QBE EUROPEAN OPERATIONS

PROPERTY MATTERS

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Introduction

A warm welcome to 2017 from the QBE Property Claims Team.

Thank you to those of you who completed the online survey. It's very useful to receive constructive feedback, which will help guide and influence content going forwards. Please feel free to email any ad-hoc comments to **tim.hayward@uk.qbe.com**.

A short break for Property Matters coincided with the outcome of the presidential race in America and the recent inauguration of Donald Trump. Early suggestions of a trade deal between the UK and the US have made the headlines, against the backdrop of ongoing Brexit discussions and the Supreme Court decision on Article 50. The detail of potential trade agreements with the rest of Europe, and further afield, are keenly awaited and will be a major challenge for the government.

Another test for the government is their response to flood management – the Commons environment committee recently described it as "fragmented, inefficient and ineffective". Further extensive flooding was recently avoided at the 11th hour when a tidal surge subsided, but served to remind us all of the risk that many parts of the country face from flooding. It is important that the issue remains on the government's agenda and QBE's active involvement on the Department for Environment, Food & Rural Affairs (DEFRA) Task Group will help provide the voice from the commercial sector.

We start 2017 with a review of the immediate aftermath, and QBE response, to a tragic fire which destroyed the Royal Clarence Hotel in Exeter. The extent of the damage, to a building of such historic significance and value, will present many challenges for our Insured and the claims team, but did allow QBE to showcase its response to such a catastrophic event.

We will also review two interesting Court of Appeal decisions. The first concerns the basis for indemnity and reinstatement, whilst the second case considers the enforceability of an insurance policy condition precedent. Finally, we look at a successful prosecution by the Insurance Fraud Enforcement Department (IFED), following a fraudulent commercial property claim.

Royal Clarence Hotel, Exeter

The immediate response to a major claim perfectly handled

On the morning of Friday 28th October 2016, a major fire broke out at the Royal Clarence Hotel, in central Exeter. Unsurprisingly, the fire received widespread national media coverage, which graphically showed the real-time devastation being caused to the historic landmark, see www.bbc.co.uk/news/uk-england-devon-37809584. The hotel was built in 1769 and is a Grade II listed building.

The first notification to the QBE team was a phone call from the client to QBE Underwriting Manager, Andrew Lake, who in turn contacted our Richard Hart (Major and Complex Claims Adjuster) to commence our large loss claim response. The immediate instruction and mobilisation of Cunningham Lindsey, Loss Adjusters, allowed their team to be on site the same day.

During the day of the fire, the QBE team liaised with a number of involved parties to offer assistance and support in the immediate aftermath of such a catastrophic event. Large parts of the town centre were closed-off over the busy Halloween shopping weekend, and the QBE team worked with the council to mitigate the impact of this, as well as liaising with the client, the broker and the emergency services. Underwriting and claims took a collaborative and shared approach, and all sides were impressed by the empathy, speed and flexibility of QBE's response.

It very soon became apparent that there would be a total loss of the site and hence a multi-million pound claim and loss to the client. QBE acted swiftly, visiting the site and establishing the facts rapidly. Because of this the team were able to meet with the client whilst the hotel was still burning and admit policy liability – a stage that can often take a number of weeks in major fire-related losses. This led to a significant interim payment to client's bank account within 7 days of the fire, helping them to cover their considerable costs in making the site safe and bridging the cash flow issues caused by the closure of the hotel. QBE recognise the importance and value of providing a client with this level of comfort, in the immediate aftermath of such a huge loss.

The QBE team have been commended for their response and management of this catastrophic loss. The broker saying "Overall I would describe it as a text book example of how major losses can and should approached by the insurance industry. It has been absolutely first class.."

Underwriting Manager Andrew Lake says:

> Underwriting and claims excellence underpins all of it. The response to this claim is exactly how I would want things to happen, because we want to be able to say to prospective and current clients: this is how QBE will deal with you.

Of course for the Royal Clarence Hotel the story continues. The owners are still making the building safe, and the claim will probably take a number of years to conclude. The QBE team are attending meetings on site every 2-3 weeks, and have a regular dialogue with the client to provide the continuing support needed.

The claim is made more complex as the hotel is a listed building, and parts of it may be able to be saved, so interested parties currently include Historic England, the Exeter Planning Department and an archaeologist. The hotel is surrounded by the ancient Exeter Cathedral Close environment, with, for example, listed cobbles outside the building, which renovation work cannot damage.

This very significant claim will be expertly handled by Richard Hart over the coming months, working with the client to deal with the claim fairly and professionally. The process has cemented the relationship with client and broker, as well as enhancing QBE's reputation with a number of external bodies such as Historic England. A true demonstration of QBE's strategic priorities of delivering both claims and underwriting excellence.

Great Lakes Reinsurance v Western Trading Limited [2016]

Indemnity and reinstatement.

The Court of Appeal has confirmed the position that a declaration can be given that an insured under a property insurance policy is entitled to be indemnified for the cost of reinstating property damaged by an insured peril, particularly in circumstances where it is unclear whether the insured intends or is able to reinstate the property. The judgment also provides helpful guidance on an insured's right to be indemnified on a reinstatement basis.

The property in question was insured by Great Lakes for £2,121,800, which was understood to be the rebuilding cost of the property. A fire destroyed the property on 24 July 2012 and Western Trading sought a declaration that it was entitled to be indemnified under the terms of the policy for the losses it had suffered, up to the policy limit of indemnity. The judge at first instance held that Western Trading was entitled to the cost of reinstatement, provided it reinstated the property and granted a declaration entitling an indemnity respect of those losses.

The Insurer appealed against the declaration on the basis that the court should determine the measure of indemnity and the entitlement to recover the cost of reinstating the property. The Insurer's argument was that the correct measure of indemnity was the reduction in the open market value of the property. The property was worth about £75,000 before the fire but afterwards (following the delisting) it was worth about £500,000. So the Insurer submitted there had been no loss to be indemnified.

The Court of Appeal followed a line of authorities and found that the correct measure of indemnity depends on:

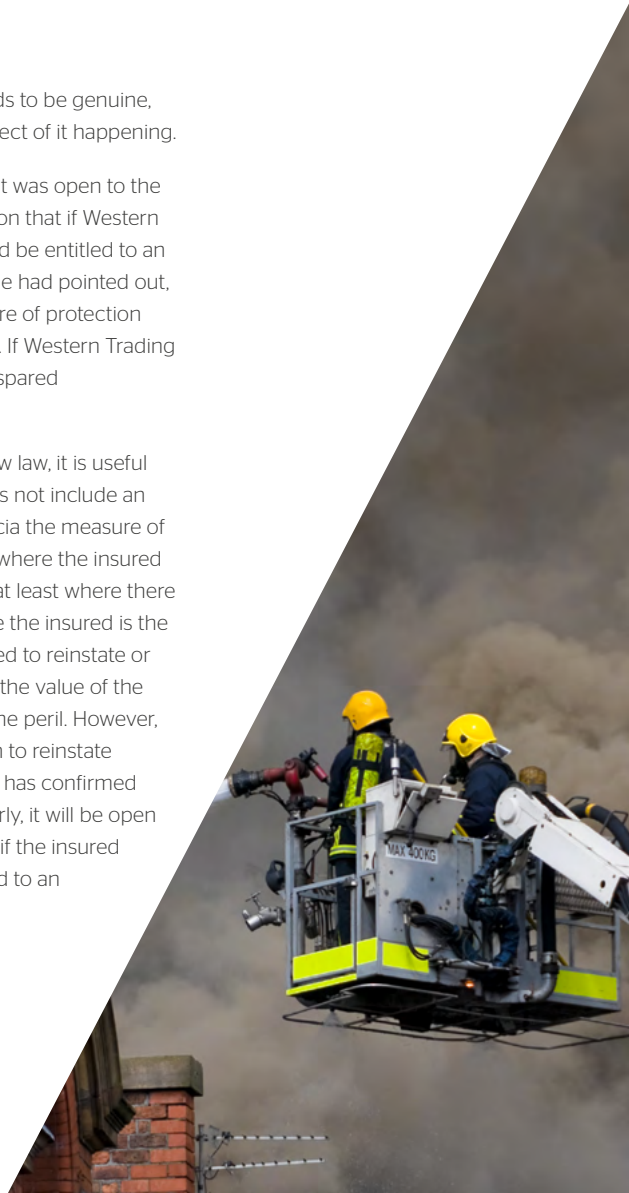
1. The terms of the policy
2. The insurable interest of the insured in respect of the property
3. The facts of the case including, with specific regard to the intention of the insured at the time of the loss.

On this occasion, the correct measure of indemnity was the cost of reinstating the property. Western Trading was bound to insure the property and to replace it in the event of fire. It had an express entitlement under the policy to the reinstatement cost, provided certain conditions were met. The judge did not regard Western Trading as having failed to act with reasonable despatch because it had not commenced reinstatement before the conclusion of the proceedings.

Even where the insured owns the property and is not under an obligation to reinstate or repair it, the indemnity must be assessed by reference to the value of the property to the insured, at the time of the peril. In most cases, this will be the reinstatement cost although that may not be the case if the insured was planning to sell the property, intending to destroy it anyway, or no one in their right mind would reinstate. The problem in this case was that there was a real possibility that reinstatement would not take place. In response to this, the court said that the insured's intention to reinstate needs to be genuine, settled and there is a reasonable prospect of it happening.

The Court of Appeal was satisfied that it was open to the first instance judge to make a declaration that if Western Trading reinstated the Property, it would be entitled to an indemnity from the Insurer. As the judge had pointed out, a declaration gave the Insurer a measure of protection which an award of damages would not. If Western Trading did not reinstate, the Insurer would be spared the consequences of the declaration.

Whilst the case does not create any new law, it is useful to the extent that where the policy does not include an express reinstatement clause, prima facia the measure of indemnity is the cost of reinstatement where the insured is obliged to replace the lost property, at least where there is a genuine intention to replace. Where the insured is the owner of the property, and is not obliged to reinstate or repair, the measure of the indemnity is the value of the property to the insured at the time of the peril. However, the requirement on an insured to begin to reinstate cannot be said to arise until the insurer has confirmed that it will indemnify the insured. Similarly, it will be open to the court to make a declaration that if the insured reinstates the property, it will be entitled to an indemnity from insurers for the cost of reinstatement.



Zurich Insurance PLC v MacCaferri Ltd [2016]

Condition precedent to policy liability

The Court of Appeal have found against Zurich, having rejected their interpretation of a condition precedent to liability, which required the insured to give of notice "as soon as possible after the occurrence of an event likely to give rise to a claim". The Insurer had argued that notice had to be given when the Insured learned of the event and realised (or ought to have realised) that it was likely to give rise to a claim. The Court of Appeal set-out the correct test and said that there was no event to be notified, unless it was likely to give rise to a claim at the time it occurred, based on an objective assessment taking into account the actual knowledge of the insured. The policy condition did not require the Insured to undertake a "rolling assessment" of the likelihood that a claim would result from the event.

The Insured hired out a "giant stapler" to a builder's merchant who in turn hired it out to a building contractor. On 22 September 2011, an employee of the contractor was seriously injured by a clip fired from the gun when he attempted to move it. The Insured was informed of the accident on 28 September 2011, but the first instance judge decided that on that date, it was no more than a possibility that the gun was to blame. The employee began proceedings against the building contractor in summer 2012 and the Insured was brought into those proceedings in July 2013. It was at that point that the Insured notified its Public Liability Insurer, Zurich, of the claim. Insurers refused an indemnity on 25 September 2013, based on the following condition precedent to liability:

> The Insured shall give notice in writing to the Insurer as soon as possible after the occurrence of any event likely to give rise to a claim with full particulars thereof...

Insurers submitted that the effect of the phrase "as soon as possible" meant both that notice had to be given within that period after the event and that the Insured had to give notice when it could with reasonable diligence have discovered that the event was likely to give rise to a claim - the duty to notify arose when its state of knowledge was such that it could notify. Zurich argued that this interpretation was supported by the obligation to give full particulars, which implied a duty of inquiry.

MacCaferri submitted that the condition could only apply if there was the occurrence of an event which had the characteristic that it was likely to give rise to a claim at the time. The phrase "as soon as possible" could do no more than specify how soon after the event notice had to be given, yet Insurers' contentions required it to do "double duty".

The Court of Appeal was not persuaded by the Insurers' interpretation and was critical of the wording. Clearer words would be needed to apply a "rolling assessment", if that was expected of the Insured. The court also relied on previous authority, which concluded that the time for assessing whether an insured must notify an occurrence as one likely to give rise to a claim, is immediately after it occurred.

Whilst the decision applied to a Public Liability Policy, Conditions precedent to liability are found across many different lines of business, including property insurance. Insurers are always keen for insureds to notify claims "as soon as possible" to allow prompt investigation, reserving and settlement. Insurers' position can be prejudiced by late notification of a claim and a court will usually consider this as part of their decision. The key is to make it abundantly clear to Insureds (and brokers) exactly when a claim (event) should be notified and give guidance where necessary.

Commercial Property Insurance Fraudster Prosecuted

Mr Sunny Kapoor of Northolt, Middlesex, is the owner of Sunny News Off-License and submitted a claim to his property insurer, AXA. He claimed that the shop's shelving units had collapsed, in his newly opened store. As a result of the alleged incident, Mr Kapoor claimed losses due to damaged bottles of spirits, wine and beer, as well as fixtures and fittings. The insurance claim totalled £17,000.

AXA's suspicions, and concerns about the legitimacy of the claim, began when the loss adjuster found in Mr Kapoor's possession seemingly fabricated documents relating to the shop repairs. Mr Kapoor was then unable to provide the loss adjuster with receipts for the damaged alcohol and suggested he had disposed of the damaged items, prior to the adjuster's visit. In combination, it is unsurprising that AXA quickly identified the claim as fraudulent in nature.

Mr Kapoor was subsequently arrested and charged by the City of London Police, Insurance Fraud Enforcement Department (IFED), with fraud by false representation. He pleaded guilty to the charge and was handed a six month suspended sentence and fined £1,500 at the Old Bailey in October.

The prosecution is a good example of a collaborative approach to combating insurance fraud, and the support of the judiciary to prosecute fraudsters.

Key findings

The insurance claim totalled

£17,000

guilty to the charge and was handed a

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