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Insights

CO-INSURANCE AND SUBROGATION RIGHTS UNDER THE SPOTLIGHT ONCE MORE

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The case of *The Rugby Football Union v Clark Smith Partnership Ltd and FM Conway Ltd* joins a growing and I believe important line of cases dealing with issues of co-insurance and subrogation. (For commentary on these cases from my colleagues, see Blog posts, *Insurance and subrogation*, *Co-insurance and subrogation rights revisited (again!)*, *Joint insurance and rights of subrogation revisited* and *A missed opportunity – Haberdashers and subrogation*.) It is of particular relevance to us in the construction industry as it looks specifically at the allocation of risk between insurers and parties to an all-risk insurance policy on a construction project involving the *JCT form of contract*.

By way of backdrop to this one:

- Parties to construction projects routinely take out a *single "all-risk" insurance policy* to the benefit of all parties and against defined risks arising on those projects – notably physical loss or damage to the works or property.
- Those policies typically exclude cover for loss or damage by reason of defective design and/or workmanship.
- Generally, where they have paid out money to an insured party, insurers have a right to make a subrogated claim to recover that loss from the third party who caused it. However, where two or more parties agree in their construction contracts to take out joint names insurance, *principles of "co-insurance"* apply:
  - a term is implied into the construction contract that, absent express wording to the contrary, those parties cannot pursue each other **in respect of the same insured risk**;
  - in turn, the insurer that pays out against the claim cannot make a subrogated claim against any of the co-insured parties **in respect of that same insured risk**.

Note the emphasis on "same insured risk".

WHAT HAPPENED?

So what happened here?

In preparation for hosting the 2015 Rugby World Cup, the RFU embarked on a number of packages of works at Twickenham stadium. Package A07.1 involved the design (by Clark Smith Partnership) and installation (by Conway) of sub-surface ductwork through which high voltage cables would be pulled as part of package A07.2 (by a third party contractor).

RFU's claim is that defects in the ductwork caused damage to the cables when they were pulled through it. RFU's losses were claimed in the sum of some £3.3m for the replacement cables and some £1.1m to rectify the ductwork.

The RFU employed Conway pursuant to the *2011 JCT Standard Building Contract*, adopting "Option C" whereby the RFU was required to take out an all-risks insurance policy to benefit Conway. To that end, the RFU had taken out an all-risks insurance policy with Royal Sun Alliance (RSA) for the various packages of work. That policy identified the RFU as principal insured and the various classes of contractor and consultant involved in the project. The scope of cover was broad and included the scope of works undertaken across the various packages. However, it included standard *Design Exclusion 3 (DE3)*, by which:

- Cover was excluded in respect of the replacement of work due a to defect in its own design or workmanship; but
- Cover was provided in respect of damage to other work or property caused by the defective work.

On that basis, RSA indemnified the RFU for the £3.3m to replace the damaged cable but did not indemnify the RFU for £1.1m to rectify the defective ductwork itself. RSA then (in the name of the RFU) brought a *subrogated claim* against Conway to recover the £3.3m claimed to have been caused by its defective work.

Conway resisted that claim on the basis that it was co-insured with the RFU under the same all-risk policy and for the same loss, and so RSA was not permitted to bring a subrogated claim against it (*Co-op v Taylor Young* and *Gard Marine*). In addition, Conway relied on an express waiver of RSA's right of subrogation that was included in the insurance policy.

JUDGMENT

In what I have found to be a striking analysis of the contractual allocation of risks through the construction contract and insurance policy, Eyre J in the Technology & Construction Court did not agree. The judgment is both notable and incredibly useful to understand the legal relationships created by an arrangement of insurance that is common in the industry.

The judge applied rules of agency to explain how, although in the policy taken out by the RFU, Conway was identifiable as being within a class of insured parties, the cover that Conway benefited from only came about as a result of the RFU contracting with RSA on its behalf as agent and, **crucially**, subject to *the scope and extent of cover* that the RFU was obliged to provide pursuant to the terms of the construction contract.

On the judge's analysis, even though the wording of the insurance policy (and, specifically the DE3 Exclusion) appeared to provide wide enough cover in its own right to protect Conway from the £3.3m of damage to the cable, the construction contract (in particular the election of Option C under the JCT insurance provisions), did not extend cover both for the rectification of Conway's own defective work, nor the damage to other property and other works caused by those defects (that is, the cable). As such, the extent of Conway's cover was restricted to that more narrow scope, meaning that Conway was not insured for the same risk and to the same extent as the RFU. In turn, the judge concluded that the principles of co-insurance did not apply here. Similarly, the judge concluded that the RSA's waiver of subrogation in the insurance policy was limited to the extent to which the insured losses are aligned. So, it was open for RSA to bring a subrogated claim against Conway in respect of the damaged cable.

ANALYSIS

Participants in multi-party construction developments (in particular involving multiple trade contract packages) should take careful note of this case.

The "Joint Names Policy" for "all-risks insurance" identified in the construction contract may not provide the extent of cover that their titles suggest, or that you are expecting – not even where the insurance policy itself is worded very broadly. It is essential that each party considers and understands fully the extent of cover actually provided for in the underlying construction contract to ensure that any gaps in cover (as Conway encountered here) can be plugged.

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MEET THE TEAM

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