Same policy, different cover.

→ The English Court of Appeal has helped untangle the complexities caused by co-insurance in the construction industry.

THE LOSING STREAK IS OVER

English rugby wins... right to bring claim against contractor

WRITTEN BY ALEXANDER LYALL

Nearly 10 years on, English rugby finally has a victory related to the 2015 Rugby World Cup. In ***FM Conway Ltd v Rugby Football Union***,[1] a company contracted by the English Rugby Football Union (the RFU) for maintenance works at Twickenham tried to rely on the fact it was co-insured to prevent the RFU and the insurer from claiming damages. The English Court of Appeal (the Court) fended off the contractor's claims, finding that it lacked commercial sense to suggest that a party could avoid liability for its own defective work simply because it was co-insured.

As the Court notes, co-insurance in the construction industry is common and can potentially create difficulty. The decision provides useful commentary on how parties can work out who is being insured and for what.

1 *FM Conway Ltd v Rugby Football Union* [2023] EWCA Civ 418.

Background

In preparation for the 2015 Rugby World Cup, the RFU was tasked with ensuring England's selected stadiums were match fit. The biggest job was the durability of Twickenham. As part of the task, the RFU engaged Clark Smith Partnership Limited to design ductwork to support high voltage power cables throughout the stadium. The RFU then engaged the infrastructure services company FM Conway to install the ductwork.

A lineout of agreements

As the RFU engaged with FM Conway, a series of agreements was signed between the two.

The first was a letter of intent

(the **letter**). Two clauses were of particular relevance. Clause 3 stated that the intention of the parties is to sign a contract based upon the JCT Standard Building Contract Without Quantities 2011 (the **JCT contract**). This was important as the JCT contract contained an all-risks insurance policy. Meanwhile, clause 21 stated that the letter was to supersede any other instruction or agreement contained in other pieces of correspondence.

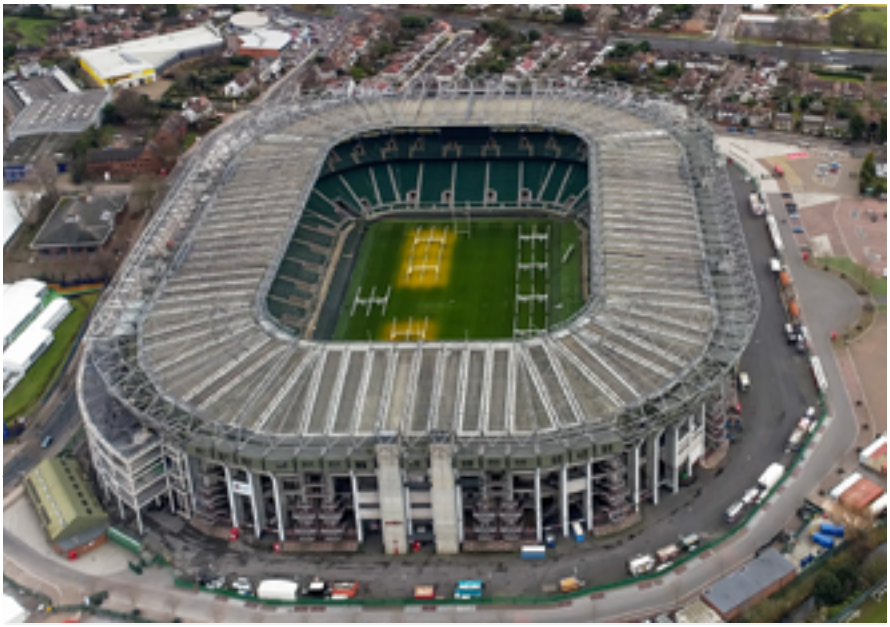
In this period, the RFU also arranged to be insured with Royal & Sun Alliance Limited (the **insurer**). The RFU and FM Conway had agreed that the RFU would procure insurance for FM Conway. This was successfully arranged and FM Conway joined the RFU on the insurance policy (the **policy**).

Clause 1(f) of the policy contained a term that waived subrogation rights. Under the doctrine of subrogation, an insurer can recover its loss by legally pursuing the party which caused the damage the insurer was bound to cover. Having waived this right, the policy would protect the RFU and FM Conway from being legally pursued by the insurer. However, as later clarified in the High Court and Court of Appeal, this applied only if they were not the cause of the damage covered.

Three months after the RFU arranged the insurance, the RFU and FM Conway signed the JCT contract.

FM Conway knocks the ball on

As the 2015 Rugby World Cup approached, water and debris were identified in the ducts of Twickenham. The cost of the various works to replace the faulty ducts went beyond £4 million and the RFU made a claim under the policy. The insurer paid out £3 million of this and consequently the RFU sought the final £1 million from FM Conway.



The insurer also considered that FM Conway was liable and used its subrogation rights against FM Conway to retrieve its loss. In turn, FM Conway began proceedings against the RFU and the insurer, arguing that it was co-insured and as a result the RFU could not claim damages against it, and the insurer could not pursue its subrogation rights.

The scope of this cover was in contention between the parties. The RFU and the insurer argued that their respective rights to claim damages had not been waived as FM Conway was not covered by the policy. The High Court agreed with this, and FM Conway appealed to the Court of Appeal.

Court of Appeal awards RFU and the insurer a penalty try

Firstly, the Court found no issue with identifying FM Conway as an insured party. The policy had identified three groups as *the Insured*, and two of these categories referred to contractors.

However, the crux of the matter was that, as Lord Justice Coulson put it, *the mere fact that A and B are insured under the same policy does not, by itself, mean that A and B are covered for the same loss or cannot make claims against one another.* Lord Justice Coulson acknowledged that it might seem odd that although FM Conway was a co-insured under the policy, its cover was different.[1]

1 *Happily*, Lord Justice Coulson reported, *the law provides a complete answer to this conundrum.*

With this in mind, a court must consider the intention of the parties and how that translated into the scope of cover. The Court addressed how this can be done.

Look to the underlying contract for consideration of authority and intention

The Court of Appeal agreed with the High Court that this insurance scheme should be considered a composite insurance policy; a method to untangle co-insurance issues first developed in *General Accident Fire and Life Assurance Corporation Limited & Anor v Midland Bank Limited*.[2] This meant each co-insured was to be treated as if they had their own policy. The underlying contract would then highlight the intention of the parties as to the scope of those policies. In *Gard Marine Energy Limited v China National Chartering Co Limited & Anor,*[3] which Lord Justice Coulson identified as the leading case on the matter, the underlying contract was held as being crucial in assessing this scope. If the intention of the underlying contract was for less coverage, then that will be given.

The importance of the JCT contract

FM Conway argued that the JCT contract was not as relevant as the policy, as the policy had been signed three months before the JCT contract. Lord Justice Coulson held that there was no principle in English law suggesting a contract not have retrospective impact in this way. This was especially true as the letter, signed at the beginning of their relationship, had explicitly instructed that a) the JCT contract was to work as their agreement; and b) that the letter, which affirmed the JCT contract, would supersede any other agreement made between the parties. In any event, the High Court was entitled to be interested in the subsequent JCT contract.

The waiver provision had been interpreted incorrectly by FM Conway

FM Conway argued that it could rely on clause 1(f) of the insurance policy. This was FM Conway's strongest and most direct argument, with Lord Justice Coulson accepting that it could fail every other point but win on this. However, in Lord Justice Coulson's view, this ran contrary to commercial common sense. It was its own errors which caused FM Conway to lose cover under the policy. It would therefore be an *extraordinary result* if FM Conway could then find cover because of this waiver. This would be getting cover through the back door. Lord Justice Coulson adopted the analysis taken in *National Oilwell v (UK) Ltd v Davy Offshore Ltd*.[4] In this decision, it was held that a waiver clause operates consistently with the commercial purpose of a contract and cannot be stretched to fit another goal.

Conclusion

While the Court's decision highlights the complexities of co-insurance, it also points to some clear principles. There is no question that parties can be under the same policy; but if the intention was for varying levels of cover, then that is what will be given. The Court has also reaffirmed common sense. If a party has caused the damage, and the policy says this removes its cover, then it cannot benefit from a waiver of subrogation. In other words – you break it, you buy it.

About the author

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2 *Accident Fire and Life Assurance Corporation Limited & Anor v Midland Bank Limited* [1940] 2KB 388.

3 *Gard Marine Energy Limited v China National Chartering Co Limited & Anor* [2017] UKSC 35, [2017] 1 WLR 1793.

4 *National Oilwell v (UK) Ltd v Davy Offshore Ltd* [1993] 2 Lloyd's Rep 582.