

# Insurance Newsbites

Updating you on insurance issues



Please find attached a brief summary of a decision recently given by the High Court which commented on notification in the context of "claims made" policies. This follows on further from the recent Kidsons judgment which has prompted a significant amount of comment in the legal press.

Please feel free to forward this to other interested parties.

If you have any questions about the topic covered, Matthew Hammond, the author of the article will be happy to help or you can get in touch with your usual Mills & Reeve contact.

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### **Notifications only effective in relation to the specific circumstances notified**

**The recent High Court decision of *Kajima UK Engineering Limited v Underwriter Insurance Company Limited* saw the court give further consideration to the scope of notifications in the context of "claims made" policies.**

The court was required to determine as a preliminary issue whether Kajima ("K") had successfully notified various defects and deficiencies prior to the expiry of its policy with Underwriter Insurance Company ("U").

#### **Background to the claim**

K entered a "claims made" policy with U for the period 20 May 2000 to 19 May 2002. The policy was stated to cover circumstances "which might reasonably be expected to produce a claim" notified during the policy period. K notified a circumstance by letter dated 22 February 2001 ("the Notification") in respect of various issues arising from settlement and movement of accommodation pods. There was no dispute as to the effectiveness of the Notification.

Over the years that followed, a number of further problems arose with the project, some of which were related to the matters contained in the Notification, but others of which were not. K sought to rely on the Notification to cover all of the further problems on the grounds that an investigation referred to in the investigation led, in time, to further investigations resulting in further defects and deficiencies being uncovered. It was these defects and deficiencies which ultimately caused K to suffer the loss giving rise to the policy claim. K argued that there was a "continuum" from 2001 onwards and that K's outlay therefore related to notified circumstances.



U argued that the Notification was in relation to specific and narrow circumstances and that K's claim should therefore be limited to those specific circumstances that were referred to in the Notification.

### **Decision**

The court agreed with U and ruled that the Notification had only been effective in relation to the specific circumstances that were notified. Those elements of the claim that related to defects and deficiencies separate to the Notification were not covered by the policy. Such a notification would not be effective in relation to any other matters save to the extent that those other matters related or contributed to the circumstances which had previously been notified or were caused by previously notified circumstances. Akenhead J concluded that it was insufficient that there was a historical "continuum" of investigation. K ought to have made further notifications as it became aware of further circumstances which might give rise to a claim. Given that many of the problems for which K claimed arose after the expiry of the policy period, U would not have been liable in any event.

In reaching its decision, the court followed the recent decision of *HLB Kidsons v Lloyds Underwriters & Others* another case that relates to notified circumstances in the context of "claims made" policies. In particular, Akenhead J referred to Gloster J's judgment in concluding that "what is or may be covered by a generally described claim simply depends upon what are in context the matters which can properly be described as covered by the particular claim".

The judge spelt out that even had the investigation referred to in the Notification revealed damages, defects and deficiencies which were not related to the notified circumstances within the insurance period, the Notification would not be wide enough to cover such laterally or coincidentally discovered matters. The investigation referred to in the Notification was not a separate notified circumstance in itself. It could, and in fact did, only relate to the notified circumstances. The fact that later investigations, even if into the notified circumstances, happened to reveal other defects did not bring them within the scope of the Notification unless they were attributable or gave rise to the notified circumstances. An insured must make further notifications as it becomes aware of further circumstances which might give rise to a claim.

### **Comment**

Interestingly, U failed to raise the issue of whether the subject matter of K's claim was covered by the 2001 notification until 2005. During that period of time, the conduct of U and its agents was consistent with the policy responding to the claim. Whilst concerns were raised regarding whether the damage related to workmanship or design issues, the issue of the scope of the notification was only raised in 2005. Regardless of this, the court did not consider there to be any grounds for U being estopped from relying on the policy points that it ultimately successfully relied on, although this may be due to the fact that K did not plead waiver or estoppel as part of its claim. It would be interesting to see whether a court would reach the same conclusion in relation to similar circumstances were a claimant to raise such an argument.

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