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Public Liability Coverage for Environmental Liabilities - a New Era of "Responsibility" for Insurers?

Introduction

Environmental pollution can give rise to many different types of financial liabilities for businesses that are responsible for that pollution. These include (a) the costs of cleaning up contaminated site(s) and groundwater as a result of statutory enforcement action by the authorities, (b) the costs of proactively cleaning up contamination under an apprehension that government or private party actions will follow unless the responsible insured performs the cleanup itself, (c) reimbursement payments to the authorities that have cleaned up the site(s), and (d) private party tort suits for damages to property harmed by pollution. In each case, the business will be concerned to know whether its insurers will pay out.

Businesses' concerns have been heightened by the introduction on 1 March this year of the Environmental Damage (Prevention and Remediation) Regulations 2009, which have brought into force the EU Environmental Liability Directive and extend environmental liabilities in certain respects.

The ability of a business to recover from its insurers will depend on the nature and wording of its policies. There are a number of products available that provide specific environmental coverage, but a company may not always have this type of cover: the focus then shifts to its general public liability ("PL") policy. This policy may have specific exclusions or limitations in relation to environmental liabilities, but in many cases PL policies will potentially provide cover.

Since 2006, the widely publicised High Court decision in *Bartoline v. Royal and Sun Alliance* [2006] EWHC 3598 (QB), which adopted a narrow definition of the scope of insured "damages" under certain PL policies, has raised questions for businesses seeking payment from their public liability insurers for environmental liabilities by restricting the meaning of "damages" in a PL policy. However, the reasoning of the Court of Appeal in the recent case of *Bedfordshire Police Authority v. Constable* [2009] EWCA Civ 64 offers a more practical construction of PL policies that may well herald a broader recognition of coverage for pollution-related costs.

The Bartoline case

Bartoline was a manufacturer and packer of adhesives. A fire occurred at its premises which led to an escape of pollutants which subsequently entered a nearby river. Pursuant to its powers under the Water Resources Act 1991 (the "WRA") the Environment Agency carried out emergency works and served notice on Bartoline - requiring it to: (i) remove the escaped pollutants; (ii) ensure that no further pollutants escaped; and (iii) reimburse the Environment Agency for its expenses in performing emergency works. Bartoline duly reimbursed the Agency and incurred its

own costs complying with the Agency's notice. It then sought to recover the amounts that it had paid out from its insurers.

Bartoline's PL policy indemnified it against "legal liability for damages". Judge Hegarty QC considered whether the costs incurred by Bartoline in relation to the property of third parties constituted "damages". The parties had accepted that Bartoline could not recover in respect of remedial work performed solely to its own property which did not address contaminated groundwater or adjacent properties. This followed the earlier case of *Yorkshire Water Services v Sun Alliance* [1997] 2 Lloyd's Rep 21 in which the Court of Appeal held that a landowner could not recover from his insurer the costs of mitigating expenditure addressing contamination solely on his own land.

The Judge concluded that Bartoline's liabilities to the Environment Agency did not amount to a liability for damages. The Judge held that the PL policy was only intended to confer an indemnity for legal liability for damages in respect of certain tortious claims, whereas Bartoline's liability to the Agency was a statutory liability in debt. Even if it were possible to interpret the policy so as to cover statutory liability that was co-extensive with tortious liability, Bartoline's liability under the WRA was too different in nature and scope for this interpretation to be applied.

The Judge relied upon a line of marine insurance cases in which the nature of "damages" was at issue in reaching his decision on the meaning of damages. After completing his review, he went on to state that the "essential purpose of [PL] policies is to provide an indemnity in respect of certain types of tortious liability."

As regards the nature of Bartoline's liabilities, the Judge held that the WRA conferred on the Environment Agency a right to recover a liquidated sum or sums representing the actual cost of the works and operations which it had carried out in accordance with its statutory powers, both where it had carried out work itself and where a polluter was in breach of a notice to carry out works. Hence the Agency could take proceedings against Bartoline to recover the sums in question as a debt, and Bartoline's liabilities were thus in the nature of a debt rather than in the nature of damages and were not covered by the PL policy.

The Bedfordshire Case

The Bedfordshire case resulted from a riot which took place at Yarls Wood Detention Centre in 2002. The owner of the detention centre sought to recover the cost of repairing the damage to its property from the Bedfordshire Police Authority pursuant to the terms of the Riot (Damages) Act 1886 (the "1886 Act"). The 1886 Act obliges a police authority to compensate those who have suffered certain types of property damage during the course of a riot. The Police Authority's PL policy indemnified it against sums it was "legally liable to pay as damages". Although the Police Authority contested liability to the owners of the detention centre, it made a claim on its insurers in relation to its potential liabilities.

As in the *Bartoline* case, the court was called upon to determine whether the obligations to make payments pursuant to a statute were in the nature of "damages".

The High Court Decision

At first instance, the Judge, Walker, J, found that no reasoned thought had been applied by the drafters of the policy in using the word "damages" in the indemnification clause; and that it was therefore inappropriate to apply the wording "liable to pay as damages" in its narrow, technical sense. By taking this approach the judge distinguished the *Bartoline* case, which had considered the term "damages" in its technical sense. Walker J held that, applying the non-technical interpretation of "damages" the Police Authority's PL cover extended to the liabilities it incurred under the 1886 Act. In reaching this conclusion, the Judge was influenced by his finding that a police authority and its insurer would have every reason to expect that liabilities

incurred under the 1886 Act would fall within PL cover when arranging that cover.

Walker J also considered how the policy would respond on a technical application of the terms of the policy, and held that, in the specific context of the 1886 Act, payments made under that Act were in the nature of damages and that the Police Authority could recover from its insurer.

The Court of Appeal Decision

The Court of Appeal upheld the first instance judgment. It confirmed that the Police Authority's liabilities under the 1886 Act were in the nature of damages, but looked at the issue more widely than had the first instance judge.

In coming to its decision, the court held that a policyholder will be liable to pay damages if the sums for which it is alleged to be liable are due to be paid by reason of a *"responsibility"* owed by the policyholder. In respect of payments that might be made by the Police Authority to the owners of the detention centre, the court had regard to the responsibility imposed on the police to maintain "law and order". Longmore, J, giving the main judgment of the court, stated that "once one appreciates that the reason for the 1886 Act placing the burden of paying compensation to the victims of riot damage on the police authority is that the police are responsible for law and order and that they are (notionally) in breach of that responsibility, it seems to me, as an English lawyer, that the compensation payable is a sum which the police authority is 'liable to pay as damages'".

The court sought to explain the *Yorkshire Water* and *Bartoline* cases against the background of the concept of responsibility: it said that, in *Yorkshire Water,* the landowner could not be responsible to himself to repair his property and, in *Bartoline*, the sums due by Bartoline were debts due under a statute, not damages.

Comment

The Court of Appeal's decision appears to herald a new approach to the manner in which the courts will determine whether a particular payment is, or is not, in the nature of "damages" for the purposes of a PL policy. There is now scope for revisiting the recoverability from PL insurers of payments made pursuant to environmental statutes, if it can be said that a statute imposes a legal responsibility on the policyholder concerned to rectify or abate pollution.

In the field of environmental insurance coverage, it is arguable that the *Bartoline* case has been superseded, and indeed may have been wrongly decided, even though the Court of Appeal in *Bedfordshire* chose to distinguish the case, rather than expressly overrule it. There is nothing in the judgment of the Court of Appeal in the *Bedfordshire* case to suggest that the court analysed in detail the nature of the responsibility imposed on Bartoline by the WRA. It is arguable that, if it had done so, it would have had difficulty in reconciling its "responsibility" test with the finding that the payments to the Environment Agency were in the nature of a debt rather than a legal liability to rectify the effects of pollution on the environmenta and public health. The WRA arguably created a responsibility to avoid polluting waterways and to compensate the Environment Agency for work carried out by the latter, so that payments made in breach of such responsibilities would be in the nature of damages.

Turning to other environmental protection legislation, it is at least arguable in relation to the new Environmental Damage Regulations, for example, that they impose various legal "responsibilities" on businesses. These include, at a minimum, the responsibility to prevent environmental damage and, should such damage occur, to remediate the damage and/or to pay the costs of the Environment Agency if it remediates the damage. Such remediation expenses would therefore be in the nature of damages and

a standard PL policy ought to respond to a claim in respect of those expenses, subject, of course, to any exclusions.

Likewise, although Part II of the Environmental Pollution Act 1990 (the "EPA") does not impose an express responsibility on a business to avoid causing environmental damage, as such, the statute arguably makes businesses responsible for avoiding pollution to their property and that of others by imposing a liability on them to pay clean up costs on service of a notice to clean up, and to reimburse the Environment Agency if it has had to clean up the polluted property.

Although the scope of the *Bedfordshire* decision is likely to need to be tested in the courts, policyholders that do not have specialist environmental insurance policies in place may have stronger grounds for invoking coverage for pollution cleanup costs under their PL policies following the *Bedfordshire* decision.

If you have any questions concerning the material discussed here, please contact the following members of our London insurance practice group:

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