

Insurance

Court of Appeal guidance on notification of circumstances



Factual Background

Euro Pools specialised in the installation of swimming pools. It entered into two professional indemnity policies with RSA for the periods 2006-07 and 2007-08. A notification was made under each policy relating to defects discovered in the operation of pool machinery.

Euro Pools identified defects in the operation of pool equipment at various locations, which it notified to RSA in 2006-07 as concerning problems with steel tanks which would be remedied using air bags. During the policy period 2007-08, Euro Pools notified RSA of a new proposed remedial scheme, namely the use of a hydraulic system rather than air bags.

The remedial works fully eroded the limit of indemnity under the 2006-07 policy. RSA argued that the new remedial work arose from the circumstance notified in the 2006-07 policy period, such that Euro Pools was not entitled to a further indemnity. Euro Pools argued that the need for more extensive remedial works was not known at the time of the 2006-07 notification and the costs of those works was therefore within the scope of the circumstance notified under the 2007-08 policy period, which would have given Euro Pools another limit of indemnity.

At first instance, the Court found that:

- A. the defects had not arisen at the relevant time for the notification of a circumstance under the 2006-07 policy year;
- B. Euro Pools did not have the requisite knowledge of the defects, and accordingly, could not notify something of which it was not aware; and
- C. Euro Pools was therefore entitled to a further £5,000,000 indemnity under the 2007-08 policy year.

RSA appealed on the basis that the Court was incorrect in finding that there was no causal link between the remedial works required and the circumstances notified under the 2006-07 policy.

The Court of Appeal found that the Court at first instance had erred, and that it was not necessary to consider whether Euro Pools could have been aware of the fundamental flaw in 2007. Euro Pools faced potential claims from numerous third parties arising from problems notified under the 2006-07 policy. It was not appropriate to "over-analyse the problem by dissecting every potential cause of the problem as a different notifiable circumstance". The parties had "lost sight" of the correct analysis; "the issue was whether, objectively speaking, the potential claims from third parties arose from the circumstances notified. The technical reason for the problem would not have mattered to the third party claimants and there was therefore no need for the Court to assess the technical aspects as to the cause of the problem or whether it was known to the parties at the time of the notification.

The Court then considered whether there was a causal link; did the claim arise from the circumstance notified? The answer was yes, because all that was required was a connection that was other than "purely co-incidental", and the Court of Appeal concluded that the first notification encompassed the possibility that proposed remedial scheme may not work, in which case other remedies would need to be considered.

The Court of Appeal therefore found that the entirety of the remedial works fell within the scope of the circumstance notified under the 2006-07 policy, and that Euro Pools was not entitled to cover under the 2007-08 Policy.

Comment

The case is unusual in that it was the insured who was arguing that the original notification should be construed narrowly, so that the circumstances subsequently notified would fall to be covered under a new limit of indemnity; frequently, it is the insurer who argues that subsequent claims do not fall within the scope of the original notification.

Nevertheless, the case reaffirms principles set out in *HLB Kidsons v Lloyds* [2008], in particular that it is possible for an insured to notify a "hornet's nest" of issues, at a point in time where there may exist issues with a project which amount to notifiable circumstances, the precise cause of which is unknown at the point of notification. Whether subsequent claims arise out of the notified circumstances will invariably be a fact specific exercise, but brokers and insureds will want to try to draft notifications to be as broad as possible so as to capture subsequent claims. Insurers, on the other hand, will no doubt want to consider whether any such attempts at notification are invalid for lack of specificity.

For more information please contact:



Christopher Ives
Principal Associate

T: +44 161 831 8191

christopherives@eversheds-sutherland.com