

Insurance business transfers: Clarity is key - (another) reminder from the courts

27 July 2023  Tim Johnson

< Previous

Global civil unrest on the rise and insurance claims?

Next >

Last month, the UK Commercial [Changing seas \(literally\) - Arctic melt sparks regulatory and insurable loss concerns](#)
Court found in favour of claimant insurer, PA(GI), in a preliminary judgment regarding indemnification given by defendant insurer Cigna under a business transfer agreement and a deed of warranty and indemnity, for compensation and costs surrounding the mis-selling of PPI policies.

Facts

PA(GI) became an indirect subsidiary of RSA in 1996. In 2003, RSA sold insurance operations to Cigna under a business transfer agreement. In that agreement Cigna provided an indemnity to RSA and members of the Seller's Group, which included PA(GI). The following year PA(GI) was sold to Resolution Life Group, removing it from the Seller's Group which was covered by the indemnity.

In 2006, PA(GI)'s creditor insurance business, inclusive of the PPI business, was sold to Groupama and in the same year complaints regarding the mis-selling of PPI between 1991 and 2004 arose. The Financial Ombudsman and the High Court held that the liabilities had not transferred to Groupama and thus, PA(GI) were the correct respondents. Following this, PA(GI) resolved the complaints, offering redress to its customers.

In the case, PA(GI) sought to recover compensation and costs under Cigna's indemnity, following the resolution of the complaints.

Cigna contended that PA(GI)'s liabilities arose because of negligence and, when correctly construed, the indemnities did not extend to losses arising from negligence. Cigna sought to rely on the 'inherent improbability' principle as per **Canada Steamship Lines Ltd v The King [1952] AC 192**, which provides that where a party agreeing to assume liability for another party's wrongdoing is inherently improbable, clearly expressed words are required for such assumption of liability to exist. Cigna also argued that PA(GI) could no longer enforce the indemnities as it was no longer a member of the Seller's Group. Additionally it argued that the indemnities were only triggered by legal liability and not reasonable settlements.

Judgment

The court ruled that PA(GI) could rely on the indemnities. Construing the language of the indemnities with reference to **Wood v Capita**, the court considered:

- the objective meaning of the language given to the indemnity and its nature, formality and quality of drafting in reference to the contract as a whole;
- rival meanings, by determining which construction made better business common sense; and
- the relevance of applying textual or factual analysis where the situation requires it, for example by addressing the clarity, access to professional assistance and whether the wording is logical and coherent. As the business transfer agreement was sophisticated and professionally drafted, the court gave greater weight to its clear and unambiguous textual language.

As the indemnity was broadly drafted, express exclusions of negligence were not necessary. Additionally, where Cigna sought to exclude liability arising from negligence in other sections, it had expressly stated such. Therefore, as negligence was not expressly excluded, the PPI liabilities were caught within the broad scope of the indemnity. Following the **Triple Point Technology v PTT** principle that unless the language is clear, it is presumed the parties did not intend to stray from their standard rights and obligations, and Cigna's arguments regarding *Canada Steamship* were therefore rejected.

Taking a commercial common-sense approach, the language of the indemnity did not suggest that PA(GI) was no longer covered due to leaving the Seller's Group. PA(GI) could enforce the indemnity under Contracts (Rights of Third Parties) Act 1999. The court also rejected the third part of Cigna's defence, confirming that settlements could be included within the indemnity.

Considerations for insurers

This case is of relevance to insurers when entering book transfers and other similar arrangements, which are increasingly common.

Additionally, this case has wider application as to how the courts will interpret contracts where the terms are potentially ambiguous. This case serves as another clear reminder that parties must be clear and precise as to the obligations and rights under any contract, and also as to the perils of entering into agreements that are internally inconsistent.

Contents

<u>The Word, July 2023</u>	→
<u>Global civil unrest on the rise and insurance claims?</u>	→
<u>Insurance business transfers: Clarity is key - (another) reminder from the courts</u>	→
<u>Changing seas (literally) - Arctic melt sparks regulatory and insurable loss concerns</u>	→
<u>How does Chilean freight crime affect insurers?</u>	→
<u>Insurance risks: ESG supply chain violations in Western countries</u>	→
<u>Nevada state bans 'defense within limits' insurance policy provisions</u>	→

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