

“The Legal Review of the Year Challenge”

Or

A study in topical professional indemnity issues

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The challenge ...

- Context of lender claims but of wider relevance
- Recent cases / developments concerning
 - Notification of circumstances / file requests
 - Contributory negligence awards

**YOU
DECIDE**

Notifications of file requests or other possible circumstances

- The arguably innocuous
- Is there market consensus?
- Will there ever be?
- No simple answers



Circumstances



Solicitors - SRA Minimum Terms and Conditions:

"circumstances means an incident, occurrence, fact, matter, act or omission which **may** give rise to a claim in respect of civil liability"

Surveyors RICS Policy Wording:

"Circumstance(s) Shall mean an incident ...omission that **might** give rise to a Claim"

ICAEW Minimum Approved Policy Wording - not a defined term:

"any circumstance which **may** give rise to a loss or Claim"

Absent a definition - anything which would fall within the duty of disclosure on renewal constitutes a "circumstance", Rix J in J Rothschild Assurance plc v Collyear [1998] first instance

Thresholds

- "Likely" - at least 50% - Layher v Lowe [1996] Court of Appeal
- "May": "fairly loose and undemanding": Rix LJ in HLB Kidsons v Lloyd's Underwriters [2008] Court of Appeal
- Rix J in Rothschild v Collyear: "the test for materiality for notice is a weak one"
- "May"/"might" - more than just some fanciful or speculative chance of a claim CGU Insurance Ltd v Porthouse [2008] High Court of Australia

What we know post Kidsons



Insured's awareness –

- (i) need subjective awareness
- (ii) NB "the insured may have his own views..., but the question has to be looked at objectively" Rix LJ

Toulson LJ: "...treat the right as if subject to an implicit requirement that the circumstance may reasonably be regarded as a matter which may give rise to a claim"

2. Insurer's understanding – objective test

"what the presentation reasonably conveyed to its recipient" Rix LJ

Confirms earlier case law that it is not necessary to stipulate it is a notification of circumstances

But what about pre-existing context?

The “game changer”?



Lord Steyn in *Mannai Investment v Eagle Star* [1997] AC 749:

“the contextual scene is always relevant ... the inquiry is objective: the question is what reasonable persons, circumstanced as the actual parties were, would have had in mind”

So – shared knowledge

Where allowed: “depends on what meanings the language read against the objective contractual scene will let in”

In *Kidsons*, the bordereau could “clarify” but “not extend” the notification

So ...

- A “bare” file request cannot be a circumstance ... but ...
- there is often be (an argument of) something more ...

File requests etc cannot ALWAYS be circumstances as may be perfectly benign

File requests cannot always be benign as there may be obvious potential



...what's the answer?

Fact specific:

- Policy wording and threshold
- Actual and objective knowledge of Insured
- Objective perspective for Insurer
- Terms of notification
- Sophistication of Insured
- What is there beyond file request
- Does it allow context and is there context
- Hindsight – Rothschild v Collyear

And a question of judgment

Arising from

“a relatively strong degree of causal connection” required
Beazley Underwriting v Travelers [2011]



Contributory Negligence Awards

- reducing rather than avoiding altogether
- do any consistent themes emerge
- are things different this time round

I didn't
say it
was your
fault

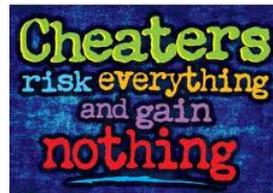
I said I
was going
to blame
you

The Rules Of The Game

- Law Reform (Contributory Negligence) Act 1945
- “Where any person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable ... shall be reduced to such extent as the court thinks just and equitable having regard to the claimant’s share in the responsibility for the damage ...”

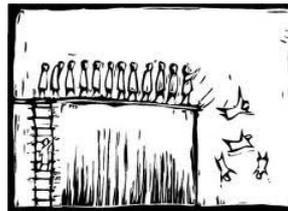
The Basics

- burden of pleading + proving is on the defendant
- causative potency : fault not causing damage irrelevant
- intentional wrongdoing



The Practice

- proving decision-making or investigation process fell below the standard expected of a prudent lender + that the fallings caused or contributed to the loss
- balance of probabilities / broad common sense
- standard of care to be expected of particular lender



Assessment Issues

- percentage discount or capping at particular LTV
- application against cap or whole loss



Common Themes

- borrower creditworthiness
- borrower honesty
- discrepancies
- inadequate instructions



Paratus v Countrywide Surveyors

- BTL disguised as a LTB
- material non-disclosures
- high LTV
- non-verified status loan and not a no status loan



PACK OF LIES

True or False

- income : £200,000 (if fact £85,000)
- debt : £44,000 (if fact £1,312,808)
- mortgage : £1,200 (if fact £2,048)
- LTV : 90%
- accepted Borrowers say so that rent 125% of mortgage



Claimant's Stance



Underwriter

- not high risk because policy said so
- if anything credit search comfort not a concern

Expert

- questions of morals / honesty irrelevant
- irrelevant material non-disclosure
- huge debts but credit search showed maintaining them
- reasonable to conclude 'good for the money'
- assume purpose false so failure to state insignificant

Judge

- Self certification 90% loans not imprudent per se
- But if engaged in that lending needed to investigate and verify matters of central importance
- If had done reasonable conclusion Borrower dishonest
- "having regard to what I regard as the comparatively egregious nature of ... lack of care, I should have made a deduction of 60%"

Future

- Huge numbers of self certification / high LTV loans that have gone wrong
- Huge numbers of BTL loans have gone wrong

