MACCAFERRI'S CONSTRUCTION OF NOTIFICATION CLAUSE ACCEPTED BY COURT OF APPEAL

Court confirms meaning of "as soon as possible" and "likely to give rise to a claim"

The Court of Appeal in *Zurich Insurance PLC v Maccaferri Limited* [2016] EWCA Civ 1302 has ruled that Insurers could not rely on a notification clause expressed as a condition precedent to avoid liability under a public and products liability policy. The judgments in both the Commercial Court and the Court of Appeal provide a timely reminder to Insurers of the importance of clear drafting and to policyholders to ensure they are aware of the obligations contained in the notification provisions in their policies.

The facts

In September 2011 a Mr McKenna suffered a serious injury at work when handling a pneumatic lacing gun. Maccaferri Limited is the UK supplier of such guns. Maccaferri were told in October 2011 that there had been "an incident" involving a gun but were not aware of any details.

In June 2012, Maccaferri were advised that a claim was being made in relation to the accident and that it was necessary for the gun to be retained for forensic testing. However, no complaint was made about the gun.

Maccaferri were first notified that they were involved in a claim in July 2013, and immediately notified their insurer, Zurich. In September 2013, Zurich declined to indemnify Maccaferri on the basis of late notification. With developments in technology and the increasing value of intangible assets, does the insurance industry need to reassess the role it plays in protecting its customers against significant losses flowing from damage to these assets?

The policy and arguments

Zurich argued that Maccaferri had not complied with the notification clause expressed as a condition precedent that:

*"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."*

It was common ground that an event is something happening at a particular time, in a particular place and in a particular way and that "an event likely to give rise to a claim" means one with at least a 50% chance that a claim would be made against the Insured.

Zurich contended that the clause obliges an Insured to notify Insurers as soon as it learns (or ought with reasonable diligence to have become so aware) of the event and realises that it is likely to give rise to a claim; even if this is well after the event occurred. On this basis Zurich argued that the matter should have been notified either in October 2011 or June 2012.

Maccaferri contended that the critical question was whether the event, when it occurred, was likely to give rise to a claim and further that that question should be answered by reference to what it knew at that time. The fact that months later it becomes likely that a claim will arise is simply irrelevant; that does not create a new event/occurrence. Furthermore this would give rise to a double duty on the part of an Insured to notify which it argued was inconsistent with the wording of the clause.

Court of Appeal

Zurich's argument and construction of the clause was rejected by both the Commercial Court and Court of Appeal.

The Court of Appeal held that *"[i]f Zurich wished to exclude liability it was for it to ensure that clear wording was used to secure that result. It has not done so."* The Court went on to say *"given the nature of the clause the ambiguity must be resolved in favour of [the insured]. Clauses such as these need to be clear if they are to have effect."*

The Court went on to hold (by reference to authority) that the obligation to notify an occurrence "*as soon as possible*" should be determined by reference to the position immediately after the event occurred; to hold otherwise would be to impose an obligation on the Insured to carry out a rolling assessment as to whether a past event is likely to give rise to a claim as circumstances develop.

Whilst the Court recognised that some policies (particularly professional indemnity) do impose such obligations, if this is what Insurers intended then it should have been clearly spelt out.

Against that analysis Clarke LJ identified the question to be determined as being whether the event, when it occurred, was likely to give rise to a claim, and held that this question should be considered by reference to whether a reasonable person (with the actual knowledge of the Insured) would have thought it at least 50% likely that a claim would be made.

Applying this test to the facts, the Court of Appeal endorsed the decision of Knowles J in the Commercial Court, and found that it was not at least 50% likely that there would be a claim on the facts known to the Insured when the event occurred. The Insured had not, at that stage, been informed that someone had been seriously injured and the prospect of the gun being at fault was "*no more than a possibility and there were many others.*"

Comment

Whilst the Insured secured a favourable outcome in this case notification clauses continue to be fertile ground for Insurers to decline cover. Policyholders need to ensure that they are aware of notification provisions in their policies and be clear as to their obligations. This is all the more so where the notification obligations are drafted as conditions precedent which allow Insurers to decline to cover a claim, even if they have suffered no prejudice.

Policyholders should understand the language used in the policy wording and be aware that minor amendments to the wording can materially change their duties. Such changes should be 'stress-tested', in conjunction with brokers if necessary, to ensure the cover remains effective for the insured risk.

Whilst the Court held that "*likely to give rise to a claim*" meant that there had to be at least a 50% prospect of a claim being made (and as such on the facts of this matter that threshold was not reached), the conclusion reached could well have been different if the threshold was "*may give rise to a claim*" as is often seen. "*May*" has been defined as more than a mere possibility and is more readily triggered. If the Insured was obliged to notify "*circumstances of which they become aware which may give rise to a claim*" then Maccaferri's knowledge in 2012 may well have triggered an obligation to notify.

Equally policyholders need to be aware that their assessment of the merits is irrelevant to the question of whether a claim is *likely* to or *may* be made. Knowles J held at first instance that a claim could be considered *likely* for the purposes of construing the policy wording even if it was bad or vexatious.

Policyholders are advised to have proper procedures for reporting incidents, with clear reporting lines in place; all employees should be made aware of those procedures and trained to follow them.
The lessons to learn for Insurers are equally clear.

As a matter of policy the Court of Appeal appears ready to apply the doctrine of contra proferentum against Insurers where there is any ambiguity in the wording, particularly where, as the Court of Appeal put it, the condition "*has the potential effect of completely excluding liability in respect of an otherwise valid claim for indemnity*." If Insurers want to exclude liability then they should ensure clear wording is used.

Further, if Insurers want to impose obligations on policyholders to carry out rolling assessments of events, then the Court will expect Insurers to have spelt that out in clear language in the policy.

By way of post script, whilst this decision is favourable to policyholders, it is unclear the extent to which it will "save" claims in the light of a policyholder's duty to make a fair presentation and to notify Insurers of material circumstances under the Insurance Act 2015.

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