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English Court of Appeal Clarifies the Law on Notification of Circumstances

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In *Euro Pools Plc (in administration) v. Royal and Sun Alliance Plc* [2019] EWCA Civ 808, the Court of Appeal considered the parameters and effect of a notification of a circumstance by an insured that could give rise to a subsequent claim under a professional indemnity insurance policy. The court held that an insured could make a broad "can of worms" notification of circumstances to its insurers such that a subsequent claim with a causal connection to the circumstances previously notified could be covered by the policy in question. This was the case notwithstanding the fact that the insured may not have knowledge of the precise causes or consequences of the circumstance notified to insurers.

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Facts: The policyholder fitted swimming pools with movable "booms" to divide the pools into different swimming zones. It had two consecutive professional indemnity policies with the insurer (30 June 2006 to 29 June 2007 ("**First Policy**") and 30 June 2007 to 29 June 2008 ("**Second Policy**")). These policies insured against the costs of remedial work undertaken to mitigate the risk of claims by third parties against the policyholder, provided that the policyholder notified the insurer of circumstances that might give rise to such claims.

In February 2007, the policyholder notified the insurer under the First Policy, in respect of problems with steel tanks, which moved the booms via an "air drive system." In June 2007, the policyholder supplemented its notification, stating that it hoped to mitigate against potential third party claims by installing "inflatable bags" (using the same air drive system), but nonetheless wished to make a notification "*...on a precautionary basis, should there be any future problems.*" ("**Original Notification**").

In May 2008, the policyholder notified the insurer that the inflatable bag solution had failed, as there was a fundamental problem with the air drive system. The policyholder installed an expensive hydraulic system, at a cost of circa £2 million, and claimed the costs of the remedial work, purportedly under the Second Policy (the "**Claim**"). The policyholder argued that the Original Notification was too narrow for the Claim to attach to the First Policy as it related to the steel tanks.

The insurer countered that the circumstances of this alleged 2008 "notification," in fact, related to the Original Notification under the First Policy and that the Original Notification was sufficiently wide for the Claim to attach to the First Policy. Consequently, the policyholder could not claim under the Second Policy. The policyholder, however, was not entitled to an indemnity under the First Policy, as it had exhausted its limit of indemnity through other claims that related to the costs of the rectification of other problems with its swimming pools.

High Court Decision

Moulder J agreed with the policyholder's submission that there was no causal link between the Original Notification and the Claim. The Original Notification concerned problems with the steel tanks and the prospect of remedying the problems with air bags, but it did not extend to replacing the air drive system with the hydraulic system. The judge held that the policyholder was not aware of a defect in the air drive system and so following *Kajima UK Engineering Limited v. The Underwriter Insurance Company Limited* [2008] EWHC 83 (TCC) ("**Kajima**"), it could not notify to insurers something of which it was unaware. Accordingly, the Claim attached to

the Second Policy and the policyholder was entitled to an indemnity from the insurer. The insurer appealed.

Court of Appeal Decision

The Court of Appeal unanimously overturned Moulder J's decision and held that the Claim arose from the Original Notification and therefore it attached to the First Policy (under which the circumstances had been notified) and not to the Second Policy. The Court of Appeal decided that the policyholder had made the Original Notification on a precautionary basis as it recognised that it might not have bottomed out the root cause of the booms' failure.

Following *Kajima*, the Court said that the policyholder's notification of circumstances covered: (a) the defects causing the problems with the booms and (b) the symptoms and consequences of the circumstances notified. The Court of Appeal said that it would have been inappropriate for the policyholder to over-analyse the problem with the booms by dissecting every potential cause of the problem as a different notifiable circumstance. The court decided that Moulder J had failed to recognise that it was possible for an insured to make a "can of worms" or "hornet's nest" notification i.e. "*…the insured can notify a problem in general terms without fully appreciating its cause or…consequences*."

Comment

Interestingly, the arguments deployed by the parties run counter to the usual commercial position where the insurer argues that a notification is narrow, to avoid indemnifying the insured, and the insured conversely argues that the notification is wide enough so that subsequent claims are caught by the notification. Although on its facts, the Court of Appeal judgment summarises some of the principles that apply when construing the scope of notifications of circumstances by insureds under a claims made policy.

In particular, an insured who notifies a circumstance to insurers may be insured for later claims with a causal connection to the circumstances previously notified even ifthat insured was unaware of the full causal origins and implications of the circumstances notified to insurers (as noted above, the policyholder had made a wide precautionary notification, which did not specify the causes of the booms' failure).