



RPC

POLICY COVERAGE:

A CRITICAL ANALYSIS

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Purpose of insurance



Employer's Liability policies

Employers' Liability (Compulsory Insurance) Act 1969

- (1) Except as otherwise provided by this Act, every employer carrying on any business in Great Britain shall insure, and maintain insurance, under one or more approved policies with an authorised insurer or insurers against liability for bodily injury or disease sustained by his employees, and arising out of and in the course of their employment in Great Britain in that business, but except in so far as regulations otherwise provide not including injury or disease suffered or contracted outside Great Britain*

Employer's Liability/Public Liability

- It is compulsory for employers to have EL insurance to cover against third party claims made by “employees” who suffer injury at work
- The minimum amount of cover is £5m
- Public Liability insurance is not compulsory

Both are generally “claims occurring” policies

Public Liability policies

- Not compulsory
- Insurers set their own terms

Cover can be declined if the Insured breaches a term of the policy

Criminal proceedings

If any governmental, administrative or regulatory body brings any criminal action against you during the period of insurance for any breach of statute or regulation directly relating to any actual or potential claim under this section, we will pay the costs incurred with our prior written consent to defend such an action against you.

Exclusion clauses

- There is nothing to prevent an Insurer from including exclusion clauses in an EL or PL policy
- It is up to the Insured to find and Insurer to provide the appropriate cover for their business activity

Exclusion clauses



I would like to draw your attention to Clause 14 that stipulates that this Public Liability Insurance does not cover you inside a china shop...

Events



Proposal Form

- Business description:
 - Off road motocross.
- Practice circuit promoter (participants bring their own bikes)

Calendar of events

- The track is available for use 52 weeks per year - twice per month on Saturday or Sunday and twice on a week day.
- We try to open twice a month on Sundays weather permitting. It is therefore impossible to give an accurate calendar of events. If we cannot run one Sunday due to bad weather we will attempt to run the following weekend.
- Weekdays are usually Tuesday or a Wednesday late afternoon during the summer during the school holidays again dependent of the weather.

Cover provided

Public Liability cover:

Any one accident or series of accidents arising out of one original cause / unlimited during the period of insurance

Scope of cover

- Accidental bodily injury to any person
- Accidental loss of or damage to property
- Accidental obstruction loss of amenities trespass nuisance or interference with any right of way light air or water

Exclusion clause

Injury to Participants exclusion

It is understood and agreed that this Policy does not indemnify the Insured for liability arising out of or in connection with any person whilst participating in or practising for any event controlled organised sponsored or supervised by the Insured or for any immediate medical or surgical relief to any person so injured

Insured's position

The circuit is simply an open facility for motocross enthusiasts. It does not ever organise “events” and so the exclusion does not apply.

Insurer's position

The Policy covers PL liabilities in the event of any injury but it excluding participants on the actual track. The open days are “events” as defined by the Insured in the proposal form. The definition of an event follows the description given by the Insured. Cover declined.

Terms of the Policy

“POLICY means and includes any information provided to the UNDERWRITERS as part of a proposal for issue renewal or amendment of or to the insurance set out in this document.”

What is an “event”?

“Each of several particular contests making up a sports competition”

Source: Oxford English Dictionary

The Financial Ombudsman's Service

Will deal with complaints from Small and Micro Enterprises

- Micro
 - has a turnover or annual balance sheet that does not exceed €2 million
 - employs fewer than 10 persons
- Small
 - has an annual turnover of less than £6.5 million
 - has a balance sheet total of less than £5 million, or employs fewer than 50 employees

Ombudsman's Decision

- Insurers should provide clear information, so the policyholder knows what cover they are getting.
- The term “event” wasn't defined in the policy. The Ombudsman considered it meant something organised by the Insured such as a race or at the very least a specific event where riders are taking part together.
- What was provided was a place where individuals could pay to ride their motorbikes around a circuit. They were not taking part in any kind of specific event, race or competition.
- The exclusion was ambiguous and ambiguity would be decided in favour of the Insured

Injury to Participants exclusion - amended

It is understood and agreed that this Policy does not indemnify the Insured for liability arising out of or in connection with an injury to any participant or for any immediate medical or surgical relief to any person so injured

Example of Courts interpreting the business meaning of a contract

Macquarie Capital v Nordsee [2019] EWHC 1655 (Comm).

- The court must ascertain the “objective meaning” of the language used in the agreement.
- The court must consider the contract as a whole, as well as the wider context.
- If there are two possible constructions, the court should adopt the construction consistent with business common sense.

Double insurance

Double insurance / rateable proportion clauses

Marine Insurance Act 1906

32 (1) Where two or more policies are effected by or on behalf of the assured on the same adventure and interest or any part thereof, and the sums insured exceed the indemnity allowed by this Act, the assured is said to be over-insured by double insurance.

Marine Insurance Act 1906

Section 80 (1) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.

Section 80 (2) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt.

Is there double insurance?

Bankers & Traders Insurance Co Ltd v National Insurance Co Ltd 2 April 1985
(Privy Council)

“The Company will indemnify an authorised driver who is driving the motor vehicle provided that such authorised driver is not entitled to indemnity under any other policy.”

Double insurance (1)

- The right to contribution as between insurers arises where more than one policy covered the risk that had given rise to the claim
 - *Albion Insurance Co Ltd v Government Insurance Office of NSW* (1969 CLR 342)

Double insurance (2)

- There is no duty to indemnify a co-Insurer who has paid a claim outside the policy
 - *Legal & General Assurance Society Ltd v Drake Insurance* (Court of Appeal 20/12/1990)

Double insurance (3)

- Where the Insured was fully indemnified by another Insurer, it was precluded from making a claim on the policy, even though the two sets of cover were not co-extensive
 - (1) *Bovis Construction Limited* (2) *Eagle Star Insurance Co Limited v Commercial Union Assurance Plc* (High Court 29 November 2000)

Double insurance (4)

Accident takes place within the period of double insurance

Double insurance (5)

Disease claims

Rateable proportion

- Bovis built commercial premises for Rosehaugh Estates (“Rose”) a property development company.
- Bovis and Rose were joint insureds under a Policy with Commercial Union which covered damage to the property for “all risks” (section 1) and Public Liability (section 3).
- Bovis was also had a PL Policy with Eagle Star.

Simplified facts – the loss

- Bovis finished the building work
- As a result of a Bovis employee leaving a switch in the wrong position, water from a heating system leaked and caused £423,000 damage / loss of rent to Rose.
- Rose claimed against Bovis

Simplified facts – the claim

- Bovis claimed on its Policy with Commercial Union
- Commercial Union declined on basis the loss was not covered by the Policy.
- Bovis claimed on another Policy it had with Eagle Star.
- Eagle Star settled the claim and paid Rose on behalf of Bovis.

The claim for contribution

- Bovis: claim for contribution from Commercial Union
- Commercial Union: Claim unfounded as Bovis had been indemnified by Eagle Star
- Eagle Star: added as an additional Claimant.

The Court's decision

(1) Bovis Construction Limited (2) Eagle Star Insurance Co Limited v Commercial Union Assurance Plc (29 November 2000) High Court (Lawtel Document No. AC0100312)

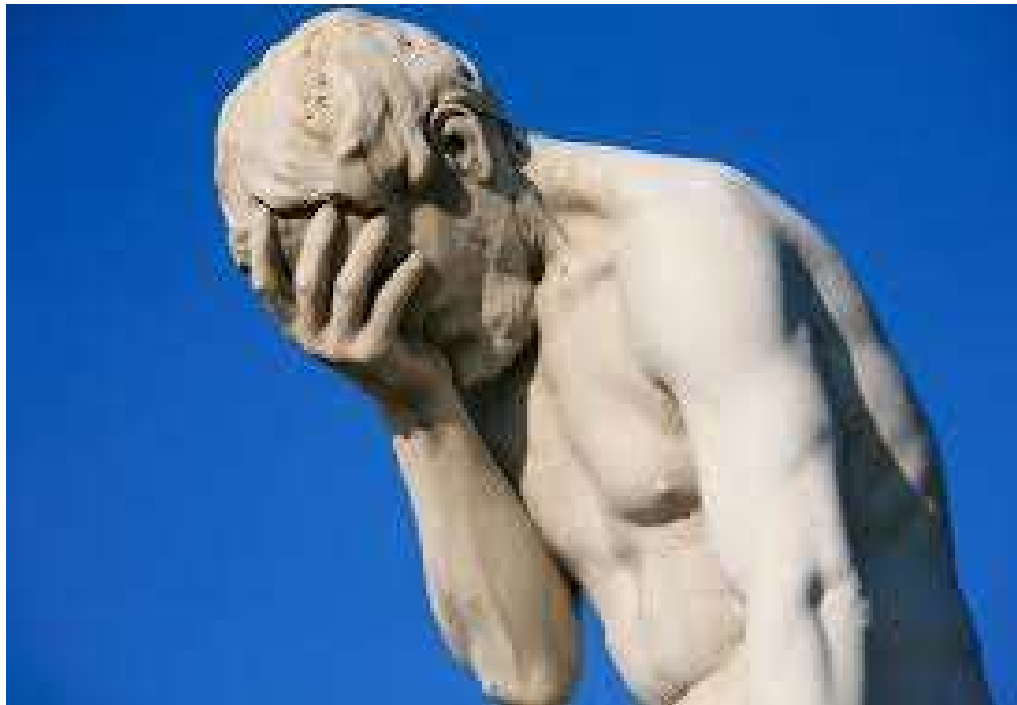
- Claim for contribution dismissed:
 - Bovis had already recovered its loss from Eagle Star

Sickness & Accident Assurance Association v General Accident Assurance Corporation Ltd (1892) 19 R 977

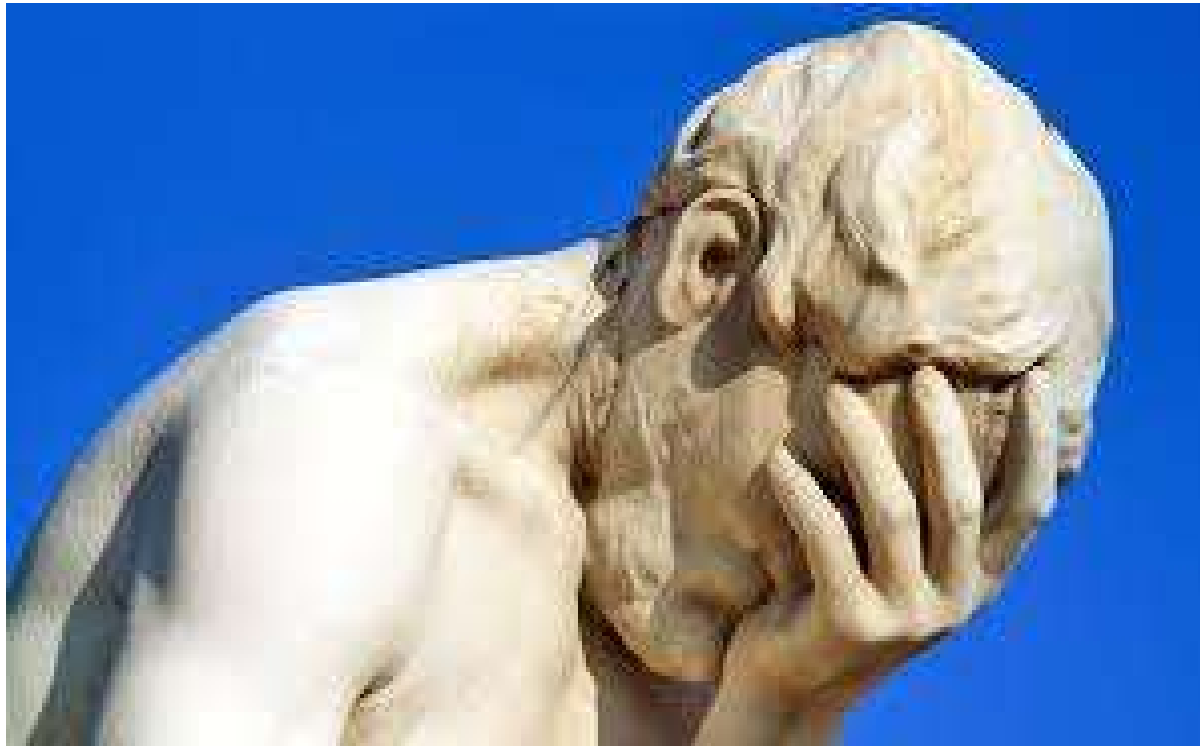
Rateable Proportion Eagle Star policy with Bovis:

“If at any time any claim arises under this policy there be any other insurance covering the same liability the company shall not be liable to pay or contribute more than its rateable proportion of any such claim and cost and expenses in connection therewith.”

Not a good outcome



It doesn't get any better



Rateable Proportion clause

- Fatal for contribution claim for loss in respect of the same damage?
 - Depends
 - *Drake Insurance Plc v Provident Insurance Plc* (Court of Appeal 17 December 2003)

Provident: insured car owner Dr Kaur

- wife Mrs Kaur was a named driver

Drake: Insured Mrs Kaur to drive any car with the car owner's consent



High Court (first instance) decision:

- Provident validly avoided the car owner's Policy – there was no double Insurance
- A rateable proportion clause in the Drake policy meant that Drake paid voluntarily anyway

Rateable Proportion clause: Drake Insurance

“If at any time any claim arises under this Policy there is any other existing insurance covering the same loss damage or liability the Company shall not be liable to pay or contribute more than its rateable proportion of such claim.”

Drake did not agree and appealed.....



Lord Justice Rix, *Drake Insurance Plc v Provident Insurance Plc*

“The facts of this appeal might have been set by a committee of law professors with the express design of giving rise to points of interest and difficulty... There is an added complication in that these proceedings do not arise between insurer and insured, but between two insurance companies.”

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Lord Justice Rix, *Drake Insurance Plc v Provident Insurance Plc*

Paragraph 79

On a point of the doctrine of utmost good faith:

“ This is another important issue which I do not think it would be right to ignore, but which I would not wish to decide.”

Court of Appeal decision (1)

1. Provident was not entitled to avoid its Policy.
2. Accordingly there was double insurance.
3. Drake Insurance was not a volunteer.

Court of Appeal decision (2)

Per Lord Justice Rix, paragraph 125:

If Drake was to enforce the rateable proportion clause against Mrs Kaur, it potentially faced grave difficulties, both of law and of business responsibility.

Drake formed the view that it would have been contrary to business ethics and the good name of the industry either to refuse Mrs Kaur a full indemnity or to involve her in litigation between the two insurers potentially concerned.

Court of Appeal decision (3)

Per Lord Justice Rix, paragraph 125:

Drake had made it clear to Provident that it disputed Provident's decision to avoid the Mr Kaur's policy

Drake told Provident it would pay the then litigate the issue with Provident if it had to.

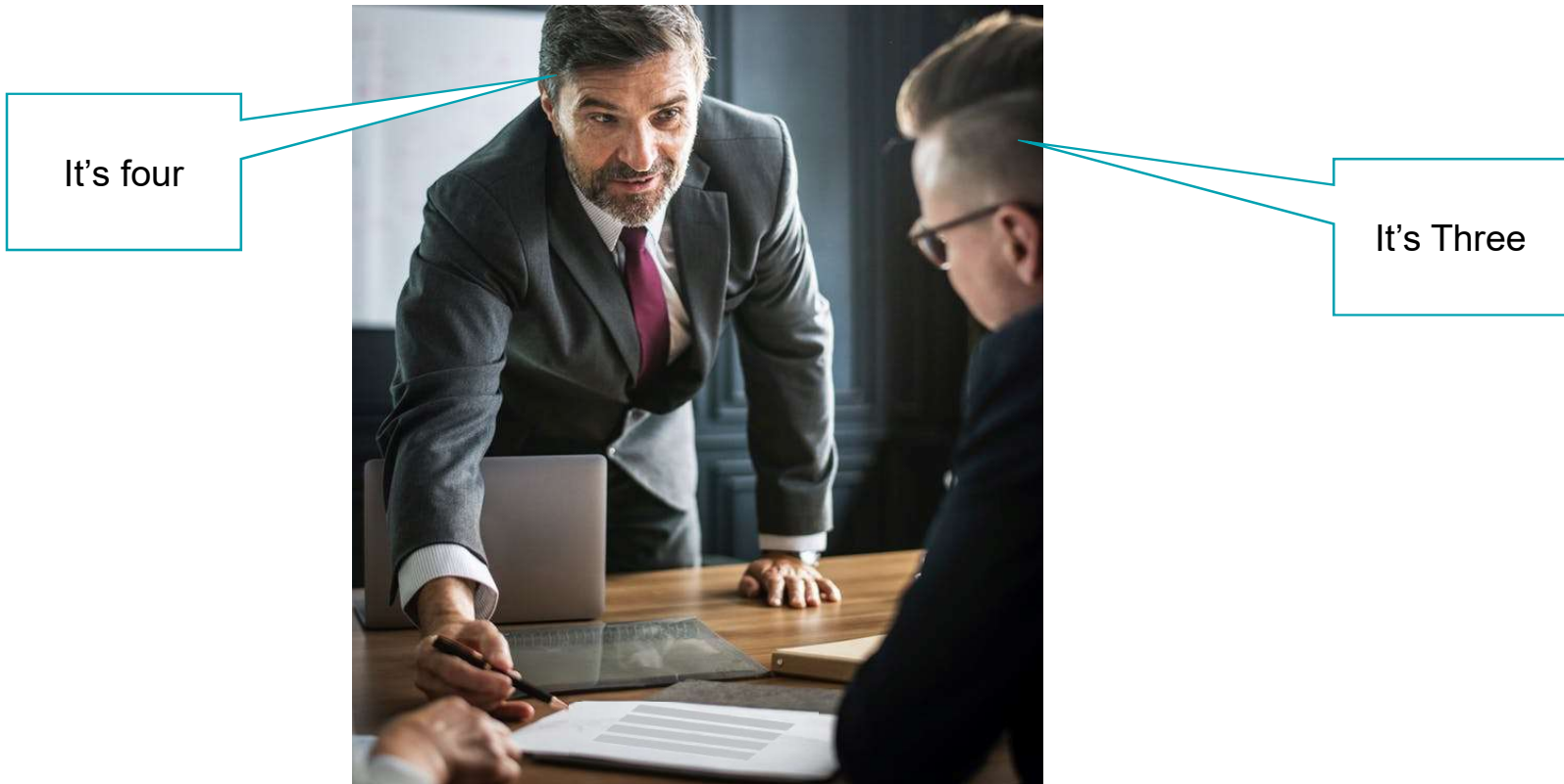
Provident could have been under no illusions as to what Drake's position was and that litigation was around the corner.

Court of Appeal decision (4)

Per Lord Justice Rix, paragraph 126:

Drake's position was not that of a volunteer but someone ethically obliged to pay a claim.

The efficacy of rateable proportion clauses?



Summary

- Facilitation of business activity
- Freedom to enter into contracts
- Flexibility to provide cover to allow businesses to engage in enterprise
- Limitation of risk through exclusion clauses
- Double insurance

It's a numbers game.....



Q&A

Policy coverage: a critical analysis



RPC