



Claiming from Insurers under a Policy of Insurance

Lumbermans Mutual Casualty Company v Bovis Lend Lease Limited KBD 5 October 2004

Bovis Lend Lease were engaged by Braehead Glasgow Ltd for the construction of the Braehead Retail and Leisure Centre in Glasgow. Numerous disputes subsequently arose and proceedings were commenced by Bovis in the Technology and Construction Court in which it sought damages of around £38m. Braehead counterclaimed for a sum of around £103m. In January 2002, prior to the trial of the matters, the parties reached a settlement by which Braehead agreed to pay Bovis £15m in full and final of all disputes under the contract.

No detail was provided within the agreement as to how the sum had been calculated nor indeed which elements of Bovis's claim or Braehead's counterclaim had been considered as valid. Bovis, however, carried policies of insurance which provided indemnity against any sum which it became legally liable to pay as a result of any neglect, error or omission. Bovis, therefore, sought an indemnity from its insurers for an amount of approximately £19m on the basis that the settlement dealt with the balance between its valid claims and those of Braehead.

Lumbermans Mutual Casualty Co, Bovis' insurers, rejected the claim and applied to the Court for a declaration that they were not liable to Bovis on the grounds that under the insurance policy, Bovis could only recover an indemnity in respect of a legal liability which had been ascertained by a judgment or arbitration award or, in the case of a settlement, proved to exist. Since the settlement did not identify any loss caused to Bovis Lumbermans argued there was no cause of action.

In response, Bovis argued that there was no legal precedent which in order to trigger an insurance indemnity stated that it must be possible to discern from the terms of the settlement itself the extent of an insured's liability. Having found that the settlement agreement did not ascertain the liability or the loss, Bovis argued that it was for the Court to determine if the insured was liable to the third party and if so, in what amount, rather than to simply reject the claim in its entirety. Bovis further pointed out that any breakdown within a settlement would not be binding upon the insurers who would insist upon going behind its terms to prove that the amounts were reasonable.

Bovis maintained that the its liability in regard to the valid counterclaims faced from Braehead had been in the order of £19m, and that the same had been properly and reasonably compromised by the settlement agreement. In this respect Bovis sought to place reliance upon advice given to by its solicitor some three years prior.

The Court held that it was an implied term of a contract of indemnity that the insured's loss would have been specifically ascertained by means of a judgment, arbitration award or settlement agreement. Where reliance was being placed on a settlement as a means of ascertainment, the insured as a matter of law, had to prove firstly, that he was under a liability insured by the policy, and secondly, that what he

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paid by way of settlement of that liability was reasonable. A settlement agreement which did not identify the loss suffered specifically by reference to the insured liability did not amount to a valid ascertainment, and, unfortunately for Bovis, other evidence could not be brought to fill that gap.

The moral of this story is that if a claim is covered by insurance, always make sure that before any settlement is reached, it is agreed by the Insurers.

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