

A 'Triple Crown' arbitral challenge in the professional indemnity insurance context (RSA v Tughans)

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Insurance & Reinsurance analysis: In this recent judgment, Mr Justice Foxton dealt with a 'Triple Crown' arbitral challenge under sections 67, 68 and 69 of the Arbitration Act 1996 (AA 1996) arising out of an arbitration award concerning a solicitors' firm's entitlement to payment from an insurer under its professional indemnity cover in respect of its potential liability to another firm of lawyers arising out of the payment of a success fee. Of interest to arbitration practitioners, the judgment (when considering the section 67 challenge) makes clear that the scope of an arbitrator's jurisdiction is not exclusively defined by the notice of arbitration but can be expanded by the subsequent agreement of the parties or the permission of the arbitrator. Accordingly, the section 67 challenge failed. The judgment is further of interest to insurance practitioners and practising lawyers since it considers as part of the unsuccessful section 69 challenge the scope of standard professional indemnity cover in respect of claims concerning the 'loss' of fees earned and paid pursuant to a contractual retainer, albeit in unusual factual circumstances. Written by Paul Toms, barrister at Quadrant Chambers.

Royal & Sun Alliance Insurance Ltd and others v Tughans [\[2022\] EWHC 2589 \(Comm\)](#)

What are the practical implications of this case?

While practitioners will be well-advised to identify and define the scope of the dispute referred to arbitration in the widest and broadest terms possible when drafting a notice of arbitration or equivalent, this case confirms that (subject to any contrary provision in the rules applicable to the particular arbitration forum) the arbitrator's jurisdiction is not exclusively limited to the matters set out in the notice of arbitration. Rather, even if particular claims do not fall within the scope of the notice of arbitration, those claims can still be pursued provided that the parties agree or the arbitrator gives permission for them to be pursued or the parties proceed on the basis that those claims fall within the scope of the arbitration.

What was the background?

The facts of the case were complex. RSA provided professional indemnity insurance to Tughans Solicitors. A US private equity fund, Cerberus, agreed to pay Brown Rudnick LLP ('BR') a success fee in the event that a transaction for the purchase of certain loans completed. BR, in turn, agreed with the then managing partner of Tughans that half of the success fee would be paid to Tughans. The transaction having completed, payment of the success fee was made by BR to an account held by Tughans but it was alleged that the managing partner diverted a significant sum to an account established by him. It was alleged that the managing partner later advised his partners that he had diverted a significant amount of the success fee and later repaid to Tughans the sums he had diverted.

BR and its insurers ERSIC took an assignment of Cerberus' claims against Tughans and later commenced proceedings in the High Court of Northern Ireland against Tughans which included claims in their own name and as assignee of Cerberus.

Tughans presented a claim under the policy in respect of its potential liability to BR and ERSIC but RSA refused cover in part contending that any liability was not incurred in connection with the business of practicing as solicitors. Tughans, therefore, commenced arbitration seeking an indemnity in respect of its liability to BR and ERSIC.

The notice of arbitration expressly disavowed any claim in respect of its liability to return any part of the success fee received from BR.

In the course of the arbitration, Tughans introduced a qualification to the claim which it had disavowed, namely it did seek an indemnity in the event that the success fee was either no longer available to Tughans as a means of meeting its liability (because tax and VAT had been paid) or because it ceased to be available in the future ('the Qualified Claim').

However, after publication of a partial final award which the arbitrator intended to be the substantive award on the scope of cover under the policy, Tughans served written submissions on the form of relief and costs, which sought declaratory relief in respect of whether any liability in respect of the success fee itself was covered by the policy. RSA objected on the basis that no such claim had been pursued in the arbitration having been expressly disavowed.

The arbitrator held in a second award ('the Award') that RSA was liable to indemnify Tughans in respect of any liability in damages in respect of the success fee itself but not in respect of any liability in restitution because Tughans had disavowed such a claim and such a claim fell outside the obligation to indemnify in the policy.

RSA challenged the Award on the following bases:

- the issue of whether RSA was obliged to indemnify Tughans in respect of damages in respect of the success fee itself was not referred to the arbitrator and, as such, he had no jurisdiction to determine it. This challenge was brought under [AA 1996, s 67](#) and was advanced on the basis that the notice of arbitration expressly disavowed such a claim
- even if the arbitrator did have jurisdiction to determine that claim, no such claim was in fact advanced in the arbitration by Tughans prior to the publication of the first partial award such that it was a serious irregularity within [AA 1996, s 68](#) for the arbitrator to have determined it
- The arbitrator's conclusion that the policy was capable of providing an indemnity in respect of Tughans' liability in respect of the success fee itself was wrong in law within [AA 1996, s 69](#)

What did the court decide?

Section 67 challenge

Foxton J held as follows:

- the notice of arbitration had (on its objective construction and by reference to its factual background)—expressly disclaimed a claim for an indemnity in respect of liability in respect of the success fee itself of any kind ie whether as damages or in restitution. He thereby rejected Tughans' argument that the only claim it had disclaimed was an indemnity in respect of a liability in restitution
- however, the scope of the arbitrator's jurisdiction was not determined by the Notice of Arbitration but rather the content of the notice had 'the effect that either RSA's consent or the Arbitrator's permission was required to permit Tughans to seek relief of the disclaimed kind from the Arbitrator (with the attendant possibility that "considerations of justice and fairness" might lead the Arbitrator to refuse that permission)'

Therefore, the section 67 challenge failed. In principle, a claim in respect of the success fee could permissibly be brought in the arbitration subject to the agreement of RSA or the permission of the Tribunal or (indeed) if the parties proceed on the basis that issues raised in pleadings or memorials which go beyond the scope of the notice of arbitration (or equivalent) form part of the reference.

Section 68 challenge

As set out above, the first time a claim was advanced without any qualification for an indemnity in respect of the success fee itself was after the arbitrator had published the first partial award. Until then, only the qualified claim was pursued.

RSA argued that there was a serious irregularity because the arbitrator had failed to consider whether 'considerations of justice and fairness' meant that Tughans should be entitled to advance the claim at that very late stage having previously expressly made clear it was not pursuing such a claim.

Foxton J accepted that there was a serious irregularity in that RSA was not allowed a reasonable opportunity to present its case and/or deal with Tughans' and a failure to conduct the proceedings in

accordance with the procedure agreed by the parties. In particular, he did not consider that the fact that RSA was able to serve written submissions after the first partial award adequately remedied the irregularity; in particular, it did not give RSA the opportunity to advance factual arguments which it had made clear it might wish to advance if such a claim was made.

Having initially been attracted to the argument that there had been no substantial injustice which could not be cured by a subsequent hearing, Foxton J held that there was substantial injustice which justified a remission to the Arbitrator for the narrow purpose of: (i) determining whether, and if so, on what terms, it should be open to Tughans to pursue their indemnity claim in relation to the success fee on an unqualified basis and (ii) to the extent it remained live following the arbitrator's determination of the issue set out at (i) above and the Court's conclusion on the section 69 challenge, what relief should be granted.

Section 69 challenge

The challenge was brought by RSA in respect of the qualified claim.

The challenge was brought on the basis that:

- if BR established liability against Tughans for the success fee, it would follow that Tughans never became entitled to the success fee and could not suffer any loss in having to return it
- it is not the purpose of a professional indemnity policy to, in effect, pay solicitors a sum representing profit costs to which they were never entitled

The premise of the challenge was rejected by Foxton J. He held that the success fee was due from BR to Tughans and, therefore, in the event that any claim for damages brought by BR against Tughans succeeded in respect of the success fee itself there would be cover under the policy. The position would be the same as in any other situation in which there had been a loss in respect of fees paid pursuant to a contractual entitlement to receive and retain those fees. As he put it, 'if the solicitor has done what is necessary as a matter of contract to accrue a right to the fee, an award of damages in the amount of the fee payable will ordinarily constitute a loss for the purposes of a professional indemnity policy'.

As a result, the judge's observations on the recoverability under professional indemnity policies of an indemnity in respect of a liability to repay sums in restitution or in respect of fees which never became due or which were paid under a contract later rescinded or avoided for fraud were not strictly relevant to the issues he had to determine but will be of general interest.

Case details:

- Court: King's Bench Division (Commercial Court)
- Judges: Mr Justice Foxton
- Date of judgment: 14 October 2022

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