

BRIEFING NOTE

The Manic Street Preachers. The London Engineering Group. His Honor Royce C. Lamberth, United States District Judge. This is My Truth. Tell Me Yours.

**South Capitol Bridgebuilders v Lexington Insurance Group 21-cv-1436
The Assassination of the London Engineering Group Exclusion LEG3/06**

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The Album: This is My Truth. Tell Me Yours

On 14 September 1998, the Manic Street Preachers released their fifth studio album, “*This is my truth. Tell me yours*”. A critically acclaimed album that sold over five million copies in six months, it represented a move away from the band’s furious alternative rock sound yet provided the perfect antidote to the self-indulgent synchro-pop that infested the charts for years follow.

Shortly after “*This is my truth*” was released, the London Engineering Group, comprising a team of London insurance market underwriters, brokers, loss adjusters and lawyers, published three extension/exclusion clauses known as LEG 1/2/3. These clauses sought to provide increasingly wide insurance covers for owners and contractors of projects under construction, as summarised in the Insurance Institute of London’s Advanced Study Group Report 208(B).

The broadest cover, LEG3, was revised in 2006 following judicial comment in *Skanska Construction v Egger (Barony) Ltd. [2003] 1 Lloyd’s Rep. 479*. Hence the name LEG3/06. The drafting challenge faced by the LEG was to express clearly the cover purchased by the insured in a short standalone exclusion that could be used in any Construction All Risk policy to displace the otherwise broad ranging standard exclusion clause. But did they succeed?

Track 3: You Stole the Sun From My Heart

LEG 3/06 looks to provide the broadest cover by displacing the standard exclusion within the all-risks cover’s insuring clause with a much narrower exclusion that excludes the following:

“All costs rendered necessary by defects of material workmanship design plan or specification and should damage (which for the purposes of this exclusion shall include any patent detrimental change in the physical condition of the Covered Property) occur to any portion of the Covered Property containing any of the said defects the cost of replacement or rectification which is hereby excluded is that cost incurred to improve the original material workmanship design plan or specification.

For the purpose of the insurance and not merely this exclusion it is understood and agreed that any portion of the Covered Property shall not be regarded as damaged solely by virtue of the existence of any defect of material workmanship design plan or specification.”

By purporting to provide the broadest cover, it promises to indemnify the costs of repairing or replacing any damage, howsoever caused, save for any improvements or betterment. But as the LEG foreshadowed in Report 208B, the distinction between a defective condition and damaged property and between a repair and an improvement has given rise to “extensive debate”, read litigation, and the reasonable expectations of cover holders mired before Courts and tribunals.

Track 11: My Little Empire

For 25 years, LEG3/06 had escaped judicial scrutiny, at least to the extent that there were no published judgments addressing its construction and application, perhaps largely because insurers chose to cloak its ambiguities within the confidentiality of arbitration. LEG2 had been addressed by the courts of Canada, at first instance and on appeal. The Canadian courts came down firmly in favour of the cover holder. See *Acciona Infrastructure Canada Inc. v Allianz Global Risks US Insurance Company 2014 BCSC 1568* and *2015 BCCA 347* that provides a helpful case study as to the tired defences too commonly raised by insurers when faced with any sizeable CAR / DSU insurance claim. Perhaps the writing was on the wall?

Track 8: If You Tolerate This Then Your Children Will Be Next

Then on 29 September 2023, almost a quarter of a century to the day when “*This is my truth*” went straight to No.1 in the UK charts, His Honour Royce C. Lamberth, United States District Judge of the District of Columbia, crashed the LEG3 party with a judgment so scathing of the drafting of LEG3 that it makes the lyrics of “*If you tolerate this*” look like a nursery rhyme. And the writer applauds His Honour Lamberth for his candid deconstruction, and destruction, of an opaque clause that has led to expensive litigation and discounted settlements over the last 25 years, during which time the LEG/DE suite of exclusions has been sold across the globe.

Track 5: Ready for Drowning

Before turning to the facts and judgment in *South Capitol Bridgebuilders*, it is worth looking in isolation as to how His Honour Lamberth described the LEG3 clause within his judgment, if only to emphasise the need for underwriters and brokers to redraft the suite of Design Exclusions 1 to 5 and London Engineering Group Exclusions 1 to 3 in language that can be understood by those buying, broking, underwriting, adjusting and litigating the cover provided.

In discussing the submissions made by both parties, His Honour hinted at the criticism that was to come, promising that the Court would “*more thoroughly untangle the tortured language of the Extension*” within its analysis of the claim. A promise that was discharged in spades. And the criticism is so damning that to paraphrase would be to deny the lyrical beauty of a carefully crafted judgment. So the judicial observations must be set out in full. Credit where credit’s due.

“The LEG 3 Extension is ambiguous, egregiously so. To understand this, one need only attempt to read it. In just three sentences, Lexington managed to squeeze in a run-on sentence, an undefined term, several mispunctuations, and a scrivener’s error.”

The Extension is internally inconsistent and bordering incomprehensible. SCB's statement that the Extension is "convoluted" is an understatement. Nevertheless, the Court will endeavour to sort it out by breaking it down piece by piece."

In breaking LEG3 down piece by piece, His Honour reinforced the ambiguities inherent within LEG3 and condemned any attempt to ignore, alternatively rely on, those ambiguities in terms:

"The Court rejects Lexington's invitation to ignore the unclear and error riddled language of the Extension, which Lexington drafted, signed and now seeks to rely on to deny coverage."

And in case Lexington sought to retreat to a typographical error to excuse any lack of clarity in a clause that was otherwise crystal clear, His Honour smartly closed off that position too:

"While a scrivener's error is not dispositive of the existence of ambiguity in a contract provision, when viewed in light of the morass that is LEG 3, this additional error reinforces this Court's conclusion that the text of the Extension is far from "clear, definite and explicit."

Track 4: Nobody Loved You

His Honour should also be applauded for his condemnation of a litigation tactic that is all too commonly used by legal counsel, with or without any analysis or thought, and serves only to drive up the cost of insurance litigation: death by a thousand authorities. Again, to set out the text in full is the only way to do it justice and to highlight the futility of this approach.

"In the span of a few pages, Lexington cites nearly two dozen cases in its argument that SCB's claim is not covered by the Policy. The Court has reviewed each of them. Lexington's cases, whilst perhaps impressive in quantity, are wanting in relevance. The Court will not endeavour to march through every individual case here, as many of these cases are inapposite for the same reason. Indeed, grouping these cases makes clear how each is distinguishable."

And in addressing one of these (three) groups of cases, His Honour candidly observed:

"Lexington does not bother to explain how these nonbinding cases are analogous or why the Court should consider them persuasive. Moreover, the larger issue with this bucket of cases is an issue applicable to all of the cases that Lexington cites: the agreement in this case is simply different. Full stop. No case Lexington cites involves a similar construction project or a similar insurance policy that was similarly modified."

Track 13: I'm Not Working

So what was the claim and why is this judgment so important for the insurance industry?

SCB constructed the Frederick Douglass Memorial Bridge in Washington D.C. including the concrete foundations. During the construction of those foundations, and by reason of poor workmanship, specifically the failure to properly vibrate the concrete after the pour to evacuate any trapped air, the concrete developed air voids or honeycombing which resulted in the actual compressive strength of the concrete being less than the concrete's design or intended strength. SCB hacked out and replaced the honeycombed concrete and claimed the

costs of repair from Lexington under a construction or builder's all risk policy that included the LEG3 exclusion.

Lexington denied liability on the basis that the concrete had not incurred any damage, arguing that it had not suffered an adverse change in condition that rendered it less valuable or less useful. Instead, rather than suffering any adverse change in condition, Lexington asserted that the hardened concrete had simply come into existence in a defective, honeycombed condition.

Lexington further argued that if the concrete had suffered damage, rather than being merely defective, then replacing the concrete with concrete that was not honeycombed constituted an improvement, and the cost of any improvements were expressly excluded by LEG3.

Track 14: Be Natural

His Honour rejected the first argument on the basis that the policy did not define "damage". Specifically, it did not define damage as an adverse change in condition. As such, His Honour had to look to ordinary meaning of the word "damage" as defined in Black's Law Dictionary, specifically "a loss or injury to person or property" or "any bad effect on a thing". Proceeding on that basis, His Honour held that in circumstances in which the inadequate vibration of the concrete during placement caused a decrease in the weight bearing capacity of that concrete when it hardened, that decrease in capacity constituted an injury, or at least a very bad effect, on the bridge and its structures. As a consequence, damage had occurred. Put another way, as the concrete did not achieve the compressive strength that it was designed or intended to achieve, by reason of poor workmanship, then the concrete was damaged by that workmanship.

Going further, His Honour found that even if "damage" did require an adverse change in condition, then such an adverse change had occurred. He observed that a change, presumably the development of air voids within the concrete by reason of the poor workmanship, that results in the reduction of the weight bearing capacity of a bridge is an alteration to that bridge.

His Honour then rejected the second argument on the common-sense basis that repairing the concrete to the condition that it should have achieved had the workmanship been carried out properly could not be considered an improvement. His Honour acknowledged that repairing or replacing a defective component can always be considered an improvement, unless it is repaired or replaced with something worse. But in the context of LEG3, an improvement is a repair or replacement that makes a thing better than it would have been but for the defect. It does not exclude a repair or replacement that returns the thing to the condition that it would have enjoyed if it had been constructed properly, that is without the defective workmanship.

Track 7: You're Tender and You're Tired

English qualified insurance defence lawyers will look to dismiss or ignore *South Capitol Bridgebuilders* on two basis. First, that under English law there is accepted jurisprudence that damage requires an adverse change in the condition of insured property, such that it is not

necessary to resort to the dictionary definition. Second, that the language of the judgment is so inflammatory that it should be ignored, or at least that it renders the judgment subject to the inevitable appeal. Both points carry some weight but only in so far as they go. And here's why.

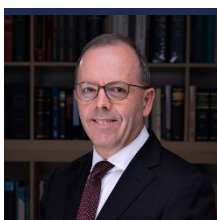
It is correct that English law requires the insured to establish that damage has occurred to insured property by establishing that there has been a change to the (physical) condition of the insured property, which change has rendered that property less valuable or less useful. See *Gwynt Y Mor OFTO PLC v Gwynt Y Mor Offshore Wind Farm Ltd [2020] EWHC 850*, a case which, like the *Manic Street Preachers*, had its roots in Wales. But English law is the outlier.

In the vast majority of countries, and in states such as Illinois, the law does not provide any jurisprudence or guidance as to what does or does not constitute damage. As such, and in circumstances in which the policy does not define damage, the Court should, as His Honour Lamberth did, resort to the ordinary meaning of the word as defined in the legal dictionaries. Such definitions do not seek to draw a fine distinction between a defective condition and an adverse change in condition. If the property does not do what it says on the tin, it is damaged.

Second, the language used in the judgment may be direct, and avoid the nuanced observations found within English law judgments, but the decision is from a distinguished District Judge sitting in the United States District Court, District of Columbia. It is not a decision from a Judge or Court unaccustomed to resolving commercial contractual disputes. And not only is it the only published decision on the construction of LEG3 but it considers and applies that clause to a set of facts in the construction industry that frequently give rise to insurance claims.

All this means that *South Capitol Bridgebuilders* is a very important decision. It exposes the drafting flaws of a clause that is central to billions of dollars' worth of construction all risks policies sold every year. It shows that LEG3 is one of a suite of clauses that simply do not work and demand redrafting. As the Manics opined at Track 7: "You're Tender and You're Tired".

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