



NEW SQUARE

**PROFESSIONAL INDEMNITY INSURANCE:
CLAIMS, CIRCUMSTANCES AND NOTIFICATION**

By

MARK CANNON Q.C.

4 NEW SQUARE

LINCOLN'S INN

LONDON WC2A 3RJ

Tel: 020 7822 2000

Fax: 020 7822 2001

E-mail: m.cannon@4newsquare.com



THE SPEAKER

Mark Cannon QC is a commercial lawyer whose main areas of practice are professional liability, insurance and construction

In the current edition of Chambers & Partners Mark is said to be "highly intelligent, good on paper and on his feet", to give "very commercial advice backed up with a very strong commercial understanding of the law" and to be "the person to go to for professional indemnity insurance. He just knows it inside out and has excellent judgement."

The Legal 500 2015 says that Mark is "very user-friendly and provides clear, reliable advice", that he is "able to quickly get to grips with complex professional negligence litigation", is "one of the brightest silks on professional indemnity law" and that he "is brilliant at assessing the law, has a strong sense of justice and is always reliable and responsive".

Recent cases include acting for one of the lead defendant firms of solicitors in the Right to Buy litigation, acting for a construction company in Northern Ireland in claims against a specialist sub-contractor and against CAR insurers and, last week, appearing in the Supreme Court in the case of *Impact Funding v. AIG Europe*.

Mark is co-author of *Cannon & McGurk on Professional Indemnity Insurance* (OUP, 2nd edition 2016) and has been an editor of *Jackson & Powell on Professional Liability* since the 3rd edition (1992), initially editing the chapter on insurance brokers. He wrote the chapter on members' and managing agents at Lloyd's for the 4th edition (1997). He has edited chapters 2 to 5 in more recent editions.

In the little spare time remains to him, Mark tries to spend a few weeks a year skiing, a few more soaking up the sun and culture of Italy, France or Spain and evenings and weekends with family, friends and books, often accompanied with a glass of wine.

Claims Made Policies

1. Why “claims made”?

- Ascertainment of liability to a third party is not a practical trigger for cover: *Robert Irving & Burns (a firm) v Stone* [1998] Lloyd’s Rep IR 258, at 261 per Staughton LJ
- Occurrence policies better suited to provide cover against loss caused by identifiable events such as collision, fire and war: *Pacific Employers Insurance Co. v Superior Court*, 221 Cal App 3d 1348, 270 Cal Rptr 779, quoted in *Stuart v Hutchins* (1998) 164 DLR (4th) 67, at 73 (Ontario Court of Appeal); see also *Slater v Lawyers’ Mutual Insurance Company*, 278 Cal Rptr 479 (Cal App 2 Dist 1991)
- If professional liability policies were underwritten on an occurrence basis (i.e. when liability was incurred, not when it was ascertained) then there would be a long tail and it would be difficult for insurers to form a view as to their potential exposure: *Reid Crowther & Partners Ltd v Simcoe & Erie General Insurance Co.* (1993) 99 DLR (4th) 741 (Supreme Court of Canada) at 747-748 (see also *Friends Provident Life and Pensions Ltd v Sirius International Insurance Corporation* [2004] EWHC 1999 (Comm); [2005] Lloyd’s Rep IR 135, 142, at [13]; *Jesuit Fathers of Upper Canada v Guardian Insurance Company of Canada* (2006) 267 DLR (4th) 1 (Supreme Court of Canada) at [24]; *Robert Irving & Burns (a firm) v Stone* [1998] Lloyd’s Rep IR 258, at 260; *FAI General Insurance Company Ltd v Perry* (1993) 30 NSWLR 89 (New South Wales Court of Appeal) at 96-97)
- Greater certainty should mean lower premiums: *HLB Kidsons v Lloyd’s Underwriters* [2007] EWHC 1951 (Comm); [2008] Lloyd’s Rep IR 237 at [18]-[20] (See also *Safeco Title Insurance Company v Gannon* 774 P 2d



30 at 35 and *FAI Insurance Ltd v Australian Hospital Care Pty Ltd* [2001] HCA 38, (2001) 204 CLR 641 at [66] per Kirby J)

2. Some consequences

- Firms need to maintain insurance until the potential for new claims from year to year
- The insured needs to be able to obtain cover for potential claims of which he learns in the current year: *Jesuit Fathers of Upper Canada v Guardian Insurance Company of Canada* (2006) 267 DLR (4th) 1 (Supreme Court of Canada) (See also *QBE Insurance Ltd v Attorney General* [2005] NZCA 193)

3. When is a claim made?

- Claim means “a demand for something as due; an assertion of a right to something”. It can also mean “right of claiming; right or title (to something or to have, be, or do something; also on, upon the person, etc., that the thing is claimed from)”.
- Solicitors’ Minimum Terms define “Claim” as “a demand for, or an assertion of a right to, civil compensation or civil damages or an intimation of an intention to seek such compensation or damages”
- *Robert Irving & Burns v Stone* [1998] Lloyd’s Rep IR 258, at 261 per Staughton LJ:

“To my mind, in the ordinary meaning of the English language, the words ‘claims made’ indicate that there has been a communication by the client to the [insured] of some discontent which will, or may, result in a remedy expected from the [insured]. There must, I say, be a communication. That seems to me the ordinary meaning of the word ‘claim’. That is a view which I have in common with the majority in *St Paul Fire & Marine Insurance Company v Guardian Insurance Company of Canada* (1983) 1 DLR (4th) 342 at

page 357, where Thorson JA said:

‘It follows in my opinion that the words claims made in the Guardian policy ought to be construed in accordance with the ordinary plain meaning of those words, which, simply stated, denote a claim that is made by being notified to or otherwise brought to the attention of the person against whom it is asserted.’”

- Claim must be made by or on behalf of the third party claimant: *Jesuit Fathers of Upper Canada v Guardian Insurance Company of Canada* (2006) 267 DLR (4th) 1 (Supreme Court of Canada)
- Manner in which claim is made: *Reid Crowther & Partners Ltd v Simcoe & Erie General Insurance Co*: (1993) 99 DLR (4th) 741, per McLachlin J at 756-757:

“What is required, unless the policy expressly so stipulates, is a *form* of demand or assertion of liability, not a *formal* demand or assertion of liability. Under a policy such as the one in this appeal, which contains no express requirement of a formal demand or indeed any demand at all, what constitutes a claim ‘made’ is a question to be resolved on the facts of the case. There is no magic formula. One must look to the reality of what the third party was communicating to the insured by words and conduct. If the message was clear, the fact that the third party through politeness refrained from stating its demand or intention to hold the insured liable in categorical legal terms should not preclude a finding that a claim has been made. Where the reasonable insured in all the circumstances would conclude that a third party was making a claim against him or her in the sense that if satisfactory payment or other form of reparation were not made the third party would sue, then it may be said that a claim has been made, even though a formal statement of liability and/or demand has not been tendered.” (emphasis in original)
- Distinguishing claims from circumstances which might give rise to a claim:



- *M J Gleeson Group Plc v Axa Corporate Solutions Assurance S.A.* [2013] Lloyd’s Rep IR 677 (no policy definition of “claim”):

Letter:

“I refer to the above property which you constructed between 2000 and 2001 for Frogmore Developments, funded by my client, Strathclyde Pension Fund.

The building's managing agents have been experiencing problems with loose cladding cappings and both cladding and roof leaks. They have had their building surveyors investigate and I enclose a copy of their Endings for your attention. You will see that they have raised concerns in respect of the Installation of the cladding cappings and deficiencies in the make up of areas of the roof, particularly at 4 floor balcony level.

My first priority is in respect of the safety aspects raised by the report and would ask you, as the design and build contractor for the project to investigate and provide your urgent confirmation that the installation is safe. Thereafter I would request your comments on the findings of the report overall together with your proposals for rectifying these apparent deficiencies in the original building design/construction.”

Judgment of HH Judge Raynor QC sitting as a judge of the High Court:

“... the letter plainly constitutes more than a mere request for information but I have concluded that it does not constitute a claim within the meaning of the policy. What it amounts to is a request for comments on ‘apparent deficiencies’, which I construe as meaning ‘seeming’ deficiencies, and proposals for rectifying deficiencies for which Gleeson accepts responsibility. It does not amount to an assertion of a right to relief ... I find ... that the letter was the communication of ‘circumstances which might lead to a claim’; whether a claim actually ensued would depend upon Gleeson's response to the letter.”



- *Arc Capital Partners Ltd v Brit UW Ltd* [2016] EWHC 141 (Comm); [2016] Lloyd's Rep IR 253 (definition of claim included “a written demand for monetary damages or non-pecuniary relief”):

Letter:

“It is our view, based on our preliminary investigations, that the Fund has a strong claim against the Manager for recovery of the Payment and all related losses, costs and interest. Whilst the principal purpose of this letter is to endeavour to agree a process for the swift and effective recovery of these sums from OH, rather than to assert or expand on the Fund's claims against the Manager or to invite a detailed debate about them, we do wish at this stage to make it clear that the Fund's rights under the investment management agreements from time to time between the Fund and the Manager, and its rights more generally as against the Manager, are fully reserved.”

Judgment of Cooke J:

“In my judgment, this letter does not constitute a demand. It is expressly a letter in which rights are reserved to pursue a claim against the Manager. Whilst the letter expressed the view that the Fund had a strong claim against the Manager, the principal purpose of the letter was expressed to be the attempt to agree a protocol for the swift and effective recovery of sums from OH, rather than to assert or expand on the Fund's claims against the Manager. It was in that context that the Fund's solicitors made it clear that its rights against the Manager were fully reserved and that any step taken by the Fund to recover from OH was not be seen as a waiver. The suggestion that it was entirely appropriate that the Manager should meet upfront the costs of the recovery strategy was not in itself a claim either. The request for confirmation of agreement to the funding of the recovery strategy was not a written demand for monetary damages or non-pecuniary relief.”

- *Gardner v Lemma Group Insurance Co Ltd (in liquidation)* [2016] EWCA Civ 484 (Solicitors Minimum Terms):

Letter:

“According to our information, the matter completed less than six years ago. Please confirm by return the exact date of exchange and/or completion. If this information is not provided within 48 hours, we may issue proceedings in order to protect our client's position as regards limitation.

Once we have reviewed the client's files, we will be in a position to respond to your question and will inform you in the event that consideration is being given to negligence.”

Attendance Note:

“Speaking to Rachel (the reference from Bracewell Law) and asking her off the record what she is looking for, because we have had some requests from other solicitors and they all seem to be similar files, there is a suggestion that there is some negligence by the solicitor, which we view in terms of our expertise as unlikely to bear any fruit. She told me that she is under strict instructions to remain completely secretive as to the reason why they require the file and she cannot tell me anything even though there may be a claim for negligence. For those reasons, I told her that I would not be notifying indemnity insurers.”

Judgment of Court of Appeal:

“The definition of a claim requires there to be communication of an intention to seek compensation or damages. The letter was designed to press Mr Gardner for disclosure of the files of the Curwens which their solicitors needed to see in order to decide whether to bring a claim. It did not articulate an intention to bring proceedings for negligence because that depended on what the files disclosed. Nor did it exhibit an already-formed intention even to issue a protective claim form. It said we ‘may’ issue protective proceedings. The telephone conversation took matters no further. It merely confirmed that there might be a claim for negligence once the files had been inspected.”

- Is a third party who gives the insured notice of intention to make a claim in fact making a claim by giving notice of his intention? *Junemill Ltd (in liquidation) v FAI General Insurance Company Ltd* [1997] QCA 261
 - Intervention by statutory regulators: *J Rothschild Assurance plc v Collyear* [1995] Lloyd's Rep IR 6, at 28 (see also *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36; (2007) 237 ALR 420)
4. What is encompassed within the claim that is made? *Thorman v New Hampshire Insurance Co (UK) Ltd* [1988] 1 Lloyd's Rep 7.
5. Claims made and notified, a double trigger:
- *FAI Insurance Ltd v Australian Hospital Care Pty Ltd* [2001] HCA 38; (2001) 204 CLR 641 per Kirby J at [67]

“The centrality of notification provisions under claims made type policies has been emphasised by decisions in the United States. Thus in *Federal Deposit Insurance Corporation v Barham* [1993] USCA5 1692; 995 F 2d 600 at 604 n 9 (1993) the United States Court of Appeals commented:

‘Because notice of a claim or potential claim defines coverage under a claims-made policy, we think that the notice provisions of such a policy should be strictly construed. See *Driskill v El Jamie Marine, Inc* 1988 WL 93606 (E D La Sept 7, 1988) (‘In occurrence policies, the notice requirement is merely to "aid the insurance carrier in investigating, setting, and defending claims," but in claims-made policies, the notice requirement is as important as the requirement that the claim be asserted during the policy period. It is the transmittal of notice of the claim that invokes coverage.’).”
 - *Reid Crowther & Partners Ltd v Simcoe & Erie General Insurance Co* (1993) 99 DLR (4th) 741 at 749-750 per McLachlin J:

“Another type of restriction of coverage in ‘claims-made’ and hybrid policies is found in what are referred to as ‘claims

made and reported' policies. Coverage under such policies applies only to claims which are both made of the insured *and reported to the insurer* during the policy period. This type of policy creates obvious problems for insureds regarding claims discovered and/or made by third parties just before the expiry of their coverage. In his article 'Professional Liability Insurance: The Claims Made and Reported Trap' (1991), 19 *W. St. U. L. Rev.* 165, Lee Roy Pierce, Jr. writes at p. 171:

'Claims made and reported policies are less expensive because it is statistically probable that a certain number of insureds will find it impossible or impracticable to timely report their claims. Thus, premium costs to the group are reduced because it is statistically probable that many insureds (who actually encounter the insured loss) will forfeit coverage.'

In Pierce's view, this situation is antithetical to the purpose of purchasing liability insurance, which is for the insured to trade a contingent loss (uncertainty) for a certain loss (the premium paid to the insurer)." (emphasis in original)

- *Stuart v Hutchins* (1998) 164 DLR (4th) 67, at [27]

"where circumstances beyond the control of the insured render it physically impossible for the insured to comply with the notice provision, general principles of contract interpretation would come to the insured's aid... Specifically, I think it would be open to the court to construe the notice provision as containing an implied term that non-compliance due to physical impossibility would not be fatal to coverage but that the insured be given a reasonable opportunity to comply."

The Duty and Right to Notify

6. Need for the ability to notify: *J Rothschild Assurance plc v Collyear* [1999] Lloyd's Rep IR 6, at 22; *HLB Kidsons v Lloyd's Underwriters* [2008] EWCA Civ 1206; [2009] 1 Lloyd's Rep 8 at [114] (see also *Friends Provident Life and Pensions Ltd v Sirius International Insurance Corporation* [2005] EWCA Civ 601; [2005] 2 Lloyd's Rep 517 at [11] per Mance LJ).

7. Circumstances and occurrences.

8. Potential to give rise to a claim: *HLB Kidsons v Lloyd's Underwriters* [2008] EWCA Civ 1206; [2009] 1 Lloyd's Rep 8.
 - Against the insured: *HIH Casualty & General Insurance Australia Ltd v Della Vedova* [1999] FCA 456

 - No need for the potential claim to have any merit: *FAI General Insurance Ltd v Australian Hospital Care Pty Ltd* [1999] QCA 243, per Derrington J at [10]

 - Degree of probability of a claim: "likely" and "might":
 - o "Likely": *Layher v Lowe* [2000] Lloyd's Rep IR 510 (CA); *Jacobs v Coster (t/a Newington Commercial Service Station) and Avon Insurance (Third Party)* [2000] Lloyd's Rep IR 506 (CA)
 - o "Might": *J Rothschild Assurance plc v Collyear* [1999] Lloyd's Rep IR 6, at 22; *HLB Kidsons v Lloyd's Underwriters* [2008] EWCA Civ 1206; [2009] 1 Lloyd's Rep 8, at [139] per Toulson LJ

9. Insured's knowledge and understanding:
 - The insured is not deemed to know that he has been negligent: *Moore v Canadian Lawyers Insurance Association* (1993) 105 DLR (4th) 258 at 261 per Hallett JA

"It is one thing for a lawyer to make a mistake and not be aware that it was a mistake nor aware of its consequences; but it is quite another to have it brought to his attention that he has made an obvious error that would likely lead to a claim if not remedied. In the former situation you would not say the lawyer had an obligation to report on the basis that a reasonably prudent solicitor would have known of the mistake and reported to the insurer; that would be absurd as it would negate the coverage in the very circumstances it was intended to apply. In the latter situation, however, the

lawyer ought to meet the standard of a reasonably prudent solicitor in reporting; otherwise a solicitor who has breached a duty to his client that has damaging consequences could ignore with impunity the notice requirement by stating that he did not understand that his apparent breach of duty, of which he had been made aware, would likely give rise to a claim.”

(See also *Permanent Trustee Australia Ltd v FAI General Insurance Co Ltd* [1998] NSWSC 1011; (1998) 153 ALR 529 at 567-568 per Hodgson CJ)

- An exercise of judgment: *HLB Kidsons v Lloyd's Underwriters* [2008] EWCA Civ 1206; [2009] 1 Lloyd's Rep 8, at [137]-[142] per Toulson LJ:

“In short, in my judgment the right general approach to a policy clause which entitles an insured to give notification of a circumstance which may give rise to a claim, and thereby cause the risk to attach to that policy, is to treat the right as subject to an implicit requirement that the circumstance may reasonably be regarded in itself as a matter which may give rise to a claim. The right general approach to a policy clause which goes further and imposes a duty on the insured to give such a notification is to treat it as implicitly limited, not only by the requirement that the circumstance may reasonably be regarded as a matter which may give rise to a claim, but to a circumstance which either the insured notifies or which any reasonable person in his position would recognise as a matter which may give rise to a claim and therefore requiring notification to the insurer.”

See further *Laker Vent Engineering Ltd v Templeton Insurance Ltd* [2009] EWCA Civ 62; [2009] Lloyd's Rep IR 704, at [81] per Aikens LJ.

10. Method of notification:

- *Friends Provident Life and Pensions Ltd v Sirius International Insurance Corporation* [2004] EWHC 1999 (Comm); [2005] Lloyd's Rep IR 135; [2005] EWCA Civ 601; [2006] Lloyd's Rep IR 45:

“Pension transfers and opt outs which are a matter of public record and relate to all pensions providers. Detailed investigation will be conducted into pensions related transactions in accordance with any SIB/LAUTRO guidelines and notification of any potential claims given to underwriters in the usual way.”

- *HLB Kidsons v Lloyd’s Underwriters* [2007] EWHC 1951 (Comm); [2008] Lloyd’s Rep IR 237:

“The Board has taken the view that this might be regarded as material information for insurers. There is no sign of a claim arising at the present time but the Board feels that it is appropriate in the circumstances to advise what is happening and to take your instructions.”

11. What can be notified?

- *Kajima UK Engineernig Ltd v The Underwriting Company Ltd* [2008] EWHC 83 (TCC); [2008] Lloyd’s Rep IR 391 at [99] per Akenhead J:

“There is no restriction in [the clause] as to what circumstances might be notified. They may be specific or general. They may relate to damage, symptoms of damage, or actual, potential or perceived defects, liabilities or losses. It is not necessary that the notified circumstances will probably give rise to a claim; it is enough that they might reasonably be expected to do so. The circumstances might impinge upon a particular project although they arise on another. An example put to Counsel was the design and build contractor to whose notice it comes that a design engineer working for it on other projects has been extensively negligent on other projects. It might then be legitimate to notify the insurers in respect of the particular project to the effect that it has come to the insured’s attention that a named individual’s possible incompetence on other projects might well have been repeated on the particular project in question.

It is impossible and unhelpful to produce a finite definition of circumstances which might reasonably be expected to

produce a claim because, given the factual permutations and possibilities, the type of such circumstances may be almost infinite.”

12. Block notifications:

- *J Rothschild Assurance plc v Collyear* [1999] Lloyd’s Rep IR 6, at 22 (*Alexander Forbes Europe Ltd v SBJ Ltd* [2003] Lloyd’s Rep IR 432, at 438 and *Standard Chartered Life Assurance Ltd v Oak Dedicated Ltd* [2008] EWHC 222 (Comm), [2008] Lloyd’s Rep IR 552 at [24].

- *McManus v European Risk Insurance Company* [2013] EWHC 18 (Ch) and [2013] EWCA Civ 1569; [2014] Lloyd’s Rep IR 169:
"The conclusion my partners and I come to, which is the inevitable conclusion one must come to is that every file conducted by Sekhon & Firth and Runhams LLP (in the period subsequent to the merger of those two practices), and in respect of which this firm is deemed by the Successor Practice Rules to be the successor practice contains or is more likely than not to contain examples of malpractice negligence and breach of contract and so each and every file of the predecessor firms Sekhon & Firth, Sekhon & Firth LLP and Runhams LLP should properly be notified to you as individually containing shortcomings on which claimants will rely for the purposes of bringing claims against this firm as successor practice.”

- *Ocean Finance & Mortgages Ltd v Oval Insurance Broking Ltd* [2016] EWHC 160 (Comm); [2016] Lloyd’s Rep IR 319:
“If during the period of Insurance the Insured becomes aware of any Circumstance which may give rise to a Claim for indemnity under this Policy and during the Period of Insurance the Insured gives written notice as soon as reasonably practicable to the Insurer in connection with said Circumstance and containing the following details:
 - a. the names of any potential claimants and a description of the specific act, error or omission which forms the basis of the Circumstance which may give rise to a Claim;
 - b. the identity of the specific Insured allegedly responsible for such specific act, error or omission;

- c. the consequences that have resulted or may result from such specific act, error or omission;
- d. the nature of any monetary changes or non-monetary relief which may be sought in consequence of such specific act, error or omission; and
- e. the circumstances in which Insured first became aware of such Circumstance based on the specific act, error or omission

then any Claim subsequently made on this Policy arising out of or in any way connected to said Circumstance shall be deemed to have been first made and reported to the Insurer by the Insured at the earliest time such written notice containing the details outlined above is received by the Insurer.”

Limited failure to provide all the required detail would not have entitled insurers to reject a block notification.

13. Notification of claims and circumstances and privilege:

- *Quinn Direct Insurance Ltd v Law Society* [2010] EWCA Civ 805; [2011] 1 WLR 308
- Claims and waiver of privilege: *Lillicrap v Nadler & Son (A Firm)* [1993] 1 WLR 94, *Nederlandse Ressorantie Group Holding NV v Bacon & Woodrow (No.1)* [1995] 1 All ER 967 and *Paragraph Finance Plc (formerl;y National Home Loans Corp) v Freshfields (A Firm)* [1999] 1 WLR 1183: When is privilege waived?
- Circumstances and privilege
- Solutions: (i) permission of former client; (ii) anonymity; (iii) standard terms and conditions.

14. Scope of notification:

- Objective analysis
- *Hamptons Residential Ltd v Field* [1998] 2 Lloyd’s Rep 248



- *John Connell Holdings Pty Ltd v Mercantile Mutual Holdings Ltd* [1999] QCA 429
15. Timing:
- Courts are reluctant to allow an insured to give notice well after the end of end of the policy period at a time of his own choosing: *HLB Kidsons v Lloyd's Underwriters* [2008] EWCA Civ 1206; [2009] 1 Lloyd's Rep 8
 - But see *Cox v Bankside Members Agency Ltd* [1995] 2 Lloyd's Rep 437 at 453.
16. Non-compliance clauses: *Arc Capital Partners Ltd v Brit UW Ltd* [2016] EWHC 141 (Comm); [2016] Lloyd's Rep IR 253

Clause 5 j:

"[C]overage is provided for Claims or circumstances which could or should have been notified under any policy or coverage section of which this Coverage Section is a renewal or replacement or which it may succeed in time provided always that:

- a. ...
- b. The Company has continued to be the insurer under such previous policy or coverage section without interruption; and
- c. The cover provided by this Extension shall be in accordance with all the terms and conditions of the policy or coverage section under which the Claim or circumstance could and should have been notified."

Clause 14:

"The Insureds shall as a condition precedent to exercising any right under this policy, give to the Company written notice of any Claim as soon as practicable and, in any event, no later than:

- (a) sixty (60) days after the effective date of the expiration or termination of this policy, provided that no Extended Reporting Period is granted by the Company; or
- (b) the expiration date of the Extended Reporting Period, if granted by the Company."

Held that the non-compliance clause provided an extension of cover.

“...the word “claim” in clause 14 (the condition precedent clause) is a reference to a claim first made against the Manager during the policy period in question. The cover which is granted by extension clause 5j, however, relates to a claim which was first made against the Manager during the preceding year's policy period and such a claim is therefore unaffected by clause 14 in the later year's policy. The “as soon as practicable” provision cannot therefore apply to that claim at all under the later policy, whatever period might fall to be taken into account in assessing timely notification. Whether clause 14 of the previous year's policy or clause 14 of the current year's policy is said to apply in circumstances covered by extension clause 5j, the result for which insurers contend would be perverse and would prevent its operation. There is no anomaly of the kind insurers suggest.

- (i) If a claim is first made against the Manager in the earlier year and is notified later than required, there will be a breach of clause 14 of that year's policy and no right to indemnity under it. In those circumstances it is irrelevant whether the claim is first notified before the end of that policy year or after the end of it.
- (ii) If the earlier year policy insurers do not renew for a subsequent year or if they renew on terms which do not include clause 5j or something similar, there would then not be any cover for such a claim against the Manager in the subsequent year either.
- (iii) If however the earlier year policy insurers renew for another year on terms including clause 5j then the subsequent year policy, by its express terms, provides cover for claims which should have been notified under the earlier year's policy. Cover then exists for the claim under the subsequent year policy, regardless of the date when insurers are put on notice of that claim in the subsequent year.”

Mark Cannon QC

4 New Square

Lincoln's Inn

7 July 2016