Mitsui Sumitomo Insurance Co (Europe) Ltd, Royal & Sun Alliance Insurance Plc & others –v- The Mayor's Office for Policing and Crime [20.05.2014]

Court of Appeal overturns Commercial Court decision in landmark ruling, holding that consequential losses are recoverable under the Riot (Damages) Act 1886, and upholds first instance finding that the attack on the Sony distribution warehouse in Enfield during the August 2011 riots was perpetrated by "*persons riotously and tumultuously assembled together*" within the meaning of the 1886 Act.

As was widely reported in the media, the Sony distribution warehouse was looted and set on fire on the night of Monday, 8 August 2011, during the widespread civil disorder and rioting which took place in London following the shooting of Mark Duggan. The attack was carried out by about 25 youths mostly from the nearby Enfield Island Village. They smashed their way into and looted the warehouse before throwing two petrol bombs, leaving the building to burn for almost ten days resulting in its total destruction. It was the largest ever arson in Europe.

The Mayor's Office for Policing and Crime ("MOPC") declined to compensate the claimants under the 1886 Act for property damage and business interruption losses. An action was commenced to recover almost £60million of indemnified losses by insurers with an interest in the warehouse, as well as £4million of uninsured losses suffered by the owners of stock held there.

Mr Justice Flaux decided at first instance that the attack fell within the scope of the 1886 Act so that insurers could, in principle, recover in respect of physical damage. However, he held that consequential loss was not compensable under the legislation.

Decision

The Court of Appeal dismissed the MOPC's appeal on the first issue and allowed insurers' cross-appeal on the second.

Consequential losses

The judges reviewed the genesis of the 1886 Act and its predecessor legislation. There was nothing in the 1886 Act to indicate that Parliament intended to deprive claimants of the right to compensation for losses consequent upon physical damage. Rejecting the MOPC's submissions, the wording of section 2(1) itself did not support the proposition that the losses sustained could not include consequential losses. Section 7 did not carry the argument any further as its purpose was merely to identify the types of claimants who could bring an action under the 1886 Act.

Equally, the 1886 Regulations should not be relied upon to interpret section 2(1) because the meaning of that section is not ambiguous. In general, courts should be cautious when having regard to regulations made under an Act as an aid to

construction and should be particularly slow to give any weight to regulations which have not been subject to any form of parliamentary scrutiny.

The bench did not find the Scottish decision in *Board of Managers of St Mary's Kenmure* [2012] to be of any help given that the Scottish legislation was sufficiently different from the 1886 Act.

"Riotously and tumultuously"

Having satisfied itself that the attack constituted a "riot", the Court of Appeal also had to decide whether the perpetrators had behaved "*tumultuously*" for the purposes of the 1886 Act. Unsurprisingly, it approved the definition given by Lyell J in *JW Dwyer Ltd v Metropolitan Police District Receiver* [1967]. Whether persons are "*riotously and tumultuously*" assembled is a factual assessment. It does not invite the question of whether the riot should have been noticeable to the police forces, which should or could have notionally responded to the threat.

The Court rejected the MOPC's central submission that the hallmark of a "*riotous and tumultuous*" assembly is confrontation. A riot can be committed in a private place; the location of the property affected is not decisive. Even though Lyell J had held in *Dwyer* that the term "*tumultuous*" connotes noise, it is not necessary for that noise to be audible outside the place where the assembly takes place.

Comment

This is a landmark decision which - for the first time in 128 years - clarifies that the compensation payable under the 1886 Act is not limited to physical damage. This is no doubt welcome news to the insurance industry as a whole. Insurers (and uninsured claimants) will now be able to recover BI losses suffered as a result of the August 2011 riots. However, whether each and every claim will be ultimately paid remains to be seen as police authorities are still entitled under the 1886 Act to "*fix*" an amount of compensation as appears to them to be "*just*", having regard to all the circumstances including the "*conduct*" of claimants as well as any "*precautions*" taken by them. What these terms mean in each case depends on the precise facts, which is likely to open the door to further litigation.

It is also expected that the government will initiate legislative changes in the light of this decision, seeking to limit the types of losses that are recoverable under the 1886 (or possibly a new) Act. This in turn may have a significant impact on the way in which riot insurance is priced, or made available, in Britain.

The judgment may also help insurers renew their efforts to pursue claims under the 1886 Act that were previously rejected on the basis that the riot damage occurred at a remote location, away from the main centre of civil disorder, or that the rioters did not generate sufficient noise to attract outside attention to their actions.

David Wilkinson and Ben Aram at Kennedys' London office acted for RSA, who insured the owners of the Sony distribution warehouse.