Duck for cover

Ian Pease reviews a case that revisits the issues surrounding joint names insurance

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Insurance is an essential element to any construction project, but when things go wrong it's good to know who's covered and who you can sue. The recent Court of Appeal case of *Tyco Fire & Integrated Solutions v Rolls-Royce Motor Cars* [2008] illustrates the point.

It all started with a flood at Rolls-Royce's (RR) manufacturing plant. Tyco had been employed to provide fire protection services including a sprinkler system for the site. A burst water pipe caused a flood which damaged both Tyco's works and other parts of RR's plant. Tyco repaired the damage to its works, but disputed whether it was liable for the water damage to the other parts of RR's plant. It claimed that under the contract with RR there was a provision for joint names insurance and that therefore it was covered by that policy. It was said that RR's only recourse was to claim under the policy and that joint insureds could not sue one another.

Background law

Tyco's argument is based on the 2002 House of Lords decision in *Co-operative Retail Services v Taylor Young Partnership* [2002]. That contract was a JCT Standard Form 1980 and it was the main contractor's responsibility to take out an all-risks joint names policy covering its sub-contractors. Given that it did this, the main contract absolved the contractor's liability for negligence or breach of statutory duty.

Unfortunately, before practical completion there was a fire. The damage having been restored, the owner then proceeded to sue its professionals. They in turn took contribution proceedings (under the Civil Liability (Contribution) Act 1978) against the main contractor (Wimpey).

The question was: did the contractual scheme (that the restoration and completion of the damaged works was to be funded only under the joint names policy and that the building owner and the contractor would each bear other losses themselves) mean that the main contractor was not liable under these contribution proceedings?

This question went all the way to the House of Lords, which endorsed the argument, holding that the very purpose of an all-risks policy, taken out in the joint names of the parties, was to provide funding for the reinstatement of the works, whatever the cause of the fire. The scheme effectively did away with the ordinary rules of compensation for negligence and breach of contract. Lord Hope summarised the position as follows:

> ... there is no liability to pay compensation on either side. The employer has no claim for compensation against the contractor. All he can do is insist that the contractor must proceed with due diligence to carry out the reinstatement work and must authorise the release to him of the insurance moneys. The contractor has no claim for compensation against the employer. All he can do is insist that the employer must use the insurance moneys for payment of the cost of carrying out the reinstatement work. It makes no difference whether the fire was caused by the negligence of the contractor or one of his sub-contractors or of the employer or of some third party for whose acts or omissions neither of the parties to the contract is responsible. The ordinary rules for the payment of compensation for negligence and for breach of contract have been eliminated. Whatever the cause of the fire, the obligation of the contractor is to carry out such work as is needed to put the matter right. His

> obligation is to restore the fire damage at his own cost, except in so far as the cost of doing so is met by sums recovered under the joint names insurance policy.

In respect of the claim under the 1978 Act, Lord Rodger noted that:

> Under section 1(1) of the Civil Liability (Contribution) Act 1978 a person who is liable in respect of damage can recover contribution from any other person who is liable in respect of the same damage. It follows that the appellants can recover contribution from Wimpey in respect of the fire damage to the works only if Wimpey were 'liable in respect of' the fire damage.

He went on to note that:

> ... for the purposes of section 1(1), Wimpey are not a person who is liable in respect of the fire damage to the works and the appellants cannot recover contribution from them.

The position of the insurers was dealt with by Lord Bingham:

> Under the contract and Wimpey's all-risks insurance policy, CRS would be effectively indemnified by the insurer's provision of a fund enabling it to pay Wimpey for repairing the fire damage. The insurers could not then make a subrogated claim against Wimpey because Wimpey was a party co-insured (with CRS) under the policy, and the insurers would be obliged to indemnify Wimpey against any liability which might be established, an obvious absurdity. The rationale of this rule may be a matter of some controversy... but the rule itself is not in doubt.

This scheme of risk-spreading is what one finds in the standard form contracts and it must be appreciated that the result found by the House arises as a result of the contractual wording. However, what Lord Bingham outlined above goes further – he referred to it as a 'rule' that one joint named insured can never sue its co-insured for damage covered by the policy, and, of course, neither can the insurer under subrogation rights, as this would lead to 'obvious absurdity'.

The Court in Tyco *concluded that whilst it was possible for joint names insurance to override a contractor's liability for negligence, the effect of a clause providing for joint names insurance will depend on the construction of the individual contract.*

Co-operative Retail Services v Taylor Young Partnership
[2002] 1 WLR 1419
Tyco Fire & Integrated Solutions v Rolls-Royce Motor Cars
[2008] EWCA Civ 286

Tyco

Tyco is a different contractual scheme by no means the same as *CRS*. In *Tyco* the Court of Appeal was again concerned with two broad matters: the matter of construing the contract and the joint names 'rule' set out above.

The matter of construction focused upon clause 13.5:

> The Employer shall maintain, in the *joint names* of the Employer, the Construction Manager *and others including, but not limited to, contractors*, insurance of *existing structures*, and in the name of the Employer, the Construction Manager, the Contractor and his sub-contractors of any tier, *insurance of the Works* and all work executed or in the course of execution and any goods and materials on Site which have become the property of the Employer against the risks covered by the Employer's insurance policy referred to in Schedule 2 (ie the Specified Perils) subject to the terms, conditions, exclusions and excesses (uninsured amounts) of the said policy. [Emphasis supplied.]

To be successful Tyco would have to convince the Court that it was covered by a joint names policy covering the existing structures (those which had been damaged). The Court concluded that Tyco was not covered under such a joint names policy, ie the phrase 'Employer shall maintain [insurance of existing structures], in the joint names of the Employer… and others including… contractors' did not include Tyco.

In relation to the point of construction, the Court concluded:

> In my judgement, the opening part of clause 13.5 is not intended to give Tyco or any individual contractor separate liability insurance in respect of the existing structures outside the area of its own works. All that this phrase is intended to do is to state that the employer's policy insuring its own property on the site embraces a series of joint name policies which protects 'others' including but not limited to contractors. Contractors are told this so that they may have the confidence that, if disaster strikes the development, the employer will have the resources to reinstate it including the resources to repair and see to completion the performance of contractors' works.

That was enough to decide the case. However, the Court went on to consider the joint insureds 'rule' concluding that whilst it was possible for joint names insurance to override a contractor's liability for negligence, the effect of a clause providing for joint names insurance will depend on the construction of the individual contract. There was therefore no overriding 'rule'. *CRS* should not be elevated to a 'rule of law', it is possible for claims to be made against a joint insured by another joint insured or by an insurer via subrogation.

Final thoughts

The thing to note about the present case is that it was not a JCT standard form (where *CRS* is still the relevant law). Many standard forms provide for a waiver against subrogation that prevents insurers from seeking to recover from insured contractors (or joint insureds). Once again, in matters of contractual construction it is essential to look carefully at the contract provisions. Furthermore, a contractor intending to rely on a contractual provision for a joint names insurance policy must ensure that the wording of the provision is sufficiently clear to ensure that it is included within those parties protected by the joint names policy. ■