CONDITIONS PRECEDENT TO LIABILITY IN INSURANCE CONTRACTS

PART ONE

Recent Cases From England and Other Jurisdictions

ANDREW J. TOBIN
Cozen O'Connor
Solicitors & Registered Foreign Lawyers*
140 Fenchurch Street | 3rd Floor
London, United Kingdom EC3M 6BL
Telephone: +44 (0)20 7864 2027
Fax: +44 (0)20 7283 2042
atobin@cozen.com

Andrew J. Tobin is a member in Cozen O Connor's London office focusing on insurance and reinsurance. This article is the first in a two-part series considering conditions precedent.

In this Part One, Andrew reviews selected recent cases from England, Scotland, the Republic of Ireland, and Singapore.

In Part Two, Andrew discusses the impact of the UK Insurance Act 2015 on conditions precedent.

Conditions Precedent — The Traditional Position

English insurance law has traditionally provided a suite of uniquely powerful remedies to protect underwriters. They included (a) the remedy of complete avoidance (rescission) of the contract where material matters had not been disclosed, and/or where matters had been misrepresented, and (b) the remedy of complete discharge from liability where a warranty had not been exactly complied with[1]. One aspect of this approach has been the preparedness of the court robustly to uphold well drafted conditions precedent so as to discharge underwriters from liability, even in circumstances where the breach is insignificant and/or not even connected to the loss, as the below recent cases show.

English and Scottish insurance law has recently been substantially reformed by the *Insurance Act 2015* (the Insurance Act). The effect of that Act is considered in detail in the Part Two of this series. Notwithstanding the new Act, the prior Common Law rules regarding conditions precedent will continue to remain highly relevant because: (a) they continue to apply to contracts underwritten before 12 August 2016 (b) parties can agree to "contract out" of the new default Insurance Act regime to apply the old law, and (c) the unreformed English Common Law position continues to apply or at least to influence the law in many Commonwealth jurisdictions, and in the Republic of Ireland.

But what are conditions precedent? Many insurance and reinsurance contracts contain conditions precedent. They can, for example, be conditions precedent to the inception of the entire contract itself, conditions precedent to liability under the contract, or sometimes conditions precedent only to the liability of individual claims.

Typically, conditions precedent are used by insurers to require that insureds take certain steps by a particular time or in a particular way, and if such steps are not taken, then insurers would expect to be relieved of all liability. Common examples include conditions precedent that require: payment of premium by a particular time, compliance with some bespoke requirement such as the maintenance of a security or fire system, notification of loss or possible third-party claims by a particular time, and cooperation in the adjustment and settlement of claims. They are also often used to require that an insured commence arbitration or litigation against insurers within a particular time, in practice shortening a limitation period.

Often conditions precedent have been categorised as warranties[2] and have been treated as such, although in other cases the courts seem to approach them as a distinct category of clause.

Critically, conditions precedent and warranties on the one hand, should be contrasted with ordinary 'conditions' in insurance contracts, on the other. If an ordinary **condition** in a policy is breached, an insurer's only remedy is to claim damages. That will often be of little practical value to an insurer, who may find it difficult or impossible to demonstrate with evidence what prejudice it has suffered from a particular breach. For example, fire insurers typically would like prompt notice of loss so as to have the opportunity to investigate the site, but if it is told of the fire late, and in breach of the condition, although it will have been deprived of an opportunity promptly to survey the site, it may struggle to quantify any particular amount of loss.

1 Sections 17-20 and s. 33 *Marine Insurance Act 1906*, prior to amendment by the *Insurance Act* 2015

2 A warranty being, under s.33 of the Marine Insurance Act 1906: "*(1)* a promissory warranty, that is to say, a warranty by which the assured undertakes that some particular thing shall or shall not be done, or that some condition shall be fulfilled, or whereby he affirms or negatives the existence of a particular state of facts … (3) A warranty, as above defined, is a condition which must be exactly complied with, wheth er it be material to the risk or not. If it not be so complied with, then … the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by him before that date." This is the originally enacted section. The final sentence has now been omitted by the *Insurance Act 2015*

In contrast, where **conditions precedent** are breached, then the traditional position under English law, prior to the application of the Insurance Act 2015, is that:

"if it is not complied with, insurers can escape liability **even if the failure to comply with the condition does not in any way cause the loss.**"[3]

The precise label given to a term is not necessarily determinative of its legal effect; an English court will construe its actual language and context. However, expressly describing a condition precedent as such is usually highly persuasive of the underwriting intention. i.e. "it is a condition precedent to liability that…" English courts are also prepared to find that clauses are in fact conditions precedent even where the words "condition precedent" are not used but words having clear equivalent effect are. For example: "no claims shall be payable until the following terms have been complied with …"

As the cases below continue to demonstrate, British, Irish, and Commonwealth courts continue rigorously to uphold conditions precedent in insurers' favour, where breached, with draconian consequences for insureds. Such decisions will remain important, notwithstanding the passing of the UK Insurance Act 2015, which is discussed more specifically in the Part Two of this series.

ENGLAND

2015: *Involnert Management Inc v Aprilgrange Ltd and Others, "The Galatea"*[4]

England Commercial Court | Yacht fire loss | Condition precedent requiring filing of proof of loss within 90 days of loss breached | insurers discharged from liability

This was a first instance decision of the Commercial Court in London concerning the loss by fire of the claimant's superyacht *The Galatea* by fire in the Athens marina in December 2011.

The policy was governed by English law but placed on the American Yacht Form 12 and contained the following clause:

"NOTICE OF LOSS AND FILING OF PROOF: It is agreed by the Assured to report immediately to the Assurers … every occurrence which may become a claim under this Policy, and shall also file with the Assurers … a detailed sworn proof of loss … within 90 days from the date of loss."

The claimant insured reported the casualty immediately to the insurers but did not provide a sworn proof of loss until 10 July 2012, more than four months after the expiry of the 90 day period. The insurers argued that the clause should be given effect to as a condition precedent, even though it was not phrased as such.

The claimant did not provide a sworn proof of loss within 90 days as required. Counsel for the claimant submitted that service of a sworn proof of loss was a pure formality given that insurers' agents attended to the scene of the fire almost immediately and were well aware of the seriousness of the damage to the vessel. It followed, according to the claimant, that insurers were duly notified of the loss and that serving a sworn proof of loss would not have added anything significant to insurers' understanding of the claim.

Insurers argued in response that the purpose of requiring the insured to file a detailed sworn proof of loss is not to serve as an alternative to insurers carrying out their own enquiries but to obtain sight at an early stage of the evidence on which the insured relies to make its claim.

The judge held that that was a "perfectly legitimate purpose" and added "but in any event whether serving a sworn proof of loss would have been useful or not, the clause is quite specific and was not complied with. There is no basis for reading into the clause any dispensation from the requirement in a situation where the provision of a detailed proof of loss is not thought to be useful. The contention that this requirement was not complied with it unanswerable."

Accordingly the court held that the claimant insured's failure to provide a sworn proof of loss within 90 days of the date of loss had the result of barring the claimant from bringing proceedings for the recovery of this claim.

3 *Cornhill Insurance PLC v D.E. Stamp Felt Roofing Contractors Limited* [2002] EWCA 395 at 19

4 [2015] EWHC 2225; [2015] LLR IR 661

Comment

This case is a good example of a condition precedent to liability being strictly applied so as to afford insurers a complete defence. The words of the clause were clear, it was clearly breached, and the practical "usefulness" or not of the clause in the circumstances of the case was expressly noted to be irrelevant by the court. The precise utility of the clause was of little interest to the court. Conditions precedent requiring service of proof of loss by a particular time commonly appear in many policies, but are sometimes overlooked by insureds and insurers. This case highlights that such clauses can and do have real teeth, and would therefore be dangerous to ignore.

2015: *Milton Furniture Ltd v Brit Insurance Ltd*[5]

England Court of Appeal | property fire loss | condition precedent regarding activation of burglar alarm upheld even though no evidence of causal link between breach and loss | insurers discharged

In this case the English Court of Appeal found that a clause requiring the activation of a burglar alarm, that was described as a "general condition," was in fact a condition precedent to liability that was breached so as to discharge insurers entirely from liability, **notwithstanding that the loss was caused by fire and not burglary.**

The claimant, Milton, stored furniture for use at exhibitions at its premises. The main part of the building consisted of a large warehouse fitted with a fire alarm (FAS) and an intruder alarm. The alarm was split into three zones, "warehouse," "offices," and "house," and it was possible to set each section separately. The policy insured against fire and contained two relevant provisions.

Protection Warranty 1 (PW1) provided: "It is a condition precedent to the liability of the Underwriters in respect of loss or damage caused by Theft and/or attempted Theft, that the Burglar Alarm shall have been put into full and proper operation whenever the premises referred to in this Schedule are left unattended and that such alarm system shall have been maintained in good order throughout the currency of this insurance under a maintenance contract …"

General Condition 7 (GC7) provided: "The whole of the protections, including any Burglar Alarm provided for the safety of the premises shall be in use at all times outside business hours or when the Insured's premises are left unattended and such protections shall not be withdrawn or varied to the detriment of the interests of Underwriters."

A fire was started deliberately by a person or persons unknown on 8/9 April 2005. At the time the building was locked and secured. Two individuals were on the premises at the time. The general manager was sleeping in a house connected to the warehouse and a sub-contractor was sleeping in another connected premises. The burglar alarm was not turned on, although the FAS was turned on. The burglar alarm company had stopped monitoring in light of non-payment.

The insurer, Brit, refused to indemnify Milton on the basis of breach of two conditions precedent in GC7: the burglar alarm had to be set "out of business hours" or when the premises were "left unattended"; and the "protections" required by the policy (i.e. the burglar alarm and FAS) "were not to be withdrawn or varied to the detriment of the interests of Underwriters without their prior consent."

The first instance court and the Court of Appeal both found for the insurer. The insured had argued that GC7 and PW1 were different but overlapped, and that PW1 was relevant only to excluding liability for **thefts** in circumstances where the burglar alarm was not in full and proper operation, and so was irrelevant to a fire damage claim. Furthermore, in the insured's view, although PW1 did not directly apply, it had the effect of excluding or modifying GC7. The judge at first instance agreed with part of this reasoning, holding that GC7 applied as an independent condition precedent but that it had to be "read down" to reduce Milton's obligations to be no greater in respect of a fire claim than for a burglary claim. Alternatively, GC7 was to be read as only applying "out of business hours **and** when the Insured's premises are left unattended," so that unless both conditions were satisfied, there was no breach.

5 [2015] EWCA Civ 671; [2016] 3 LLR 192 – Court of Appeal (England)

The Court of Appeal was satisfied that GC7 should be read as a condition precedent because GC17 had expressly provided that compliance with all conditions, necessarily including GC7, "shall be a condition precedent to any liability" on the part of Brit. The Court of Appeal did not agree with Milton, or the court below, that one clause should modify the other, or that there was any hierarchy between them requiring GC7 to be read down. Rather the court should try to give effect to each clause independently. Focusing on the wording of GC7 the Court of Appeal found that it required the protection to be operating "at all times out the business hours **or** when the Insured's premises are left unattended" so that the burglar alarm had to be set either when the premises was unoccupied **or** after working hours, and not both. 'Or' did not mean 'and' as the insured had contended. Accordingly the insured was in breach and insurers were discharged from liability altogether.

Comment

The result in this case is striking. The loss was in fact caused by fire in circumstances where the fire alarm was working. However, although the loss was not caused by burglars, insurers were able to rely upon the non-compliance with the burglar alarm clause to be relieved entirely of liability, nevertheless.

This is a good example of a case that might be decided differently under the default provisions of the UK Insurance Act 2015, as is discussed in Part Two of this series.

2016: *Zurich Insurance PLC v Maccaferri Limited*[6]

England Court of Appeal | Liability policy | meaning of notification clause requiring notice to insurers "as soon as possible" of an "event likely to give rise to a claim"

The question in this case before the English Court of Appeal was whether Zurich was entitled to rely upon an allegedly breached claims notification condition precedent in its policy in order to decline to indemnify its insured (Maccaferri) in respect of the insured's liability to contribute to damages payable to a Mr. McKenna who had suffered a severe injury to his eye when a clip was discharged from a pneumatic gun. The case addressed the questions of when the insured knew, or should have known, when a relevant event occurred that was "likely to give rise to a claim" thus triggering the obligation immediately to notify Zurich.

Maccaferri hired a pneumatic gun for use in the construction business to builders' merchant Jewson, who in turn hired it to Drayton Construction, who was Mr. McKenna's employer. The evidence was that Mr. McKenna was injured on 22 September 2011 in the course of his employment although the accident did not appear in Drayton's accident book until 27 September 2011. On 28 September 2011 Maccaferri's sales coordinator was notified of the incident in very general terms, and was told that the gun was to be taken off-hire and kept for investigation. What information Maccaferri received in the following weeks was not entirely clear, but by 12 January 2012 it was clear that Maccaferri knew that someone had in fact been injured by the gun. On 12 June 2012 Jewson forwarded to Maccaferri email correspondence with Drayton that made clear that solicitors were dealing with a claim in relation to the gun in 2011. The sales representative for Maccaferri (Mr. Abbey) gave evidence that in June 2011 he had overheard conversations relating to an incident at Drayton in which an employee had lost his eye. He suspected this incident was connected to the gun he had been corresponding about but his evidence was that it did not occur to him that the accident occurred because of a fault with it. He reported discussing what he had overheard with a manager.

Mr. McKenna sued Drayton in July 2012. On 18 February 2013 judgment on liability was entered by consent against Drayton, damages to be assessed. Drayton sued Jewson for contribution on 29 March 2013, and on 12 July 2013 Jewson joined Maccaferri to the claim by way of Part 20 proceedings. On 18 July 2013 Jewson wrote to Maccaferri advising that they had issued Part 20 proceedings against it. That letter was received on 22 July 2013. Maccafferi notified its broker on 22 July, who in turn notified Zurich straightaway.

On 25 September 2013 Zurich wrote to Maccaferri declining to indemnify it under the policy. On 30 September 2013, Macafferi, Jewson, and Drayton each agreed to contribute to a settlement with Mr. McKenna.

Zurich's Public and Products Liability policy agreed to indemnify Maccaferri for legal liabilities for compensation arising out of accidents and personal injury, occurring within the policy period. Clause 1 of the policy contained a general declaration that due observance of the conditions by the insured insofar as they related to anything to be done and complied with by the insured was to be a condition precedent to any liability under the policy.

6 [2016] EWCA 1302

The crux of the case was the interpretation of Clause 2, which read

"The Insured [Macafferi] shall give notice in writing to the Insurer **as soon as possible** after the occurrence of any event likely to give rise to a claim with full particulars thereof. The Insured shall also on receiving verbal or written notice of any claim intimate or send same or a copy thereof **immediately** to the Insurer and shall give all necessary information and assistance to enable the Insurer to deal with, settle or resist any claim as the Insurer may think fit. …" [Judge's emphasis]

Zurich argued that the true meaning of the clause must be that, if the insured did not know of the event when it occurred he must nevertheless give notice of it to the insurers when he becomes aware of the event, and that it was likely to give rise to a claim[7]. Furthermore, the effect of the phrase "as soon as possible," according to Zurich's counsel, was not limited to specifying a period after the event within which notice must be given. It meant that the obligation to notify arose when the state of knowledge of the insured was such that it was, or **should have been**, possible to do so. In essence, Zurich argued that this meant that the insured had to be pro-active in making inquiries once it became aware of circumstances that **might** give rise to a claim.

The court rejected Zurich's construction of the clause, saying that it would have "the potential effect of completely excluding liability in respect of an otherwise valid claim for indemnity. If Zurich wished to exclude liability it was for it to ensure that clear wording was used to secure that result." The court said that although it would be possible to construe the phrase "as soon as possible" as meaning that the insured should have notified its insurers when it knew or should have known that an event that had occurred in the past was likely to give rise to a claim, which would be a "strained interpretation and erroneous."

The court highlighted that "clauses such as these need to be clear if they are to have effect" and commented that "Zurich's construction imposes an obligation to carry out something of a rolling assessment as to whether a past event is likely to give rise to a claim (and possibly whether an event has happened at all) as circumstances develop … If that was what was intended, insurers could be expected to spell it out."

So, in light of that construction, the question the court asked itself was: whether, when the event occurred, it was "likely" to give rise to a claim. That would depend on whether, in light of the **actual knowledge** that the insured then possessed, a reasonable person would have thought it at least 50 percent likely that a claim would be made.

Considering the facts, the Court of Appeal endorsed the trial judge's findings, holding that: "When the incident occurred, on the facts then known to Maccaferri, it was not at least 50 percent likely that there would be a claim. The circumstances of the "incident" were unclear; it had not been made clear to Maccaferri that a c-clip had got into someone's eye or that someone had been seriously injured. That the gun was at fault was no more than a possibility, and there were many others. I note that even during the course of the subsequent proceedings two of the experts could find nothing wrong with the gun. In those circumstances Zurich is not entitled to rely upon the condition as a ground for denying liability."

The Court of Appeal noted without disapproval that the judge had accepted Mr. Abbey's evidence that he asked for information from those to whom Maccaferri had hired the gun, but got no answer. There were some computerised records at Jewson indicating some communication between Maccaferri and Jewson, but he was not prepared to accept those communications amount to evidence that Maccaferri was aware that an "event likely to give rise to a claim" had occurred or that with reasonable diligence it could have discovered that such an event had occurred.

Comment

The key difficulty faced by Zurich here was that the clause in question triggered a notification obligation from when the insured knew of an event that was **likely to give rise to a loss.** Although the insured had some awareness of an incident, at no point did it have sufficient information to make an assessment that there was a greater than 50 percent chance that there would be a claim, and so the clause could not be triggered. The outcome might have been different had the clause required, for example, immediate notice of circumstances that **might** give rise to a claim.

7 It was common ground before the court that "likely" referred to a claim with at least a 50 percent chance of success per *Layher v Lowe* [2000] Lloyds Rep IR 510 at 512

SINGAPORE

2016: *Grace Electrical Engineering Pte Ltd v EQ Insurance Co*[8]

Singapore High Court | Claim under liability policy following fire | whether a general declaration that general conditions are conditions precedent is effective | contra proferentem | effect of clause requiring reasonable care | whether breach must be causally relevant to the loss | effect of clause requiring no admissions | effect of contractual time bar to indemnity claim | insurer discharged

This was a case before the High Court of Singapore involving the interpretation and application of a number of conditions precedent. Singapore insurance law very closely follows English common law pursuant to its *Application of English Law Act 1996.* [9]

Grace Electrical was an electrical contractor. Foreign workers lived and cooked in the insured's premises. In 2012 a fire occurred that spread to neighbouring premises occupied by Te Deum engineering. Grace was prosecuted for various health and safety and planning violations. Te Deum commenced proceedings against Grace to recover its loss. Grace claimed under its liability policy with EQ, who denied liability in light of several alleged breaches of conditions precedent. Grace then brought proceedings.

The policy contained various general conditions, as follows. Under GC9 the insured was to:

"exercise reasonable care that … all statutory requirements and by-laws and regulations imposed by any public authority are duly observed and complied with."

Under GC4 the insured:

"shall not without the consent in writing of [EQ] … make any admission … in connection with any accident or claim **and** [EQ] shall be entitled if it so desires to take over and conduct in the name of [Grace Electrical] the defence of any claim or to prosecute in the name of [Grace Electrical] at its own expense and for its own benefit any claims for indemnity or damage or otherwise against any persons and shall have full discretion in the conduct of any proceedings and in the settlement of any claim and the Insured shall give all such information and assistance as the Company may require." [emphasis added]

GC12 provided that:

"If [EQ Insurance] shall offer an amount in settlement or disclaim liability for any claim hereunder and such claim shall not within 12 calendar months from the date of such offer or disclaimer have been referred to arbitration under the provisions contained in the Policy or been made subject to pending court action then the claim shall for all purposes be deemed to have been abandoned and shall not thereafter be recoverable hereunder."

Significantly, GC13 provided that:

"The due observance and fulfilment of the terms provisions and conditions of this Policy insofar as they relate to anything to be done or not to be done by the Insured and the truth of the statements and answers in the proposal shall be **conditions precedent** to any liability of [EQ Insurance] to make any payment under this Policy." [emphasis added]

EQ argued that GC13 made clear that GCs 4, 9, and 12 were to be conditions precedent to liability and that each had been broken, and that each breach relieved EQ of liability under the policy entirely. Grace did not dispute that this would be the effect of breaches, if in fact GCs 4, 9, and 12 were conditions precedent. So, the first question for the court was whether GC13 in fact converted the other GCs into conditions precedent.

8 [2016] SGHC 233 (Singapore High Court)

9 Note that the common law in England relating to insurance is now substantially changed by the UK Insurance Act 2015, in force on contracts underwritten after 12 August 2016. So after that date, Singapore, and some other Commonwealth jurisdictions that historically have followed English insurance common law will be in the odd position of continuing to apply English insurance law as it existed before 12 August 2016, but the courts of England will be applying the new UK Insurance Act.

The court noted the used of the label "condition" or "condition precedent" is not necessarily determinative of that clause's legal effect, especially when the label is attached generally to terms of a different nature. The court followed a decision of the English High Court in *Pilkington United Kingdom Ltd v CGU Insurance PLC*[10] that gave full effect to a general declaration clause. In *Pilkington* the English court had noted that:

"…provisions in a policy which are stated to be conditions precedent should not be treated as a mere formality which is to be evaded at the cost of a forced and unnatural construction of the words used in the policy. They should be construed fairly to give effect to the object for which they were inserted, but at the same time so as to protect the assured from being trapped by obscure or ambiguous phraseology …"

On the other hand the court noted that it may not always be possible to give effect to a general declaration clause where to do so would give rise to absurdity, for example where a clause cannot be a condition precedent by any stretch of the imagination. The court referred to *Aspen Insurance UK Ltd v Pectel*[11] in which the judge had observed that a general declaration clause might convert some but not all clauses to conditions precedent, because they were incapable of being construed as such.

The insured argued that the *contra proferentem* rule should be applied so as to resolve any doubt concerning interpretation in its favour and to deny effect to the general declaration in GC13. The rule was not relevant because this was not a case in which the words were unclear or unambiguous[12]. Overall, the wording was clear, and the general declaration clause did in fact turn GCs 4, 9, and 12 into conditions precedent.

The court then considered each relevant GC. It held that GC9 meant that Grace was under a duty to exercise reasonable care to ensure compliance with all statutory requirements and that the breach was evidenced by the fact that Grace had pleaded guilty to the charges made against it. Grace argued that given the commercial objective of policy, it would only have been in breach of GC9 if the failure to observe statutory regulations was the proximate cause of the fire.

In construing GC9 the court applied the test in the English case of *Fraser v BN Furman (Productions) Ltd*[13] that a reasonable care condition precedent should only be applied as such when: "it can be shown affirmatively that the failure to take precautions was done recklessly, that is to say with the actual recognition of the danger … and not caring whether or not that danger was averted." On the facts, the court was amply satisfied that reasonable care had not been exercised and found that: "Grace Electrical's breach of GC9 was of a condition precedent, and that there is no need to examine whether the non-compliance breach caused the relevant loss." It followed that insurers would be relieved of liability.

EQ's next contention was that Grace breached GC4, a condition precedent, in failing to obtain EQ's consent in writing before pleading guilty to five criminal charges. Relying on Singapore authority,[14] and the wording of the clause, the court held that the obligation to seek such consent was not relevant to criminal admissions. This was particularly so when, as in this case, the crimes in question were of strict liability and so the admissions did not necessarily carry an inference of negligence. The court also highlighted with approval English authority[15] holding that it is against public policy for clauses to be construed in such a way as to prevent an insured from electing to plead guilty to criminal offence. Accordingly EQ was unable to rely on GC4 as a defence to its liability under its policy.

10 [2004] EWCA Civ 23

11 [2008] EWHC 2804 (Comm)

12 The reluctance to apply the *contra proferentem* rule unless absolutely necessary is consistent with trends in the English Court. In October 2016 the UK Supreme Court in *Impact Funding Solutions Ltd v AIG Insurance* [2016] UKSC 57 restated with approval the holding in *Cornish v Accident Insurance Co Ltd* (1889) 23 QBD 453, 456 that: "… in a case of real doubt, the policy ought to be construed most strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt, not for the purpose of creating a doubt, or magnifying an ambiguity, when the circumstances of the case raise no real difficulty." In December 2016 the English Court of Appeal in *Taberna Europe CDO II Plc v Selskabet* [2016] EWCA Civ 1262 noted that "In the past judges have tended to invoke the *contra proferentem* rule as a useful means of controlling unreasonable exclusion clauses. The modern view, however, is to recognise that commercial parties (which these were) are entitled to make their own bargains and that the task of the court is to interpret fairly the words they have used."

13 [1967] 2 LLR 1

14 *Cosmic Insurance Corporation Ltd v Hup Chuan Guan Trading Co* [1990] 2 SLR(R) 319

15 *Lickiss v Milestone Motor Policies at Lloyd's* [1966] 1 WLR 1334

Finally the court considered the effect of GC12 that purported to operate as a contractual time bar. EQ argued that it repudiated liability on 17 March 2013 thus triggering the 12-month period under GC12. EQ brought its action against Grace more than 12 months later. Grace argued that time had not started to run for the purposes of the time bar clause because, in the context of a liability policy, which this was, a claim for indemnity under the policy can only be made against an insurer when the existence and amount of liability to the third party has been determined and established by action, arbitration, or agreement. The court followed the proposition of the English Court of Appeal in *William McIlroy (Swindon) Ltd v Quinn Insurance*[16] that: "it makes no sense to think that an insured may have become time barred in a claim under such a policy before, possibly years before, he has any cause of action to bring it. Normally a time bar operates on respect of a cause of action and not before a cause of action has even matured …" Therefore on the facts of this case, which concerned a liability policy, the contractual time bar period had not started to run and the accordingly EQ was unable to rely upon it. It was significant that the clause referred to dates of **claims** and not to e.g., the date of notification of a possible claim.

Comment

The case applied and usefully highlights a number of previously established principles, including: (a) that general declaratory words can be used to deem other clauses as conditions precedent to liability, assuming that such clauses are capable of being given meaning as such (b) that a duty in a condition precedent to take "reasonable care" requires at least recklessness (d) that notwithstanding clear language a court will not enforce a condition precedent where it would be against public policy to do so, and (e) in the context of a **liability** policy time may not start to run for the purposes of a contractual limitation period until the insured's inwards liability has crystallised by action, arbitration, or agreement.

SCOTLAND

2016: *Zurich Insurance PLC v Coralpeak Limited*[17]

Scotland | Outer House of the Court of Session | fire policy | whether a general declaration that general conditions are conditions precedent is effective | Effect of clause requiring reasonable precautions

This Scottish case raised similar issues to those raised in Singapore in *Grace Electrical Engineering Pte Ltd v EQ Insurance Co* regarding compliance with a "reasonable precautions clause."

A fire destroyed the insured school in Glasgow in 2013. Zurich's policy provided:

> 3. REASONABLE PRECAUTIONS
>
> The insured will comply with all regulations imposed by any competent authority and take all reasonable precautions to prevent or minimise accident, injury, loss or damage. In addition the insured will comply with makers recommendations made in respect of plant and machinery wherever reasonably practicable.
>
> 12. OBSERVANCE
>
> The due observance and fulfilment of the terms and conditions of this Policy by the insured so far as they relate to anything to be done or complied with by the insured will be a condition precedent to any liability of the insurer to make any payment under this Policy.

Zurich, the insurer, alleged that condition 3 was by virtue of condition 12 a condition precedent to liability that, if breached, would discharge it from liability entirely. Zurich denied coverage on the basis that the "reasonable precautions" clause has been breached by the insured who had, allegedly, failed to act on the findings of certain fire risk assessments and by doing so breached certain statutory obligations requiring the same. Zurich argued that whether or not the fire in question was caused by the alleged breaches was legally irrelevant to the question of the application of the condition precedent. Zurich alleged that the breaches were so serious as to be "reckless" and so met the standard required to breach a reasonable precaution clause under *Fraser v BN Furman (Productions) Ltd*[18].

16 [2011] EWCA Civ 825

17 [2016] SCOH 43

18 [1967] 2 LLR 1. Also relied on in Singapore High Court in *Grace Electrical Engineering Pte Ltd v EQ Insurance Co*, discussed above.

Construing condition 3 with condition 12, the court had no difficulty in concluding that condition 12 was a condition precedent, which, if breached would release the insurer from liability. As to the question of breach, the court noted that the commercial purpose of property and liability insurance is to indemnify insureds for the consequences of their negligence, and with that in mind, in the context of a reasonable precaution condition precedent, the insurer must establish that the insured's behaviour, per *Furman*, was "at least reckless, that is say made with actual recognition by the insured himself that a danger exists and not caring whether or not it is averted. The purpose of the condition is to ensure that the insured will not, because he is covered against loss by the policy refrain from taking precautions which he knows ought to be taken."

The question then arose as to whether the insured's case could be summarily dismissed without a need for trial. The court followed Lord Diplock's finding in *Furman* that: "The assessment of recklessness on the part of an insured is a question of fact and degree to be decided in the context of all the circumstances of the case. Only if it is an inescapable inference from the facts averred that the insured's conduct was reckless … can the action be dismissed without any enquiry into the facts." The court was unable to draw that inference on the evidence before it, holding that a factual enquiry would be needed.

Comment

This is yet another case illustrating how courts will uphold and enforce conditions precedent to liability, as matter of principle and without regard to the causal relevance of breach and any particular loss. In step with the High Court of Singapore in *Grace Electrical* the Scottish court held that (a) general declaratory words can convert other terms into conditions precedent and (b) that in the context of reasonable precautions clauses, the insurer must establish that the insured was in fact reckless as to whether or not those precautions were breached.

REPUBLIC OF IRELAND

2016: *Kelly Builders (Rosemount) Limited v HCC Underwriting Agency Limited*[19]

Republic of Ireland High Court | fire policy | condition precedent concerning 'suitable and fully charged fire extinguishers' breached | compliant extinguishers would not have prevented loss - insurers discharged from liability nevertheless

This Irish case concerned fire damage in 2010 caused by hot works to a bitumen roof. The fire policy contained a condition precedent that: "the following must be kept available for immediate use near the scene of operations (a) suitable and fully charged fire extinguishers."

The judgment is very lengthy, but in summary the facts found by the court were that, on 26 November 2008 a Mr. Feeney, a hot works subcontractor, was provided with an "ABC" type fire extinguisher from the plaintiff insureds. He did not check the gauge or service label but the seal was intact and the nozzle clipped on. During blowtorch work on a felt roof, Mr. Feeney noticed smoke. On closer inspection the fire was seen to be seated in at least three locations on the roof. He tried to extinguish it with the ABC fire extinguisher he had with him but it failed to operate.

It was common ground between the parties that by the time Mr. Feeney had located the fire, it was incapable of being controlled with fire extinguishers. Insurers defended the claim on the basis of the condition precedent.

In passing, it should be noted that the insurance law of the Republic of Ireland is very closely related to that of England, and the judgment refers throughout to various leading English as well as Irish cases.

The plaintiff insured first argued that the insurers should be unable to rely upon the condition precedent because it would be "unreasonable" in circumstances where the fire could not have been extinguished by fully operative extinguishers in any event. The court dismissed that argument, and expressly adopted as "eminently logical" the finding of the English Court of Appeal that if a condition precedent "is not complied with, insurers can escape liability even if the failure to comply with the condition does not in any way cause the loss."[20]

19 [2016] IEHC 72

20 *Cornhill Insurance PLC v D.E. Stamp Felt Roofing Contractors Ltd* [2002] EWCA 395

Second, the court considered whether the insured or the insurer had the burden of proof regarding the application of the condition precedent concluding in light of the English and Irish authorities that the burden lies squarely upon the insurer to prove that the fire extinguisher was neither sufficient, nor fully charged.

Third, the court considered whether the clause could be complied with by having but a single fire extinguisher, bearing in mind that the clause referred to "extinguishers" and held that, in light of Canadian and Irish authority, that the requirement could be met by the presence of a single extinguisher.

Fourth, the court had to determine if the fire extinguisher was "suitable." It found that an ABC type extinguisher was suitable for the task in hand.

Fifth, the court asked if the extinguisher was "fully charged" in the sense of having a full complement of dry powder extinguishing agent and expellant gas. The fire extinguisher experts who examined the extinguisher after the event were not able to state the condition of it prior to the effort to extinguish the fire. The court was persuaded by expert evidence that the most likely explanation was the prior loss of expellant gas. As that evidence was unrebutted by the insured, the insurers had met their burden of proof.

In conclusion the court dismissed the insured's claim "notwithstanding the fact that the presence of a fully charged fire extinguisher would have made no difference to the outcome of the fire which actually occurred" because it had breached the policy condition precedent by not having "suitable and fully charged fire extinguishers" which were "available for use near the scene of operations" because the actual extinguisher used was not in fact "fully charged."

Comment

The outcome of this case, although hard on the insured, is absolutely consistent with the traditional English approach to conditions precedent to liability. The court was prepared robustly to enforce it against the insured notwithstanding that the presence or absence of working fire extinguishers would have made no difference to the loss that actually occurred.

CONCLUSIONS

Although from differing common law jurisdictions, and with widely differing facts, these recent cases collectively well illustrate a continuing, consistent, and robust approach to the enforcement of breached conditions precedent so as to discharge insurers entirely from liability, irrespective of any causal relationship between the breach of the clause and the loss that actually occurred. In each of the mentioned cases the courts very carefully construed the clauses before them, but in most cases did not seek to resort to strained interpretations in order to disapply them.

In England, the Courts' approach to conditions precedent to contracts incepting or renewing after 12 August 2016 is significantly altered by Part 3 of the Insurance Act 2015 that seeks to mitigate some of the harsher features of warranties and conditions precedent. Nevertheless it will continue to be very important for insurers and insureds to continue to bear in mind the prior common law position because (a) it continues to apply to English, Scottish, and Northern Irish law contracts that incepted or renewed before 12 August 2016; (b) it will be relevant where parties agree to "contract out" of the Part 3 of the Insurance Act, and (c) it continues to apply to contracts governed by the laws of many other English common law jurisdictions.

Part 2 of this series considers how the law relating to conditions precedent in England is changed by the UK Insurance Act 2015.