

Interpreting exclusion clauses in insurance contracts

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The Crowden v QBE Insurance decision

1. The modern approach to construing commercial contracts applies no special rules to exclusion clauses. They are not to be read strictly against the person who drafted them, rather the objective is to discover what a reasonable person would have understood them to mean: Crowden & Anor v QBE Insurance (Europe) Ltd [2017] EWHC 2597 (Comm) (19 October 2017).

3PB's Analysis

2. **The Facts.** The Claimants sued their former financial advisors after a recommended investment, linked to Lehman Brothers' securities, failed through insolvency. The Claimants secured judgment against those advisors, who became insolvent as a result.

3. In an action against the advisors' insurers brought pursuant to the (now repealed) Third Parties (Rights against Insurers) Act 1930, the insurers sought to avoid liability relying on an exclusion clause, which stated:

"This Insured section excludes and does not cover any claims, liability, loss, costs or expenses arising out of or relating directly or indirectly to the insolvency or bankruptcy of the Insured or any insurance company, building society, bank, investment manager, stockbroker, investment intermediary, or any other business, firm or company with whom the Insured has arranged directly or indirectly any insurance, investments or deposits..."

4. **The arguments.** Perhaps understandably, and at first blush rather compellingly, the Claimant argued that this exclusion clause was not designed to avoid liability for negligent acts, and was limited only to those circumstances where the liability arose from non-negligent acts or omissions. In addition, the Claimants argued that the exclusion clause related only to the

investment of the insured's own funds, not investments made on behalf of its clients. Finally, the Claimant argued that the clause itself should be narrowly construed, and taken not "to give rise to an arbitrary division between advice given in respect of different forms of investment". This later basis arising from the obvious point that insolvency is likely to be the only form of loss an investor will suffer under certain instruments such as corporate bonds.

5. As part of the "construction" argument, the Claimants reasoned that "insolvency" must mean nothing less than formal insolvency, such as liquidation.
6. In so arguing, the Claimants maintained that an insurance exclusion had to be clear and unambiguous and that the principles governing the construction of exemption provisions in ordinary contracts apply to insurance exclusions, and the principles in Canada Steamship Lines Ltd v The King [1952] AC 192 apply to such clauses.
7. **The Judgment.** The Judge disagreed on every point. Importantly, despite the "safety net" provisions of a professional's insurance policy, the Court approached the contract not from the starting point that the note was designed to protect the client from bad advice from an insolvent advisor, but on the basis that the contract of insurance was one step removed from primary liability, and therefore it was quite understandable that the insurer would impose strict bounds as to the scope of its liability. An insurer must be freer, not less free than the insured, to exclude liability for areas into which it did not wish to provide cover. The Judge decided that because the insurance policy supplements primary liability, its effect is to increase, by however small a degree, protection, and not limit rights which would otherwise exist but for the exclusion clause.
8. The Court went on to determine whether the insurance contract generally, or its "exclusions clauses" (if they can still be called that given the



above) should be vigorously interpreted *contra proferentem* as may have been suggested in Cornish v Accident Insurance Co Ltd (1889) 23 QBD 453, 456 and in Blackburn Rovers Football & Athletic Club plc v Avon Insurance plc [2005] EWCA Civ 423; [2005] Lloyd's Rep IR 447.

9. No, the Court found. The modern approach is to be found in Impact Funding Solutions Ltd v Barrington Support Services Ltd [2016] UKSC 57; [2017] AC 73, which prefers not to overlay any special rules of construction other than those to be applied to any commercial agreement, that is “*what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean*” (see Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 110).

Impact of the Decision

10. This is clear, albeit first instance, guidance on the construction of insurance contracts, and their exclusions clauses in particular. The claim was for a relatively modest value, and it might well be that this summary judgment brings to an end this litigation. It will be interesting to see if the Court of Appeal adopts the clear, straightforward reasoning of this Judge in this

case; I suspect it will carry significant weight in the High Court and inferior courts of first instance. Its judgment on a wide range of construction issues brings a compelling contractual orthodoxy to insurance contracts.

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This article intends to state the law at the date indicated above. Although every effort is made to ensure accuracy, this article is not a substitute for legal advice.

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