**31 July 2013**

**PRESS SUMMARY**

**Teal Assurance Company Limited (Appellant) v WR Berkley Insurance (Europe) Limited and another (Respondents) [2013] UKSC 57**
***On appeal from [2011] EWCA Civ 1570***

**JUSTICES**: Lord Neuberger (President), Lord Mance, Lord Clarke, Lord Sumption, Lord Toulson

## BACKGROUND TO THE APPEALS

This appeal concerns the order in which claims made by an insured exhaust layers of insurance cover under a programme of professional liability insurance.

Black and Veatch Corp (BV) is a firm of architects and engineers incorporated in Delaware, USA. BV purchased a programme of professional liability insurance containing various layers. The programme provided for a self-insured retention of US$10 million per occurrence and US$20 million in the aggregate, as well as for a deductible of US$100,000 per claim (or US$250,000 in the case of remedial work under a special endorsement).

Above the self-insured retention and deductible, BV had a primary layer of insurance cover underwritten by the insurer Lexington. This primary layer was for US$5 million per claim excess of the self-insured retention and deductible. The Lexington policy required BV to have paid the amount of the deductible and self-insured retention "prior to the Company indemnifying the Insured under the terms and conditions of this Policy".

Above this primary layer was a so-called 'PI tower' consisting of three differently-sized layers of excess insurance, providing in total a further US$55 million of cover. The excess policies covering these layers were underwritten by the appellant, Teal Assurance, which is BV's captive insurer, and reinsured with independent reinsurers not involved in these proceedings. The policies constituting the PI tower were worldwide in scope. Finally, BV had a US$10 million layer of "top and drop" insurance. It was again underwritten by Teal and was reinsured with the respondents. Unlike all the underlying policies, it excluded US and Canadian claims.

Each excess layer policy, including the top and drop, was expressed to be subject to the same terms and conditions as the underlying Lexington policy and to drop down to continue as the underlying policy as and when the policy or policies underlying it were exhausted. Each also provided by clause 1 that liability to pay under it "shall not attach unless and until the Insurers of the Underlying Policy(ies) shall have paid or have admitted liability or have been held liable to pay, the full amount of their indemnity inclusive of costs and expenses".

During the relevant insurance year, BV notified 27 claims, four of which have a value in excess of US$1 million. Two of these four are US or Canadian claims; the other two claims are non-US/Canadian claims. To maximise the cover available to its associate BV, Teal wishes to ensure that the non-US/Canadian claims are met from the top and drop policy, irrespective of when BV's liability was ascertained. It maintains that BV can present or it can pay the US/Canadian claims first, and that, thereafter, when the PI Tower cover is exhausted, it can recover the other non-US/Canadian claims under the top and drop policy, and pass them on to the respondent reinsurers. It maintains that the

order in which BV's liability for claims or expenses was ascertained is irrelevant as a matter of general law and/or under the specific terms of the primary and excess policies.

The Court of Appeal rejected Teal/BV's interpretation. The CA held that the claims should be met in the order in which BV's liabilities and expenses were ascertained. Teal appeals to the Supreme Court.

**JUDGMENT**

The Supreme Court unanimously dismisses Teal's appeal. Lord Mance gives the Court's judgment.

**REASONS FOR THE JUDGMENT**

- The ascertainment by agreement, judgment or award, of the insured's liability to a third party, or the incurring by the insured of expenses, within the scope of a liability policy gives rise to a claim under the policy. This is turn exhausts the policy cover either entirely or *pro tanto* **[17]**.

- The Supreme Court rejects the appellant's submission that liability insurance is as a matter of principle only exhausted *pro tanto* when the insurer either admits liability or meets the claim. The appellant's analysis could lead to the insured having causes of action or recoverable claims which together exceed the limit of the cover. This would make no sense as an insurer is only liable up to the limit of the cover **[16-18]**.

- An insured can decide not to notify a claim to its insurer, or can withdraw or abandon a claim which it has notified. The insurance will not then be exhausted by that claim, and the next claim will be recoverable in the ordinary course under the insurance. That is different from what BV and Teal propose, namely to continue with claims, whilst adjusting their priority **[19]**.

- The requirement under the Lexington policy that BV have "paid" the amount of the deductible and the self-insured retention prior to Lexington "indemnifying the insured under the terms and conditions of the policy" does not literally require BV to have made monetary disbursements. Instead the term "paid" is better understood as a measure of liability incurred **[20-21]**. Otherwise the present liability insurance would not provide the insured with indemnity to meet the threat of insolvency which might result from third party claims **[21]**.

- Even if the term "paid" does require BV to make monetary disbursements prior to being indemnified this does not mean that BV can alter the order in which claims are met by the insurance programme simply by choosing to make an earlier disbursement in respect of a later ascertained liability or expense **[22]**.

- Under the terms of the primary policy Lexington, and under the terms of each excess policy Teal, are liable for claims in the order that BV incurred ascertained expenses or third party liability up to the policy limit **[23 and 25-26]**. Clause 1 of the excess policies cannot alter this. It defines when liability arises, not the claims in respect of which liability arises **[25-26]**. It provides that liability only attaches under each excess policy in turn as and when the underlying insurers pay or admit or are held liable in respect of BV's ascertained expenses or third party liability **[26]**. As and when this occurs, each excess policy drops down to continue as if it were the primary policy **[27]**.

- This also constitutes the commercially more sensible interpretation **[29-31]**.

*References in square brackets are to paragraphs in the judgment*

**NOTE**

**This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at:**
www.supremecourt.gov.uk/decided-cases/index.html