

THE CASE FOR SUBROGATION

Haberdashers' Askes Federation Trust v Lakehouse Contracts Ltd & Ors (2018) has raised the possibility of more Construction Insurers pursuing claims against Subcontractors that may believe they are protected by the project policies.

Building works were being carried out for Haberdashers' Askes Federation Trust at Hatcham College. As part of the works, the main Contractor, Lakehouse Contract Ltd appointed Cambridge Polymer Roofing Ltd to undertake some roofing works. On 6th April 2010, hot work on the roof involving the use of a blowtorch on a roofing membrane resulted in a fire and a £8.75 million property damage claim.

Lakeland Contracts had taken out a Project Insurance policy that included cover for Subcontractors. Project Insurers indemnified the loss and then sought to recover some of that payment from Cambridge Polymer Roofing, who resisted on the basis of being a co-insured under the Project Insurance policy. Despite the Project Insurance policy insuring 'the main Contractor and all Subcontractors', a clause in the roofing sub-contract stated that the Cambridge Polymer Roofing would obtain its own Third Party Liability insurance up to a limit of £5 million. As a result the Project Insurers argued that they were not covered by the Project Insurance policy.

The Honourable Mr Justice Fraser heard the case in the High Court, Technology and Construction Court (QBD). He considered that in order to address the opposing arguments he would advise the 'legal mechanics' by which cover was available to a Subcontractor under a project policy. Three different ways of assessing the situation were discussed, these being agency; standing offer; and acceptance by conduct.

The concept of 'agency' could not be accommodated for two reasons. Firstly, the identity of the Subcontractor could not be identified at the time the policy was effected and they would not have been able to agree policy cover as they had no insurable interest at the time the policy was incepted.

When considering 'standing offer' and 'acceptance by conduct' the key issue to consider is the intention of the parties. Reference was made to the Supreme Court decision in *Gard Marine v China National Chartering*, where it was held that subrogated claims cannot generally be brought against co-insureds, regard had to be made to the particular terms of the contract between the co-insureds.

Normally, a Subcontractors appointment might lead to its inclusion in a defined group and cover being afforded by the Project Insurance policy, with the benefit of the Waiver of Subrogation clause. In this particular case, the terms of the subcontract expressly required Cambridge Polymer Roofing to obtain its own Third Party Liability insurance, so they were not an Insured or beneficiary of the Project Insurance. They were not entitled to rely on the waiver clause, and the Contracts (Rights of Third Parties) Act 1999, was of no assistance because a policy term excluded the operation of that act.

Mike Hornby, Chartered Loss Adjuster, Integra Technical Services suggests that "whilst this decision may be challenged in a higher court, it does raise some interesting questions for Insurers, Contractors and Subcontractors about the construction of the terms of the various sub contracts, and differing policy conditions that will inevitably flow through the use of a high number of Subcontractors."

The case was effectively an action between the Insurers of the various responsibilities and the main project policy, previously considered to be a catch-all for any subrogation issue. Whilst it is not yet confirmed whether the decision will be appealed, this could be determined by the Insurers weighing up the potential legal costs of appeal, against merely amending future policy wordings to take note of the decision. This

could be achieved by specifically excluding any Subcontractors with an insurance requirement from policy cover – or at the other end of the scale, expressly stating such insurances will be secondary to the main contract cover.

“Both main Contractors and Subcontractors will need to consider the implications for their insurance risks and costs.”

Mike Hornby, Integra Technical Services.

Main Contractors may tighten their bespoke contracts to ensure every Subcontractor has an obligation to insure their works and liabilities, but in so doing a degree of control of a claim may be lost, which may not sit comfortably with the project management. The alternative is to let the Project Insurance policy capture and control the many potential risks, subject to Insurers acceptance.

The other potential consequence is Insurers instructing legal experts more frequently when a loss occurs as they look more closely at the wording, and cover, of every Subcontractor involved in a claim. Mike believes that "this degree of increased scrutiny will, by its very nature, extend the investigation stage of a claim, with consequent delays in establishing liability, and potentially increased costs of claims handling."