# Professional Indemnity Insurance: What Sort of Circumstances?

**Introduction**

Professional Indemnity business is underwritten on a "claims made" basis. By a condition in the policy (usually a condition precedent) cover also makes provision for and requires notification of "*circumstances that are likely to give rise to a* claim", or alternatively "*circumstances which may give rise to a claim*". This is often referred to as the deeming clause.

A typical notification of circumstances condition:

*If, during any period of insurance, the Insured shall become aware of any circumstance or occurrence which is likely to (*or alternatively *may) to give rise to a claim, the Insured shall as soon as is reasonably practicable give notice to the insurer of such circumstances or occurrence and any claim which may subsequently be made against the Insured, by reason of such circumstances or occurrence shall be deemed to have been made during the period of insurance.*

In *Layher Ltd v Lowe* [2000] Lloyd's IR 510 the clause read: "*The Insured shall give notice in writing to the Insurer as soon as possible after the occurrence of any event likely to give rise to a claim with full particulars thereof.*" This was held to mean at least a 50% likelihood of a claim occurring.

Where the word "may" is used the likelihood of a claim arising could be a lot less – say a 5% probability. As Rix J said in *Rothschild v Collyear* "the test of materiality for notice is a weak one".

Therefore, under a "likely" wording the Insured must notify any circumstances where there is a probability of a 50% chance of a claim and the Insurer need only accept circumstances where there is such a probability. This is unfavourable to an insured who has a circumstance that falls below the 50% threshold of probability. The insurers may decline to accept it even though there is some substance to the circumstance. Additionally, there is a duty on the insured to disclose all material facts at inception and renewal and in the event that the existing insurer declines renewal it would be impossible to find a new insurer who would be prepared to accept the risk without excluding such circumstances.

Under a "may" wording the Insured is required to notify circumstances with a 5% probability of giving rise to a claim and the insurer must accept those circumstances. This is favourable to an insured in having circumstances accepted – a fact confirmed in several cases. However, it also means that the insured must advise such circumstances even if the insured takes the view that the circumstances are unlikely to produce a claim.

The situation is not always helped by insurers' attitude to the notification of circumstances.

***BNP Mortgages Ltd v Page & Wells and Sun Alliance & London Insurance plc*** **[1994] (Unreported)**

Sun Alliance had insured Page & Wells, a firm of surveyors, for the period 14 May 1991 to 13 May 1992 (later extended to 20 May 1992). The policy contained the following clause:

*The Insured shall give written notice to the company (regardless of the Insured's contribution) as soon as possible after becoming aware of circumstances which might reasonably be expected to produce a claim irrespective of the Insured's views as to the validity of the claim or on receiving information of a claim for which there may be a liability under this insurance. Any claim arising from such circumstances shall be deemed to have been made in the period of insurance in which such notice has been given.*

On 27 April 1992, the insured wrote to Sun Alliance stating that one of their employees, Mr. Bass, had been interviewed by the Fraud Squad and that he was assisting them with their inquiries into alleged fraudulent overvaluations for mortgage purposes. The letter also stated that the indications from the police were that many more properties could be involved than those already notified. The insured attached a list of properties that identified every property surveyed by Mr Bass since the beginning of 1988 and the letter indicated that the defendants wished to give written notice, in accordance with the deeming clause, that any of the properties in the list were capable of producing a claim. The list of properties included a property known as Bonbini.

Sun Alliance refused to accept the list of properties as a valid notification and declined to renew the insured's policy. Shortly after the expiry of the policy period, BNP made a claim against the surveyors in respect of Mr. Bass' valuation of Bonbini, and this was settled by Page & Wells for £75,000.

The issue was what constituted valid notification under the "deeming" clause. Sun Alliance contended that there had to be notification of circumstances which might reasonably be expected to produce a particular claim, and that the production of a list of properties in respect of which a claim might be made was insufficient to trigger the deeming clause.

It was held that the deeming clause required no more than identification of circumstances that might reasonably be expected to produce a claim of some sort under the policy. In this regard, it the importance of equating the provisions of the deeming clause with the obligation to disclose material facts at renewal was stressed. On the facts, it was held that the defendants' letter of 27 April 1992 constituted a sufficient notification and that, accordingly, the Bonbini claim arose from circumstances which had been notified to Sun Alliance during the policy period.

***Rothschild v Collyear [1999] Lloyds Rep IR 6***

In one of the first Pensions mis-selling cases, Lautro (the Life Assurance and Unit Trust Regulatory Organisation), a predecessor of the FSA wrote to their members to say that a KPMG report disclosed a "problem which needs to be tackled" regarding non-compliance in the selling of pensions in cases, known as "transfers" and "opt-outs". On 27 January 1994, a few days before the expiry of the policy on 31st January, Rothschild gave notice to insurers by reference to the Lautro letter and the KPMG report of 2,500 review cases (required to comply with Industry Regulation). The policy wording referred to circumstances "*which may give rise to a claim*" against the insured. The Insurers disputed that there was a valid notice on the basis that no criticism had been levelled against the insured, and no cause for concern specific to any of their investors had been identified. They then did not renew the policy. The notification given by the insured was held to be valid.

*Where a prediction based not only on objective evidence which has itself been under scrutiny by independent professionals, but also on the concern of regulatory authorities, turns out to have been entirely justified by events, it seems to me to be unrealistic to say that that prediction was invalid and unjustified merely because there was much other evidence which was not yet to hand, even though that evidence was of particular relevance to an important aspect of the prediction. This must be a fortiori the case where the prediction has to be not of what will be but only of what might be (Rix J)*

***Kidsons v Lloyd's Underwriters*** **[2007] EWHC 1951 (Comm)**

Kidsons had developed tax engineering schemes through its subsidiary, Solutions@Fiscal Innovation Limited. The circumstance notified was at the instigation of an employee of the insured who described the schemes as "an assault on the Treasury". The policy had a "may" deeming clause:

"*the Assured shall give to the Underwriters notice in writing as soon as practicable of any circumstance of which they shall become aware during the [Policy period]…which may give rise to a claim or loss against them. Such notice having been given any loss or claim to which that circumstance has given rise which is subsequently made after the expiration of the [Policy period] shall be deemed for the purpose of this Insurance to have been made during the subsistence thereof.*"

The claim and the notification gave rise to a number of issues but the court did give some definition of a "*circumstance which may give rise to a claim*".

*a "circumstance … which may give rise to a loss or claim against" the assured, it …requires that the circumstance should be one which, objectively evaluated, creates a reasonable and appreciable possibility that it will give rise to a loss or claim against the assured. It is necessary to emphasise, however, that a circumstance may give rise to a loss or claim when there is a possibility or perceived possibility that, at some stage in the future, it will do so. There need not be a certainty that it will do so; there need not to be a probability or likelihood that it will do so. All that need exist is a*

*state of affairs from which the prospects of a claim (whether good or bad) or loss emerging in the future are "real" as opposed to false, fanciful or imaginary.* (Gloster J).

***McManus Seddon Runhams and others v European Risk Insurance* [2013] EWHC 18 (Ch)**

McManus Seddon took over the work of Runhams in June 2011, Runhams had taken over Sekhon Firth in October 2010. McManus Seddon were the successor practice as far as insuring the risk of claims against Sekhon Firth. In April 2011 three former members of Sekhon Firth were subject to proceedings before the Solicitors Disciplinary Tribunal. Between Nov 2011 and May 2012 17 claims were made relating to work carried out by Sekhon Firth. These were accepted by the insurers together with 15 other cases involving the same lender. As a consequence of the claims notifications McManus Seddon arranged a review of 110 random files by an independent regulatory consultancy called Corre. The review found that there had been "a consistent pattern of breaches". McManus Seddon then gave a "blanket notification" of 5,000 files relating to work carried out by Sekhon Firth as follows. The notification condition was on a "may" basis.

*"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 … 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 … should properly be notified to you as individually containing shortcomings …."*

The notification was rejected by the Insurers:
*"The list of matters contained in the List and the Spreadsheet do not amount to valid Circumstances as you have not [identified] the specific incident, occurrence, fact, matter, act or omission which would give rise to a Claim on each individual file. Simply stating that Sekhon & Firth worked on the files in the List and Spreadsheet does not constitute a valid notification, and as such, the notifications are firmly rejected in their entirety and without question. The files highlighted in the Corry ( sic) report are specific and the problems on each have been highlighted. However, Insurers expressly reserve their rights in relation to those matters.*

MSR sought declaratory relief that valid circumstances had been notified – this would have given them the opportunity to effect insurance in the open market as opposed to having to go to the ARP. The judge followed the decisions in *Rothschild* and *Kidsons*: the "blanket" notification could not be declined by the Insurer, although the insured did not obtain the declaratory relief they sought.

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