

POLICYHOLDER LESSONS: COMPLIANCE WITH NOTIFICATION PROVISIONS



INTRODUCTION

Many liability insurance policies allow a policyholder to notify circumstances or events that may lead to claims. Where a notification clause is mandatory, so that a policyholder is required (as oppose to merely permitted) to notify certain circumstances or events, it is imperative that a policyholder complies with that obligation, particularly where expressed as a condition precedent to insurers' liability.

In *Maccaferri v Zurich Insurance*¹ the English Commercial Court was asked to consider whether a condition precedent relating to notification of events required an insured, in effect, to investigate whether a claim was likely to arise from an event (and then to notify of the event). The Court rejected that argument and found that, on the facts, the insured had not breached the condition precedent.

THE CLAIM AGAINST THE INSURED

The insured was the supplier of a Spenax gun, which was being used by a Mr. McKenna to attach wire caging together, when he suffered a serious eye injury. Mr. McKenna sued his employer. His employer sued the company it had hired the gun from, and that company then sued the insured.

THE RELEVANT CONDITION PRECEDENT

The insurer denied the claim on the basis of an alleged breach of a condition precedent, which was in two parts. Part one provided 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".

Part two provided that:

"The Insured shall also on receiving verbal or written notice of any claim intimate or send same or a copy thereof immediately to the Insurer and shall give all necessary information and assistance to enable the Insurer to deal with, settle or resist any claim as the Insurer may think fit..."

NO OBLIGATION TO IDENTIFY POTENTIAL CLAIMS

The Court rejected the insurer's argument that the words "as soon as possible" in the first part of the relevant clause indicated that an obligation to notify arose when an insured could, with reasonable diligence, have discovered that an event was likely to give rise to a claim. A contrary finding would have required the insured, in effect, to investigate events in order to assess the likelihood of a claim.

¹ *Maccaferri Limited v Zurich Insurance PLC* [2015] EWHC 1708 (Comm).

The judge accepted that this interpretation might mean that there was an event that led to a claim, which would not have to be notified under the first part of the clause. However, the second part of the clause (dealing with actual claims) remained available, so that insurers would receive notice where there was an actual claim.

THE INSURED DID NOT BREACH THE CONDITION PRECEDENT

The accident occurred in September 2011. The insurer argued that this was an event likely to give rise to a claim, and failure to report this was a breach of the condition precedent.

Consistent with prior case law, the judge found that an event “likely to give rise to a claim” meant an event “*with at least a fifty percent chance that a claim against the claimant would eventuate*”. Although there had been an accident and the gun was involved, at the time of the accident a claim was a mere possibility. Likelihood could not be inferred from the happening of an accident.

LESSONS FOR POLICYHOLDERS

Policyholders will welcome the Court’s view that the clause referenced did not require the insured to take proactive steps to investigate events and potential claims, although the case cannot be taken as determining that such an obligation will never exist. Each clause will need to be considered individually.

Notification of events and circumstances is an important element of insurance coverage. In the context of claims-made policies, clauses dealing with notification are helpful in allowing a policyholder to report matters to a particular policy, such that coverage will then follow if a covered claim arises. However, this case serves as a reminder that breach of a condition precedent (and, in some cases, a condition) relating to notification can lead to an otherwise covered claim being denied.

The insured in this case ultimately prevailed, but not without an extensive legal battle and the time and cost that a legal battle entails. It is far preferable for there to be no doubt at all surrounding compliance with a notification obligation. Policyholders will be well served by being aware of the reporting obligations of their specific policies (which differ from policy to policy) and having robust procedures in place to capture and report relevant events, circumstances, and claims.

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GRAPHICS NO. 15-0697

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