RPC

Legal alert – July 2015

Milton Furniture Limited v Brit Insurance

Attended is a commonly used term found in most property insurance policies. The case law to date on the meaning of "attendance", "attended" and "unattended" deals with theft from unattended vehicles. In a judgment handed down on 7 July 2015, the Court of Appeal gives guidance on the meaning of "unattended" in the context of security requirements in commercial premises.

The facts

Milton and its group company GPE hired out furniture for use at exhibitions. The business operated out of leased premises which consisted of a large warehouse, a dwelling house and an office block. The offices, warehouse and house were joined by a link building.

The premises were protected by an intruder alarm. The burglar alarm was split into three zones: warehouse, office, and house. Each zone could be set separately.

The alarm was monitored by a third party alarm receiving centre. However, the monitoring of the intruder alarm ceased in February 2005 due to the non-payment of the invoice from July 2004.

At approximately 01:00 on Saturday 10 April 2005 there was a fire in the warehouse section of the premises. The fire was started deliberately by a person or persons unknown.

On the night of the fire the General Manager and a subcontractor were staying overnight at the premises. The general manager was asleep in the house and the subcontractor was asleep in the link room.

The intruder alarm was not set on the night of the fire. The fire alarm was permanently set and it sounded triggering a call from the alarm company to the General Manager alerting them to the fire.

Following the fire Milton claimed for loss of stock and business interruption. Insurers repudiated the claim in May 2005 for breach of the following general condition (GC7):

"The whole of the protections including any Burglar Alarm provided for the safety of the premises shall be in use at all times **out of business hours or when the Insured's premises are left unattended** [the first limb] and such protections shall not be withdrawn or varied to the detriment of the interests of Underwriters without their prior consent [the second limb]" (Our emphasis)

The repudiation was challenged.

Any comments or queries?

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The issues in dispute

Insurers' position was that:

- Milton was in breach of the first limb of GC7 because the fire occurred outside of business hours and the intruder alarm was not set
- in addition the premises were "left unattended" because the two men were asleep at the time of the fire in separate parts of the premises and could not be said to be attending to it
- GC7 was a condition precedent but in any event there was a clear causal connection between the failure to set the intruder alarm and the fire
- further Milton was in breach of the second limb of GC7 because the monitoring of the intruder alarm had been withdrawn without Insurer's consent.

Milton's position was:

- GC7 was to be read as requiring the alarm to be set outside of business hours and when the premises were unattended because to read the condition otherwise would lead to impossible results eg having to set the alarm outside business hours while people were still on the premises. On that interpretation Milton argued that because there were two people were in the premises on the night of the fire the premises were not left unattended and therefore there was no breach
- Milton also relied on Protections Warranty 1 contained in the Schedule (PW1). This stated: **PW1 Intruder Alarm Warranty** - only applicable if indicated on the Schedule. "It is a condition precedent to the liability of the Underwriters in respect of loss or damage caused by Theft and/or attempted Theft, that the Burglar Alarm shall have been put into full and proper operation whenever the premises referred to in this Schedule are left unattended and that such alarm system shall have been maintained in good order throughout the currency of this insurance under a maintenance contract with a member of NACOSS." PW1 only required that the intruder alarm was set when the premises were unattended Milton argued that GC7 had to be construed in light of PW1. PW1 was a special clause because it had been specifically included in the Policy at placement and as such greater weight should be given to it than GC7. On this basis:
  - first, GC7 could not be a condition precedent to liability (by reference to the due observance clause) in relation to the intruder alarm because that was the purpose of PW1
  - secondly, GC7 could not impose a higher burden/be more onerous on the Insured than PW1 so you had to "read down" the obligations in GC7 with the effect that the intruder alarm only needed to be set if the premises were left unattended
- the presence of the General Manager and the subcontractor was sufficient to constitute "attendance"
- in relation to the second limb of GC7 Milton argued that in order to be in breach it needed actual knowledge of the withdrawal of the monitoring by the alarm company. Milton maintained that they did not have this knowledge. They had not appreciated that there was a risk that monitoring would be discontinued if they did not pay the invoice. Secondly, it was GPE that were responsible for the payment of the invoice not Milton.

The Court of Appeal's decision

The key issues decided by the Court of Appeal are as follows:

Was GC7 subordinate to PW1 so that compliance with GC7 was not a condition precedent?

No. GC7 was a condition precedent which applied to the intruder alarm.

The effect of the policy wording was to confirm that PW1 and GC7 both applied. The

inclusion of PW1 could not be construed as excluding the application of GC7.

Furthermore the policy contained a due observance condition which made it clear that all general conditions which necessarily included GC7 were condition precedents.

There was nothing to suggest that GC7 was subordinate to PW1 or that PW1 was a "special" clause. PW1 and GC7 both formed part of the standard terms of the Policy. In these circumstances there was no special hierarchy.

Although there was overlap between GC7 and PW1, there was no conflict or inconsistency between the two conditions. GC7 applied to all claims; PW1 to claims involving theft or attempted theft.

In those circumstances the court must attempt to give effect to the provisions of each clause.

Does PW1 qualify GC7 so that the obligations regarding the intruder alarm are read down with the effect that the intruder alarm should only be set when the premises were unattended?
No. The Court of Appeal held that the language of GC7 was plain: it required the intruder alarm to be set in 2 eventualities: first, outside business hours, irrespective of whether the premises were unattended or not, and secondly when the premises were left unattended. The meaning of "or" was disjunctive.

In this case both PW1 and GC7 could be read together without inconsistency. In these circumstances the Court should give effect to both conditions in so far as was possible.

In response to Milton's argument that compliance with GC7 would lead to impossible results (of having to set the alarm outside business hours even if there were people in that part of the premises) the Court of Appeal accepted that GC7 would only apply to the extent possible and would not require Milton to fulfil an impossible obligation.

The evidence showed Milton had regularly set the intruder alarm in the parts of the premises where people were not present outside of business hours in the months before the withdrawal of the monitoring services.

In these circumstances, the Court of Appeal held that "premises" could be construed as including "any part of the premises" and that GC7 required the alarm to be activated in those parts of the relevant "premises" both outside business hours or when the relevant part of the premises are left unattended) to the extent that it was not impracticable to do so because of the legitimate presence of persons in certain parts of the premises.

Was Milton in breach of the first limb of GC7?
Yes. Milton was in breach of GC7 because it had failed to set the intruder alarm outside of business hours. Business ended at 20:30 and the burglar alarm had not been set after that point.

The Court of Appeal went on to consider whether the presence of two men sleeping in different parts of the premises to where the fire was started amounted to the premises being "left unattended". It held that it did.

The ordinary meaning of the word "attending" is "looking after something". Applying the approach in *Starfire Diamond Rings Limited*, the Court of Appeal held that the natural meaning of the word "attended" in the context of insured property is that someone is keeping the property under observation and is in a position to observe any attempt by anyone to interfere with it. "Attended" clearly involved not only someone actually being present at the premises but also a level and degree of actual attention being given to it.

In this case the warehouse was over 30,000sqft; the office, house and link were some 2,500sq ft. On the evening in question,

there were two people present: one in the house; one in the link room. From 22:00 both were asleep.

In these circumstances neither of them could be said to be attending to the premises or giving them any attention at all.

Whether Milton was in breach of the second limb of GC7 by causing or permitting the withdrawal of the monitoring of the intruder alarm?
Yes. The Court of Appeal held that Milton was in breach of the second limb: "such protections shall not be withdrawn or varied to the detriment of the interests of Underwriters without their prior consent".

The reference to "such protections" did not refer to those protections which should have been in use at any time; it referred to all protections that were in place for the safety of the property. The second limb of GC7 was a separate obligation concerned with the maintenance and retention of the protections which underwriters had been advised were in place in the proposal/presentation.

The cessation of monitoring constituted a "withdrawal". A burglar alarm being disabled by the wires being cut by a burglar would not; nor would a temporary suspension of the monitoring service, for example due to a power cut.

The withdrawal of the monitoring of the intruder alarm was detrimental to Brit's interests in that it was a serious impairment of the security arrangements relating to the premises. That "detriment" did not need to be linked to the circumstances of the loss.

As a matter of construction, the wording imposed a strict obligation on the Insured in respect of a "withdrawal". "Withdrawal" could be effected unilaterally by a third party without the knowledge of the Insured. On this basis knowledge on the part of the Insured was not a requirement to establish breach.

In contrast the Court of Appeal accepted that "variation" of protections did necessarily imply some degree of knowledge on the part of the Insured.

As regards the test that should apply if/where knowledge was a requirement: the relevant test would be one of reasonable or common care. In other words, whether Milton was aware of the facts which gave rise to the withdrawal of the monitoring service, or whether, if it was not actually aware, it was in a position where, exercising common care, it ought to have known of those facts.

In considering the circumstances that led to the cessation of the monitoring the Court of Appeal rejected the attempt by Milton to assert that it was GPE (another group company) that was responsible for the payment of the invoice and not Milton, in circumstances where the two companies had common directors. It also observed that it was common sense that an obvious consequence of not paying the July 2014 invoice was that the monitoring would be withdrawn and found that failing to take any action upon receipt of letters chasing payment amounted to recklessness.

Commentary

This is a welcome decision as it provides clarity and guidance in relation to the meaning of "attendance"/"left unattended" in the context of commercial property insurance.

The term "left unattended" is not capable of any precise definition, and will differ will depend on the particular circumstances. The starting point is that the term "attendance" has to be taken in its ordinary sense meaning "looking after something" and then applied to the particular facts of the case such as the nature of the property insured, where it is stored/located, the other security protections in place.

It is clear that "attendance" requires that a level and degree of attention such that the

insured or its agent is in a position to observe any attempt by anyone to interfere with it.

In this case the insured was present albeit asleep. This was not sufficient. But it is important to note that the Court of Appeal suggested that if someone had been awake and carrying out regular patrols of the warehouse that might have amounted to "attendance" provided that one security guard could have effectively patrolled the building at night.

Similarly, in the same way that presence was not sufficient because there was no way of being able to intervene, it is also possible to see that that presence may not be required if for example, the property is being monitored remotely, for example, via CCTV or actual presence is not possible.

The challenges in relation to this claim arose from the fact that the Policy did not expressly cater for a situation where part but not all of the premises was attended. This case is therefore a helpful reminder to always make sure the alarm condition requires the alarm to be set when the premises or parts thereof are unattended.

It also offers a cautionary tale in relation to the interaction between terms imposed in the Policy Schedule and the Policy Wording. Be careful when imposing conditions within the Schedule to ensure that they are not inconsistent with the general conditions of the Policy Wording.

The decision also provides useful guidance in relation to the requirement to not withdraw or vary protections at the insured premises, which has not previously been addressed by the court, including what will constitute a "withdrawal". It also clarifies that where knowledge of the Insured is a requirement of a particular condition, that knowledge will be measured by reference to what a reasonable person exercising reasonable care would know.

RPC represented Riverstone Insurance Limited (formerly Brit Insurance Limited). If you have any queries or wish to discuss any aspect of this decision please contact Victoria Sherratt and/or Christopher Neilson. We will also be running a seminar later this year. If you would be interested in attending or sending one of your team, please let us know so that we can register your interest.

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