Insurance/
Reinsurance

December
2013

INSURANCE BULLETIN

Follow settlements to the rescue

The Thai floods of 2011 have, by virtue of their widespread impact over time and area, thrown up many apparent tensions between, for example, aggregation principles embodied in 72-hour clauses, on the one hand, and occurrence definitions on the other. Typically, these tensions have arisen where the different clauses are to be found in different contracts in the reinsurance chain. In Tokio Marine (TM) v Novae (N), they were found in the same original insurance contract, and the main issue in this case was whether a retrocessionaire was bound to follow the original insurer's settlement which embodied a compromise of this tension.

A had insured T and others in respect of physical damage and business interruption at various locations affected by the floods. After an apparent difference of opinion as to how many deductibles should apply, due to tension between the hours clause and the occurrence language (which provided for aggregation of occurrences arising from one "source or original cause") A settled T's claim with one deductible. TM then followed suit under its facultative proportional reinsurance of A, which contained a follow the settlements clause.

TM sought to recover from N, which reinsured TM under a facultative excess of loss retrocession contract with "as original language", an unqualified follow the settlements clause, and a very large excess. N, however, wanted to reopen the aggregation issue under the retrocession, on the basis that it was not bound to follow A's compromise of the underlying aggregation issue, and that the aggregation language in the retrocession was different to that in the original policy, leading to the application of more than one deductible. Thus N's limit and deductible were expressed to apply to each "loss occurrence", which N argued was different to the "occurrence" in the original policy, and was, N argued, equivalent to the classical "event" i.e. something which happened at a particular place, in a particular way, at particular time (and would lead to more than one deductible). The battle lines were drawn.

holman fenwick willan hfw

Hamblen J. found that, on construction of this retrocession, "loss occurrence" meant the same as "occurrence" in the original. He also found that the relevant provisions in the retrocession were deliberately chosen to be back-to-back with the original (there being no back-to-back presumption, since the retrocession was non-proportional), and N was bound by A's determination as to the application of the aggregation provisions. N was bound to follow A's settlement/compromise of the aggregation issue, and, in order to recover from N, TM had to show that the claim, as recognised by A in its original settlement, was one which only arguably fell within the retrocession as a matter of law, as opposed to on the balance of probabilities.

These were findings of preliminary legal issues only, and, perhaps unsurprisingly in view of the general importance of some of the issues, mainly the standard of proof issue (arguably, etc), N has leave to appeal against the aggregation and follow settlement findings.

For more information, please contact Andrew Bandurka, Partner, on +44 (0)20 7264 8404, or andrew.bandurka@hfw.com, or your usual contact at HFW.

Australian bushfires – application to exclude evidence dismissed

Matthews v SPI Electricity Pty Ltd & Ors (Ruling No 31)[1]

The Supreme Court of Victoria has dismissed an application in a class action relating to one of the 2009 "*Black Saturday*" bushfires to exclude evidence which was found to have been obtained as a result of trespass. The Court held that in view of the timing of the application (months after the discovery of the possible trespass) and the high probative value of the evidence, the desirability of admitting the evidence outweighed the desirability of excluding it. The Court therefore exercised its discretion pursuant to s138 of the *Evidence Act 2008 (Vic)* (Evidence Act) to admit the evidence, notwithstanding the breach of Australian law which would otherwise render it inadmissible.

The class action proceeding in this case involves claims for loss and damage arising out of one of the "*Black Saturday*" bushfires which occurred in February 2009 in Victoria, Australia. These bushfires cumulatively caused 173 deaths and widespread destruction of and damage to property. The trial of the proceeding commenced in March 2013 and is ongoing.

It is alleged in the proceeding that the Kilmore East fire ignited as a result of the failure of an overhead electricity powerline owned and operated by the electricity distributor (the Utility). One of the central issues in dispute in the proceeding is what caused that powerline conductor to break.

In 2012, the Utility set up dummy conductors on the same span which failed in 2009, intending to measure the environmental and other conditions which affect the line. The test was designed and overseen by experts retained by the Utility for the purpose of defending the class action proceeding. Test data was collected and analysed for over a year and is the subject of numerous individual and joint reports produced by a number of experts, including experts engaged on behalf of the plaintiff.

In September 2013, the plaintiff brought an application pursuant to s138 of the Evidence Act to exclude all the evidence from the test data on the basis that it was obtained improperly and in contravention of Australian law, alleging that it was obtained by reason of the Utility's trespass onto the property of a number of different landowners on which the test spans were located. S138 of the Evidence Act provides that where evidence has been obtained improperly or in contravention of Australian law (or in consequence of such impropriety or contravention), it "*is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting [the] evidence*".

The Court found that the Utility had trespassed onto the landowners' properties when setting up and carrying out the tests because:

1. The Utility did not have the authority under the relevant electricity legislation to access the properties for the purposes of carrying out testing for the court proceeding absent the landowners' consent; and
2. In seeking the permission of the landowners to access their properties, the Utility's representatives had not disclosed the purpose for which the access was sought (namely, to set up the tests in order to gather evidence in defence of the claims in the class action proceeding) and, as such, did not have their consent. A number of the landowners (some of whom are also members of the class action plaintiff group) gave evidence that, had they been aware of the purpose, they would not have allowed access.

As a result of this finding, the Court determined that the application of s138 of the Evidence Act meant that the Utility bore the burden of persuading the Court that it should exercise its discretion to admit the evidence and that, in determining whether to exercise that discretion, the Court had to weigh-up the public interest of having before it all probative evidence against the public interest in deterring misconduct and maintaining the legitimacy of the judicial system.

1 [2013] VSC 575

In this case, the Court found that the interests of having the evidence admitted outweighed the undesirability of it not being admitted for a number of reasons, including:

1. The probative value of the evidence, which was potentially high in the sense that the test data went to the core of the case against the Utility. In addition, the data had been used by a number of experts to reach or fortify conclusions and the expert evidence was relied upon heavily by all parties.
2. The contravention of the law in this case (the trespass) did not cause any inconvenience or damage to the landowners and none of them had pursued a civil remedy against the Utility. Further, there was no real prejudice caused to the plaintiff as the Judge did not accept that the plaintiff could have played a part in the testing had she been aware of it earlier.
3. The Utility's contravention of the law was not deliberate or reckless.
4. The second defendant, an inspection company engaged by the Utility, which was innocent of any wrongdoing in relation to the trespass, would have been deprived of the benefit of the field testing if it were not admitted into evidence.
5. The plaintiff's solicitors could have brought the application as early as January 2013, prior to the commencement of the trial, yet did not do so until 6 months into the trial. The Judge found that their actions in this regard were both unacceptable and unreasonable, contrary to the spirit of the obligations to the Court contained in the *Civil Procedure Act 2010 (Vic)*, and had the potential to cause significant disruption to the trial.

Many jurisdictions have comparable laws in relation to the exclusion of evidence which has been obtained improperly or illegally and, to different degrees, require the Court to balance up a range of factors when determining whether that evidence is admissible. The decision highlights the need to take care when gathering evidence as even an unintentional contravention of the law, has the potential to render inadmissible the evidence which has been obtained as a result of or in consequence of that contravention.

Holman Fenwick Willan is representing the second defendant in the class action and related litigation.

For more information, please contact Elizabeth Wroe, Senior Associate, on +61 (0) 3 8601 4524, or elizabeth.wroe@hfw.com, or Richard Jowett, Partner, on +61 (0)3 8601 4521, or richard.jowett@hfw.com, or your usual contact at HFW.

Basis of contract clauses

In our March 2013 Bulletin, we reported on the case of *Genesis Housing Association v Liberty Syndicate Management Ltd* in which the Technology & Construction Court held that the insured housing association (G) could not recover under a policy providing cover in the event of a building contractor's insolvency due to the combined effect of (i) an incorrect statement in the proposal form as to the identity of the builder; and (ii) a "basis of contract" clause in the declaration to that form, providing that the statements made therein would form the basis of the contract between G and the insurer, L. The Court of Appeal has recently upheld this decision, holding itself bound by the long-established principle that, where a proposal form contains a basis of contract clause: (i) the proposal form has contractual effect, even if the policy contains no reference to it; and (ii) all statements in the proposal form constitute warranties on which the insurance contract is based and cannot therefore be treated as immaterial. The effect of this is that any factual error in the proposal form, however minor, will discharge insurers from liability under the policy. This will be the case even where the error is unintentional and immaterial to the risk.

Basis of contract clauses, which may appear either in a proposal form or in the policy wording itself, have often been the subject of criticism from judges, the Law Commission, academics and industry bodies. Such criticism is generally focused on the perceived injustice involved in insurers taking technical defences after claims have arisen, relying upon breaches which may be immaterial to the risk and irrelevant to the loss. In our experience most insurers have not generally relied solely upon such defences unless there is some connection to the risk or the loss, or some other reason why the claim is regarded in a poor light. Situations in which basis of contract clauses have been held to absolve insurers of liability include where:

- The insured incorrectly answered a question in the proposal form concerning previous claims (Condogianis v Guardian Assurance Company Ltd).
- The insured inadvertently gave the wrong address for where a lorry was garaged (Dawsons Ltd v Bonnin).
- The insured's agent gave incorrect answers to questions in the proposal form about previous losses (Rozanes v Bowen).
- The claimant innocently made a false statement about his father's state of health in a proposal for life insurance (Holmes v Scottish Legal Life Assurance Society).

- The insured incorrectly answered questions about how long it had carried out business at the premises and whether it was the sole occupier (*Unipac (Scotland) Ltd v Aegon Insurance Co (UK)*).

Whilst acknowledging the criticism of basis of contract clauses, the Court of Appeal was nonetheless forced to conclude in the *Genesis Housing* case that the underlying principle was "not open to challenge in this court". Such clauses have, however, recently been subject to concerted challenge of a different kind, AIRMIC having produced a guide and model wording to raise awareness among its members and counteract the impact of basis clauses, as well as urging its members to lobby their insurers for the removal of such clauses from their policies. The AIRMIC guide includes a sample endorsement designed to negate any basis clause included in a policy, expressly providing that any such clause will have no effect. A number of major insurers have responded by offering support for the campaign, distancing themselves from the use of such clauses and in some cases announcing that basis of contract clauses will no longer be used in policy wordings.

The Law Commission has also turned its attention to basis of contract clauses, which as a result of its reforms are no longer permissible in consumer insurance contracts. The Law Commission has now recommended that basis of contract clauses in business insurance policies should also be abolished, as part of its reconsideration of the law of warranties in insurance contracts. As well as identifying the unfairness inherent in the use of basis of contract clauses described above, the Law Commission has also pointed to the fact that in an international context, English law on this point seems unbalanced, noting that most common law jurisdictions have moved away from the English law approach.

Given the weight of opinion against them and the proposals for their abolition, the days of the basis clause may be numbered. However, reform may take a number of years and for the time being cases such as this illustrate the care that those purchasing business insurance and their advisers must take to identify, understand and avoid being caught by basis of contract clauses, the consequences of breaching which may not be spelled out in the policy or the proposal form and thus be unclear to the non-legal purchaser. Similarly, providers of business insurance may wish to consider the possible reputational risk involved in the continued use of basis of contract clauses.

For more information, please contact Ben Atkinson, Associate, on +44 (0)20 7264 8238, or ben.atkinson@hfw.com, or Andrew Bandurka, Partner, on +44 (0)20 7264 8404, or andrew.bandurka@hfw.com, or your usual contact at HFW.

Termination of policies in France – attempts to restrict insurers' rights

The French Insurance Code provides a relatively comprehensive set of rules which determine in particular the extent to which parties to an insurance contract are free to choose the terms of the contract.

The Insurance Code thus allows an insurer to terminate a policy in a number of relatively standard cases, such as non-payment of premium, or aggravation or misrepresentation of the risk. Article R113-10 of the Insurance Code also allows an insurer to terminate a contract after a loss has occurred, if the policy so stipulates.

A number of French parliamentarians consider the latter provision to be excessively harsh on the insured, who may thus find himself without cover once a loss has arisen, and unable to find equivalent cover at similar premium levels. They have therefore introduced a draft law to amend the Insurance Code, whereby any clause purporting to allow an insurer to terminate cover following a loss would be deemed to be null.

This proposed amendment has caused considerable concern amongst insurers active in the French market. It nevertheless remains to be seen whether this amendment will become law, bearing in mind that those proposing this are currently in opposition.

Nevertheless, whilst this bill may never be voted into law in this form, the legislative trend in France is currently unfavourable to insurers. Another draft law in relation to consumer rights was approved by the French Senate in September 2013, and included a provision which would simplify an insured's right to terminate certain categories of consumer policies at any time, after the expiry of the first year of cover. It is therefore conceivable that the proposed amendment relating to termination after loss could become law, in line with consumer pressure groups' current influence on insurance legislation.

For more information, please contact Olivier Purcell, Partner, on +33 (0)1 44 94 40 50, or olivier.purcell@hfw.com, or your usual contact at HFW.

Judgment call: 'Alexandros T'

After much to-ing and fro-ing between the English High Court, a Greek court, the Court of Appeal in London and the Supreme Court, we now thankfully have some clarity around the issue of the finality of an English settlement agreement. In a landmark decision the Supreme Court has ruled that an English settlement agreement

should bring a full stop to a dispute and should not be capable of being unravelled by a foreign court.

The facts of the story have been well publicised: after the sinking of the 'Alexandros T', owners Starlight Shipping Company became embroiled in a bitter dispute with its insurer, launching a claim against them in the High Court in London in 2006. The case settled for 100% of the principal sum claimed. Subsequently Starlight issued a fresh claim against the insurers in Greece, sending a shock wave through the London insurance market, where their action was seen as potentially undermining the very concept of finality (key to legal and business certainty) in settlement agreements. Starlight was using arguments that evidence had been fabricated and witnesses bribed in the course of the English proceedings, to persuade the Greek court to review the circumstances of the case and effectively unpick the settlement agreement. In response, the insurers sought the assistance of the High Court in enforcing the settlement which was in turn resisted by Starlight who applied for these English proceedings to be stayed while the Greek proceedings were ongoing. So a classic turf war over the jurisdiction of the dispute. The High Court concurred with the insurers and stayed the Greek proceedings, but the to-ing and fro-ing continued with the Court of Appeal reversing this position. The insurers then took the matter to the Supreme Court, which issued its judgment last month.

The sound of the insurance markets breathing a collective sigh of relief is audible. In its judgment the Supreme Court underlined that it was important not to prevent a final decision of the English court where this was the jurisdiction that governed the contract. "Once there is a final judgment of the English court, it will be recognisable in Greece, as elsewhere in the EU and will assist the Greek courts." The Supreme Court determined that Article 27 of the EU Jurisdiction Regulation, which obliges any court other than the first seised (in this case Greece) to order a stay, did not apply because the English and Greek proceedings did not involve the same "cause of action". This is a highly technical argument, and possibly the result is counter-intuitive to what the man on the street would have thought, but this was an essential determination if there was to be a victory for common sense in this case. The outcome is that both proceedings can in theory continue, but the Greek action is now pointless, as any recovery will be automatically indemnified in England.

Commentary so far on the long term impact of the ruling has focussed on the point that it increases certainty and confirms that English settlements cannot be unravelled easily by a foreign jurisdiction. But is the position really as well shored up as many commentators would have us think? Looking at the detail of the case it was actually a very close call. The critical question was whether the two arms of the dispute - ie a) upholding the settlement agreement in contract, and b) seeking tortious damages effectively on the basis that the action that led to the agreement was tainted by fraud - were completely separate causes of action, or whether they were actually part of the same one. The Supreme Court decided they were separate causes of action, which is the main reason it determined the case in the way that it did. But the facts would not have to be that different in another case for the court to come to a different conclusion, at which point we could well find ourselves in a similar position to where we were after the Court of Appeal's decision in this case. For example, fraud could make the settlement voidable, or the jurisdiction in the settlement agreement might not be expressed as exclusive. Also, what gave this case extra dimension is the fact that damages for late payment by insurers are not available in England (unlike in Greece), whereas the Law Commission looks like it may change that. Further, not all settlement agreements will be subject to English law and jurisdiction: if they are subject to another law or jurisdiction, all the questions that were examined in the chain of proceedings we saw in the Starlight case might be viewed differently elsewhere, in any country in the EU.

Yes it certainly is good news that we have some more certainty about the integrity of settlement agreements in England, but perhaps this is not the last word we have heard on these issues.

This article was first published in The Lawyer, 2 December 2013, and is reproduced with permission.

For more information, please contact Jonathan Bruce, Partner, on +44 (0)20 7264 8773, or jonathan.bruce@hfw.com, or your usual contact at HFW.

Broker must pass on collections - timebar no excuse

Equitas Ltd v Walsham Brothers & Company Ltd[2]

This case, the background to which was the Reconstruction and Renewal process (which created Equitas and is credited with rescuing Lloyd's), examined the nature of the broker's obligation to remit premium and claims with reasonable promptness, once collected and whether or not claims, brought by Equitas in respect of unpaid balances and the related lost investment return, were time-barred because more than six years had elapsed since the date when the broker had first breached its obligation by not remitting these promptly.

2 [2013] EWHC 3264 (Comm)

It was agreed by the parties that "acting with reasonable promptness" in this context meant payment on the first day of the second month after the month in which a payment was received by the broker.

The judge found on the facts that the relationship between the broker and the syndicates (Equitas' assignors) was of an on-going nature and that the broker's obligations included administering the reinsurance contracts generally, over a number of years and in a professional and businesslike way. The judge therefore held that the broker's obligation to remit payments reasonably promptly (which arose concurrently in contract and tort) was continuing. This meant that a new cause of action arose on each day when it failed remit the sums collected. Hence, Equitas' claims were not time-barred, despite the six-plus years since the broker had first breached its obligation.

In order to sense-check this conclusion, the judge considered whether or not an honest and conscientious broker would have felt obliged to remit funds to his principal six years and a day after he ought to have. He considered that the broker would have "*rightly concluded that even now he was still under a duty to remit those funds*".

The judge also applied *Sempra Metals v Inland Revenue Commissioner*, ruling that Equitas was, in principle, entitled to compound interest on late remittances.

For more information, please contact Edward Rushton, Associate, on +44 (0)20 7264 8346, or edward.rushton@hfw.com, or Andrew Bandurka, Partner, on +44 (0)20 7264 8404, or andrew.bandurka@hfw.com, or your usual contact at HFW

Good faith and (re)insurance contracts in the UAE

Holman Fenwick Willan recently acted on behalf of an insurer in a landmark case in the UAE courts concerning breaches of the duty of good faith[3]: the insurer successfully counter-claimed against an assured in the Abu Dhabi Courts for rescission of a marine hull insurance policy on the grounds that the assured failed to properly disclose and/or misrepresented its previous claims history in the proposal form at the time of placement.

The Abu Dhabi Supreme Court accepted that the previous claims history was material for the purposes of Article 385(b) of the UAE Maritime Law, ordered that the policy be rescinded *ab inito* in accordance with Article 388 of the same law, and rejected the assured's claim for a total constructive loss.

3 Case No. 434 of 2013.

Conferences and Events

London Insurance Market Day Awards
London
5 December 2013
Attending: Paul Wordley and Costas Frangeskides

IRLA Breakfast Briefing
London
5 December 2013
Panellist: Carol-Ann Burton

Cargo Insurance In Practice Seminar
Geneva
16 January 2014
Presenting: Paul Wordley and Ciara Jackson

HOLMAN FENWICK WILLAN LLP
Friary Court, 65 Crutched Friars
London EC3N 2AE
United Kingdom
T: +44 (0)20 7264 8000
F: +44 (0)20 7264 8888

Lawyers for international commerce hfw.com

© 2013 Holman Fenwick Willan LLP. All rights reserved

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice.

Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please contact Craig Martin on +44 (0)20 7264 8109 or email craig.martin@hfw.com