Policing policies

Martin Cox reports on pre-litigation access to insurers and their policies

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In the recent High Court decision of *Peel Port Shareholder Finance Company Ltd v Dornoch Ltd* [2017], the court declined to exercise its discretion under the Civil Procedure Rules (CPR) to order the pre-action disclosure of an insurance policy held by a solvent insured. This article considers the extent to which the outcome in this case is consistent with the overriding objective that courts dispose of cases justly and at proportionate cost.

The article also examines whether the court may be inclined to exercise its discretion differently, in appropriate circumstances, if faced with a similar application but in respect of an insolvent insured, noting that the recent High Court decision in *BAE Systems Pensions Funds Trustees Ltd v Royal & Sun Alliance Insurance plc* [2017] may be instructive. In this case, the court joined in an insurer as a defendant to litigation in hand under the Third Parties (Rights Against Insurers) Act 2010 (the Act), despite the insurer's insistence that the insurance policy in place did not cover the insured's potential liability.

'Why make directions and provide significant cost budgets relating to points of quantum issues that may prove irrelevant because the uninsured or under-insured opponent cannot meet the judgment subsequently made?'

Peel Port: High Court refuses to order pre-action disclosure

In *Peel Port*, the Technology and Construction Court considered an application under CPR 31.16 by the owners of a warehouse destroyed by fire for pre-action disclosure of a solvent lessee's full insurance policy from its insurers, who had been substituted as the respondent to the application.

Accepting that the jurisdictional threshold of CPR 31.16 was met by the claimant, the court held that it was therefore a matter of its 'unfettered discretion' whether it should order the disclosure. In refusing the application and declining to order the respondent insurer to disclose the policy, the court exercised its discretion having regard to 'the statutory and procedural landscape', and in doing so set out a number of reasons for justifying its refusal:

- The Act is a legislative regime specifically enacted to, among other things, provide information rights in respect of insolvent insureds. Jefford J said:

  > Parliament cannot have envisaged that CPR Rule 31.16 would or would commonly be used to obtain insurance policies from the insurers of insolvent insureds.

  (It was alleged by the claimant in this case that there was 'strong evidence' the successful enforcement of any judgment against the wrongdoer would 'likely' result in that company's insolvency.)

- There has never been an express statutory provision entitling a litigant to obtain the insurance policy of a solvent insured. As the judge noted, 'a litigant takes his defendant as he finds him'.

- In proceedings against the insured, CPR 31.16 does not provide a route for the prospective claimant to obtain the insurance policy of a solvent insured because the policy does not

meet the test for standard disclosure.

- Attempts to deploy other provisions of the CPR to obtain the insurance policy of a solvent company have failed in a number of other cases previously.

claimant indicated it would not pursue litigation against either the company or the insurer on the basis that to do so would undoubtedly ultimately be fruitless, as a waste of both time and cost.

If it was found that the insurance policy did not cover the liability, the prospective claimant indicated it would not pursue litigation against either the company or the insurer on the basis that to do so would undoubtedly ultimately be fruitless.

In the light of this background, the judge explained in her judgment that it would be:

> ... curious if a potential claimant... could say that because the solvent insured might become insolvent and that he... might then have a claim against insurers, he should have disclosure of the policy under rule 31.16.

The court's refusal to disclose the policy perhaps comes as no surprise, insofar as it is a restatement of a well-established historic position, namely, that the courts will not be quick to order the disclosure of a solvent defendant's liability insurance information.

What is perhaps more surprising is that the court nevertheless chose to exercise its discretion in this way given the particular circumstances of this case, namely:

- it was said that the insured company had not articulated any defence to a potential claim against it in open correspondence;

- the enforcement of any judgment against the insured company would likely make that company insolvent; and

- if it was found that the insurance policy did not cover the liability, the prospective

Jefford J, however, took the view that these circumstances were not so 'exceptional' that they warranted a different exercise of discretion, commenting that:

> These circumstances, whilst perhaps not common are equally not that uncommon and still depend on a series of hypotheses about what might happen.

In the circumstances, the result, at least on those facts, may seem at odds with other CPR requirements, and in particular the overriding objective that courts deal with cases 'justly and at proportionate cost' (CPR 1.1(1)), which includes 'saving expense' (CPR 1.1(2)(b)).

Without expressly referring to the overriding objective in the decision, the case raises a number of questions:

- How is it in line with the overriding objective for there to be a mystery around whether a defendant can meet a judgment?

- Why make directions and provide significant cost budgets relating to points of quantum issues that may prove irrelevant because the uninsured or under-insured opponent cannot meet the judgment subsequently made?

- Why potentially allow that waste of costs and court time just to preserve the secrecy around insurance policies?

- What circumstances would be sufficiently 'exceptional' for the court to exercise its discretion differently?

The last question raises the prospect of whether the court would be persuaded to exercise its discretion differently, in the same circumstances, faced with the same application (ie for full disclosure of the insurance policy from an insurance company denying the policy's relevance) but in respect of an already insolvent alleged wrongdoer.

The Third Parties (Rights Against Insurers) Act 2010

The Act, which came into force on 1 August 2016 (repealing and replacing earlier legislation from 1930), introduces a less complex and potentially cheaper route for claiming directly against the insurer of an insolvent corporate defendant.

One of the significant ways in which the Act provides for this is through the information-providing requirements set out in s11 and Sch 1 of the Act. Under those provisions, a prospective litigant can ask the insolvent company and/or insurer of that company (among others) for various information, including:

- whether there is a contract of insurance that covers the supposed liability or might reasonably be regarded as covering it (Sch 1, para 1(3)(a)); and

- if there is such a contract, details of any such policy, including its terms (Sch 1, para 1(3)(b)).

A person who receives a notice requesting that information must, within a period of 28 days, provide such information that it is able to provide and/or notify the requesting party why they cannot provide the information.

Paragraph 2(3) of the same schedule provides the court with jurisdiction to order the

insurance company (or other relevant respondent) to comply with its duty only where the insurance company refuses to comply with its duty under that schedule.

What of the situation, therefore, where a prospective litigant asks for information in respect of an insolvent company's policy, but the relevant insurer, while acknowledging a policy does exist within the stipulated 28-day period, takes the view, as might be expected to be the case, that it does not cover (and could not reasonably be regarded as covering) the supposed liability, and thus refuses to provide any further information beyond the fact of its existence? In any event, the Act does not specify that the insurance policy itself must be provided.

In this situation, the prospective claimant is faced with an insolvent company, but is apparently then left under the Act having to trust the judgement solely of the insurer (against whom the prospective claimant could otherwise pursue a claim under the Act) that the policy does not cover the prospective claim, without the insurer having to provide a copy of the policy or any other information in respect of it. According to the strict terms of the Act, the insurance company has notionally discharged its duty, and the Act provides no other express jurisdiction for the court to hear any application in respect of it.

In this scenario, the prospective claimant may seek to go outside the Act and make a CPR 31.16 request for pre-action disclosure of the policy. Faced with an application in these circumstances, it remains to be seen whether the court would exercise its discretion differently as compared to the *Peel Port* case. In this situation, faced with fewer 'hypotheticals' (assuming the insolvency of the company is established) and the need to dispose of the case 'justly and at proportionate cost', the court may be more inclined to order the early disclosure of the policy. It remains to be seen whether (and how, if at all) the fact that the Act provides for the provision of 'information' whereas CPR 31.16 relates to the disclosure of documents would have any bearing on that exercise of such discretion (an issue which the court was alive to in *Peel Port*).

BAE Systems: High Court orders joinder of insurance company

The recent case of *BAE Systems* may provide some clues as to how the court may exercise its discretion faced with the scenario just considered. One of the two principal issues in this case concerned an application to join the insurer (RSA) as a co-defendant to an insolvent defendant, pursuant to s2 of the Act. The insurer sought to resist this joinder on the basis that it said that the insurance policy in place did not cover the liability claimed.

In this case (in which the judgment makes apparent that the full policy had already been disclosed), the court had no hesitation in making the application and joining the insurer as a co-defendant, holding that:

> ... section 2(1) is engaged even where there is a potential dispute as to whether or not there is appropriate cover under the policy... Section 2 is engaged wherever the claimant claims that the insured is a relevant person.

Significantly, in justifying this decision, the court noted that if it subsequently transpired that it was:

> ... simply unarguable that any relevant cover was in place [then] this court could, of course, strike out such proceedings as having no real prospect of success...

and/or it was always open to the insurer 'to seek declarations and/or have preliminary issues determined in respect of the issue of coverage'.

Conclusion

These two recent cases demonstrate that for the purpose of accessing solvent defendants' liability insurance information, it is doubtful that the CPR will be of much assistance. This is likely to be the case even in situations such as that in *Peel Port* where the prospective claimant was faced with an insured defendant on the brink of insolvency with no apparent defence to the claim, and where the overriding objective would otherwise seem to call for a more liberal exercise of the courts' discretion in order to avoid ultimately futile, but expensive, litigation.

The prospective claimant may seek to go outside the Act and make a CPR 31.16 request for pre-action disclosure of the policy.

Where the relevance of the policy is in dispute, the *BAE* case shows that such cases will require effective and proactive case management by the courts to root out ultimately hopeless cases against insurance company defendants at an early stage, including through the early determination of discrete issues such as whether any policy does indeed provide the cover claimed.

By contrast, where faced with an insolvent wrongdoer, early access to information is provided for on a statutory basis. The rights that prospective claimants are provided with by the Act where the alleged wrongdoer is already insolvent means that the Act is likely to be a thorn in the side for insurers, even before any sort of liability is established. ■

BAE Systems Pensions Funds Trustees Ltd v Royal & Sun Alliance Insurance plc & ors
[2017] EWHC 2082 (TCC)
Peel Port Shareholder Finance Company Ltd v Dornoch Ltd
[2017] EWHC 876 (TCC)