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Insurance Newsbites

Updating you on insurance issues

The eagerly anticipated Court of Appeal decision concerning notification under a claims-made professional indemnity insurance policy in *HLB Kidsons v Lloyd's Underwriters* was handed down yesterday. Kidsons' appeal was dismissed on all major points, except those relating to the effect of the later notifications to the two leading Lloyd's syndicates and the company market.

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Background

Kidsons, a firm of chartered accountants, claimed under its professional indemnity policy in respect of claims made against it arising out of various tax avoidance schemes which it had marketed.

Although the claims against Kidsons were made outside the policy period, Kidsons relied upon General Condition 4 (GC4) of the policy. GC4 enabled the insured to obtain an extension of cover in respect of any claims made after the expiry of the policy provided that the insured gave notice to the underwriters "as soon as practicable" of any circumstance of which they became aware during the policy period.

Kidsons had purported to give notice of the circumstances giving rise to the claims under GC4 by presentation of two letters which had been sent within the policy period. Underwriters argued that the purported notifications did not comply with GC4.

Court of Appeal decision

The decision of Gloster J, handed down in August 2007, has been given wide coverage in the industry press for its potential impact upon the practice of notifying and notification wording. The Court of Appeal judgment will generate similar interest. Some of the main points to come out of the Court of Appeal decision are discussed below. Lord Justice Rix gave the leading judgment with which Lord Justice Toulson and Sir Richard Buxton (for the most part) agreed.

- **Conditions precedent** An important issue concerned whether GC4 should be treated as a condition precedent to liability notwithstanding the fact that it was not labelled as such. Rix LJ recognised that if underwriters were prevented from repudiating liability for late notification, even though a claim should emerge after the end of the policy year, a claims-made policy would essentially become entirely open-ended, turning

the concept of such a policy on its head. As Gloster J had noted, underwriters are looking for a definite cut-off date at the end of the policy period in order to be able to ascertain the scope of accrued or potentially accruing exposures.

Rix LJ held that GC4 was a condition precedent. However, this finding was primarily based more upon the wording of GC4 and not the "commercial importance" arguments above.

The requirement under GC4 that notice of a circumstance be given "as soon as practicable" did not in Rix LJ's view render the provision a condition precedent. However, the wording "Such notice having been given" in the second part of CG4 did. The second part of GC4 allowed the whole provision to benefit from a condition precedent status, including the requirement that notice be given as soon as practicable.

- **Impact of the Minimum Terms** The Court of Appeal also examined the potential impact of the Minimum Terms of the Institute of Chartered Accountants of England & Wales (the Minimum Terms) on GC4 as a condition precedent. The Minimum Terms purport to limit underwriters' remedy for breach of a "condition" of a policy to compensation only. Rix LJ found that the reference in the Minimum Terms to "conditions" did not apply to "conditions precedent" (whether this related to an extension of cover provision such as GC4 or a standard notification clause dealing with claims made within the period of cover). Accordingly, underwriters were entitled to repudiate liability for a breach of GC4 and were not limited to compensation for breach.

  Gloster J had also held that the Minimum Terms only applied to situations where a breach would lead to a reduction of cover which already existed and did not affect underwriters' entitlement to deny cover for non-compliance with a provision which was concerned with the extension of cover (such as GC4). Rix LJ was generally supportive of Gloster J's views about the Minimum Terms.

- **Insured's state of mind** Rix LJ was somewhat sceptical of the view expressed by Gloster J that the insured's state of mind is relevant to determining the extent to which it was aware of, and therefore capable of notifying, circumstances which might give rise to a claim. Gloster J thought that, if the insured is not aware of the significance of a relevant circumstance at the time it purports to give notice, the notice is ineffective. Rix LJ, on the other hand, thought that the question of whether circumstances brought to the attention of the insured might give rise to a claim is an objective one and that it is for underwriters to rate the risk, not the insured.

- **Effective notification** Gloster J had set out various elements required to provide an effective notification of circumstances. In particular, she said that the notification should be in terms which leave the reasonable recipient in "no reasonable doubt" that it is purporting to notify a circumstance, and should refer to the specific circumstances which may give rise to a claim. It should also identify an error, act or omission or potentially negligent or wrongful conduct and, if possible, identify a possible claimant or victim and the loss that they may have suffered as a result.

  Rix LJ did not agree with this analysis (Sir Richard Buxton disagreed with him on this point). Whilst the letter of 31 August 2001 was not a very satisfactory letter, it was nevertheless a notification on all objective criteria. In particular, the letter had

been presented to the claims side of underwriters with an accompanying bordereau headed “Claim circumstance notification bordereaux”. He noted that the details in the bordereau were somewhat vague and it stated that no claim had been made. However, he said that the question is what the letter said, not what it did not say. (However, it is worth noting that GC4 said nothing about how a notification was to be made. Notice provisions in other policies sometimes specify more precisely what a notice must contain.)

Rix LJ was particularly critical of the “no reasonable doubt” test referred to by Gloster J. He thought that few notifications could survive a test which required them to leave underwriters in no reasonable doubt that a notification of circumstances had been made.

- **”As soon as practicable”** Notice given a month or so after the circumstances could have been identified was held to be “as soon as practicable” since the market permits some latitude. Gloster J did not consider that notice given four months after (and almost three months after the expiry of the policy period) was “as soon as practicable”. Rix LJ agreed with this.

Comment

The decision has provided further clarity on when a circumstance arises and what constitutes a condition precedent, and the need for careful drafting in this regard. However, some may be disappointed by the watering-down of Gloster J’s checklist of what is required for an effective notification.

Insurers should also be alert to the possibility that professional bodies may now wish to review their minimum terms, and that this could have an impact on insurers' rights and remedies.

Click here for a full copy of the judgment:
http://www.bailii.org/ew/cases/EWCA/Civ/2008/1206.html

Queries

If you have any queries on the impact of this judgment please contact either Neil Davis on 020 7648 9238 or Tom Filby on 020 7648 9262.