the grounds of abuse of process. The Court of Appeal ruled that there was no general rule of law that a claim which was in part fraudulent was lost in its entirety by reason of the fraud, and that the insurance rule that a claim was lost even if only partially fraudulent was confined to that context. The CA followed Churchill Car Insurance v Kelly [2006] EWHC 18 (QB) in holding that the genuine part of the claim was unaffected by the fraud in respect of the rest of the claim. It followed that CPR 3.4(2) could not be used to strike out the genuine claims.



Intermediaries

Dunlop Heywards (DHL) Ltd v Erinaceous Insurance Services Ltd [2009] EWCA Civ 354

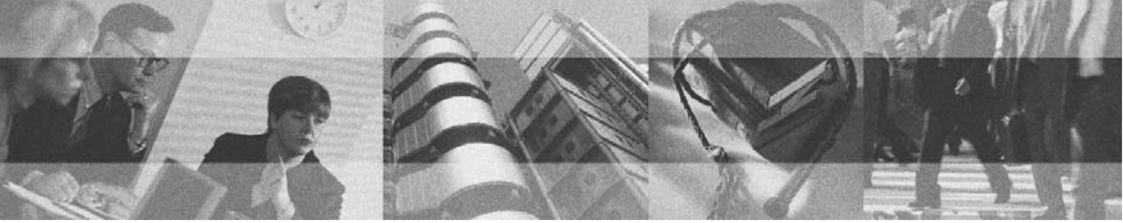
Producing brokers entered into arrangements with placing brokers for renewal of the assured's excess liability cover: the placing brokers were appointed following a presentation to the producing brokers but the appointment was in effect made by the assured. The policy obtained by the placing brokers contained a restriction on cover to Commercial Property Management activities, a restriction which had not appeared in the earlier documents passing between the parties leading up to the slip on which the policy was based; draft wording had been sent to the producing brokers by the placing brokers but no objection was raised. Claims were made against the assured in respect of allegedly fraudulent valuations. The assured did not make any claim against the insurers but instead claimed against the producing brokers. The producing brokers sought to have the insurers joined to the proceedings under CPR 19.2, an application contested by the insurers. The producing brokers also sought indemnity and contribution from the placing brokers, and the placing brokers sought to have the claim against them struck out.

Field J held at first instance that the slip had replaced any earlier agreements so that there was no basis for rectification of the wording, and although there was an argument to be had on coverage it was not appropriate to join the insurers to the proceedings unless a claim was actually made against them. Joinder was thus refused. As far as the placing brokers were concerned, Field J held that the claim should not be struck out. It was arguable that the placing brokers were in breach of their contract with the producing brokers, in that they had undertaken to renew the insurance on no less favourable terms than the expiring cover. Field J also held that it was arguable that the placing brokers had assumed a direct responsibility in tort towards the assured even though there was no contractual relationship between them.

The Court of Appeal upheld the producing brokers' appeal against Field J's refusal to order the joinder of the insurers. The Court of Appeal was satisfied that there was at least a good arguable case that the producing brokers had shown the existence of a common intention that the entirety of the assured's activities should be covered and not just commercial property management. There was also an argument that the common intention had survived into policy. The authorities held that where one contract had been superseded by another and the later contract had a number of altered terms, it was difficult to show that an earlier prior intention was continued into the final contract. However, in the present case there was a renewal, there had been an assumption that cover was intended to continue on the same basis, there were no material changes and the renewal made no commercial sense. Accordingly the rectification argument was not too weak a basis for joining the excess insurers. If they were not made parties to the trial, it would not be possible to obtain disclosure and their evidence and they would not be bound by the result. The existence of the construction defences also made it desirable for the insurers to be joined.

Temple Legal Protection Ltd v QBE Insurance (Europe) Ltd [2009] EWCA Civ 453

Temple entered into a binding authority with QBE under which Temple was given the power to write after the event insurance business on behalf of QBE. Temple in turn delegated the power to issue policies to various coverholders, mainly solicitors who took up claims the costs of which were insured by QBE. The binder provided that, upon its termination, "10.2.1 Temple shall immediately



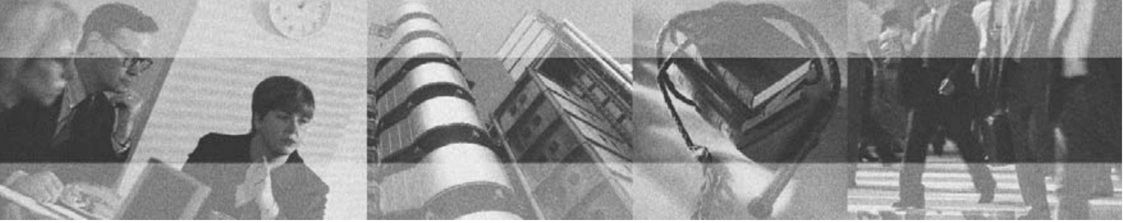
cease and shall have no further authority either to bind or offer to bind insurances or to renew any insurances but shall have authority to cancel, extend, amend or alter any insurances already bound. 10.2.2 unless otherwise agreed in writing by QBE, Temple shall remain liable to perform its obligations in accordance with the terms and conditions of this Agreement in respect of all insurances bound prior to Termination until every such insurance has expired or has otherwise been terminated." QBE terminated the binding authority, alleging breach of contract by Temple following Temple entering into a binding authority with another insurer and thereby ceasing to write business for QBE. Temple asserted that it retained the right under the binder to handle present and future claims arising under policies issued prior to termination. The dispute went to arbitration, and the arbitrator found for QBE on the basis of common law principles of agency. Temple appealed against the award, and although Beatson J found that the arbitrator had erred in applying common law principles rather than construing the binder, Beatson J concluded that the arbitrator had reached the correct conclusion. Section 10.2.2 was concerned only with the situation in which, following expiry, Temple had refused to carry out its obligations: it said nothing about the authority of Temple after the binder had been terminated. Beatson J also held that QBE was a party to the various coverholder agreements entered into by Temple with the solicitors, and that if Temple was no longer authorised from conducting run-off business it would not be in breach of those coverholder agreements.

The Court of Appeal upheld Beatson J's conclusion, but for slightly different reasons. Moore-Bick LJ and Bennett J held that QBE was not a party to the coverholder agreements, but that those agreements were to be interpreted as meaning that Temple's rights and obligations under them arose only while it was acting as agent for QBE. The effect of section 10.2.2 was to confer obligations on Temple, but not rights. Rix LJ held that section 10.2.2 did confer rights upon Temple, but that section 10.2.2 ceased to be applicable where there was a repudiatory breach of the binder by Temple. The Court of Appeal agreed with Beatson J that Temple did not have any interest, and had not incurred any obligations to third parties, which rendered the binder irrevocable.

Liability Insurance

HLB Kidsons v Lloyd's Underwriters [2008] EWCA Civ 1206

The assured, a firm of accountants, owned a company, S@FI, which marketed tax avoidance schemes. The claimants were insured against liability under three professional indemnity policies which incepted on 1 May 2001 and terminated on 30 April 2002. The policies were written on a claims made basis. General Condition 4 provided that: "The Assured shall give to the Underwriters notice in writing as soon as practicable of any circumstance of which they shall become aware during the period specified in the Schedule which may give rise to a loss or claim against them. Such notice having been given any loss or claim to which that circumstance has given rise which is subsequently made after the expiration of the period specified in the Schedule shall be deemed for the purpose of this Insurance to have been made during the subsistence hereof." In August 2001 the assured considered concerns that had been voiced by an employee that the products were flawed, and wrote to its brokers on 31 August 2001 setting out those concerns. Thereafter four presentations were made to the underwriters: (1) on 27 September 2001, when the letter was given to them; (2) on 17-18 October 2001, when the letter was resent but this time accompanied by details of five cases



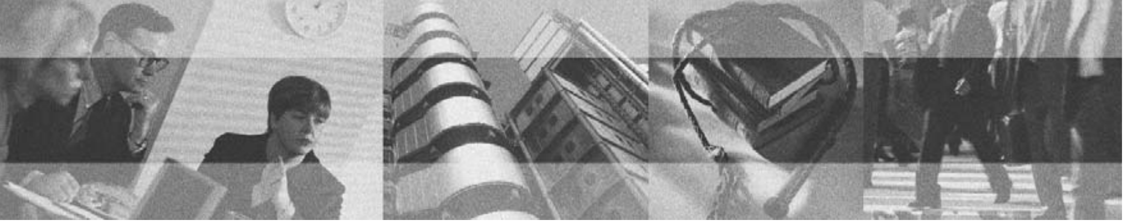
and a claims bordereau, although at this time the assured believed that there were no problems with its products; (3) on 18-19 April 2002, to the leading Lloyd's underwriters and the companies market, consisting of the earlier material and a further letter dated 28 March 2008; and (4) to the Lloyd's market, consisting of the material in the April 2002 material.

There was no appeal against the first instance ruling that there had not been a valid presentation at stage (1). The Court of Appeal (Buxton LJ dissenting) overturned Gloster J's ruling that there had not be a valid presentation at stage (2): although the letter was not satisfactory, it fulfilled the objective criteria for a notification of circumstances in that it reasonably conveyed that intention to the underwriters, no particular form of wording was required and the assured had been aware of circumstances which might have given rise to a claim even though the assured did not believe that a claim would be made. The Court of Appeal held, however, that the notification was not a general one and related only to the employee's concerns about the particular scheme discussed in his letter. The Court of Appeal held, upholding the decision of Gloster J, that there had been a valid notification at stage (3) in that it amplified the information given at stage (2), and the notification was a general one. The Court of Appeal also upheld Gloster J's ruling that there had not been a valid notification at stage (4) because it had not been made as soon as practicable, and it was further held that General Condition 4 was a condition precedent to liability so that a late notification defeated the notification.

The Court of Appeal further held that the right to notify circumstances was an extension to the basic claims made cover and that the two heads of cover were independent, so that if circumstances were not notified as soon as practicable it did not preclude the assured from notifying a claim made against it during the currency of the policy. Finally, a policy term which provided that "Any claim first notified to the Assured prior to the expiry date of this policy will be deemed to fall to be dealt with under this policy provided it is properly notified to Underwriters within 15 calendar days of the expiry day" was held not to provide a cut-off for the notification of claims but rather was a general provision under which, if a claim was made against the assured during the currency of the policy, it could be notified within 15 days following the expiry of the policy – that meant in turn that a claim made against the assured at the end of the policy period which was not notified within 15 days of expiry would nevertheless be within the scope of cover as long as notification was made as soon as reasonably practicable.

Aspen Insurance UK Ltd v Pectel Ltd [2008] EWHC 2804 (Comm)

The assured, a specialised construction contractor with expertise in the removal of asbestos, was insured a Combined Liability policy with a retroactive date of 11 February 2004. Condition 4 set out the claims procedure, and condition 4(a) required the assured to give immediate written notice to brokers of: "(i) any occurrence which may give rise to indemnity under this insurance." Condition 13, entitled "Observance", went on to state that "The liability of Underwriters shall be conditional on … The Assured paying in full the premium demanded and observing the terms and conditions of this insurance." On 9 February 2004 the assured commenced preparatory work on the South Tunnel of BT's Deep Level Tunnel Facility in Manchester, and work on the North Tunnel was commenced on 22



March 2004. A fire occurred in South Tunnel on the morning of 29 Marcy 2004. The insurers were not notified of the fire until 22 March 2007. Teare J held, in a trial on preliminary issues, that the insurers were not liable.

(1) The retroactive clause did not provide a defence. While it was the case that work on the South tunnel had commenced on 9 February 2004, the fire arose in the North Tunnel only.

(2) The claims condition required immediate notification of any occurrence which may give rise to indemnity: that meant notification "with all reasonable speed considering the circumstances of the case" of any occurrence in respect of which there was a real as opposed to a fanciful risk of the underwriters having to indemnify the assured, and in determining whether there was such a risk the court was to apply an objective test, taking into account the knowledge that the assured possessed in order to determine the extent to which the assured was aware of, and hence capable of notifying, occurrences which may give rise to an indemnity. On the facts, notification should have been made immediately, or at the very latest by November 2004 when it was clear that the materials used by the assured were under investigation.

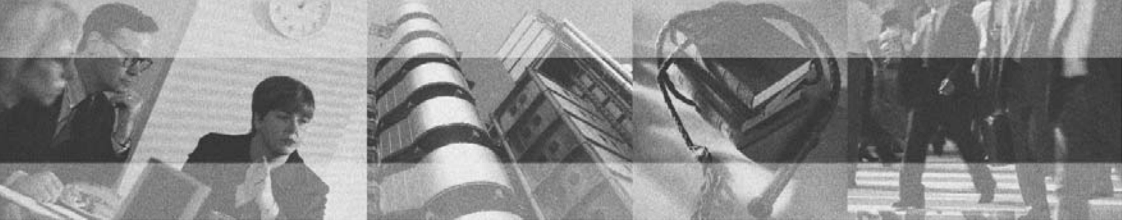
(3) Compliance was a condition precedent to liability, as the commercial purpose of the condition was to allow the insurers to receive early notification of any event which could give rise to a claim. Teare J further held that: (a) a breach of the condition did not affect the policy as a whole, but only the claim in question; and (b) the effect of condition 13 was not necessarily to require all conditions to be treated as conditions precedent, but condition 4(a) was appropriately treated as a condition precedent.

Employers' Liability Trigger Litigation [2008] EWHC 2692 (QB)

This was the collective hearing of six specimen actions to identify the trigger under various employers' liability policies in respect of claims by employees against their employers for mesothelioma contracted by inhaling asbestos fibres. In 2006 the Court of Appeal held, in Bolton Metropolitan Borough Council v Municipal Mutual Insurance Ltd [2007] Lloyd's Rep IR 173 that, in the context of a public liability policy, where the insurers provided indemnity against liability for accidental bodily injury or illness "when such injury, illness, loss or damage occurs during the currency of the policy", the word "occurs" referred to the date of the tumour and not to the date of inhalation. Before Bolton employers' liability insurers had treated the date of inhalation as the relevant trigger date. The issue in the present cases was whether the employers' liability policies in question responded to the date on which asbestos was inhaled or to the date on which mesothelioma was contracted. The policies in question all referred to the provision of indemnity for claims in respect of injury "sustained" during the currency of the policy. Burton J, distinguishing Bolton, held that in the context of employers' liability insurance, the word "sustained" referred to exposure and not to the tumour (ie, injury in fact). The court ruled as follows.

(1) A single fibre of asbestos could not cause mesothelioma. It was exposure to quantities of asbestos fibres which was causative of mesothelioma, and the risk increased with the dosage.

(2) The effect of the Compensation Act 2006 was that any one solvent employer was responsible in full for the entirety of the claimant's claim, once it had been found that the



employee had been tortiously exposed to asbestos during his employment by that employer, whatever might be the position in relation to the balance of any period or periods of exposure, subject to the employer's right to claim a contribution

(3) The Employers' Liability (Compulsory Insurance) Act 1969 came into force in January 1972, and made it compulsory for employers to take out employers' liability insurance, and insurers no longer had the right to exempt any disease from insurance cover. The actual "trigger" for an insurer's liability under employers' liability insurance was the liability of the employer to the employee, until the establishment and ascertainment of which there was no right of indemnity by the employer against the insurance company.

(4) The claimants' case that the policies attached by reason of there being injury or disease at the date of inhalation would be rejected. No injury was suffered at the date of inhalation. Risk was damage, but it was not injury or disease. Even if that was wrong, it would have been necessary for such injury or disease to have been actionable at that time for the policy cover to be triggered, and it would not have been so actionable

(5) Prior to Bolton there was no universal usage of the insurance industry to pay out mesothelioma or similar claims under employers' liability policies by reference to date of exposure.

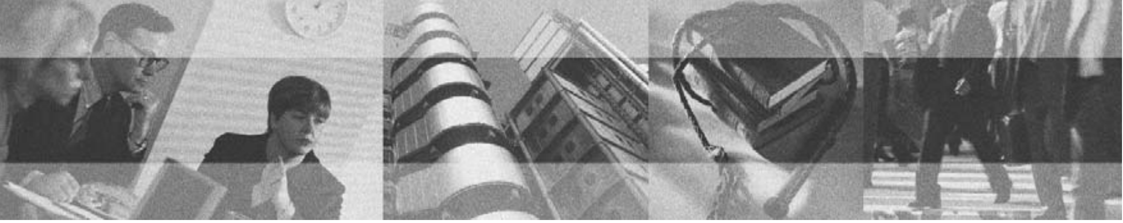
(6) The policies were ambiguous and were to be construed as meaning that they responded in respect of mesothelioma claims on an "exposure" basis. The factual matrix – consisting of the background in the Workmen's Compensation Acts, the Employers' Liability (Compulsory Insurance) Act 1969 and public policy – pointed to this conclusion.

(7) If that was wrong, and the policies responded on an injury in fact basis, the insurers MMI were not estopped by representation or convention from relying upon that basis of cover as against Zurich (who had purchased its business) or as against policyholder Local Authorities.

Greene Wood & McLean LLP v Templeton Insurance Ltd [2009] EWCA Civ 65

The claimants, solicitors, obtained after the event insurance from the defendant insurers to enable claims to be brought by a group of miners against other solicitors who had allegedly failed to represent them properly in their personal injury claims against employers. The claimants asserted that there was an agreement that if the claimants

paid the premiums the defendants would honour their obligations under the ATE policies, and that such agreement had let the claimants to guarantee to the miners that if they lost there would be no risk on them of having to pay costs. The miners failed in their application for a Group Litigation Order and they were ordered to pay the costs. The defendant refused to provide an indemnity. The claimants made payment themselves, took an assignment of the miners' rights against the defendants and sought to recover from the defendant under the alleged agreement or alternatively by way of contribution under the Civil Liability (Contribution) Act 1978. The claimants obtained permission to serve the defendants outside the jurisdiction, and the defendants in the present hearing argued that the permission should be set aside because the claims had no reasonable prospect of success and because claimants had failed to disclose material facts on the application for service out. The Court of Appeal, held as follows



(1) Contrary to the view of the trial judge, there was a serious issue to be tried in relation to the claim in contract. If such a term was not to be implied and, if the insurers refused to indemnify the miners in respect of costs and disbursements, the miners would have recourse to the English solicitors under their guarantee rather than embark on proceedings against the insurers. In those circumstances it is at least arguable that it was necessary to imply a term in the agreement with the solicitors that the insurers would meet valid claims.

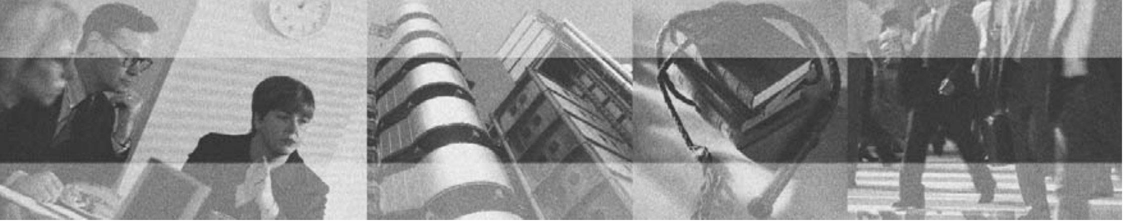
(2) The claim for contribution fell within CPR 6.20(5) because it was "a claim in respect of a contract": there was no need for the claim to be under a contract and it was enough that the claim related to or was connected with a contract. It was irrelevant that the claimants were not parties to the relevant contract. There was a serious issue to be tried in respect of the contribution claim in that both parties were potentially liable to the miners and accordingly they were responsible for the "same damage" under the Civil Liability (Contribution) Act 1978. England was the proper place to bring the claim: the costs liability of the miners arose from proceedings in England; and the ATE policy provided for arbitration in England between the defendants and the miners.

Toropdar v D [2009] EWHC 567 (QB)

D, a ten year old boy, ran out in front of a car driven by the claimant, and suffered severe injuries. The claimant's insurers, exercising subrogation rights, sought a declaration of non-liability. The court held that on the facts the claimant was not entitled to a declaration, given the speed of his driving and the local conditions. The court also considered whether a declaration should be granted in such circumstances, and concluded that a negative declaration should be made in a personal injury case if it would serve a useful purpose. It might be refused if it would be unjust, eg, because the injured party at that stage has no legal representation, because the outcome might depend upon finding further information or because the victim is not ready to go to trial. A declaration would also be refused if a claim had not been seriously canvassed.

Axa Insurance Ltd v Akther & Darby Solicitors [2009] EWHC 635 (Comm)

Axa's predecessor in title, NIG, offered ATE insurance through the defendant solicitors. Policies were issued on behalf of NIG in those cases where the solicitors were satisfied that the prospects of success were at least 51% and that the damages awardable would be at least £1000. NIG was involved in the scheme from October 2000 to August 2003, and in that period issued about 40,000 ATE policies in respect of claims conducted by some 170 panel solicitors. The scheme proved to be a disaster for NIG. On 17 June 2008 Axa commenced proceedings against 89 firms of panel solicitors, alleging breach of contract and negligence in respect of some 26,000 claims, giving rise to losses of about £65 million. Axa's assertions were that the solicitors had failed to adhere to the initial criteria of 51% success rate and a minimum of £1000 damages in accepting risks (vetting breaches), that they had failed to notify NIG of the need to withdraw indemnity where the prospects of success fell below 50% or where it became clear that damages would not exceed £1000 and that they had failed to conduct claims with reasonable care and diligence (conduct breaches). The losses constituted the amount of claims paid by NIG. The solicitors asserted that the claims in tort were time-barred by section 2 of the Limitation Act 1980. Flaux J held as follows.



(1) As regards the vetting breaches, damage to NIG occurred as soon as a flawed risk was accepted, as the loss in such a case was not contingent but occurred immediately.

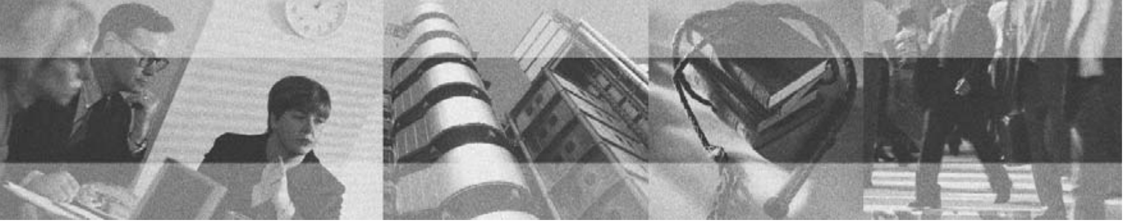
(2) As regards conduct breaches, damage occurred (a) in respect of non-notification, on the date at which a notification should have been made, as that was the point at which damage occurred by exposing NIG to a greater risk than it had intended; and (b) as far as failure to conduct a case properly was concerned, damage occurred when, as a consequence of the breach, there had been a material diminution in the prospects of successfully prosecuting the claim.

Barr v Biffa Waste Services Ltd [2009] EWHC 1033 (TCC)

The defendant operated a landfill site in Hertfortshire, and faced some 140 nuisance and negligence claims from neighbouring households, alleging odour omissions from the site. The claimants obtained an After the Event policy, and the defendant was informed about this but the defendant's request for disclosure of the policy was denied. The claimants applied to the court for a Group Litigation Order, and the defendant sought disclosure of the ATE policy as a condition of the Order. Coulson J held that the policy should be disclosed. (1) Although the law did not allow the disclosure of liability policies to claimants, the position of ATE insurance was distinguishable. (2) An order could be made under CPR 31.14, which states that a party may inspect a document which is mentioned in a statement of case, a witness statement, a witness summary or an affidavit. An order would be made unless the document was protected by litigation privilege or unless it was irrelevant. (3) An ATE policy was not protected by litigation privilege – it did not fall into any protected category. (4) The policy was relevant to the proceedings because: it underlay the application for the GLO; there would be no proceedings without the GLO, given that each individual claim was relatively small and probably not worth the costs risk; and terms of the policy were relevant to the issues before the court. (5) In the alternative disclosure would be ordered under the court's general case management powers in CPR 1 and 3: the defendant was entitled to know if the claimants were good for any costs order, and there was no prejudice by requiring disclosure.

Flexsys America LP v XL Insurance Company Ltd [2009] EWHC 1115 (Comm)

The assured was a manufacturer and distributor of rubber products. A competitor alleged that the assured had engaged in an unlawful conspiracy to monopolise the US market for a particular chemical, and commenced proceedings. The claim was dismissed but the assured incurred costs in excess of US$2 million. The assured was insured under a local policy for the annual aggregate sum of US$1 million, and there was a Master Policy which operated as an excess cover for US$25 million in excess of US$1 million. The Master Policy contained a "Drop-Down" clause which provided that: "In the event of total exhaustion of a local policy this Policy will continue in force as the underlying insurance subject to the terms Exceptions and Conditions of the particular local Policy." On the basis that the insuring provisions of the local policy covered the claim but the insuring provisions of the Master Policy did not cover the claim, Tomlinson J held that the Drop-Down clause did not operate to require the Master Policy insurers to provide an indemnity. The purpose of the clause was to reinstate cover of US$1 million where the policy limits under the local cover had been exhausted by earlier claims, in which case the Master Policy dropped down to provide the coverage that would



have been available under the local policy. The clause had no application to the case in which a single claim exceeded the limits of the local policy but fell outside the insuring provisions of the Master Policy.

Property Insurance

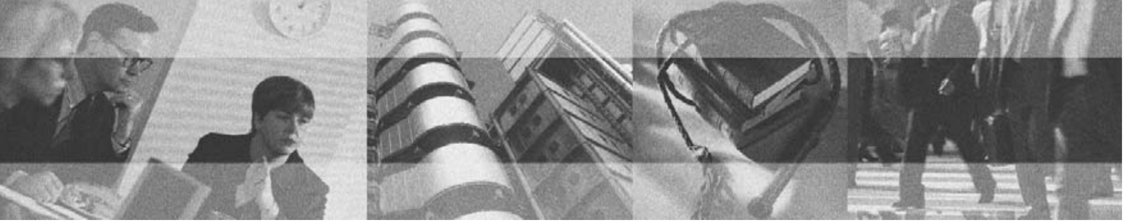
Ansari v New India Assurance Ltd [2009] EWCA Civ 93

The claimant purchased commercial premises and leased them to a tenant. The claimant applied for insurance and described the tenant's business as "wholesaling kitchenware". He also gave a positive answer to the question, "Are the premises protected by an automatic sprinkler installation?" The declaration on the form stated that the assured had answered questions to the best of his knowledge and belief. The subsequent policy provided in General Condition 2 stated that "This insurance shall cease to be in force if there is any material alteration to the Premises or Business or any material change in the facts stated in the Proposal Form or other facts supplied to the Insurer unless the Insurer agrees in writing to continue the insurance." There was also a non-invalidation clause which provided that "The interest of the freeholder … in this insurance shall not be prejudiced by any act or neglect whereby the risk of destruction or damage is increased without the authority or knowledge of the freeholder …" The premises were badly damaged by fire, and subsequent investigations showed that the sprinkler system had been turned off and in any event there was no supply of water to the premises. It was also discovered that the tenant's business also consisted in selling large toys, including bicycles and small motor cycles. The insurers relied upon General Condition 2. It was held by the Court of Appeal, affirming the first instance decision of Patten J, that they were not liable. (1) The assured had stated that the sprinkler system protected the premises, a statement which was to be construed as meaning that the system was operative and not that it was merely installed. (2) There had been a material change in the facts stated about the sprinkler system. The test of materiality was not the wide one laid down for pre-contract disclosure, but was a narrower one which asked whether the alterations had a significant bearing on the risk. The clause, unlike that in Kausar v Eagle Star Insurance Co Ltd [2000] Lloyd's Rep IR 154, did not reflect the common law rule that an insurer was discharged only if the risk was completely altered and not merely increased. (3) The assured was aware that the sprinkler had been turned off and thus could not rely on the "non-invalidation" clause. (4) Mr Ansari had stated on the proposal form that the premises were occupied by a tenant whose business was the sale of kitchenware. There was no dispute that there had been a material change of use, in that scooters and mini-motorbikes were quite different from kitchenware.

Marine Insurance

Pratt v Aigaion Insurance Company SA [2008] EWCA Civ 1314

The claimant insured his fishing trawler with the defendant insurers under a policy which provided "'Warranted Owner and/or Owner's experienced Skipper on board and in charge at all times and one experienced crew member." The vessel was destroyed by fire at a time when nobody was on board. At first instance, the insurers were held to be entitled to rely upon the warranty, which was to be construed literally: although there were common sense limits on the



wording, there was a breach in the circumstances. The Court of Appeal reversed this decision. The primary purpose of the warranty was to protect the vessel against navigation hazards, as was underlined by the reference to "one experienced crew member". The warranty was designed to operate only at times when it was to be expected that two members of the crew would be on board. The phrase "at all times" was ambiguous and was to be construed contra proferentem against the insurers: it did not mean that there had to be a member of crew on board when the vessel was safely moored, even if the generator was running at the time.

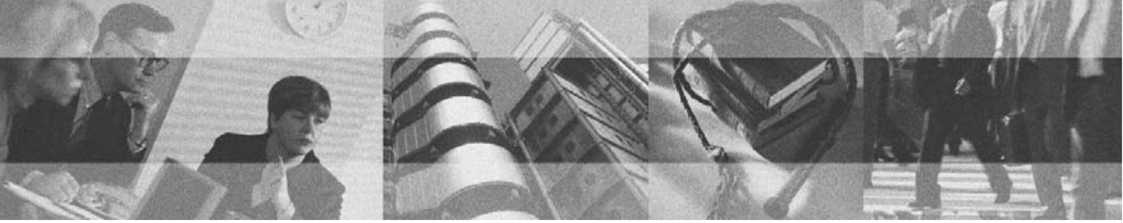
Allianz Insurance Co Egypt v Agaion Insurance Co SA [2008] EWHC 1127 (Comm)

The reinsured issued a policy of marine insurance on 1 April 2005. The policy contained a "Deferred Premium Clause" the effect of which was that – in accordance with the practice of the assured and the reinsured – the premium was payable in quarterly instalments, the first instalment falling due 45 days after inception and notice of cancellation being required in the event of non-payment. The reinsured's brokers had, in December 2004, offered the reinsurers a share in the reinsurance of the risk, and had sent terms and conditions which referred to a "Deferred Premium Clause". The reinsurers agreed to the risk on 2 April 2005. On 15 April 2005 the reinsurers issued a reinsurance policy which stated that premiums were due on 31 March and 30 June 2005, and that payment was to be within 60 days. The reinsured paid the premium to its brokers, but the premium was not forwarded to the reinsurers. On 23 July the vessel became a total loss. The reinsurers denied liability, arguing that: (1) the term "Deferred Premium Clause" was too vague to be enforced so that the entire policy was void for uncertainty; (2) if there was a binding contract, then the reinsured was obliged to pay the premiums in accordance with the terms in the reinsurers' own policy. The reinsured argued that section 53(1) of the Marine Insurance Act 1906, which provides that the broker is directly responsible to the underwriters for the premium, prevented the reinsurers from relying upon any breach of any relevant premium warranty because under the common law fiction upon which section 53(1) was based the brokers were deemed to have paid the premium and received a loan from the underwriters.

The court ruled that the reinsurers had to pay. (1) The reinsurance policy was not void for uncertainty. The reference in the reinsurance to the "Deferred Premium Clause" was to the provision in the direct policy. The reinsurers thus had the right to terminate the policy for breach only by giving notice, which they had not done. (2) The reinsurers could not impose their own premium payment terms on the reinsured after the contract had been made, and the reinsured's silence did not create an agreement to accept the reinsurers' terms. (3) Had the reinsured been in breach of the clause, section 53(1) would not have prevented the reinsurers from relying on the premium clause: the fiction upon which the section was based was irrelevant, and the section meant simply that if the broker did not pay the premium then the clause was broken.

Global Process Sytems Inc v Syarikat Takaful Malaysia Berhad [2009] EWHC 637

An oil rig, the Cendor MOPU, was being towed on a barge from Texas to Malaysia. Its legs were in place and elevated in the air above the deck. On the evening of 4 November 2005 a leg was lost at sea, and the remaining two legs fell off the following evening. The loss occurred



because of fatigue cracking caused by the repeated bending of the legs due to the motion of the barge. The rig was insured under Institute Cargo Clauses A against all risks, but there was an exclusion for inherent vice. The owners asserted that the proximate cause of the loss was failure to ensure that adequate repairs had been carried out near Cape Town where the tow had stopped en route. The insurers asserted that the cause of the loss was either inherent vice or the inevitable consequence of the inability of the oil rig to undertake the voyage. Blair J held that the insurers were not liable.

(1) The assured was required only to show that the loss was accidental or not inevitable; the burden then shifted to the insurers to prove that an exception applied.

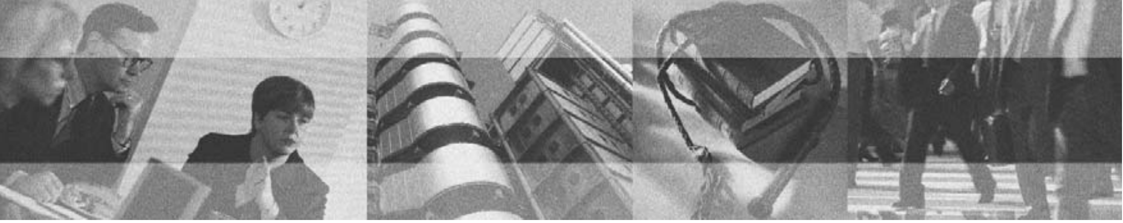
(2) The loss was not inevitable. It was a low threshold for the assured to show fortuity, in the sense that the loss was not inevitable. In the present case a loss may have been probable, but it was not inevitable. It was unnecessary to decide whether an inevitable loss fell within the policy, although the phrase "all risks" did not include inevitable losses.

(3) The insurers had made out the defence of inherent vice. The test for inherent vice was whether there was "inherent inability to withstand the ordinary incidents of the voyage". There was no rule of evidence that, absent exceptional weather, a loss was to be attributed to inherent vice: every case required a proximate cause to be determined. Further, inherent vice was not excluded simply because there were external events: inherent vice could be triggered by an external circumstance such as the weather. In the present case the proximate cause of the loss was the inability of the rig to withstand the ordinary incidents of the voyage, including the weather which could have been expected, and not the absence of repairs.

Dornoch Ltd v Westminster International BV (No 2) [2009] EWHC 889 (Admlty)

The hull and machinery of a vessel owned by the assured and registered in the Netherlands, was insured by primary and excess layer insurers. She became a constructive total loss on 8 March 2007. Notices of abandonment tendered on 26 and 27 March 2007 were rejected by all of the insurers, but the loss was subsequently paid in full by them. In December 2008 all of the excess layer bar one, and all of the primary layer bar two, representing, respectively, 85% and 77.5% of the market, expressly elected to take over the interest of the assured in what remained of the subject matter insured. On 9 January 2009 the assured sold the vessel to an associated company for ?1000, the purpose being to prevent the underwriters from selling the vessel to any of the assured's competitors. Thereafter the remaining insurers elected to take over the vessel. These facts gave rise to a series of preliminary issues. Tomlinson J ruled as follows.

(1) Where a notice of abandonment was given but not accepted, the assured had to continue to be prepared to abandon the subject matter to the insurers or the right to claim for a constructive total loss would be lost. Conversely, where notice of abandonment was accepted then the abandonment was irrevocable. It was uncertain whether acceptance of a notice of abandonment effected an election by the insurers under section 63(1) to take over the vessel, or whether acceptance of a notice of abandonment was properly to be understood as an irrevocable election to exercise the right which on the promised payment for a constructive total loss would become available to the insurer by virtue of section 79(1). Once insurers had accepted notice of abandonment, equity imposed an equitable lien in their favour of the



insurers to secure their position in the interval between the making of their irrevocable promise and irrevocable election and the transfer of the right on payment.

(2) Where a notice of abandonment had been declined but there had been a subsequent payment for a constructive total loss, the failure by the insurers to accept the notice of abandonment could not without more deprive the insurers of their right to take over the assured's interest in the subject matter under section 79(1). There was also no reason why declining a notice of abandonment should amount to an irrevocable election not to exercise their right to take over the subject matter under section 63.

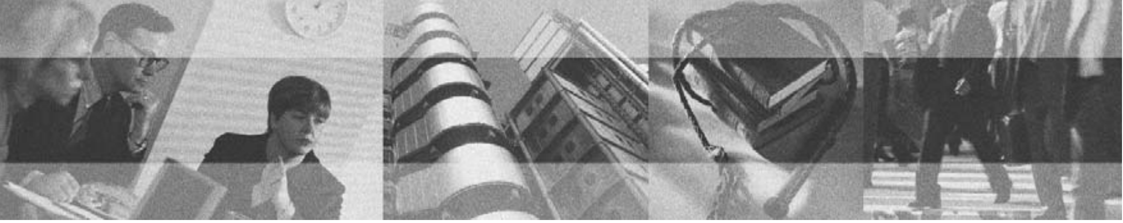
(3) In the present case the claimants had not, by virtue of their paying a constructive total loss in April 2008, acquired a proprietary interest in the vessel in the form of an equitable lien. Equity would secure the position of an insurer who exercised his election to take over the vessel, but there was no reason why equity should intervene to secure insurers' position whilst they took further time to decide whether they wished to assume those burdens. The Act did not provide that an insured who was paid for a constructive total loss must not dispose of his interest in the subject matter insured without underwriters' consent.

(4) The insurers had not impliedly elected to take over the vessel under sections 63(1) or 79(1) of the 1906 Act by paying the salvage/wreck removal claim in July 2008, and by paying the salvage/wreck removal claim in July 2008 the claimants did not acquire a proprietary interest in the vessel in the form of an equitable lien.

(5) When, in December 2008, 85% of the excess layer and 77.5% of the primary layer expressly elected to take over the vessel, that election was effective for the for the purposes of section 63(1) and 79(1) of the 1906 Act. It was not necessary for all subscribing insurers to make an election: that argument ignored the fact that each insurer had a separate contract with the insured and the Act was concerned with each individual contract. Provided that any one underwriter had paid his proportion of a total loss of the ship, or his proportion of a total loss of an apportionable part of or of the whole of the goods, he had a right of election. The electing insurers became co-owners with the assured in their respective proportions. As a result of the express election in December 2008 the relevant underwriters acquired a beneficial interest under a trust. They were entitled to have the appropriate number of whole shares transferred to them to be registered in their name.

(6) On the assumption that the purchaser of the vessel was a bona fide purchaser for value without notice of any equitable rights, legal title would have been validly and effectively transferred and the insurers' rights extinguished, although if the purchaser was not a bona fide purchaser for value without notice then the insurers' equitable interests would have survived the purported sale. However, the insurers who had elected in December 2008 had become legal co-owners and remained so even after the purported sale, there being no relevant exception to the principle nemo dat quod non habet.

(7) Where legal ownership in a vessel was divided, the majority interest had an entitlement to the possession of the vessel to the exclusion of the minority. As majority legal owners, the insurers would be entitled to apply under section 188(1) of the Law of Property Act 1925 to have the vessel realised by judicial process.



(8) It was common ground that the relevant system of law for determining the incidence of proprietary interests in the vessel prior to, at the time of, and after the purported transfer of the vessel to the purchaser Westminster Dredging was the lex situs. The question of whether English law applied the principle or renvoi would not be determined, although if the court was to decide that as a matter of English common law reference to the lex situs as being the law governing the incidence of proprietary rights in moveable property included reference to the choice of law or private international law rules of the situs, it would be rowing against a strong tide.

(9) The lex situs of the vessel was Thai law. It was common ground that on deregistration the lex situs became Thai law and, as regards the period before deregistration, there was no authority which bound the court to hold that, when considering the effect of the sale of a vessel, the lex situs was the place of registration rather than the place where the ship was physically situate at the time of the sale.

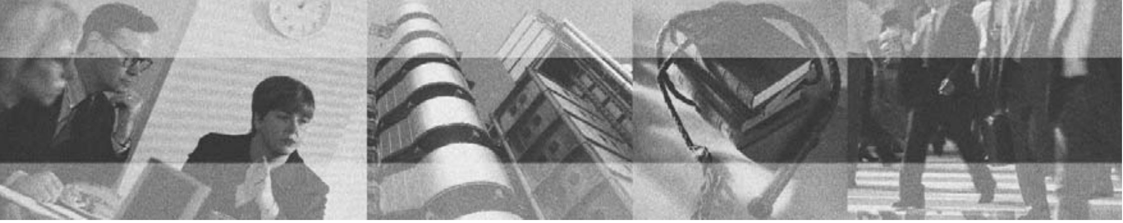
NOTE *Dornoch Ltd v Westminster International BV (No 3) [2009] EWHC 1782 (Admlty).*

Here it was further held as follows: (1) Had the insurers elected not to take over the interests of the assured in the vessel, they would not have been entitled to claim its residual value. An insurer who had not exercised his election to take over an as yet unsold vessel was not entitled to the proceeds of the sale of the wreck by way of subrogation under section 79 of the 1906 Act. If the option was not exercised then the vessel remained in the ownership of the assured, and it did not matter whether the assured repaired the vessel or resold it – the insurers had no further rights in respect of it or its proceeds. However, insurers who merely refused to accept abandonment and paid for a constructive total loss did not lose all benefit of salvage – that could only occur with an express disclaimer by the underwriters of their entitlement to salvage. (2) The endorsement by the leading underwriters on the constructive total loss settlement of March 2008, "Net open market residual value of vessel to be accounted to insurers" did not amount to an election by them not to take over the vessel. The background of the 1906 Act was that the insurers were entitled to take over the vessel on payment for a constructive total loss, and that what was intended was the usual co-operative arrangement the assured would either assist in facilitating the sale of the vessel to a third party or, if they wished to retain the vessel, to account for the residual value to underwriters. That aside, any decision by the leading underwriters on this matter was not binding on the following market by reason of the slip provision "Claims to be agreed by the slip leader hereon and X-changing Claims Services and such agreement to be binding on all underwriters." An election on taking over the subject matter went beyond what was normally inherent in a settlement. If that was wrong and there was an election not to take over the vessel, the assured was estopped by convention from relying on the endorsement as an election by the insurers not to take over the vessel. There was a shared assumption to that effect.

Reinsurance

Wasa International Insurance Co Ltd v Lexington Insurance Co [2009] UKHL 40

Lexington insured Alcoa from 1 July 1977 until 1 July 1980 against loss of or damage to property and business interruption risks, with a limit of liability of "US$20,000,000 loss or damage arising from any one occurrence" and a per occurrence deductible for property

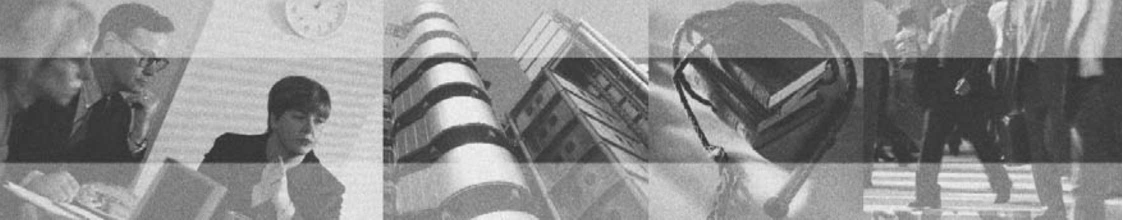


damage of US$250,000. Lexington agreed to submit to the jurisdiction of the court of any competent jurisdiction within the United States at the request of Alcoa. Lexington obtained facultative reinsurance cover from the London market on more or less the same terms, in the usual form of a slip policy which covered all risks of physical loss (excluding fire) "as original", the amount reinsured was US$20,000,000 each occurrence and in the annual aggregate, and the period of the cover was stated to be "36 months 1.7.77 L/U &/or pro rata to expiry of original". The slip policy referred to a "full reinsurance clause", which provided "warranted same ... terms and conditions and to follow the settlements", and the slip stated that the reinsurers would "pay ... all such loss as may happen to the subject matter ... during the currency of the policy" and that the reinsurers agreed to indemnify the reinsured in respect of loss to the insured subject matter "during the continuation of this Policy". Wasa subscribed to a 1% line and AFG subscribed to a 1.5% line. It was not disputed that the reinsurance agreement was governed by English law.

In the early 1990s Alcoa was required by various US Federal and State environmental regulators to clean up pollution at some thirty-five sites used by Alcoa for some fifty years. In turn Alcoa commenced proceedings in Washington against its property and liability insurers on risk in the period from 1965 to 1985, seeking a declaration of their liability. The trial judge held that there had been two occurrences, wastage from manufacturing units and wastage from other sources, and that the appropriate apportionment was to divide the total repair costs for each site by the number of years in which damage occurred and then to allocate the appropriate proportion to each year. The evidence showed that the damage had occurred over many years up to the date of the inception of the insurance in 1977 and for some years thereafter, so that by using the allocation formula Lexington was liable only for relatively small percentages of the total loss. The losses at some sites were below Alcoa's deductible. However, this decision was reversed on appeal, the Supreme Court of Washington holding that the insurers – including Lexington – were jointly and severally liable to Alcoa for all property damage, including damage which occurred before the 1977 cover incepted. Lexington thereafter settled with Alcoa on 24 November 2003, agreeing to pay $US103,140,500 over a two year period. Wasa and AFG commenced in London seeking negative declaratory relief. Lexington cross claimed for sums which it alleged were due under the reinsurance: as against Wasa that sum was US$1,031,405 plus defence costs of US$283,747,53 (1%) and against AGF that sum was US$1,547,107.50 plus defence costs of US$452,621.30 (1.5%). The House of Lords, reversing the decision of the Court of Appeal and reinstating the judgment of Simon J, held that the reinsurers were not bound by the settlement.

(1) Reinsurance was not a form of liability insurance but rather took effect as a further insurance on the subject matter of the original insurance. Reinsurers were not, therefore, automatically liable to meet liabilities incurred by the reinsured under the direct policy.

(2) While it was usually the case that facultative proportional reinsurance was back to back with the direct policy where very similar words of coverage were used, that did not apply in the present case because: (a) the parties could not have contemplated in 1977 that the law of Pennsylvania would be applied to the claim under the insurance; and (b) a duration clause was fundamental to the risk run by the reinsurers. Accordingly, the reinsurers were entitled to rely upon the English law definition of the duration clause in the reinsurance, and that provided cover only for damage occurring during the currency of the policy.



(3) In the absence of express wording, the retention was not per occurrence but was "one-off".

Motor insurance

McCall v Poulton [2008] EWCA Civ 1263

M's taxi was damaged by the negligent driving of P. M hired a replacement vehicle from Helphire and obtained an insurance policy from Angel Assistance covering legal costs and also Helphire's charges in the event that they could not be recovered from P. In fact P was uninsured. The Motor Insurers Bureau indemnified M for personal injury and property damage, but refused to pay the hire costs on the ground that the Uninsured Drivers' Agreement did not extend to subrogation claims. Helphire and Angel argued that the MIB Agreement had to be construed consistently with the Second Motor Insurance Directive (which it was argued required indemnification for hire costs), and that in any event the MIB was an emanation of the state so that the Directive was directly effective as between claimants and the MIB. The Court of Appeal held that each of these issues should be referred to the European Court of Justice for a preliminary ruling.

Maher v Groupama Grand EST [2009] EWHC 38 (QB)

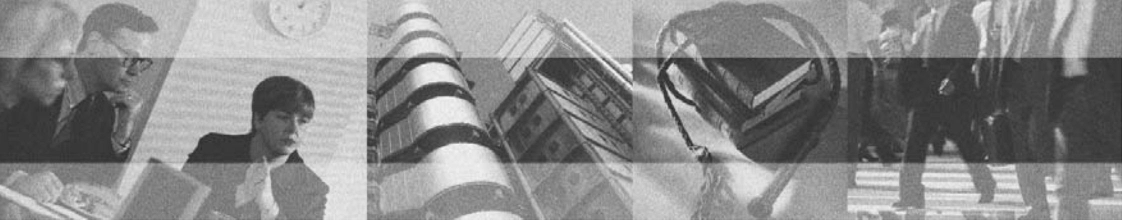
In July 2005 the claimant was injured in a road accident in France, as the result of K, a French national, losing control of his vehicle. The claimant commenced proceedings against the insurers in England under the direct action set out in the Fourth Motor Insurance Directive, European Parliament and Council Directive 2006/26/EC. Blair J held that: (1) damages in respect of a direct action were to be assessed in accordance with English law on the principle in Harding v Wealands [2007] 2 AC 1 that the measure of damages in a tort claim is a matter of procedure and thus for the law of the forum rather than the law governing the tort; and (2) the existence of any right to pre-judgment interest was a matter for French law, but the amount of such interest was a matter of English procedural law under the Supreme Court Act 1981, s 35.

Note that if the accident had occurred on or after 11 January 2009, the measure of damages would have been governed by French law, in accordance with European Council Regulation 864/2007/EC, the Rome II Convention, which states that the law applicable to a tort also governs the assessment of damages (art 15).

NOTE: In Knight v Axa Assurance [2009] EWHC 1900 (QB), on almost identical facts, the reasoning in Maher was followed.

Royal & Sun Alliance plc v Hume [2009] CSIH 24

H was insured by RSA under a motor liability policy in accordance with the Road Traffic Act 1988. He was involved in an accident. Judgment was given against H, and RSA satisfied the judgment in accordance with section 151 of the Road Traffic Act 1988. RSA sought to recover from H the sums paid by them to the third party under a policy term which provided that if RSA was required to pay a third party in circumstances when, but for section 151, they would not have faced any liability, then H was required to repay that sum. The court ruled that H had been in breach of a policy condition regarding the giving of notice, that the breach operated



to discharge the insurers from liability and accordingly that they had made payment only by reason of section 151. As a result they were entitled to recover.

Wilkinson v Fitzgerald [3009] EWHC 1297 (QB)

W's parents bought him a car. It was insured by W's mother but W was a named driver. W was seriously injured in an accident while the car was being driven by his friend F: W let F use the car even though W knew that F was not insured. The insurers said that they would not satisfy any judgment that W obtained against F, because under section 151(8) of the Road Traffic Act 1988 they had a right to recover from W any sums that they were liable to pay on the ground that W had caused or permitted the use of the car without insurance. It was not disputed that the insurers were liable to satisfy any judgment that W might obtain against F under section 151 of the 1988 Act – the issue was whether section 151(8) gave the insurers the right to recover their payment from W. If they did, then W would not receive compensation from the insurers and nor could he receive compensation from the Motor Insurers Bureau under the Uninsured Drivers' Agreement, because that applied only where there was an unsatisfied judgment (which was not the case here because the judgment would have been satisfied in the first instance). Blair J held that the section did not have that effect. He paraphrased the EC's Second Motor Insurance Directive, article 2(1) as meaning that where a statutory provision or contractual clause restricts cover by reference to the authorisation of the driver, it is to be treated as void against all persons save those who knowingly entered a stolen vehicle. Blair J viewed section 151(8) as an exclusionary provision which was prohibited by EC law: it was unreal to draw a distinction between a clause which prevented recovery, and clause which allowed recovery but removed it a nanosecond later. It was possible to construe section 151(8) as not extending to a person who was entitled to the benefit of a judgment under section 151. The correct approach was to allow W to enforce any judgment in his favour, free of section 151(8). It was the proper function of contributory negligence to determine how much the judgment in W's favour should be.

Copley v Lawn; Maden v Haller [2009] EWCA Civ 580

In the first case, Copley v Lawn, C's car was damaged in an accident caused by the negligence of L on 23rd November 2006. C needed a replacement car immediately, and on 26th November she made an agreement with Helphire under which she hired a car at £39.90 per day while her car was being repaired. On the same day, shortly afterwards, she received a call from L's insurers offering her a replacement car. She did not accept that offer. She subsequently made a claim against L for 71 days' hire charges. The Deputy District Judge awarded only 7 days hire because C had a right to cancel the Helphire agreement within 7 days and by failing to do so had not mitigated her loss. In the second case, Maden v Haller, M's car was damaged on 26th July 2006 as a result of H's negligence. H's insurers offered a replacement car within 24 hours, but M ignored the offer and entered into an agreement on 18th August with Helphire for a replacement vehicle costing £156.80 per day – he subsequently claimed for 3 days' hire. His claim was dismissed by reason of his failure to mitigate. The Court of Appeal held that neither C nor M had acted unreasonably and that they could not be said to have failed to mitigate their losses. However, if there had been a failure to mitigate then there was a right to recover at least the actual reasonable cost of hire.