Why Timely Notification Matters

The recent judgment in *Makin v QBE Insurance (Europe) Ltd [2025] EWHC 895 ("Makin")* highlights the importance of notifying potential insurance claims promptly.

This case, which reinforces the significance of condition precedents, provides useful guidance on their construction whilst also dealing with the binding nature of judgments in the context of the Third Parties (Rights Against Insurers) Act 2010 ("the 2010 Act"). The transcript is available at this link.

Background

The claim, which arose out of a tragic set of circumstances, was brought by Mr Daniel Makin. On a night out in August 2017, Mr Makin, who was 29 years old at the time, was in "high spirits". The evening ended with an altercation between Mr Makin and bar security staff, during which he was forced to the ground and held in a headlock. After the altercation, he got up, walked out of the bar and took a taxi to his home, where he lived alone.

Two days after the incident, he was found by his mother. He had suffered a stroke and had been left with catastrophic life changing neurological damage, requiring full-time care.

The security staff was employed by Protec Security Group Ltd ("Protec"), against whom Mr Makin brought a claim. In 2023, liability judgment was given in favour of Mr Makin but on the day before the preliminary issues hearing, Protec went into liquidation.

Mr Makin, then, brought a claim direct against Protec's public liability insurer, QBE Insurance (Europe) Ltd ("QBE"), pursuant to the 2010 Act. QBE denied liability, relying on the claims notification clause of the policy.

The Policy and notification of the claim to QBE

The Policy contained the following provision:

"CLAIMS CONDITIONS

The following Conditions 1-10 must be complied with after an incident that may give rise to a claim under your policy. Breach of these conditions will entitle us to refuse to deal with the relevant claim.

…

You or any other party insured by your policy must inform Sutton Specialist Risks Ltd:

3.1 immediately you have knowledge of any impending prosecution, inquest or inquiry in connection with any accident or disease, which may be the subject of claim, give notice in writing and give us any further information and assistance we may require, …

3.5 within as soon as practical but in any event within thirty (30) days in the case of any other damage, bodily injury, incident, accident or occurrence, that may give rise to a claim under any your policy but not separate specified above." (our emphasis)

Although the sole director of Protec ("the Director") was away on annual leave at the time of the incident, he became aware of it on his return, when he was contacted by the police who were investigating the circumstances. Further, he was also made aware -

- by an email from the bar dated 29 December 2019, enclosing Mr Makin's claim. In the covering email, the bar noted that: "*I have been advised to contact you and ask for you to pass this on to your insurance also*."; and
- by a letter from Mr Makin's solicitors to Protec dated 5 June 2020 headed "*Letter of Claim – Catastrophic Injury".*

None of the above documents were passed to Protec's insurers at the time they were received. The first time the insurers were notified of the claim was by email from the Claimant's solicitors dated 8 July 2020, enclosing the Letter of Claim from the Claimant's solicitors to Protec dated 5 June 2020.

The issues

The claim gave rise to four key issues for the Court to consider:

1. Did Protec fail to comply with its claims notification obligation?
2. Did the relevant clause operate as a condition precedent to indemnity?
3. If not a condition precedent, was QBE's refusal of indemnity unlawful under the principles in *Braganza v BP Shipping Ltd [2015] UKSC 17*?
4. Was QBE entitled to challenge the underlying finding of liability under the 2010 Act?

Issue 1: Did Protec fail to comply with the obligation to notify in time?

On the first issue, the Mr Makin relied on the Court of Appeal's finding in *Zurich Insurance plc v Maccaferri Ltd [2016] EWCA Civ 1302*[1]. In that case, the policyholder was obliged to notify their insurers when they "*learn of the event and realise[s] that it is likely to give rise to a claim".*

[1] The case concerned the personal injury sustained by the employee of a building company who was injured when a so-called Spenax gun accidentally discharged, hitting him in the face. The supplier of the gun, was informed that an incident had occurred involving a gun and that it should be recalled and kept for investigation. Later, it learned that the incident had involved someone suffering injury, though there was no indication this was due to the gun being faulty. Only when it was joint as a Part 20 defendant to proceedings brought by the employee against his employer did the supplier notify their own insurers.

The Protec Policy required notification of events which '*may*' give rise to a claim and Mr Makin argued that the same principle applied, namely that "*the chance of the claim being made is to be assessed on the basis of the incident itself (though not limited to the exact moment of its occurrence), without regard to matters that come to light subsequently".*

Mr Makin argued the clause had not been breached as, at the time of the incident, he appeared unharmed and was able to get up and walk away. It was not, then, reasonably perceived that the altercation would give rise to a claim.

The Court however, preferred insurer's position. Although the bar altercation may not in itself have immediately suggested serious litigation risk, the fact that Protec's employees were the subject of a subsequent police investigation signified an escalation which, objectively, made it foreseeable that a personal injury claim might follow. This was plainly sufficient to trigger the duty to notify.

Issue 2: Was the obligation to notify a condition precedent?

On this issue, QBE relied on the wording that failure to notify *"will entitle us to refuse to provide indemnity"*. This, they said, created a condition precedent, breach of which automatically relieved it of liability, irrespective of whether any prejudice had been caused.

Mr Makin contended that the clause merely conferred a discretion upon QBE to withhold indemnity, rather than a strict precondition to coverage. He emphasised the absence of language making it explicit that the clause was a condition precedent and that no cover would be afforded unless complied with.

The Court concluded that the clause did create a condition precedent. It noted that the wording was sufficiently clear and unambiguous, using the imperative "will entitle" rather than permissive language, and did not refer to the exercise of judgment or discretion. Therefore, breach of this provision automatically entitled it to decline cover, without needing to establish prejudice.

Issue 3: Hypothetical Braganza analysis.

As it had found that the notification clause was a condition precedent, it was not necessary for the Court to consider this issue. Nevertheless, it did go on to consider, obiter, how Mr Makin's claim would have fared had the notification clause been discretionary.

Mr Makin's case was that if the provision was subject to insurer's discretion, any decision to refuse indemnity must meet the so-called Braganza test[2] - that is, the insurer's decision must be made in good faith, for proper purposes, and must not be irrational.

The Court agreed that had insurer's decision been one of discretion rather than obligation, the refusal of cover would have been irrational and unlawful. There was no evidence that the late notification had prejudiced QBE's ability to investigate or defend the claim. The Court noted that the underlying facts were relatively well-documented and QBE had not adduced any concrete

[2] From Braganza v BP Shipping Ltd [2015] UKSC 17, in which Lady Hale JSC stated in her judgment at [30], *"… unless the court can imply a term that the outcome be objectively reasonable—for example, a reasonable price or a reasonable term—the court will only imply a term that the decision-making process be lawful and rational in the public law sense, that the decision is made rationally (as well as in good faith) and consistently with its contractual purpose."*

disadvantage caused by the delay. On that basis, any discretionary refusal would have been unreasonable under the Braganza standard.

Issue 4: The binding nature of the liability judgment

Finally, a key point of contention was whether the insurer was bound by the earlier 2023 judgment against Protec establishing liability. QBE argued that it had not been a party to those proceedings, had not been afforded the opportunity to test the evidence or legal findings and should, therefore, be entitled to challenge the issues of causation, foreseeability, and quantum in the direct action brought under the 2010 Act.

In support of this argument, QBE relied in part on the High Court's decision *in AstraZeneca Insurance Company Limited v XL Insurance (Bermuda) Limited and ACE Bermuda Insurance Limited [2013] EWHC 349,* where the Court held that a reinsured party's prior settlement or judgment could not bind its reinsurer in subsequent proceedings unless the reinsurer had expressly agreed to be bound or had participated. Insurers contended that the same logic should apply here, so that an insurer cannot be bound by findings made in proceedings to which it was not joined, especially where it had no procedural input.

On this point, the Court preferred Mr Makin's position that the statutory framework of the 2010 Act created a distinct mechanism by which a Claimant steps into the insured's shoes. Once liability had been established against the insured, the insurer is confined to argue policy-based defences, but cannot reopen findings of fact or law already adjudicated.

In reaching this conclusion, the Court endorsed the finding of the Scottish Court of Session in *Scotland Gas Networks plc v QBE UK Ltd [2024] CSIH 36* that "*Section 1 of the 2010 Act is clear in setting out different routes to establishing the liability of the insured, including the obtaining of a judgment which determines that issue."* The 2010 Act did not permit insurers to re-litigate liability when this has been established in prior proceedings.

CPB Comment

The decision in Makin illustrates the Court's willingness to construe notification clauses as a condition precedent, even without the clause being labelled as one, so long as the wording is sufficiently clear and unambiguous so as to demonstrate the insurers' intention to create one.

This serves as a reminder that post-claim cooperation or engagement may not cure a technical breach where cover has already been forfeited. At the same time, the case illustrates that where the notification clause is not expressed as a condition precedent, the insurer may struggle to avoid cover due to the Braganza principle. As such, Makin is also a reminder that fairness principles still operate at the margins. While the outcome turned on strict policy interpretation, the Court made clear that an irrational refusal of cover, had it been discretionary, would not have been upheld. This underscores the continued relevance of Braganza principles, even in a sector governed by finely tuned contractual terms. Whilst insurers will have a legitimate interest in conducting their own investigations, this will not enable them to decline cover where sufficient evidence has been collated by others. If this is the intended legal effect, insurers should ensure notification clauses are worded as a condition precedent.

Equally important is the Court's confirmation that once liability is judicially established, insurers cannot seek to reopen the underlying findings. The judgment aligns firmly with the Scotland Gas Networks case and distinguishes the private contractual context of AstraZeneca. Insurers facing direct claims under the 2010 Act must recognise that when liability or causation has been determined prior to their joinder, their defences are limited to matters of coverage and indemnity. This emphasises the need for insurers to keep potential claims under review, to ensure they are placed to intervene in claims against their policyholders for which insurers may ultimately be liable.

August 2025

Any questions

If you have any questions regarding the insurance-related issues highlighted in this article, please get in touch with Bernadette or Lisbeth.

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