Insurance
Case Law Update
Rosling King LLP

In an important decision for asset management companies and professional trustees, the Court of Appeal has provided useful guidance on interpretation of indemnities and excess clauses in the context of professional indemnity insurance, including the extent to which rights of subrogation may exist against a co-insured.

The Facts

The second Claimant, Mr Egerton-Vernon ("PEV"), was a personal trustee employed by Rathbone Trust Company Jersey Limited ("Rathbone Trustees") to provide professional services to trusts established by the late Jack Walker, a well-known industrialist and chairman of Blackburn Rovers plc (the "Trust"). During PEV's employment, Rathbone Brothers plc ("Rathbone") and Rathbone Trustees agreed to indemnify PEV for liabilities arising from the performance of his services (the "Rathbone Indemnity"). Subsequently, PEV stopped working full-time and became a consultant for Rathbone Trustees pursuant to an agreement containing a clause indemnifying PEV with respect to certain liabilities arising from his services as trustee.

Rathbone had purchased £50 million of professional indemnity insurance ("PII") through AIG and the Defendant excess insurers. The policy included a clause which provided that the insurance cover operated in excess of any "other insurance and indemnification available from other sources" (the "Excess Clause").

Beneficiaries of the Trust brought proceedings against PEV alleging that poor investment decisions had been made in breach of professional and fiduciary duties. Rathbone and PEV brought proceedings against the excess insurers to establish cover in relation to the beneficiaries' claims.

At first instance, the Commercial Court held that: (i) the claim against PEV was covered by the excess insurers' policy; (ii) on a true construction of the Excess Clause, PEV was not obliged to claim under the Rathbone Indemnity in the first instance; and (iii) in the event of payment to PEV under the policy, the excess layer insurers could exercise a right of subrogation against Rathbone. Insurers appealed against decisions (i) and (ii) and Rathbone appealed against decision (iii).

The Decision

In summary, the Court of Appeal had to determine: (i) whether PEV had been covered by the PII policy when acting as a personal trustee, which depended on whether he could be regarded as a "paid employee…working under the direct control or supervision of an insured company"; (ii) whether due to the Excess Clause, PEV was required firstly to exhaust any other remedies he had, other than against the insurers; and (iii) whether the insurers, if they were liable to PEV, could be subrogated to his entitlement to take advantage of the Rathbone Indemnity.

Firstly, the Court of Appeal held that the policy did provide cover for PEV's liabilities arising from his conduct as a personal trustee of the Trust and/or as a consultant. It was noted that the provision of trustee services was a core part of Rathbone's business and there could be no doubt that insurers were undertaking to cover liabilities arising from the provision of those

services. Upon becoming a consultant, there had been no material change in PEV's relationship with Rathbone and it was clear that he continued to provide professional services on behalf of Rathbone, for purposes of coverage under the PII policy.

Secondly, the Court of Appeal held that the Excess Clause was not triggered by the Rathbone Indemnity. Employers frequently give indemnities to employees arising out of potential negligent conduct and it would negate the purpose of indemnity insurance to interpret a policy to exclude insurers from liability in such circumstances. It was decided that the parties would have reasonably intended that such a clause could only apply to another source of indemnity provided by an independent third party, and express wording would be required if an indemnity granted by a co-insured was to be the primary source of cover ahead of the PII policy.

Finally, the Court of Appeal reversed the first instance decision on rights of subrogation: concluding that excess insurers were not entitled to recover from Rathbone amounts paid to PEV, pursuant to the Rathbone Indemnity. Following a comprehensive review of relevant authorities, the Court of Appeal found that it was an implied term of the PII policy that insurers were not entitled to subrogate against a co-insured under the same policy. This interpretation was consistent with the commercial context in which PII cover had been purchased by Rathbone to protect both itself and those it insured against third party claims. The parties would reasonably have intended that the insurance would apply first in the event of such claims, with the indemnity granted by Rathbone to operate in excess of the insurance cover.

Conclusion

The judgment is welcome news for PII policyholders and particularly those involved with provision of professional services to clients operating in the wealth management sector. The case also highlights the importance of ensuring policy wordings are carefully drafted to avoid potential disputes in relation to the scope of cover and the order in which different forms of financial protection will apply.

For further information, please contact Georgina Squire or the Partner with whom you usually deal.