LLOYD'S LAW REPORTS

Editor:
Miss M. M. D'SOUZA, LL.B.
of the Middle Temple, Barrister

Consulting Editor:
G. M. HALL
of the Middle Temple, Barrister

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CASES JUDICIALLY CONSIDERED

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COURT OF APPEAL

July 26, 27 and 28, 1976

COMMERCIAL UNION ASSURANCE CO. LTD. v. HAYDEN

Before Lord Justice CAIRNS, Lord Justice STEPHENSON and Lord Justice LAWTON

Insurance (Public Liability) — Double insurance — Contribution — Public liability policies effected with insurance company and with Lloyd's underwriters — Policies concurrent — No pro rata average contribution — Settlement by insurance company of assured's claim under policy — Claim for contribution from Lloyd's underwriters made by insurance company — Whether "maximum liability" approach or "independent liability" approach applicable.

C. effected a public liability policy with the plaintiff insurance company with a limit of £100,000 in respect of any one accident. A policy which contained a public liability section was also issued by the defendant, a representative Lloyd's underwriter, the sum insured being £10,000. Each policy contained a clause stating that if at the time of any claim arising from it there should be any other insurance covering the same risk, the insurers would not be liable for more than a rateable proportion of it. Neither policy contained a pro rata average condition. P. suffered an injury on C.'s premises. His claim of £4425.45 was settled by the plaintiffs who claimed a contribution from the defendant on the "independent liability" approach i.e. on the basis that the contribution should be calculated in accordance with what would have been the respective liabilities of the insurers towards C. if each had been the sole insurer. They contended that since the claim would have been met by either insurer in full, they were entitled to a contribution of one half of C.'s claim i.e. £2212.72. The defendant, however, maintained that the "maximum liability" approach should be adopted i.e. the contribution should be calculated in proportion to the limits of the respective policies i.e. the proportion of 10 to 1. On this basis he was liable only for 1/11th of C.'s claim i.e. £402.31.

———*Held*, by Q.B. (DONALDSON, J.), that the "maximum liability" approach should be adopted.

Judgment for the plaintiffs.

On appeal by the plaintiffs:

———*Held*, by C.A. (CAIRNS, STEPHENSON and LAWTON, L.JJ.), that (1) there was no authority binding on the Court and there were no decided cases which indicated a clear preference for one basis over the other (*see* p. 12, col. 1; p. 14, col. 2);

(2) the issue was one of construction and was equally capable of bearing either suggested meaning (*see* p. 12, col. 1); but the more likely meaning to be intended by reasonable business men was the independent liability basis which was more realistic in its results (*see* p. 12, col. 2; p. 13, col. 1; p. 15, col. 1);

(3) the obvious purpose of having a limit of liability was to protect the insurers from the effect of exceptionally large claims and it appeared artificial to use the limits under the policies to adjust liability in respect of claims which were within the limits of either policy (*see* p. 12, col. 1);

(4) where there were two insurers with differing upper limits for claims the inference was that they were both accepting the same level of risk up to the lower of the limits and a "rateable satisfaction" would be an equal division of liability up to the lower limits (*see* p. 16, col. 2).

Appeal allowed. *Leave to appeal to House of Lords granted.*

The following cases were referred to in the judgments:

American Surety Co. of New York v. Wrightson, (1910) 16 Com. Cas. 37;

Citizens Mutual Automobile Insurance Co. v. Firemen's Fund Insurance Co., (1964) 234 Fed. Supp. 931;

Dering v. Winchelsea, (1787) 1 Cox Eq. Cas. 318;

Ellesmere Brewery Co. v. Cooper, [1896] 1 Q.B. 75;

Godin v. The London Assurance Corporation, (1758) 1 Wm. Bl., 103; (1758) 1 Burr. 489;

Home Insurance Co. v. Baltimore Warehouse Co., (1896) 93 U.S. 527;

Industrial Indemnity Co. v. Continental Casualty Co., (1967) 375 Fed. Rep. (2nd) 183;

Newby v. Reed, (1763) 1 Wm. Bl. 417;

North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co., (1877) 5 Ch. D. 569;

Oregon Automobile Insurance Co. v. United States Fidelity and Guarantee Co. (1952) 195 Fed. Rep. (2nd) 958;

Pendlebury v. Walker, (1841) 4Y & C. Ex. 424;

Scottish Heritable Securities Association v. Northern Insurance Co., (1883) 11 Sess. Cas. R. 287;

Sickness and Accident Insurance Association v. General Accident Assurance Corp., (1892) Sess. Cas. R. 977.

This was an appeal by the plaintiffs, Commercial Union Assurance Co. Ltd. from the decision of Mr. Justice Donaldson given in favour of the defendant, Mr. Nicholas Charles Hayden, a representative Lloyd's underwriter and holding in effect that the maximum liability basis applied to the question of how liability between the plaintiffs and defendant should be apportioned where both of them had insured against the same risk and there was a clause in each policy providing that in such circumstances the insurer shall not be liable for more than its rateable proportion of any claim.

Mr. Justice DONALDSON delivered the following reserved judgment on July 28, 1975: On May 26, 1971, Mr. Frederick Parsons sustained an injury on the premises of Messrs. George Cartwright. He put forward a claim for damages which was settled for £4425.45p. including costs. Messrs. Cartwright had prudently taken the precaution of insuring against such a liability. Indeed, whether by accident or by design, they had two insurance policies which applied. The first was with Lloyd's and was in their common form public liability policy with a limit of £10,000 any one accident. The second was with the Commercial Union. This took the form of their "Compact" policy which really consists of a selection of standard policies made up to suit the needs of the assured. Cartwrights chose the fire, money and public liability sections. I am only concerned with the latter, which was limited to £100,000.

Each policy contained a rateable proportion clause and it is the meaning of those clauses and the rights of the insurers inter se which have given rise to this action. As, on any view, Cartwrights could recover the whole of their loss from the two insurers taken together, Lloyd's and the Commercial Union, acting in accordance with the best traditions of the London Market, have made sure that Cartwrights are not troubled with this matter. By agreement, the Commercial Union met the claim in full, without prejudice to their right to claim contribution from Lloyd's. Lloyd's say that that contribution should be calculated in proportion to the limits of the respective policies, i.e., 10:1. Accordingly they admit liability for, and have paid the Commercial Union, 1/11th of Cartwrights' claim or £402.31. This I will call the "maximum liability" approach. The Commercial Union, for their part say that the contribution should be calculated in accordance with what would have been the respective liabilities of the insurers to Cartwrights if each had been the sole insurer on the risk. As the claim would, on that hypothesis, have been met by either insurer in full, the Commercial Union claim an additional contribution of £1810.41, bringing their recoveries from Lloyd's up to one half of Cartwrights' claim. This I will call the "independent liability" approach.

The sum in dispute is of no great consequence to either party, but the principles involved have only once been considered by an English Court.

The rateable proportion clauses are in the following terms:—

Commercial Union.

If at the time of any claim arising under this Section there shall be any other insurance covering the same risk

or any part thereof the Company shall not be liable for more than its ratable proportion thereof.

Lloyd's.

If any claim covered by this Policy is also covered in whole or in part by any other insurance, the liability of the Underwriters shall be limited to their rateable proportion of such claim.

The minor differences in wording and the ancient and modern versions of spelling are not material and the clauses can be treated as identical. Such clauses undoubtedly have the effect of restricting the right of the assured to look to one insurer only should a claim arise, but the average assured would certainly be surprised to be told it.

It has been said that the object of this clause is to *compel* contribution between insurers (see Bunyon—Law of Fire Insurance, p. 294) and clearly it is right that each should bear their share of the loss, irrespective of whether the assured looks to one or the other or to both for indemnity. But surely in modern times a rateable proportion clause is unnecessary to achieve this result, for there is an equitable right of contribution in all circumstances in which the clause would apply and little difficulty in finding or obtaining payment from co-insurers. This right, incidentally, is different from a subrogation right which does not exist as between insurers in a case of double insurance: see *Austin v. Zurich General Accident and Liability Insurance Co. Ltd.*, (1945) 78 Ll.L.Rep. 185; [1945] 1 K.B. 250; but it appears that, in circumstances different from the present, the clause has another effect, namely, that if the assured has cover with insurer "A" and subsequently, from an abundance of caution or forgetfulness, effects the like cover with insurer "B", insurer "A's" liability is reduced even if the assured can recover nothing from insurer "B" because of a breach of condition or because insurer "B" is insolvent. Bearing in mind that insurer "A" necessarily knows nothing of the cover to be granted later by insurer "B" and that the premium charged by insurer "A" takes no account of the later insurance, I find this suggested result surprising. Suffice it to say that insofar as this proposition rests upon the authority of *Weddell v. Road Transport*, (1931) 41 Ll.L.Rep. 69; [1932] 2 K.B. 563; the facts there were very special in that the assured had, by his own inaction after the loss, defeated the right of insurer "A" to claim contribution from the insurer "B".

However, as I have said, on the facts of the present case, if Cartwrights had sued both the insurers, they would have recovered £4425.45 in all and the proportionate liability of the parties would have reflected their equitable right of contribution inter se. In other words, the phrase "rateable proportion" in the clause means that proportion which would be borne by any one insurerer if the assured had been entitled to look, and had looked, to him alone and that insurer had exercised his right to claim equitable contribution from any other insurers.

In *American Surety Co. of New York v. Wrightson*, (1910) 16 Com. Cas. 37, Lord Sumner (then Mr. Justice Hamilton) after reviewing and dismissing the authorities to which he had been referred, said that insurers' rights to contribution depended "upon natural justice and upon principles of equity". Since neither can operate in a vacuum, I propose to summarize the materials which have been placed before me.

The text books. I have been referred to Bunyon's Law of Fire Insurance (1913), Baker Welford—Law Relating to Accident Insurance (2nd ed., 1932), Welford and Otter Barry—Law Relating to Fire Insurance (4th ed., 1948), MacGillivray on Insurance Law (5th ed., 1961), Ivamy—General Principles of Insurance Law (2nd ed., 1970), Colinvaux—The Law of Insurance (3rd ed. (1970)) and Minion.

From these works, I gather the following information:

(a) Double insurance with a consequent right to contribution, or the need to apply a rateable contribution clause, can arise in many different circumstances. The principal classes of case appear to be the following:

(i) *Concurrent policies insuring property.* Two or more policies apply to the same property or groups of property, each group being insured separately but not necessarily for the same amounts.

(ii) *Non-concurrent policies insuring property.* Two or more policies cover the property affected by a peril insured against but also individually cover property which is not insured by both or all of the policies. The sums insured under the policies may be lump sums covering all the

property or may be allocated over specific items. In either case, the sums may differ.

(iii) *Concurrent and non-concurrent policies insuring liabilities.*

(iv) *Policies containing "pro rata average" conditions.* These provide that if the subject matter is worth more than the sum insured, i.e., there is under-insurance, the liability of the insurer shall be reduced in proportion to the under insurance. Policies containing these clauses may be either concurrent or non-concurrent.

(b) The use of the word "rateable" in the standard contribution clauses merely serves to give apparent clarity to a situation which is obscure in the extreme.

(c) For very many years, the problems have been recognised and differing views expressed as to the correct solution, but meanwhile the British market has resolved the matter domestically by agreement between insurers. So far as property insurance is concerned, the basis has been that:

(i) Unless the assured has been guilty of some fault (as in the *Austin* case) and, subject always to the application of any pro rata average conditions, the assured is entitled to be fully indemnified up to the limits of the policies. Accordingly, if a particular method of calculating contribution would give the assured less than a full indemnity, it is modified, the insurers bearing the loss which would otherwise fall on the assured in the like proportion as they bear the remainder of the loss.

(ii) Where concurrent policies on property without pro rata average conditions are involved, the practice is to apportion contribution using the maximum liability approach, i.e., to treat each insurer as having underwritten that proportion of the loss which the sum insured by his policy bears to the aggregate of the sums insured by all the policies.

(iii) Non-concurrent policies on property without pro rata average conditions seem to be treated in the same way as concurrent policies, but there is a complication where the peril affects more than subject matter and the double insurance may not be identical for all; e.g., where there is a loss of property "X" and property "Y" and "X" has been insured by "A" and "B" and "Y" by "B" and "C". Here the practice seems to be to start with the largest loss (X) and, having worked out the contribution as if it was the only loss, to do the same calculation in respect of "Y" using the sums insured *less* the contribution due in respect of "X". The same calculation is then done taking "Y" first. Thereafter, a mean of the results is used for the purpose of calculating actual contribution, provided that this gives the assured his fullest entitlement.

(iv) Other methods of apportionment have been suggested and are discussed in MacGillivray at pars. 1866 and 1867.

(v) In the case of domestic property, where insurances commonly cover different interests (e.g., that of mortgagor and of mortgagee) insurers, with a cheerful disregard for the decision in *North British and Mercantile Insurance Co. v. London, Liverpool and Globe Insurance Co.*, (1877) 5 Ch.D. 569 treat all the insurances as covering the same interests.

(vi) Where policies contain a pro rata average clause, contribution is based upon the independent liability approach.

(d) There appears to be no settled basis for contribution under liability, as contrasted with property, insurances.

The North American Cases. I have been referred to two Canadian cases: *McCausland v. Quebec Fire Insurance Co.*, (1894) 25 Ont.L.R. 330, and *Eacrett v. Gore District Mutual Fire Insurance Co.*, (1903) 60 Ont.L.R. 592, and to four United States cases: *Home Insurance Co. v. Baltimore Warehouse Co.* (1876) 93 U.S.R. S.C. 527, *Oregon Auto Insurance Co. v. United States Fidelity and Guarantee Co.* (1952) 195 Fed. Rep. (2nd) 958, *Citizens' Mutual Automobile Insurance Company v. Firemen's Fund Insurance Co.*, (1964) 234 Fed. Supp. 931, and *Industrial Indemnity Co. v. Continental Casualty Co.*, (1967) 375 Fed. Rep. (2nd) 183. From these cases it appears that the maximum liability approach is adopted universally in North