

Property Insurance Update

June 2010

When the cracks first appear

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It may be argued by some that the issue of notification under a property policy should not be complicated because the occurrence of a defined peril is not usually difficult to determine. The issue can become complicated, however, where the peril is progressive, such as with subsidence, and where initial signs such as minor cracks may not be noticed immediately. It is only when cracks become significant or are accompanied by other problems, such as water ingress, that the true nature of a problem becomes clear. [More...](#)



Double insurance: it's policy wordings not previous cases that count

Extracting general principles from case law on 'double' insurance can be fraught with uncertainty. Gavin Kealey QC, sitting as a Deputy High Court Judge in the Commercial Court in a preliminary issues trial in *The National Farmers Union Mutual Insurance Society Limited v HSBC Insurance (UK) Limited*, has brought some refreshing clarity to the subject, confirming that it is policy construction, not previous cases, that is the key to resolving such disputes.

On 10 October 2007, contracts were exchanged in relation to the sale of The Old Hall, Langham in Rutland, a handsome 17th Century country house valued at around £2.5m. The sale contract provided that the risk of damage to or destruction of The Old Hall passed to the buyers on exchange of contracts. [More...](#)

Stop Press

Jones v Environcom & Miles Smith Insurance Brokers

Environcom (the insured) recycled waste electrical goods and in the recycling process used plasma guns at high temperatures. [More...](#)

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Any comments or queries?

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When the cracks first appear

The recent Commercial Court case of *Loyaltrend v Brit UW Ltd* [2010] EWHC 425¹ provides useful guidance on when a failure by a policyholder to provide timely notification of a claim can be relied upon by insurers as a complete defence to liability. Comments made by the court also underline for brokers the importance of ensuring that prompt notification is made, in particular, where the claim involves a progressive peril and where more than one insurer underwrites cover over a period of time.

It may be argued by some that the issue of notification under a property policy should not be complicated because the occurrence of a defined peril is not usually difficult to determine. The issue can become complicated, however, where the peril is progressive, such as with subsidence, and where initial signs such as minor cracks may not be noticed immediately. It is only when cracks become significant or are accompanied by other problems, such as water ingress, that the true nature of a problem becomes clear. This can give rise to additional issues where an insured changes insurer from one year to the next. So when should an insured be notifying insurers and when can insurers rely on an insured's failure to comply with policy notification provisions to dispute a claim?

In the domestic context, guidance from the Association of British Insurers (ABI)² recommends that insurers should be notified as soon as a policyholder believes there may be a problem. Where problems span a period over which several insurers are on risk, the ABI's *Domestic Subsidence Claim Handling Agreement* provides clarity over how claims should be handled. This guidance does not, however, cover commercial policies and HHJ Mackie's recent decision provides useful direction on this issue.

Background

Loyaltrend operated a chain of "high end" clothing shops, including one which occupied let premises in Notting Hill. Following a particularly hot, dry summer, signs of cracking at the shop were first noticed by Loyaltrend in August 2003, at which time the landlord's agents were informed. An inspection of the premises by a representative of the agents confirmed the existence of cracks. By November 2003, cracking was more significant and signs of movement were noticed in the pavement in front of the shop. At that stage, the landlord's buildings insurers were notified. Diary entries made by the shop manager noted some water ingress around this time and Loyaltrend also appointed a buildings surveyor who engaged in correspondence with the landlord's agents.

In early 2004, a technical report was commissioned on behalf of the landlord identifying significant interior cracking. Correspondence between Loyaltrend's buildings surveyor and the landlord's agents referred to cracking and water penetration. Temporary repairs were then carried out by the landlord's agents in spring 2004. Despite this, factual evidence submitted on behalf of Loyaltrend confirmed that towards the end of 2004 circumstances deteriorated considerably.

Loyaltrend sought an indemnity from its insurers for material damage



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Footnotes

- 1 Whilst proceedings were initially issued against Creechurch, Brit and Catlin, only Brit were involved in the defence of this claim at trial.
- 2 ABI Guidance Note "Subsidence - Dealing With The Problem"

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to tenants improvements for trade contents and stock. Loyaltrend argued that it had notified the claim in August 2004, when its duty to do so had arisen and when regular water ingress had started to occur. A considerable proportion of Loyaltrend's claim was made up of business interruption losses because it was argued that a reduction in takings occurred from October 2004.

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The policy

Loyaltrend's brokers had recommended a shop and restaurant insurance policy provided under a coverholder scheme. Insurance was purchased from December 2002 to December 2006, during which time cover was underwritten by three different insurers: Creechurch between December 2002 and December 2003; Brit between December 2003 and December 2004; and Catlin between December 2004 and December 2006. The policy covered material damage caused to tenants improvements, fixtures and fittings, trade contents and stock at the Notting Hill premises as a consequence of various defined perils, including subsidence. It also provided business interruption cover arising as a consequence of material damage covered under the policy.

The policy required Loyaltrend to provide immediate notification to insurers of *"the happening of any injury or damage in consequence of which a claim is or may be made"*. That provision was made a condition precedent to liability in light of a due observance provision contained within the policy.

Notification

When notification actually took place was a matter which was in dispute at trial. On Loyaltrend's case, it had contacted brokers about issues with ongoing subsidence and the risk that the shop might be forced to close temporarily during remedial works in August 2004. Loyaltrend argued that it was not until this point that it had become aware that there might be a claim under the policy. Oral evidence from a representative of the brokers suggested that they had notified a claim to coverholders in August 2004 but this was not supported by correspondence, documents and witness evidence adduced on behalf of Brit. Brit argued that the claim was not notified until August 2005.

Court's findings

The court rejected Loyaltrend's submissions on notification and found that the claim had not been notified until August 2005. Brit, as the only remaining insurer involved at trial, was successful in arguing that Loyaltrend had failed to comply with the notification condition within the policy. The court found that the question of when a claim may be made for the purposes of the notification condition had to be considered objectively, following the decision of the Court of Appeal in *Laker Vent Engineering Ltd v Templeton Insurance Ltd* [2009] EWCA 62. This involved asking whether the reasonable person would have considered a claim likely to arise given the known circumstances. To determine the issue in this case, the court took into account factors within the knowledge of Loyaltrend, including: Loyaltrend's appointment of a buildings surveyor in 2003, Loyaltrend's notification of the cracking to the landlord's agents in August 2003; and records confirming the existence of severe cracking in 2003.

In addition, the court provided a helpful reminder on the nature of business interruption cover, confirming that for an indemnity to be payable for business interruption losses, these have to

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be consequential upon material damage covered by the policy. Contrary to arguments made on behalf of Loyaltrend, business interruption losses were not covered independently.

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The court's conclusions highlight that legal principles established in the context of liability policies (see *Aspen Insurance UK Ltd, Brit Holdings Ltd, DAC v Pectel Ltd* [2008] EWHC 2804; *HLB Kidsons (a firm) v Lloyd's Underwriters* [2008] EWCA 1206; *Laker Vent Engineering*) can also be found to apply in the context of property policies. For insurers to be able to rely on the breach of a notification provision as a defence to liability, this must be a condition precedent to liability and clear evidence must be established to confirm the extent of the insured's knowledge.

Double insurance: it's policy wordings not previous cases that count

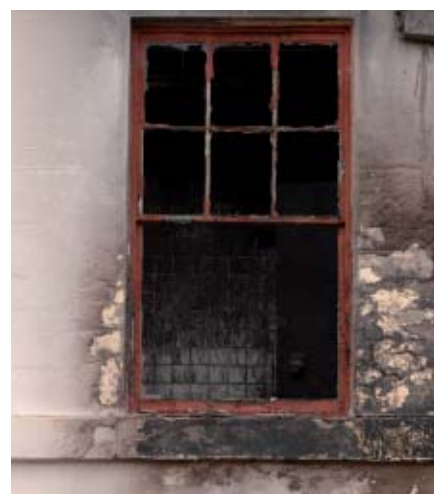
Extracting general principles from case law on 'double' insurance can be fraught with uncertainty. Gavin Kealey QC, sitting as a Deputy High Court Judge in the Commercial Court in a preliminary issues trial in *The National Farmers Union Mutual Insurance Society Limited v HSBC Insurance (UK) Limited*¹, has brought some refreshing clarity to the subject, confirming that it is policy construction, not previous cases, that is the key to resolving such disputes.

On 10 October 2007, contracts were exchanged in relation to the sale of The Old Hall, Langham in Rutland, a handsome 17th Century country house valued at around £2.5m. The sale contract provided that the risk of damage to or destruction of The Old Hall passed to the buyers on exchange of contracts.

On 27 October 2007, between exchange of contracts and completion, The Old Hall caught fire and sustained serious damage. The buyers initially refused to proceed with the purchase but after the sellers served a Notice to Complete, the sale proceeded at the contract price.

The buyers had taken out buildings insurance for The Old Hall with National Farmers Mutual Insurance Society (NFU) for the period from 4 October 2007 to 4 October 2008. The sellers also had buildings cover provided by HSBC covering the period 11 December 2006 to 10 December 2007.

As the buyers paid the full contract price, the sellers did not claim under their HSBC policy. The buyers were indemnified for the fire damage, around £1.85m, under their NFU policy and NFU sought a contribution from HSBC. HSBC denied that they were liable to make any payment.



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Footnotes

1 [2010] EWHC 773 (Comm)

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HSBC's plain English policy set out in section one what was and what was not covered as follows:

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WHAT IS COVERED	WHAT IS NOT COVERED
<p>This insurance covers the buildings for physical loss or physical damage....</p> <p>This section also covers...</p> <p>anyone buying your home who will have the benefit of section one until the sale is completed or the insurance ends, whichever is the sooner</p>	<p>We will not pay...</p> <p>if the buildings are insured under any other insurance</p>

Claims Condition 2 of the HSBC policy stated:

"OTHER INSURANCE

***We** will not pay any claim if any loss, damage or liability covered under this insurance is also covered wholly or in part under any other insurance except in respect of any excess beyond the amount which would have been covered under such other insurance had this insurance not been effected."*

NFU's policy

The NFU policy insured buildings against damage from fire. One of the General Conditions to the policy stated that:

"Other insurance

*If, when **you** claim there is other insurance covering the same.... **damage**....**we** will only pay **our** share...."*

Double insurance – or not?

NFU contended that this was a dispute about double insurance. HSBC argued that because NFU's policy provided cover to the buyers, HSBC's did not. In the alternative, they argued that if cover was afforded to the buyers, the HSBC policy operated only as an excess policy to the NFU policy.

The judge accepted that there were sound commercial reasons why a seller might wish to insure a property up to completion notwithstanding that it was at the buyer's risk from exchange of contracts. For example, the property might be damaged and the buyer unable to complete. However, there was no legal requirement for the seller's insurers to extend cover to the buyer between exchange of contracts and completion.

He held that the correct approach was to review the respective policy wordings in the circumstances of the case. On the correct analysis, section one of the HSBC policy provided only a qualified extension of cover to the buyers. Because the NFU policy provided cover to the buyers, the qualification was triggered. Accordingly, the HSBC

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policy did not cover the buyers. The 'other insurance' general condition was subordinate to section one, as it was section one that set out the scope of the indemnity. This was therefore not a case of double insurance.

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*The judge ruled emphatically that this was **not** a double insurance case.*

Earlier authorities

Despite the parties' counsels' extensive review of authorities on double insurance in various jurisdictions, the judge found these authorities to be of little assistance in the present case. He nevertheless reviewed a number of authorities in some detail and, although his comments are *obiter*, they offer useful guidance.

He discussed the three categories of 'double insurance' clauses, namely:

- (i) where a policy excludes an indemnity in the event of other insurance (an 'escape' clause);
- (ii) where the loss is limited to a rateable proportion;
- (iii) where one policy acts as an excess in the event of cover under another policy.

He considered the authorities of *Weddell v Road Transport and General Insurance Company Limited*² where two 'escape' clauses cancelled each other out so that both insurers were liable; *Gale v Motor Union Insurance Company*, *Loyst v General Accident Fire and Life Assurance Corporation*³, where the policies contained rateable proportion clauses; and *Austin v Zurich General Accident & Liability Insurance Company Limited*⁴, where one policy contained an excess clause and the other a rateable proportion clause. He cast doubts on the correctness of the construction of the policies in *Austin*.

Useful assistance was, however, to be found from a New Zealand Court of Appeal case, *State Fire Insurance v Liverpool & London Globe Insurance*⁵, where the majority ruled that a rateable proportion clause should be subordinated to the indemnity clause.

Although the judge ruled emphatically that *The National Farmers Union Mutual* case was not a double insurance case, the judgment provides a valuable review of double insurance case law, and perhaps a timely reminder to insurers to review policy provisions that might force property insurers to pay or contribute to a large claim even when the property is legally at another insurer's customer's risk.

Footnotes

- 2 [1932] 2K.B. 563
- 3 [1928] 1K.B. 359
- 4 (1944) 77 Lloyd's List Law Reports 409
- 5 [1952] NZLR 5

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Stop Press

Jones v Environcom & Miles Smith Insurance Brokers [2010] EWHC 759 (Comm)

Environcom (the insured) recycled waste electrical goods and in the recycling process used plasma guns at high temperatures. Brokers were held to be in breach of duty to the insured for a failure to properly explain and supervise its disclosure obligations, meaning that the insured did not disclose certain fires attributable to the use of the plasma guns. A subsequent fire occurred and insurers avoided the policy. The insured argued that if these fires had been disclosed it would have obtained appropriate insurance cover. The court held that, as insurers were aware of some of the fires and had initially declined to provide cover, they would have been even more unwilling to offer terms if the full facts had been disclosed. The insured's claim therefore failed.

Although liability was narrowly avoided on this occasion, the case provides a timely reminder to brokers to ensure that clients fully understand their disclosure obligations. As a result of this case, it is likely that a broker's role in any avoidance will come under even closer scrutiny – something that we have recently seen in a coverage dispute that this firm successfully defended on behalf of insurers, *AC Ward & Son Ltd v Catlin (Five) Ltd*. For more details, go to our January Update [click here](#)

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