Notification of circumstances – clarification from the Court of Appeal Euro Pools Plc v Royal & Sun Alliance Insurance Plc [2019] EWCA Civ 808

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The Court of Appeal has examined a notification of circumstances which *"might reasonably be expected to produce a Claim"* in its recent decision in *Euro Pools Plc v Royal & Sun Alliance Insurance Plc*.

The Court overruled the first instance decision, holding that there was a low materiality threshold for a notification to be effective. The test was a relatively undemanding one, comparable to the test to be applied if the clause refers to circumstances that "may" give rise to claims.

Decisions on the scope of notifications of circumstances under professional indemnity insurance policies have led to recurring disputes. They can have serious consequences for both insurers and the insured. The date of notification may decide which policy responds, which insurer picks up the claim, and the applicable policy limit and excess.

Often in these cases, it has generally been the insured contending that a low threshold applies so that a notification is effective. In this case, the insured sought access to a second policy and renewed limits of indemnity and thus sought to constrain the ambit of an earlier notification.

Background

Euro Pools specialised in the installation of swimming pools. In 2007, it became aware of problems with the moveable booms which would rise and fall to act as vertical walls to divide a pool into different areas. Euro Pools sought an indemnity from RSA under its professional indemnity policy in respect of expenses incurred in carrying out mitigation works.

In February 2007, Euro Pools notified RSA that there were problems with booms rising and falling which was thought to be due to leaks from the tanks of the air-drive system. Replacement of the tanks with inflatable bags was thought to be a solution. Upon renewal of the policy in June 2007, Euro Pools again advised of the problems with the tanks on the booms but indicated that this was being fixed by inflatable bags. Euro Pools wished to ensure that the matter was logged on a precautionary basis. In May 2008, RSA were advised that the inflatable bags had failed and that Euro Pools intended to remedy this by installing a hydraulic system to replace the air-drive system.

An issue arose over whether the relevant policy was the June 2006 to June 2007 policy (the first policy), as contended by RSA, or June 2007 to June 2008 policy (the second policy), as contended by Euro Pools.

Although the key terms of the policies were identical, the limit of indemnity had almost been reached under the first policy. Both policies contained a condition precedent to Euro Pool's right to be indemnified. This required written notice from the insured *"as soon as possible after becoming aware of circumstances which might reasonably be expected to produce a Claim"*. Any Claim arising from such circumstances would then be deemed to have been made in the period of insurance in which notice was given.

At first instance, the judge held, in favour of the insured, that the claim for mitigation costs attached to the second policy. This resulted in RSA being liable for £2.4m in claims.

The judge held that the scope of the 2007 notification was limited to a problem affecting the tanks. It was not a notification

of circumstances in relation to installing a hydraulic system as, at the time of the notification, Euro Pools were not aware of a flaw in the air-drive system.

Decision of the Court of Appeal

The Court of Appeal allowed RSA's appeal and held that the claim for mitigation costs attached to the first policy year as a result of the original notification in February 2007.

In reaching this decision, the Court of Appeal reviewed the relevant legal principles. These include:

- The deeming provision should be construed and applied with a view to its commercial purpose (i.e. to provide an extension of cover for all claims in the future which flow from the notified circumstances).
- A provision which refers to circumstances that "may" give rise to claims was an undemanding test; there need only be a possibility of claims in the future.
- A notification need not be limited to particular events. It can be a "can of worms" or " hornet's nest" notification where the exact scale and consequences of the problem are not known.
- Although the insured has to be aware of the circumstances which might reasonably be expected to produce a claim, that does not mean that the insured has to know the cause of the problem or the consequences that may flow from it.
- If there has been a proper notification of circumstances, any claim arising from those circumstances will be considered to have been made within that period of insurance provided that there is a causal (not merely coincidental) link between the notified circumstances and the later claim. Conventional principles of interpretation should be applied when construing a notification.
- The Court of Appeal held that the circumstance which had been notified during the first policy year was that the booms, which were powered by an air-drive system, were not rising and falling properly. Euro Pools did not then know the fundamental cause of the problem with the air drive system (whether a flaw in the structural design of the system, defects in the tanks, or in the air bags). This did not make any difference. A notification of circumstances would cover the defects causing, and the consequences of, the circumstances notified. Euro Pools were aware that there was a serious problem in the failure of the booms to rise and fall properly and that it might face claims from third parties for that reason. It was not appropriate "to over-analyse the problem by dissecting every potential cause of the problem as a different "*notifiable*" *circumstance*".

The June 2007 notification was significant. At that time, Euro Pools appreciated that it might not have resolved the problem but hoped that using bags instead of tanks would provide a solution. Although this would have fallen within its deductible, it still made a general precautionary notification.

There was a causal connection between the problems notified in 2007 and the work carried out to install the hydraulic system. If there had not been repeated failures of booms incorporating tanks, there would have been no need to install bags; nor to modify those bags; nor to install hydraulics in mid-2008. There was an unbroken causal chain running through the sequence of design changes. The claim for the cost of mitigation works thus arose from the circumstances notified in the first policy year.

Comment

This decision does not create new law but rather is a decision on the facts. The decision itself should not surprise, since many had found the first instance decision a somewhat restrictive approach to the construction of notifications. The case confirms that an insured can notify general circumstances which may give rise to a claim without having full knowledge of the cause of the problem or the potential consequences. Once circumstances which may give rise to a claim are notified, any claim with a causal link to those circumstances will be deemed to fall within the earlier period of insurance.

The Court of Appeal stated in this case that a requirement to notify circumstances which may give rise to a claim was subject to a "deliberately undemanding" test and that there need only be a possibility of claims in the future. The wording used was "might reasonably be expected to produce a claim". The Court stated that the addition of the word "reasonably" did not affect the low materiality threshold of the test. It did not draw a distinction between the wording "may give rise to claims" and "be expected to produce a claim".

Although it will normally be an insured that is arguing for a broad interpretation of a notification of circumstances, this case illustrates that that will not always be the case. Here, there was a significant benefit to the insurer in arguing that the initial notification encompassed all subsequent mitigation costs incurred by Euro Pools. Like aggregation, which is another recurring source of disputes with insureds, the issue needs to be addressed objectively as possible, without regard for the interests of a particular party.

Drafting an appropriate notification of circumstances, and responding to the notification, will remain challenging for insurers and insureds alike.

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