Insurance/
Reinsurance

July 2013

Construction of a Claims Control Clause

Beazley Underwriting Ltd & Ors. v Al Ahleia Insurance Co & Ors. [2013] EWHC 677 (Comm)

This case illustrates both the importance of compliance with claims control clauses and the narrow approach that the courts will to take to construction of such provisions. It also raises the possibility that parties to a reinsurance contract may have a certain degree of autonomy when it comes to settling their own share of a loss, even where a claims control clause is present.

Reinsurers brought proceedings against their Cedants, seeking a declaration of non-liability for breach of a condition precedent claims control clause.

During the adjustment of the claim, Cedants had entered into relatively advanced discussions with the Insured over liability. Such discussions took place without the approval or knowledge of those Reinsurers bringing the proceedings.

Reinsurers alleged that Cedants were in breach of the claims control clause in both (i) conducting negotiations with the Insured; and/or (ii) admitting liability and/or settling and/or compromising the claim; without the approval of Reinsurers.

The Court held that Cedants had not breached the claims control clause. The conduct complained of did not amount to "negotiations" for the purposes of the clause. Nor did anything that Cedants had done amount to a settlement, compromise or admission of liability within the meaning of the clause. Cedants were not therefore barred from pursuing their claim against Reinsurers.

The case illustrates the narrow approach that courts will take to construction of claims control clauses. Such clauses should therefore be drafted to make absolutely clear what is required. Equally, although in this case Cedants were found not to be in breach, extreme care must be taken to ensure that any discussions entered into by a cedant with an insured do not amount to a breach of claims control provisions in the reinsurance contract, particularly where these are conditions precedent to liability.

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Interestingly, although the point was not ultimately to be decided in view of the court's conclusions, support was offered in the judgment for the Cedant's alternative argument that a loss under the policy can be divided up into separate "pizza slices", each representing the proportion of the risk held by the cedant (i.e. by way of retention) and his reinsurers. This raises the possibility that where, as here, there is disagreement amongst those concerned, it may be open, depending on the circumstances and the wording of the relevant provisions, for an individual "slice-holder" to settle his share of the loss without contravening his obligations to his reinsurers/co-reinsurers. Reinsurers have sought permission to appeal.

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Changes to the regulatory landscape – the FCA

On 1 April 2013, the FSA was replaced by three new regulatory authorities, the Financial Policy Committee, the Prudential Regulation Authority (the PRA) and the Financial Conduct Authority (the FCA). The FCA is now the prudential and conduct regulator for insurance intermediaries and the conduct regulator for insurers. In many ways, firms may view the FCA as the FSA with a different name, however, there are some notable differences in the approach being adopted by and the powers available to the FCA compared to its predecessor.

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Objectives

The FCA has an overarching strategic objective "to ensure that markets function well", which is complemented by three operational objectives:

(a) To secure an appropriate degree of protection for consumers.

(b) To protect and enhance the integrity of the UK financial system.

(c) To promote effective competition in the interests of consumers.

It is clear from the literature produced so far, that the FCA is intending to achieve these statutory objectives through a judgement based and pre emptive approach, comprising a focus on business models, product governance, early intervention and review of the risks caused by wholesale and retail conduct.

Supervisory approach

The FCA has indicated that there are three pillars to its approach:

1. **Proactive Firm Supervision,** which will involve specific firm assessment to establish that firms are being run in a way that treats customers fairly, minimises risk to market integrity and does not impede effective competition.
2. **Event Driven Work,** covering matters that are emerging or have happened and which are unforeseen.
3. **Issues and Products Work,** involving sector risk assessment of areas delivering poor outcomes.

Conduct and prudential supervisory categories

There are new conduct and prudential classifications for firms regulated and supervised by the FCA, which will determine the intensity of the supervision undertaken in relation to those firms. As with the FSA regime, the intensity of supervision is determined on the level of risk a firm presents to the market.

The conduct classifications range from C1 to C4. C1 and C2 firms will be supervised on a relationship managed basis by a named supervisor, whereas C3 and C4 firms will be subject to a lighter assessment and supervision by a team of sector specialists rather than a dedicated supervisor. Insurance groups with large retail operations are likely to fall within the C1 and C2 categories and smaller firms including almost all intermediaries are likely to fall within the C4 category.

The prudential classifications which apply to non-PRA regulated firms (i.e. insurance intermediaries) range from P1 to P4. These will be allocated according to the prudential significance of a firm, including such factors as the knock-on effects to the market if the firm fails and the extent of a firm's client money and asset holdings.

New product intervention powers

The FCA has broader powers than its predecessor, particularly in respect of product intervention. The FCA can prohibit firms from entering into specified agreements if it appears necessary or expedient to advance certain statutory objectives. This will

include an ability to make temporary product intervention rules lasting a maximum period of 12 months without public consultation. This power could be used to restrict certain product features or the promotion of particular product types.

The FSA Handbook

The FSA Handbook has been divided into a FCA Handbook and a PRA Handbook, according to the apportionment of regulatory powers and responsibilities between the two authorities under the new regime. The existing substantive provisions of the FSA Handbook are largely unchanged and most of the new provisions in the handbooks have been to implement the new procedures and powers being introduced.

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Extended Warranty Contracts – are they contracts of insurance?

The UK Supreme Court upheld the Court of Appeal's decision in the case of *Digital Satellite Warranty Cover Limited & another v FSA* (see HFW's Insurance/Reinsurance Bulletin, January 2012) that extended warranty contracts (EWCs) are contracts of insurance for the purposes of UK regulation.

The case concerned EWCs provided in relation to satellite television equipment under which equipment would be repaired or replaced. The High Court and the Court of Appeal determined that EWCs were contracts of insurance falling within the "Miscellaneous Financial Loss" class in Schedule 1 of the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (RAO). Consequently, the providers of EWCs were held to be effecting and carrying out contracts of insurance without authorisation, in breach of the Financial Services and Markets Act 2000.

In the Supreme Court, the providers submitted that the EWCs should not fall within the definition of a general contract of insurance under the RAO on the grounds that: (a) the EU First Non-Life Directive (NLD) required the RAO to be interpreted to include only contracts of insurance that provide for financial benefits and not benefits in kind; and (b) the business carried on by the companies did not fall within the classes of general insurance specified in the RAO (in particular, the companies noted that classes 1 to 17 in the NLD do not extend beyond contracts of insurance that provide financial benefit). Therefore, it was submitted that in implementing the NLD, the UK was not entitled to regulate contracts that only provide for benefits in kind.

The Supreme Court held that the NLD only laid down a minimum standard to be applied by the UK when determining which contracts should be classified as contracts of insurance and the UK was entitled to adopt a wider classification than the NLD. It was held that the RAO included both contracts that paid benefits in kind, such as EWCs, as well as those that paid financial sums, and the appeal was dismissed.

Comment

This decision, whilst not surprising, clarifies the position that the UK is entitled to take a wider approach to what constitutes a contract of insurance than the minimum standards set by the NLD. The Court also confirmed the long established footing at common law that contracts of insurance include contracts in which the insurer offers benefits in kind (per *Prudential Ins Co v IRC [1904]*).

A point that remains undecided is whether classes 1-17 of the NLD exclude benefits in kind. Although the Supreme Court's view was that they did not exclude benefits in kind, it considered that this was ultimately a matter for the European Court of Justice to resolve.

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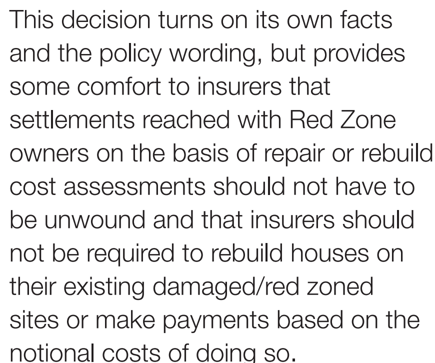
Christchurch earthquakes – Red Zone insurance issues clarified

O'Loughlin v Tower Insurance Limited [2013] NZHC 670 (5 April 2013)

The New Zealand High Court has recently provided some much anticipated clarification on key insurance issues affecting thousands of policy-holders owning residential properties in the Christchurch Red Zone and their insurers.

The court in *O'Loughlin* held that the creation of the Red Zone in Christchurch did not constitute or cause physical loss or damage or natural disaster damage to the claimants' house or render it a total loss.

The claimants were, however, successful in establishing that the cost of repair calculation, which was the basis of Tower's settlement offer and payment to the claimants, was not in accordance with Tower's obligations under the policy.



This decision turns on its own facts and the policy wording, but provides some comfort to insurers that settlements reached with Red Zone owners on the basis of repair or rebuild cost assessments should not have to be unwound and that insurers should not be required to rebuild houses on their existing damaged/red zoned sites or make payments based on the notional costs of doing so.

This decision also indicates that, where settlement offers or payments are based on hypothetical repair options, the repair option put forward by the insurer must be reasonably proven and able to achieve a building consent. If it is not, the insurer may be found to have failed to fulfil its obligations under the policy.

This decision is also potentially of wider significance, outside of the Christchurch earthquakes setting, in that it provides some guidance as to how government actions and mandates may impact upon insurance/reinsurance policy coverage.

Background

The claimants' property was damaged by earthquakes/aftershocks on 4 September 2010, 22 February 2011 and 13 June 2011.

From 23 June 2011, the NZ government created residential zones in Christchurch based on the severity and extent of land damage and cost effectiveness and social impacts of land remediation. The Red Zone was for the worst affected areas and it was decided that the government, through the Canterbury Earthquake Recovery Authority (CERA), would offer to buy properties in the Red Zone. The government may also decide to acquire compulsorily properties in the Red Zone and the local council may decide not to continue providing services to properties in the Red Zone.

The claimants accepted an offer from CERA to purchase their land while retaining the right to pursue their insurer, Tower, in respect of the damage to their house.

The policy provided that Tower had the option to arrange payment, rebuild, replacement or repair for loss and damage that is caused *"to the same condition and extent as when new."*

Tower offered to settle the claim by making a payment based on hypothetical repairs using injections of low mobility grout (LMG) to re-level the concrete slab foundation.

The claimants alleged that Tower's settlement offer (and subsequent payment) did not meet its obligations under the policy and that the claimants were entitled to a higher payment by Tower based on the cost of rebuilding the house on the existing site.

Issues

The two key issues considered by the High Court were:

- Whether the Red Zone designation constituted or caused physical loss or damage or natural disaster damage to the claimants' house and rendered it a total loss?
- Whether payment based on the estimated cost of repair using LMG injections fulfilled Tower's obligations under the policy?

Decision

Justice Asher's interim decision held that:

- The Red Zone designation did not itself cause any physical loss or damage (or natural disaster damage) or render the house a total loss. The Red Zone did not require physical alteration or repair to the house, and did not prohibit habitation, repair or rebuilding, or the grant of a building consent.
- As a matter of New Zealand law, there is no basis to follow US authorities supporting a broader interpretation of physical damage than that taken in the Commonwealth jurisdictions or more generous insurance coverage based on the "reasonable expectations" of the cover the claimants thought they had purchased.
- The policy did not respond to claims for economic loss and, in any event, the claimants had not established that the red zoning had resulted in economic loss. Accordingly, the red zoning did not cause any loss covered by the policy.
- Tower had the option as to whether it repaired, replaced or rebuilt the house, but Tower's proposed repair methodology was not reasonably proven and may not secure a building consent.
- On the facts, the amount Tower chose to pay had not been shown to be the replacement value, and did not equate to the actual cost of bringing the house back *"to the same condition and extent as when new",* as required under the policy.
- Tower, having failed to persuade the Court that its proposed repair methodology met its obligations under the policy, was then entitled to choose to pay either:
  - the cost of building a comparable house on a sound site in Christchurch outside the Red Zone; or
  - the cost of buying a comparable existing house on a sound site in Christchurch outside the Red Zone.

- The claimants were not entitled to the higher costs of rebuilding the house on the damaged red zoned land because these costs were not going to be incurred and the claimants were not entitled to a payment in excess of the costs of replacing the house.

Resolution

It is understood that Tower and the claimants reached a confidential settlement shortly after the interim decision was released.

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D&O cover in France – sanctions and penalties uninsurable

A recent judgment of the French Cour de Cassation (Supreme Court) illustrates the manner in which public policy rules in the Insurance Code override the terms of a policy.

An insured had taken out a D&O policy, providing cover for the financial consequences of its directors' and officers' liability resulting from any professional fault; a specific extension of cover was obtained for *"civil fines and/or penalties"*.

However article 113-1 of the Insurance Code provides that an insurer is not bound to indemnify loss resulting from intentional fault or fraud on an insured's part.

A director of the insured was fined EUR500,000 by the Autorité des Marchés Financiers (the French stockmarket supervisory body) for providing misleading information to the public. The director sought to be indemnified under the policy; the insurer rejected the claim.

In the ensuing proceedings, a civil court in Nanterre and then the Versailles Court of Appeal dismissed the claim under the policy, on the grounds that the misrepresentation of the company's financial position had been deliberate, and that the insurers were therefore not bound to indemnify the loss pursuant to article 113-1, notwithstanding the extension of cover which had been obtained for such penalties.

The position was confirmed by the Cour de Cassation, which appears to have approved a relatively broad concept of intent. The narrow concept is the intent to cause the specific loss; the broader approach considers the intent to commit the fault. These are both relatively standard approaches under French law.

The Court also referred to such intentional fault being incompatible with risk ("aléa"), without which there can be no valid insurance under French law; this is also a relatively standard approach, whereby the intent to commit a fault or to cause loss negates the notion of risk, and is thus uninsurable.

The Court may however also have created confusion, by finding that the director could not be indemnified since he had intended to make the insurers pay for the consequences of his misrepresentation; this is however not a requirement under article 113-1 of the Insurance Code. It is unclear whether this was a mere slip of the pen, or whether the Supreme Court considers this to be a material consideration; if so, this would amount to a radical, and impractical new approach.

The main point to note is that the French Supreme Court in effect avoided determining the most interesting point of law in this case, which was whether insuring administrative sanctions was itself contrary to public policy, bearing in mind the near-criminal nature thereof.

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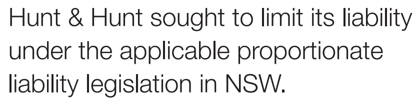
Proportionate liability and concurrent wrongdoers – professional advisers and fraudsters

On 3 April 2013, the High Court of Australia handed down a decision that will impact insurers of lawyers and other advisers who negligently fail to protect clients against the fraud of another party. In *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10, the High Court overturned an earlier NSW Court of Appeal decision holding that a solicitor who had negligently drawn a mortgage for a lender could not limit its liability to its client as a concurrent wrongdoer under the *Civil Liability Act* (NSW) 2002, where the primary cause of the loss to the lender was due to the actions of fraudsters.

The facts

Two fraudsters conspired to forge a signature on the mortgage and loan agreement and then pocket funds advanced on the mortgage by the mortgagor, Mitchell Morgan Nominees Pty Ltd (Mitchell Morgan). The solicitors for a borrower, Hunt & Hunt Lawyers (Hunt & Hunt) had negligently, but without knowledge of the fraud, drawn a mortgage that prevented Mitchell Morgan from enforcing against properties securing the borrowings.



Hunt & Hunt sought to limit its liability under the applicable proportionate liability legislation in NSW.

The proportionate liability regime

Under the legislation, a "concurrent wrongdoer" can limit its liability for physical damage or pure economic loss arising from a breach of a duty of care (or misleading and deceptive conduct) to such amounts as a court considers just, having regard to the extent of the defendant's responsibility for the damage or loss.

This overcomes the common law rule of joint and several liability under which joint tortfeasers are liable to a plaintiff for the entire loss even though they are partially to blame.

Were Hunt & Hunt concurrent wrongdoers?

To qualify as a concurrent wrongdoer under the legislation, a person must be *"one of two or more persons whose acts or omissions caused, independently of each other or jointly, the damage or loss that is the subject of the claim"*.

The key issue for Hunt & Hunt was whether, together with the fraudsters, they caused the same damage or loss to Mitchell Morgan. The Court of First Instance held that they did but the Court of Appeal disagreed holding that analysing the immediate consequences of the wrongdoers actions, the loss suffered by Mitchell Morgan as a result of the actions of the fraudsters was the paying out of money when it would not otherwise have done so, whereas the loss suffered as a result of the actions of Hunt & Hunt was the consequence of not having the benefit of security for the money paid out.

Thorny issue of same damage or loss

The majority of the High Court held that the Court of Appeal's approach of isolating the immediate consequences of the breach was not always appropriate. The Court considered the intertwined nature of events. In relation to the breach by Hunt & Hunt, for example, there were two conditions necessary for the mortgage to be completely ineffective: (a) that the loan agreement was void; and (b) that the mortgage document was negligently drafted. Hunt & Hunt was responsible for (b), but the fraudsters were responsible for (a).

The High Court held that the Court of Appeal's approach harks back to a "but for" test: but for Hunt & Hunt's negligence, loss would not have been suffered. However, it noted that the same can be said "but for" the fraudsters' conduct. The Court considered that the legislation called for a broader approach-based judgment and policy consideration.

Good news for insurers?

For insurers of professionals in similar circumstances to Hunt & Hunt, this is good news as they will only be responsible for the amount the court apportions against the professional; in this case 12.5%.

But is this a highly unusual case or one that could apply more generally? It is clear that the approach of the High Court is not applicable in every case. For example, the Court distinguished the case of an owner's claim against a delayed builder that was impaired by negligent certification of an architect, holding the losses to each be different.

It is, however, not always easy to see why the Court accepted that the damage in these cases was different, but not in Hunt & Hunt. For example, the Court considered it relevant that the negligence of Hunt & Hunt only rendered the mortgage ineffective because of the fraud, i.e. the fraud is inextricably tied up with the negligence of the lawyers. But the same could be said of the builder's delay, without which the architect's negligent certificate would not have caused any loss.

Ultimately, it may have been that the Court was influenced by the fact that the fraudsters were so clearly at fault that it would be unfair to burden the solicitors with 100% of the blame and that the broad value judgments and policy considerations in the legislation allowed them to come to a view that was based on fairness rather than cold hard logic.

The better view is that the High Court has broadened the test for determining whether wrongdoers have caused the same loss or damage from a narrow enquiry based on the immediate effects of the breach to one that also looks at the wrongdoer's overall moral responsibility for the loss. While this may introduce an element of uncertainty, it does make for flexibility and common sense.

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Construction of a public liability policy

M J Gleeson Group PLC v AXA Corporate Solutions S.A. [2013] Unreported

This case concerned the scope of cover under a contractor's public liability policy, and more particularly the construction of an extension to that policy, which provided cover for defective workmanship of sub-contractors. The case also involved

Following rectification work, a substantial claim in respect of the defective workmanship in question was intimated against the Assured, who sought confirmation from the Insurer that cover would be provided under the sub-contractors' extension.

consideration of what might constitute a valid claim against the insured for the purposes of such claims-made cover.

The Assured was a construction contractor who had carried out a development at a site in Watford. Some months after completion of the development, the Assured received a letter sent on behalf of the funder of the development, identifying concerns in respect of the installation of the cladding cappings and deficiencies in the make-up of areas of the roof, and seeking the Assured's comments and proposals for rectification. The defective work in question had been carried out by the Assured's sub-contractors. Although the court did not hear evidence on the question for the purposes of this preliminary issue hearing, it appears to have been at least arguable that, aside from the defective workmanship itself, no damage had been caused to the development property and that there was therefore no "Damage to Property", as required under the general insuring clause in the policy.

Following rectification work, a substantial claim in respect of the defective workmanship in question was intimated against the Assured, who sought confirmation from the Insurer that cover would be provided under the sub-contractors' extension. A dispute arose and certain issues were submitted for preliminary determination, including (i) the scope of the extended cover; and (ii) whether or not the 25 May 2007 letter amounted to a claim against the Assured for the purposes of the policy.

The Assured argued that, on a true construction of the extension, cover in respect of sub-contractors' defective workmanship responded whether or not "Damage to Property" had occurred. On this analysis, the extension would amount to a separate, self-contained insuring clause, under which cover would be triggered not by property damage but simply by Assured's legal liability arising from a sub-contractor's defective workmanship. The Insurer disagreed, arguing that the extension did not displace the general insuring clause, and therefore only provided cover where the sub-contractor's defective workmanship had caused "Damage to Property" (that is to say, damage other than the defective workmanship itself).

The Court preferred the Insurer's construction, which was supported by the language of the policy and in particular by the words *"This Section of the Policy extends to indemnify..."* at the beginning of the extension. Moreover, adopting the Assured's construction would in effect turn the extension into a guarantee of the workmanship of its sub-contractors. This would in the Court's view be an extraordinary extension of public liability cover, requiring clear words. It would also call into question whether the policy could in fact properly be described as public liability cover.

The Court also held that the funder's letter did not amount to a claim within the relevant policy period, because it did not amount to an assertion of a right to relief. Cover under the sub-contractors' extension depended upon a claim having first been made against the Assured (or notification of a circumstance having been given to the Insurer) within the policy period.

Generally speaking, in the absence of express provision, a public liability policy will not cover liability in respect of pure economic loss suffered by a third party. This is because such polices are, broadly speaking, intended to provide cover against the assured's liability for its negligence towards the public at large, which liability does not as a matter of law include liability for pure economic loss. Where required, extensions providing cover in respect of liability for pure economic losses are available, sometimes for little or no additional premium. However, those wishing to purchase such extensions should consider carefully with their advisers the gap in cover to be filled and the scope of any extension proposed, as there are a wide range of clauses available, offering varying degrees of cover.

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NEWS

HFW has hosted or participated in a range of industry events during June and July. Below is a short summary of each.

9th Annual JLT Global Communications Technology and Media Forum

HFW co-sponsored this prestige invitation only event (18–20 June). Peter Schwartz presented, with industry leaders, Benedict Burke (Crawfords), Candy Holland (Echelon) and Charlotte Barnekow (Ericsson) on " Being Cat-Ready " – dealing with natural and man-made catastrophes – legal and practical issues in claims handling. Peter also presented with John Barlow, Luke Foord-Kelcey of JLT and James Tuplin of Allianz on Data Breach Claims, Breach Response and Risk Management.

HFW Seminar – Reform of s.53 Marine Insurance Act

On 27 June, HFW hosted a seminar on the reform of s53 of the Marine Insurance Act 1906 with guest speaker David Hertzell, the Law Commissioner responsible for insurance contract reform. HFW Partners, Jonathan Bruce and Costas Frangeskides spoke at the seminar. Costas provided a summary of the present unsatisfactory state of the law under section 53, while Jonathan presented the case for reform. David Hertzell, concluded by giving a summary of the Law Commission's consultation on reform of section 53 and the position regarding implementing legislation.

IRLA Members Breakfast Briefing

HFW Partner Andrew Bandurka and Associate Edward Rushton spoke at a well attended breakfast seminar organised by IRLA on 4 July. The subject of the presentation was the recent High Court appeal of an arbitration award regarding whether the 9/11 World Trade Centre attacks amounted to one or two "events", and on the related issues facing insurers and reinsurers faced with aggregation questions.

CLT Insurance Litigation Conference, London

HFW Partner John Barlow spoke at CLT's recent Insurance Litigation Conference, discussing the mis-selling of financial products and insurers' responses to the claims which have arisen. John also discussed the role of the FOS/FCA and the implications of their findings when relied upon by Courts of Law. Finally, John examined the impact of the Standard Life decision on mitigation of loss covers and what steps can be taken to preserve such cover.

Conferences & Events

International Marine Claims Conference

London
25-27 September 2013
Attending: Toby Stephens, Richard Neylon & Alex Kemp

London Market Claims Conference

London
24 October 2013
Attending: Paul Wordley

For more infromation about any of these events, please contact events@hfw.com.

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