Filling the void

Andrew Hogan on remedies when an ATE or BTE insurer disputes cover

'And so, for these reasons the claim is dismissed,' is not a phrase that either a claimant – or their solicitor acting under a conditional fee agreement – will relish hearing at the end of a trial. In such circumstances, the next immediate questions are how any adverse costs orders and own-client disbursements can be paid. Personal injury claimants will have the benefit of qualified one-way costs shifting (QOCS), but even so, may face a hefty bill for their own disbursements.

It is at this moment that any policy of before-the-event or after-the-event insurance effected by the claimant – the latter usually through the agency of his solicitors – will come to the fore. But what if the BTE or ATE insurer refuses to pay out, relying on alleged breaches of policy conditions or warranties, or, even more dramatically, fraud by the losing claimant?

What remedies does a client have then? In context, it may not just be the client who seeks a remedy. Many solicitors provide credit to their clients in the first instance by funding their disbursements, often by way of overdraft. An ATE insurance policy acts as effective re-insurance for the solicitors' outlay, obtained at the behest of the solicitors' bankers.

What follows is an analysis of the key issues that arise at this juncture, and what route of challenge might be pursued against a defaulting insurer.

CLAIM FOR INDEMNITY

The starting point is that the insured will wish to raise a claim for an indemnity or an action for damages amounting to an indemnity against the insurer, which will be met with a reason or litany of reasons why the insurer is not obliged to pay out on the claim on the policy.

In summary, the usual reasons for refusal of indemnity include misrepresentation at the time of the inception of the policy, non-compliance with terms and conditions, subsequent developments in the litigation that the insurer was not informed of, any finding of fraud against the insured made by a trial judge, and possibly that the liability incurred is outside the scope of the policy.

Before consideration can be given to whether there is scope to challenge a refusal of indemnity, the first issue that falls to be addressed is whether the solicitor can represent the client in a fresh dispute with the ATE insurer. In many cases there will be a conflict of interests.

A client will usually have obtained their ATE insurance through the agency of their solicitor, carrying out insurance mediation activities. The policy may be one that gives the solicitor delegated authority to run the litigation without recourse to the ATE insurer, but often it will not; and there will be terms requiring the insurer to give consent to the issue of proceedings, or be notified of material developments in the litigation, or the making of any part 36 offer.

The performance of these obligations will be entrusted to the solicitor: if the insurer's allegation is that these obligations have been honoured in the breach and not the observance, so that it is contended to be the solicitor's fault that the insurer has repudiated liability, a clear conflict of interest will arise. The client may well wish to sue the insurer on the contract of insurance, and the solicitor for professional negligence in the alternative.

Another issue that can arise concerns who can bring an action. If the main sum at stake is the disbursements paid by the solicitor, and the client has little interest in pursuing the BTE or ATE insurer – perhaps because his liability for adverse costs is covered by QOCS – the party with the greatest interest in pursuing an action may be the solicitor, who is substantially out of pocket by his payment of disbursements.

In this scenario, the solicitor may be able to sue the insurer directly by taking an assignment of the client's rights under the policy: subject to there being no clause against assignment, or arguments of public policy arising from the case of *Trendtex Trading Corp v Credit Suisse* [1982] AC 679. Sometimes the facts can give rise to arguments that the solicitor may claim for a direct right to an indemnity, as happened in *Greene Wood McLean LLP (In administration) v Templeton Insurance Limited* [2010] EWHC 2679 (Comm), though it should be noted that this arose when solicitors had discharged clients' adverse costs liabilities and could rely both on the principle in *Brook's Wharf & Bull Wharf Ltd v Goodman Bros* [1937] 1 K.B. 534, and the Civil Liability (Contribution) Act 1978.

Assertions by insurers that they are entitled to void the policy, and their reasons for doing so, must be carefully scrutinised. When misrepresentation is alleged, the starting point is that it is trite law that a contract of insurance is a contract of utmost good faith, and there is a duty on the insured to provide full disclosure of the facts that are material to the insurer's risk.

Many ATE contracts will be with insured parties who could aptly be described as consumers, and duty of disclosure is found in sections 2 and 3 of the Consumer Insurance (Disclosure and Representations) Act 2012. If the insured is a business, then section 3 of the Insurance Act 2015 imposes a similar obligation on a business, described as a duty of fair presentation.

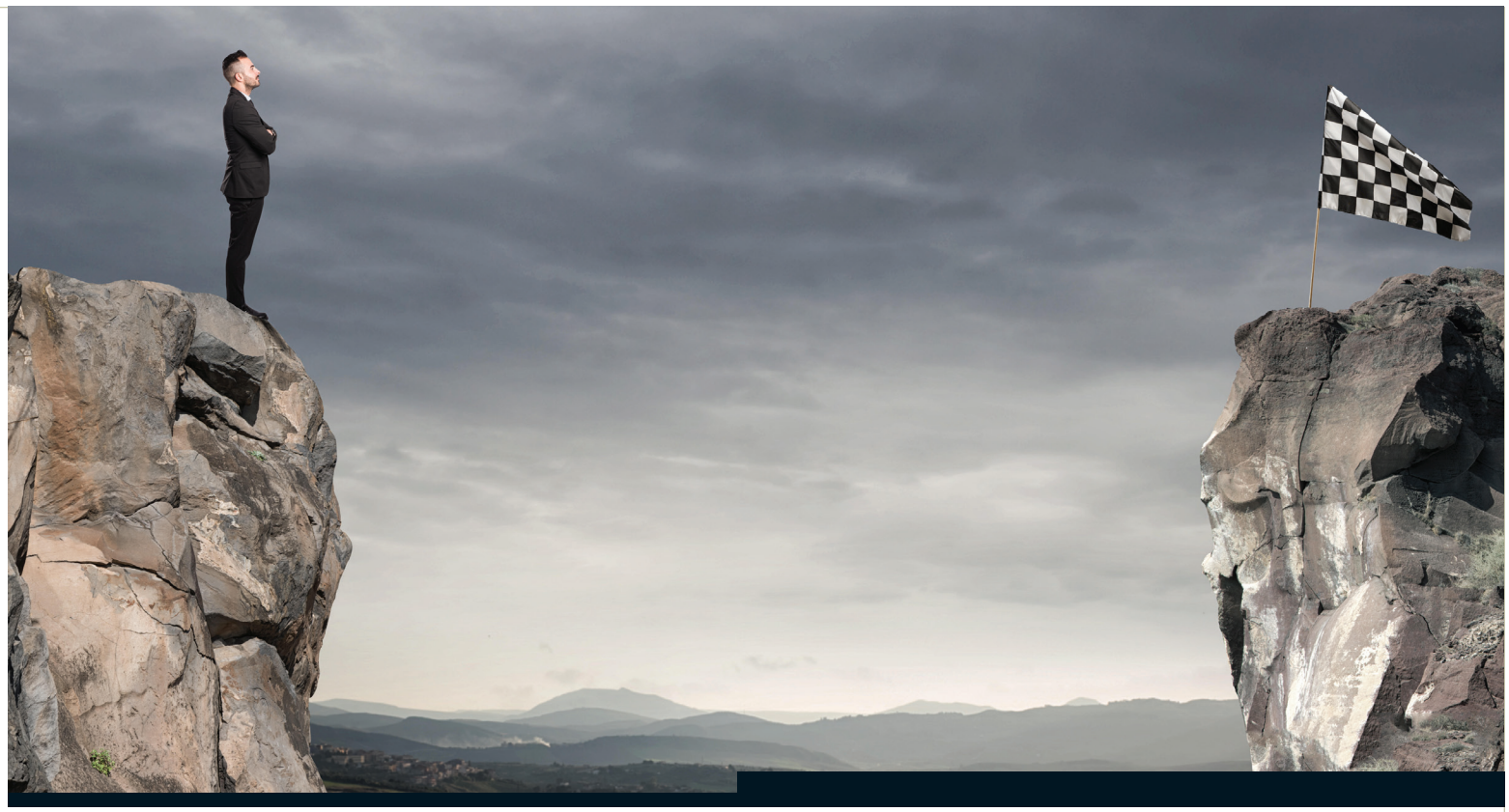
If a reason for voiding the policy is given as misrepresentation, it follows that the relevant duty must be identified, and the facts said to constitute a misrepresentation considered, to see whether the insurer can rely on the statutory provisions. A distinction will exist between innocent and fraudulent misrepresentation. In an innocent misrepresentation, the insurer must establish that it was material to its decision to insure. But no such requirement of materiality applies to a fraudulent misrepresentation. A further requirement is that either type of misrepresentation induced the insurer to make the contract. The key to this task will be to read carefully the written insurance proposal and any accompanying documents sent to the insurer, upon which document they will have based their decision to write a policy, and see whether it is full and complete.

Insurance contracts have a different terminology to other contracts, and will contain terms that are either warranties or conditions, whereby warranties are the more important of the terms, and conditions are often of a lesser significance. Many insurance policies will label the most important terms as warranties. Of the two categories, warranties are the more significant, because of the consequences of breach. A breach of a warranty will render the contract voidable if it is breached, with no liability to pay on the policy at all when voided. There is an obligation on the insured to comply exactly with the provisions of the warranty.

Conversely, a breach of condition is different in its effect. If a breach of a condition does not result in the loss insured against being sustained, then it will not be a breach giving rise to a right of avoidance. Moreover, a breach of condition will constitute a limiting event on an insurer's liability, but not entitle it to avoid the policy entirely.

Even if an insured is in breach, this is not necessarily the end of the matter: if the insurer can be said to have waived or affirmed the breach, by having knowledge of it, but still continuing with cover and possibly accepting further tranches of premium, the insurer will be estopped from

DISBURSEMENTS



being able to rely on the breach. However, the courts tend to emphasise both the requirements of actual knowledge of breach on the part of the insurer, and clear communication of waiver consequent to that knowledge.

FRAUD AT TRIAL

Perhaps the clearest example of a situation where an insurer might wish to avoid the insurance policy, is where the insured has lost at trial due to findings of fraud or dishonesty being made against them. An interesting question arises as to whether these findings between the client and the third party can be relied upon in themselves, as between the client and the insurer.

In other contexts, where there is a dispute between the third party and the insured and their insurer raises indemnity issues, it is common for the insurer to be joined to the action through a part 20 claim, and findings will be made on both the main claim and part 20 claim in one trial.

In the context of a dispute with a BTE or ATE insurer, that option will not be realistic as in virtually every case, the dispute only arises after an adverse judgment.

In what is perhaps the leading case on this point, *Persimmon Homes Ltd v Great Lakes Reinsurance (UK) Plc* [2010] EWHC 1705, Comm Mr Justice Steel had no difficulty in allowing the trial judge's findings in the original action as evidence, despite the seeming inconsistency with decisions such as *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1, which re-emphasised the rule in *Hollington v Hewthorn* [1943] KB 857 that findings in one civil case are inadmissible in a later civil case.

The cases can perhaps be reconciled on the basis that the insurer and insured are privies, and the doctrine of estoppel per rem judicatem precludes the re-opening of the point. In any event, the point may have little practical force if the evidence at the first trial is available, and supportive of a finding of fraud.

Not all circumstances where a client comes under an adverse costs liability will be insured events; it is common for policies to exclude cover for costs awarded when a claim has been struck out, or there has been other default that caused the incurrence of adverse costs. Some policies are barely worthy of the name, because they also exclude a liability to pay adverse costs, where for example a part 36 offer has not been beaten, until any damages or costs the insured may have been ordered to pay have been exhausted in discharging the adverse costs order.

ARBITRATION

Most policies of ATE insurance will have an arbitration clause: this can be quite a valuable route of redress as an alternative to litigation, not least since the decision in *Essar Oilfields Services Limited v Norscot Rig Management PVT Limited* [2016] EWHC 2361 (Comm) indicates that in principle, the cost of litigation funding (and possibly other additional liabilities) might be recoverable. And the straitjacket of costs budgeting and costs management imposed by the courts under part 3 CPR, simply won't arise.

A further alternative is a complaint to the Financial Ombudsman: http://www.financial-ombudsman.org.uk. As ever, with these forms of alternative redress, the ease of making a complaint to the Ombudsman must be weighed against the nature of the dispute and the adequacy of the remedy the Ombudsman might provide.

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