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English Courts Construe Notification of Event Clause Narrowly and Stress That Ambiguous Conditions Precedent Must Be Interpreted in Policyholders' Favour

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Insurance

In response to the Insurance Act 2015, insurers may increasingly include conditions precedent in their policies in place of warranties, whose effect the Act has weakened. In the recent case of *Zurich Insurance Plc v Maccaferri Limited* [2016] EWHC Civ 1302, the Court of Appeal in London made clear that an ambiguous condition precedent must be interpreted strictly against the insurer. The court there construed narrowly the words "as soon as possible" in a clause that required notification of an event likely to give rise to a claim, rejecting the insurer's argument that the policyholder had a duty to perform a rolling assessment of the likelihood that a past event might give rise to a claim.

Background

Under English law, the breach by a policyholder of a notification provision that is classified as a condition precedent entitles its insurer to refuse to pay the relevant claim, without proof of prejudice. Many English policies provide that compliance with their notification provisions is a condition precedent to the insurer's liability; late notification therefore can become a potent weapon for insurers.

In the *Maccaferri* case, a combined Public and Product Liability policy covering accidental personal injury to third parties contained a common notification provision to the effect 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."* The policy also provided for immediate notification of receipt of any claim. A common clause in the policy provided that the due observance by the policyholder of policy conditions that related to anything to be done and complied with by the insurer (i.e., including the notification clauses) was deemed a condition precedent to the insurer's liability under the policy.

The policyholder supplied pneumatic lacing tools to the UK construction industry, referred to as "guns", which operated like giant staplers. In September 2011, an employee of a company that had hired a gun supplied by the policyholder received injuries to the face and eye as a result of an incident with the gun. Six days later, the policyholder was notified of an incident, but was not given details or told that there had been a serious injury. A representative of the policyholder subsequently learned that someone had been injured and that the gun was being forensically tested at the instigation of the injured person's employer, but received no information that the gun might be at fault and did not believe that the policyholder was going to be sued.

It was not until just under two years after the incident that the policyholder was joined as a third party to proceedings instituted by the injured man's employer. The policyholder then immediately notified its insurer of the claim, but the insurer denied coverage on the basis that the policyholder had failed to notify it of an event likely to give rise to a claim.

The Parties' Arguments

The parties agreed that the law is settled that "*an event likely to give rise to a claim*" means an event with at least a 50 percent chance that the claim against the policyholder will be made. The question in the *Maccaferri* case was when the policyholder was obligated to assess whether an event was likely to give rise to a claim.

The insurer argued that a policyholder must give notice as soon as it is able, using reasonable diligence, to discover that an event likely to give rise to a claim has occurred, and that this means that the policyholder is under a duty to engage in a continuing or "rolling" assessment of whether an event of which it has been made aware is likely to give rise to a claim.

The policyholder countered that the words "as soon as possible" in the notification clause referred simply to the promptness with which notice in writing needed to be given if there had been an event which was likely to give rise to a claim. The only time at which the policyholder was obliged to assess whether a claim was likely was when it was first notified of the event, and it had no duty to perform a rolling assessment.

The first instance judge, Mr Justice Knowles, rejected the insurer's arguments, and found for the policyholder.

The Court of Appeal's Decision

The Court of Appeal upheld the first instance judge's decision. It held that, in the absence of clear wording, the insurer's interpretation of the clause imposing a continuous obligation on the policyholder to assess whether a past event was likely to give rise to a claim (and possibly whether an event had happened at all) as circumstances developed—must be rejected as "strained and erroneous."

The court emphasized that any ambiguity in the wording of the notification provision must be resolved in favour of the policyholder because the provision was a condition precedent, introduced by the insurer, with the potential effect of completely excluding liability in respect of an otherwise valid claim for indemnity.

The judgment confirms that the test to be applied under the notification provision turns on the policyholder's actual knowledge at the time when it learnt of the relevant event: that is, whether a reasonable person in the policyholder's position at that time would have considered a resulting claim at least 50 percent likely. The court's analysis was based on a scenario where the policyholder became aware of the event soon after it happened, but the court accepted that the notice obligation was not even potentially triggered if the policyholder had no actual knowledge of the event.

Applying these criteria, the Court of Appeal found that the first instance judge reasonably concluded that, at the time when the policyholder became aware of the relevant event, there was not at least a 50 percent chance that a claim against the policyholder would result. The circumstances of the incident were unclear to the policyholder, which was also unaware that

someone had been seriously injured and that a staple had gone into somebody's eye; nor was it clear that the product supplied by the policyholder was at fault.

The Implications for Policyholders

This decision is particularly important in light of insurers' increasing use of conditions precedent in place of warranties, whose effectiveness as an insurer's weapon the Insurance Act 2015 has weakened. The court stressed that unclear conditions precedent of any kind, including the notification conditions there at issue, will be construed in favour of the policyholder.

In relation to notification, the Court of Appeal has rightly refused to impose on policyholders a duty to put in place a proactive continuing assessment of the significance of every event that could remotely give rise to a claim unless the policy clearly imposes such a duty.

Nevertheless, policyholders with policy language such as that in issue here should not ignore subsequently known evidence that a claim is likely to be made, and should consider whether it would be prudent to give notice to insurers in such situations.

Policyholders with English law policies must in any event ensure that they are fully aware of the detail of notification obligations in those policies and comply with them at all times, particularly because such obligations are in general characterised as conditions precedent.

If you have any questions concerning the material discussed in this alert, please contact the following members of our firm:

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