

CONFIDENTIAL CLIENT BRIEFING KIDSONS' APPLICATION TO "OCCURRENCE" BASED POLICIES

This week the case of *Aspen Insurance UK Ltd & Others v Pectel Ltd [2008] EWHC 2804 (Comm)* highlighted the contentious issue of notifications made to insurers. This comes on the back of the recent *HLB Kidsons v Lloyds Underwriters & Others [2008] EWCA Civ 1206* decision (see Client Briefing dated 5 November 2008). Whilst the Kidsons Court of Appeal decision came too late for the Aspen case, the Aspen case followed and cited the first instance Kidsons decision of Gloster J in a number of crucial areas, namely the question of who is the knowledge holder and whether the clauses in this policy amounted to a condition precedent and if so, with what effect.

The Aspen case concerned a notification made in March 2007 which related to a fire in 2004 in a deep level communications tunnel owned by BT. The notification point was dealt with as a preliminary issue. The main issues before the court were (1) whether the assured had complied with condition 4(a), the notification provision; and, (2) whether condition 4(a) was a condition precedent to the underwriters being liable to indemnify the assured in respect of the liability arising out of the fire. Condition 4 (a) provided as follows:

"4) Claims Procedure

(a) The Assured shall give to Miles Smith.... immediate written notice with full particulars of:-

(i) any occurrence which may give rise to indemnity under this insurance...."

In considering whether the assured had complied with this provision, Teare J. considered whether the assured had the necessary awareness that the occurrence "*may give rise to indemnity*" under the policy. In considering this issue the Judge held that there "*must be a real as opposed to a fanciful risk of the underwriters having to indemnify the assured*". The correct test to be applied, citing Kidsons' first instance decision which was upheld on appeal, was essentially an objective one taking into account the knowledge that the assured possessed. The judge held that there was a real risk that the assured might claim an indemnity under its policy and the risk was one which would have been recognised by a reasonable man having the knowledge of the assured.

The further issue of whether compliance with the notification provision was a condition precedent required consideration of the policy as a whole and that included the interaction of condition 4 (a) with condition 13 of the policy:

"13) Observance

The liability of Underwriters shall be conditional on:-

(i) The Assured paying in full the premium demanded and observing the terms and conditions of this insurance."

The Judge held that on the true construction of the policy, including condition 13, compliance with condition 4 (a) was a condition precedent to underwriters' liability to indemnify: "*A condition requiring "immediate notice" cannot be construed as requiring "notice, whenever given"*". Teare J held that condition 13 when

read in conjunction with condition 4 (a), made it clear that the parties intended there to be a conditional link between the assured's obligation to comply with the notification provision and underwriters' obligation to pay the claim. The Judge regarded it important to consider the commercial purpose of the notification provision, namely, that it enables underwriters to investigate the potential claim at the earliest opportunity. Again, the Kidsons decision of Gloster J was cited in the debate on this issue. The result was that underwriters were entitled to decline liability on the basis that the notification was held not to have been made in time as the assured, on the facts of this case, had been obliged to give written notice to the underwriters of the fire in November 2004 at the latest instead of March 2007 when notice was given.

This and the Kidsons case highlight that compliance with notification provisions is an extremely important issue and a potential minefield for assureds. The following of Kidsons in the Aspen case demonstrates its importance not only to policies written on a "claims made" basis but, as in the Aspen decision, to policies written on an "occurrence" basis. Whilst the Kidsons Court of Appeal decision came too late for the Aspen preliminary issue trial, it provides important guidance on notification issues for all in the insurance market: policyholders; brokers; insurers and reinsurers.

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