Insurers’ right to reimbursement of advanced Defence Costs

The High Court’s decision in *Oldham v QBE Insurance (Europe) Ltd*¹ provides mixed news for Insurers. The judgment confirms that (i) Insurers have the right to reimbursement of previously advanced defence costs where ultimately no coverage is found despite there being no express right to reimbursement in the policy but (ii) that the trigger requiring the advancement of defence costs is easy for the Insured to pull.

**Background**

The Insured, an accountant, faced third party proceedings arising out of his professional work. His professional indemnity insurance policy was subject to the benefit of the minimum indemnity requirements (the “Minimum Terms”) of the Institute of Chartered Accountants in England and Wales.

QBE, his insurers, disputed that their policy covered the claim and the resultant coverage dispute between QBE and the Insured was referred to arbitration per clause C10.1 of the Minimum Terms. Pursuant to its obligation under clause C10.2 of the Minimum Terms, QBE funded the Insured’s defence costs for the claim against him pending resolution of the coverage dispute.

The coverage arbitrator subsequently held that the Insured was not covered by the QBE policy on the basis that the claim against him had been first made prior to QBE’s policy period and that QBE was entitled to reimbursement of the defence costs which it had advanced, some £43,000 - despite there being no express right to reimbursement in the QBE policy or the Minimum Terms.

On appeal to the High Court, the Insured argued that the QBE policy and/or the Minimum Terms did not require repayment of the defence costs.

¹ 01.12.2017 - [2017] EWHC 3045 (Comm)
Judgment

The High Court confirmed QBE’s right to reimbursement of the defence costs.

The starting point for the Court was that the “liability of insurers for defence costs arises only if and to the extent that there is coverage under the policy”. If the Insured’s arguments were correct, clause C10.2 (which was not on its face intended to be an insuring clause) would have the effect of altering the scope of cover, to provide coverage for defence costs for uncovered claims incurred provided those defence costs were incurred while coverage was still in dispute. This would confer an entitlement on an Insured to create a right to coverage merely by asserting (however spurious) a right to coverage.

Applying the usual rules of contract interpretation, the natural conclusion of the Minimum Terms drafting was that the advancement of defence costs was provisional and subject to repayment in the event that the coverage dispute was resolved in favour of the Insurer.

Commentary

The case confirms that Insurers have a right to repayment of previously advanced defence costs where coverage under the policy is held not to exist and despite there being no express right to reimbursement. The current version of the Minimum Terms (1 May 2017) is identically drafted on these substantive issues to the 2014 version reviewed by the Court in this case. Therefore, the decision provides good law that can be used going forward both for ICAEW Minimum Terms policies specifically and (likely) any other policies that require advancement of defence costs pending resolution of a policy dispute but which do not include an express reimbursement clause.

The judgment also highlights that an Insured “…need only assert a right to coverage, however, ill founded” which then engages the Minimum Terms policy arbitration dispute resolution process which in turn triggers the advancement of defence cost obligation². The coverage dispute does not have to meet any minimum threshold of merit. This is likely to be a concern to Insurers given the time it can take to win any coverage dispute in arbitration and the potential impecuniosity of the Insured when reimbursement finally becomes due.

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² Per Halki Shipping Corp v Sopex Oils Ltd [1998] 1 WLR 726

For further information please contact:

Stephen Reilly
Partner
T: +44 (0)20 7469 0419
E: s.reilly@beale-law.com

Amelia Hamilton
Trainee Solicitor
T: +44 (0)20 7469 0414
E: a.hamilton@beale-law.com

www.beale-law.com