

A QUESTION OF CIRCUMSTANCES



PROFESSIONAL INDEMNITY INSURANCE CONFERENCE

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Introduction

- The Kidsons' Notification Provision

"The Assured shall give to the Underwriters notice in writing as soon as practicable of any circumstances of which they shall become aware during the period specified in the Schedule which may give rise to a loss or claim against them. Such notice having been given any loss or claim which is subsequently made after the expiration of the period specified in the Schedule shall be deemed for the purpose of this Insurance to have been made during the subsistence hereof"

No clear rules

- Circumstances / loss
- Awareness
- Causal link between circumstances and prospect of a claim
- Form
- Breadth
- Notification to whom?
- Timing
- Effect

Circumstances / Loss

- "Claims made" wording
- Deeming provision – extension to cover
- Contrast "loss occurring" wording
- "awareness of circumstances" or "knowledge of loss"

Rothschild v Collyear [1998]

RSA v Dornoch [2005]

AIG v Faraday [2007]

Awareness

- Awareness
- Matter of Fact
- Attribution of knowledge

Meridan Global Funds v Securities Commission [1995]

Markel Capital Ltd v Gothaer Allgemeine Versicherung AG [2008]

Causal link between circumstances & prospect of claim

- "May give rise" or "likely to give rise to a claim"
Layher v Lowe [2000]
Laker Vent v Templeton [2009]
Aspen Insurance UK Ltd & others v Pectel Ltd [2008]
- Objective assessment taking into account the assured's knowledge
- More than a matter of awareness
- Involves a degree of crystal ball gazing

Form of the Notification

- In writing
- Unless policy otherwise provides there is no particular form a notification has to take
- Loose and undemanding test
- Fair, comprehensive and comprehensible

Breadth of Notification

Kajima UK v The Underwriter Insurance Company [2008]

- Construction of flats in Leeds
- Professional indemnity policy on claims made basis
- Notification provision similar to Kidsons clause

Breadth of Notification

- Kajima notification:

"Accommodation pods settling and moving excessively; causing adjoining Roofing and Balconies and Walkways to distort under differential settlement. Service connections also under risk from movement; Potential Internal damage; Tennant [sic] Risk/Danger, and or Inconvenience"

Breadth of Notification

Kajima: Did the claim arise from the notified circumstances?

- A notification is only effective in relation to the specific circumstances notified, the defects which caused the circumstances, the symptoms of the circumstances and the consequences of the circumstances – need a causal as opposed to coincidental link.
- It would not be enough for the assured to say that he thought there might be some unknown and unidentified design deficiencies.
- Further notifications have to be given when new circumstances become known to the Insured.

Breadth of Notification cont.

- There had to be a causal rather than co-incidental link between the notified circumstances and the later claim.
- The claim which is later pursued may not arise from other circumstances which were discovered after notification, and
- It is possible for specific or general circumstances (including a hornets nest or can of worms type circumstance) to be notified, provided that there is, on an objective basis, a reasonable and appreciable possibility that they would give rise to a loss or claim against the Insured.

But contrast with King v Brandywine Reinsurance Co (UK) Ltd [2004]

To whom should a notification be given?

- What does the notification clause say?
- If silent, to whom should it be sent? Placing side or claims side of insurers?
- Where multiple insurers/syndicates on risk who should be notified?
- Objective awareness – the reasonable recipient

Timing

- Immediately
- Within a specified time
- As soon as practicable
- Premature notice – can you notify too soon?

Laker Vent v Templeton [2009]

Aspen Insurance UK Ltd & Others v Pectel Ltd [2008]

AIIG v Faraday [2007]

Effect of Breach

- Condition precedent automatic discharge from liability
- The creation of a condition precedent:
 - (1) Described as condition precedent
 - (2) The consequences of a breach of condition may be spelt out in the clause itself or by another clause in the policy
Aspen Insurance UK Ltd & others v Pectel Ltd [2008]
 - (3) Policy may contain a sweeping clause describing all conditions as condition precedent
 - (4) Wording or significance of the condition
- Conditional link between notification and indemnity

Friends Provident v Sirius [2005]

HLB Kidsons v Lloyd's Underwriters & Others [2008]

Kajima UK v The Underwriter Insurance Company [2008]

Laker Vent v Templeton [2009]

Waiver

- Reasonable time to investigate
- Unequivocal representation (by words or conduct)
- Reliance on representation
- Detriment

Kosmar Villa Holidays v Syndicate 1243 [2008]

Lexington v Multinacional de Seguros [2008]

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