Trustee Liability Insurance - Do You Get What You Paid For?

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Rathbone Brothers PLC & Anor v Novae Corporate Underwriting Limited & Ors [2014] EWCA Civ 1464

In this case, which will be of interest to all professional trustees and their employers, the English Court of Appeal examined the insurance and indemnity arrangements in place for a Jersey trust company business, and in particular:

(a) The extent to which the trust company's insurance policy covered its employees and consultants who were acting as personal trustees (**Coverage Dispute**);

(b) The extent to which an indemnity given to an employee or consultant had to be exhausted before the insurance policy could be required to pay out (**Excess Clause Dispute**); and

(c) The extent to which, if the insurance policy had to pay out first, the insurance company could recoup that payment from the trust company by being subrogated to any right of indemnity the employee/consultant had against his employer (**Subrogation Dispute**).

Facts

This case concerned the insurance cover that might be available to a trustee who was being sued by certain beneficiaries for breach of trust arising from alleged poor investment decisions. One of the trustees was Paul Egerton-Vernon (**PEV**), who was an employee of, and subsequently a consultant to, Rathbones Trust Company Jersey Limited (**RTCJL**). PEV was therefore being sued personally.

PEV had the benefit of an indemnity from both RTCJL and its parent company, Rathbone Brothers plc (**PLC**) (**Indemnity**). This provided that they would indemnify him, and be jointly and severally liable, for liabilities arising from the performance of his services, excluding liabilities arising from fraud or wilful misconduct. There was a limit of £40 million in respect of each event giving rise to any liabilities.

For the relevant year of account, PLC had purchased £50 million of professional indemnity insurance (**PII**) on behalf of the Rathbones group (including RTCJL), including annual civil liability, Directors and Officers' and financial crime insurance. The Group's trust-related activities, including the provision of professional trustees by RTCJL, were fully set out in the renewal submission.

Coverage Dispute

The arguments

The various excess insurers disputed that there was coverage under the PII policy, alleging that:

(a) PEV was not "*a paid employee … working under the direct control or supervision of an insured company*", and was therefore not an "insured person" for the purposes of the policy; and

(b) The personal trustee services provided by PEV did not fall within the "professional services" covered by the civil liability policy, which were defined as "*the financial services declared in the submission performed by or on behalf of an insured company pursuant to an agreement with a third party: (i) for compensation; or (ii) in conjunction with services for compensation*"

Among other things, the insurers argued that:

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The Court of Appeal Decision

The Court of Appeal rejected the excess insurers' arguments, holding that:

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Excess Clause Dispute

The arguments

Clause 5.14 of the PII policy provided that: "*Insurance provided by this policy applies excess over*

insurance and indemnification available from any other source".

The insurers submitted that this allowed them to refuse to pay out on the policy until PEV had exhausted his claims under the Indemnity. Alternatively, they claimed that there were certain Directors and Officers policies (**D&O**) which also provided cover and had to be exhausted first.

The Court of Appeal Decision

The Court of Appeal rejected the insurers' arguments:

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Subrogation Dispute

An insurer who has fully indemnified an insured against a loss covered by a contract of insurance between them may ordinarily enforce, in the insurer's own name, any right of recourse available to the insured. This is known as a right of subrogation, and it can be excluded either:

(a) where there is a waiver in the insurance policy itself, or

(b) where the terms of an underlying contract between the insured and the third party (against whom there would otherwise be a right of recourse) the strip subrogation right of any substance and thus preclude its exercise.

In this case, the Court of Appeal found that there was no express waiver in the policy with respect to the Indemnity. However, the majority of the Court of Appeal found that the Court should imply a term that the insurers would not seek to be subrogated to PEV's rights under the Indemnity, as it could not have been the intention of the parties that the insurers should be able to enforce rights of indemnity against a co-insured (PLC) where that co-insured was indemnifying the very same risk as the insurers. To hold otherwise would be to deny PLC the very benefit which the policy was intended to confer, and defeat the purpose for which they had paid the premiums.

In any event, the Court of Appeal also held unanimously that one could readily imply a term into the Indemnity contract to the effect that it was intended to provide supplemental protection only once the claim against the insurance company had been exhausted. In this way, any right of subrogation would be stripped of substance as the Indemnity could not have been enforced once the insurance policy had fully paid out.

Comments

Given that the insurance arrangements of Channel Island trust businesses are often governed by English law, the English Court of Appeal's decision will be welcomed by those acting as professional trustees or directors of corporate trustees, and their employers, who no doubt will view the decision as reflecting the commercial reality and purpose behind insurance and indemnity arrangements of this kind. The Court of Appeal was prepared to look to the intention of the parties and where necessary imply terms in order to avoid a commercially absurd result.

However, the case also serves as a reminder that, particularly where an underlying claim is of high value (as was the case here), insurers may seek to have the policy construed strictly and in accordance only with the words used in the contractual documentation. As was noted by the Court of Appeal, where experienced commercial parties have addressed an issue in a particular way in the contractual documents, the court should be very slow to conclude that they were not intending to do so. It therefore of course remains important to ensure that the wording of contracts of insurance and/or indemnity is clear and is tailored to the specific liabilities sought to be covered, as standard policy wordings may not adequately address all of the intricacies involved in the actual provision of trust services.

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