Ocean Finance & Mortgages Limited v Oval Insurance Broking Limited [2016]

March 2016

Judgment in this case was handed down at the beginning of February 2016.

The judgment considers when an insurance broker should advise the insured to make a "block notification" of circumstances and, importantly as well, the issue of what actually does or does not constitute a block notification.

The analysis of Cooke J may ultimately be helpful to insurers who are looking to argue that a particular notification is not a "block notification", and thus of limited scope.

Facts

The insured systemically mis-sold PPI over a number of years to c. 18,000 clients. By the time of the relevant notifications (late October 2009) to the insured's expiring 2008/9 PI policy, this was apparent to the insured and the producing broker (Oval), and ought reasonably to have been apparent to the placing broker (Senior Wright) as well. In 2010, the insured was subsequently required by the FSA to undertake a past business review, encompassing c. 10,000 past sales.

It appears that the parties accepted that the notifications made by Senior Wright to the primary and excess insurers of the 2008/9 policy, were not capable of operating as a block notification, sufficient to attach the 2010 past business review to that policy.

Both the primary and excess insurers renewed the 2008/9 policy. In 2010 Oval made a block notification to them under the renewal (ie the 2009/10 policy). This notification was accepted as such by the primary. However, the excess insurer declined cover under the 2009/10 policy, on the basis that:

- the block notification could and should have been made in 2009, during the currency of the prior year
- the "prior circumstances" exclusion in the 2009/10 policy therefore applied
- cover for the past business review was thus excluded under the 2009/10 policy (whilst there was no cover available for it under the 2008/9 policy, as the notice under that earlier policy was not a block notification).

The insured brought proceedings against the producing broker, Oval, in respect of losses sustained in connection with the past business review and that it was unable to recover from the excess insurer under the 2008/9 policy. The insured's case against Oval was that Oval ought to have advised it to make a

Any comments or queries?

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block notification to the 2008/9 policy. Oval admitted that it did not provide such advice and eventually admitted breach of duty and causation as well, and settled the insured's claim against it for £1.85m plus costs.

Oval brought a Part 20 Claim against Senior Wright, alleging essentially that, as the placing broker who had actually made the notifications in 2009, Senior Wright was to blame.

Liability

The judge found that Senior Wright had taken it upon itself to make the notifications in 2009, with no instructions from Oval, and thus "assumed a duty, both in contract and tort to Oval (and potentially a duty in tort to [the insured]) in relation to making appropriate notification to the 2008/2009 year insurers".

The judge held that Senior Wright breached this duty, because:

- as was not disputed by Senior Wright, the notifications that it had made in 2009 under the 2008/09 policy did not constitute a block notification
- whereas, at the time of those notifications, Senior Wright was on notice of facts from which it should have (i) concluded that a block notification was probably required and (ii) put in train (or advised the insured to put in train) the steps required to validly make that notification.

The essential facts of which Senior Wright was aware and giving rise to its duty to act included the following:

- the insured had been in the business of selling PPI
- the insured had lost 37 FOS cases on the basis that its sale staff has not disclosed certain details relevant to the PPI sale
- the sales staff used a script, when selling PPI.

The judge found that Senior Wright should have reviewed the 37 FOS decisions, from which it should have concluded that there was, or could well have been, a material omission from the sales script, and thus a systemic issue that would potentially affect all of the insured's past PPI sales.

This illustrates that a broker potentially has to review in detail, and analyse critically, adverse FOS (or court) decisions against an insured of which they are made aware, with a view to considering whether they might indicate a systemic issue requiring a block notification.

The judge found that Senior Wright should have appreciated that there was potentially a systemic problem, and effectively should have advised the insured to instruct lawyers to investigate whether or not that was the case and, if it turned out to be the case, a block notification needed to be made. Oval provided such advice to the insured in 2010, leading to the block notification being made to the 2009/10 policy. However, the advice should have been provided by Senior Wright (and Oval) in 2009, so that the notification could have been made to the earlier year.

The judge allocated 30% of the responsibility to Senior Wright (and 70% to Oval), on the basis Oval had a much more in depth knowledge of the facts, as it was closer to the insured, and had seen far more relevant documents, and thus was considerably more culpable than Senior Wright for failing to appreciate back in 2009 that a block notification might have been required at that point.

What constitutes a block notification?

The case is also noteworthy because it provides guidance on what actually constitutes a block notification.

As above, Senior Wright appears to have accepted that the notifications that it made in 2009 to the 2008/9 policy were not block notifications.

- The notice to the primary insurer, included the following:
  - "the FSA…could feel that Ocean [the Insured] have an endemic or single cause/problem issue which would then mean they would have to review ALL of their PPI sales, which total 18,000. This would have massive practical and financial implications and would effectively bury the company if that happened".

- The notice to the excess insurer was much narrower. In its opening paragraphs it stated: "this [notification] relates specifically to the sale of PPI policies, of which the insured has sold approx 18,000 over the years". Unlike the notification to the primary insurer, however, there was no mention of the insured possibly having to "review ALL of their PPI sales" which might "bury the company if that happened". Instead, the notice to the excess insurer mentioned that, "[s]ince 31/10/08 the Insured has had approx 504 FSA reportable PPI complaints. They have rejected a large proportion and have about 200 or so live complaints". The notice then warned that, as a result of the FSA consultation paper CP 09/23, the insured was reviewing all of the rejected complaints, "in line with the new consultation process/guidelines, which will inevitably mean that some cases rejected will have to be settled and cases may attract higher settlement values".

One can readily understand that the notification to the primary insurer of the 2008/9 policy was not sufficiently wide to capture the subsequent past business review that the insured was eventually required to undertake. However, it is more difficult to see why the notice to the excess insurer of that policy was not wide enough to constitute a block notification. This is especially so given the judge held that, at the time of that notification, the primary insurer's underwriters would have known and appreciated that "there was a real likelihood" of the FSA requiring "a full past business review of all PPI sales [to be undertaken by the Insured] with drastic consequences [for the Insured]".

At paragraphs [133] and [134] of the judgment, it appears Cooke J was of the view that, to have been effective as a "block notification" under the 2008/09 policy, the 2009 notifications needed to have:

- included the names of the potential claimants – "in excess of 10,000 sales" and
- identified the "acts which formed the basis of the circumstances which could give rise to claims".

On the facts, the relevant acts were inadequate selling "scripts", as identified by 37 adverse FOS decisions, of which both the insured and the primary insurer were aware at the time of the 2009 notifications; the 37 adverse FOS decisions had earlier been provided to the primary insurer. As a result:

- seemingly it does not matter if the insurer is aware of the acts giving rise to liability from previous notifications and (as Cooke J also found) that the actual underwriter can be taken to have known that those acts could give rise to liability to the whole customer base
- it is incumbent on the insured (or the broker on its behalf) to join the dots and spell it out for the insurer in the purported block notification, if the notification is to operate as a block notification.

Whilst the full text of the notification clause is not apparent from the judgment, it seems to have been in fairly standard form. It required the insured to specify, amongst other things, the names of the potential claimants and other details, including, possibly (this is not clear), the acts said to give rise to the claims. As above, the primary insurer was aware of those acts as giving rise to liability in individual cases and can be taken to have known that that liability was likely to be replicated across the entire customer base, but the notifications in 2009 were not block notifications because they did not make clear that they were block notifications, eg by listing the 10,000 names, and they did not actually spell out for the insurers that those acts were the acts that could form the basis of the 10,000 claims.

In McManus v European Risk Co hf [2013] EWCA Civ 1545, the Court of Appeal considered that a firm of solicitors had successfully made a block notification, which, although it did not list out the names of every potential claimant, was clearly headed "Blanket Notification of Circumstances" and explained in unambiguous terms that every file that a predecessor firm had conducted may contain certain specified shortcomings (or related shortcomings).

Based on the *McManus* and *Ocean Finance* decisions, it seems that, to successfully notify a large number of transactions to insurers as potentially giving rise to claims, the notification must leave the insurer in no real doubt that it is intended as a "block" (or "blanket") notification, must identify the claimants, and, crucially, identify the acts or wrongdoing that it is thought may give rise to the entire mass of claims. Indeed, based on *Ocean Finance*, if the notification clause expressly states that the insured must provide the names of the potential claimants (the clause in *McManus* did not expressly provide for this), the notification may fail if the insured has this information to hand and fails to provide it to the insurer.

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