Negative Declarations in Insurance Litigation: What are the Rules?

1. Introduction

1.1. Declarations, whether positive or negative, are discretionary remedies. However until the last five years the prevailing attitude of the Courts was that the discretion in favour of making a negative declaration was an "unusual" remedy which would "hardly ever"[1] be made. Defendants, it was felt, should wait to be sued.

1.2. That approach to the exercise of the discretion has now changed following the observations of Lord Woolf MR in *Messier-Dowty Ltd v Sabena SA*[2]. The extent of the change in thinking can be seen from the observations of Morison J that:

> *"Proceedings in which the only claims are for negative declaratory relief are no different from any other action save that it is for the Claimant to show that the grant of such a declaration is "useful" in the context of the disputes between the parties. But in every case the Claimant must show that there is a dispute which he "bona fide desires to try."*[3]

1.3. There is no doubt that proceedings seeking negative declarations have been on the increase since 2000, spurred on by the Brussels Convention and now the Jurisdiction Regulation, and by decisions in the ECJ such as *The Tatry*, so that they cannot really be said to be an unusual remedy in 2004[4]

1.4. This new attitude to the exercise of the discretion has met with differing responses – particularly in its application to insurance cases.

1.5. On one hand, negative declarations have been hailed as "a useful new weapon in the armoury of insurers" which permits them to "go on the attack in English Courts in order to prevent proceedings being bought against them by potential claimants in unfavourable jurisdictions"[5].

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[1] Guaranty Trust Co of New York v Hannay & Co [1915] 2 KB at 564-565.
[2] [2000] 1 WLR 2040 at 2050-51.
[3] BP International Limited v Energy Infrastructure Group Limited [2003] EWHC 2924 (Comm) at [21].
[4] See *Travellers Casualty v Arkwright* [[2004] EWHC 1704 (Comm) at [91] per Hirst QC sitting as a High Court judge.
[5] "Insurance: Muddy waters", Talbot Rice, Legal Week, 2005.

1.6. On the other hand, the prospect of an injustice occurring due to an assured being unwillingly dragged into litigation is still obviously keenly felt. An article appeared in Lloyd's List in July this year strongly decrying the current state of affairs and arguing that the current trend is that Courts now so freely dispense negative declarations that underwriters effectively have a right to "force, at a time of their own choosing, the assured into making a decision as to whether or not to claim" and going to far as to warn that:

> "*If this trend is allowed to proceed unchecked, London's reputation as the world's leading insurance market and reliable forum for the resolution of insurance disputes could be adversely affected.*" [6]

1.7. The writer of that article opined that a "House of Lords decision against such techniques, based on public policy grounds, is perhaps to be hoped for".

1.8. It is the purpose of this paper to accordingly examine the principles regarding the granting of negative declaratory relief, with particular reference to relief sought by insurers. In doing so it is impossible not to reach the conclusion that negative declarations are, for good reason, now a useful and effective remedy whose use is unlikely to be limited in the foreseeable future.

2. Negative declarations and Insurers

2.1. It has long been recognized that negative declarations have a legitimate role to play in the context of commercial insurance where a party may well have a commercial need to obtain an early determination upon his liability to another who may seek to claim against him.

2.2. So, for example, an insurer may wish to know whether he should conduct the defence of a threatened claim against his insured.[7]

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[6] Martin, "Negative tactic that has so far been condoned by the Courts", Lloyds List 6 July 2005, commenting on *CNA Insurance Co Ltd & Ors v Office Depot International UK Ltd* [2005] EWHC 456 (Comm)

[7] See Dicey and Morris at paragraph 12-035, citing Booker v Bell [1989] 1 Lloyd's Rep 516, HIB Ltd v Guardian Insurance Co Inc [1997] 1 Lloyd's Rep 412; Gan Insurance Co Ltd v Tai Ping Insurance Co [1998] CLC 1072, Tiernan v Magen Insurance Co Ltd [2000] I.L. PR 517; CGU v Szabo [2002] 1 All

2.3. Nor is it anything new for an insurer to seek a declaration of non-liability and to be met with a counterclaim from a defendant seeking an order that it be indemnified.

2.4. Furthermore, it must be recognised that where the Insurer faces the initial burden of proof – where there are questions about the applicability of exceptions for specific risks, wilful acts of the assured, breaches of warranty or conditions, non-disclosure, fraud or misrepresentation – there are real grounds for arguing that the natural order of things is not reversed by the Insurer taking the role of claimant.

2.5. This was recognised by Hirst QC in *Travellers Casualty v Arkwright* [[2004] EWHC 1704 (Comm) at [93] where he stated that:

> "*Looking at the negative declaratory relief sought in this case, in my judgment it directly raises the two crucial issues on liability:*
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> *(1) Can Insurers prove a breach of the Warranty; alternatively*
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> *(2) Can Insurers prove that they have no liability under the Policy because of a failure by Sun Life to comply with the notification provisions.*
>
> *Having reached a determination of these issues, there would be no difficulty in framing the appropriate declarations. In my judgment the grant, or the refusal to grant, these declarations, would be decisive as to Insurers' liabilities under the Policy. If Insurers failed to establish (1) and (2), all that would be left to determine would be quantum. So in my judgment there can be no substantial doubt that the determination of these issues would be useful. Indeed they are the issues that must be determined either in England or Ontario to decide liability under the Policy. It does not make any real difference to their efficient determination which party is claimant/plaintiff and which defendant. The burden of proof will not be altered.*"

3. Negative Declarations: What are the rules?

3.1. In the sense that the remedy is discretionary, the question more appropriately put is, of course, what are the proper principles guiding the granting of the remedy?

ER (Comm.) 83. See also Insurance Corporation of Ireland v Strombus [1985] 2 Lloyd's Rep 138, 144 and HIB v Guardian Insurance [1997] 1 Lloyd's Rep 412, 416-8.

3.2. The starting point is Lord Woolf's comments in ***Messier-Dowty***. At 2049 he cited with approval the observations of Advocate General Tesauro in ***Owners of cargo on board the ship Tatry v owners of the ship, Maciej Rataj*** [1999] QB 515 at 526 where he stated:

> *"It should be borne in mind that the bringing of proceedings to obtain a negative finding, which is generally allowed under the various national procedural laws and is entirely legitimate in every respect, is an appropriate way of dealing with genuine needs on the part of the person who brings them. For example, he may have an interest, where the other party is temporising, in securing a prompt judicial determination if doubts exist or objections are raised of the rights, obligations or responsibilities deriving from a given contractual relationship".*

3.3. The decisive passage – although strictly speaking obiter dicta – in Lord Woolf's reasons is at 2051 where he states that

> "*The approach is pragmatic. It is not a matter of jurisdiction. It is a matter of discretion. The deployment of negative declarations should be scrutinised and their use rejected where it would serve no useful purpose. However, where a negative declaration would help to ensure that the aims of justice are achieved the courts should not be reluctant to grant such declarations. They can and do assist in achieving justice.*
>
> *While negative declarations can perform the positive role, they are unusual remedy in so far as they reverse the more usual roles of the parties. The natural defendant becomes the claimant and visa versa. This can result in procedural complications and possible injustice to an unwilling defendant. This in itself justifies caution in extending the circumstances where negative declarations are granted, but, subject to the exercise of appropriate circumspection, there should be no reluctance to their being granted when it is useful so to do*"[8]:

3.4. As I have already observed, in many, if not most, cases where insurers are seeking a declaration of non-liability the relevant issues will be issues upon which they bear the burden of proof. Accordingly in many cases

[8] Messier Dowty Limited v Sabena S.A. No 2 [2000] 1WLR 2040 at 2051 per Lord Woolf M.R

involving insurers the need for caution on procedural grounds signaled by Lord Woolf does not even arise.

3.5. We are therefore, subject to some particular features relating to negative declarations and forum referred to below, effectively left in a position where there is now little difference between the exercise of the discretion in cases where positive and negative declarations are sought.

3.6. This seems to be confirmed in two recent non-insurance cases dealing with negative declarations. In ***Bristow Helicopters Limited v Sikorsky Aircraft*** [2004] EWHC 401 (Comm) Morison J said at [25]:

> *"It seems to me that the Courts now recognise that there is little if any difference between a claim for a positive declaration and one that is negative in form. A positive declaration may well have a negative effect and vice versa. Whether such a claim is proper or not proper is not to be determined by the form of the claim, but by its substance. This seems to me to be the effect of the decision in Messier Dowty."*

3.7. The above was approved by the Court of Appeal this July in in ***Seismic Shipping Inc and Westerngeco Ltd v Total E & P UK PLC*** [2005] EWCA Civ 985 where at [39] Clarke LJ (with whom Rix LJ and Sir Martin Nourse agreed) said:

> *"There was a time when negative declarations were somewhat frowned upon by the English courts. Although of course everything depends upon the circumstances, that is not now the case. Encouraged by the approach of the European Court of Justice in cases like The Maciej Rataj [1995] 1 Lloyd's Rep 302, the English courts do not now discourage negative declarations as once they did. So for example in Messier-Dowty v Sabena [2000] 1 WLR 2040 Lord Woolf MR said at paragraph 36:*
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> *"I can see no valid reason for taking an adverse view of negative declaratory relief. This is whether it is claimed in relation to transnational disputes or domestic litigation."*
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> *See also for a further example,* ***Bristow Helicopters v Sikorsky Aircraft*** *[2004] EWHC 401 (Comm) per Morison J at paragraph 25."*

4. Negative Declarations and Forum Shopping[9]

4.1. "Traditional" Defendants have as much an interest in securing a forum where their chances of success are increased as much as a Plaintiff does. There are a number of ways in which a Defendant may try to do this: jurisdictional challenge, applying for a stay of proceedings or for an anti-suit injunction are the three main strategies employed. .

4.2. Seeking negative declaratory relief, particularly in circumstances where the insurer is able to obtain a declaration of non-liability prior to judgement elsewhere can often have a similar effect.

4.3. If the declaration can be registered in the foreign jurisdiction then there is the possibility of arguing that the matter has become res judicata between the parties. This would be the case if, for example, the declaratory judgement was subject to recognition under Regulation 44/2001. Alternatively the negative declaration could found a plea of issue estoppel in the foreign proceedings or at the very least be used as a guide to questions of the law of the forum granting the declaration. In many cases all Courts' wariness of inconsistent findings will mean that the declaration is likely to have significant persuasive power on both the parties and the foreign tribunal in any event.

4.4. An application for negative declaratory relief brought in an appropriate forum will not necessarily be deprecated as forum shopping or a tactic to influence a jurisdictional contest[10]. On the other hand, where negative declaratory relief is sought in a clearly inappropriate forum, it is right that the proceedings be stayed, but this is for a jurisdictional reason unrelated to the form of relief.

4.5. There is a long history of English courts treating applications for negative declarations, particularly when they occur in the context of multi-jurisdictional disputes, with extreme caution.

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[9] See generally Chapter 4 of Bell, "Forum Shopping and Venue in Transnational Litigation" (2003), which has an invaluable discussion of the strategies that defendants might employ by "reverse forum shopping".

[10] See the discussions in Collins, "Negative declarations and the Brussels Convention", (1992) 108 LQR 545, Bell, "The negative declaration in transnational litigation", (1995) 111 LQR 674, Dicey and Morris on The Conflict of Laws , 12th ed (1993) 406-408, and Cigna Insurance Australia Ltd v CSR Ltd (Supreme Court of New South Wales, Rolfe J, 15 August 1995, unreported))

4.6. Kerr LJ said in ***The Volvox Hollandia*** [1998] 2 Lloyds Rep. 361 at 391 that:

> *"Claims for declarations, and in particular negative declarations, must be viewed with great caution in all situations involving possible conflicts of jurisdictions, since they obviously lend themselves to improper attempts at forum shopping."*

4.7. As has been made clear, this approach is no longer reliable in the post *Messier-Dowty* era. However notwithstanding the new liberal attitude to negative declarations careful scrutiny is still required to ensure that inappropriate forum shopping is not allowed[11]

4.8. In ***New Hampshire Insurance Co. v. Philips Electronics North America Corporation*** [1999] 1 Lloyd's Rep. 58, 61-62, decided in 1997, the Court of Appeal approved the judgment of Rix J. where he laid down four key principles, of which the following three are relevant:

> *"(1) There is power to grant a negative declaration but the fundamental test is whether it would be useful.*
>
> *(2) Careful scrutiny must be exercised, not just to test the utility of negative declaratory relief, but also to ensure that inappropriate forum shopping is not allowed, let alone encouraged.*
>
> *(3) The existence of imminent foreign proceedings is always a highly relevant consideration, not only for the purpose of testing the utility of the English claim, but also having in mind the need to avoid the twin dangers of forum shopping and of the vices of concurrent proceedings."*

4.9. These principles are still applicable. They were recently applied by Hirst QC sitting as a judge of the High Court in ***Travellers Casualty and Surety Company of Europe Limted & Ors v Arkwright and Ors*** [2004] EWHC 1704 (Comm), where he found that the fact that both of the competing jurisdictions in that case, England and Ontario, could fairly be argued to be the "right" jurisdiction. This, in the circumstances, meant that

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[11] Burrows v. Jamaica Private Power Co Ltd [2002] Lloyd's Rep. I.R. 466 at 470 para 7; Lincoln National Life Ins Co v. Employers Reinsurance Corp [2002] EWHC 28 (Comm); [2002] Lloyd's Rep. I.R. 853 at 858-9.

he would not decline to exercise jurisdiction on the grounds that there was "inappropriate" forum shopping.

4.10. Hirst QC's reasoning is applicable to many insurance situations and for that reason it may be helpful to set it out in full:

> "*97. In my judgment it is fairly clear that Insurers perceived that there would be an advantage to them if they were able to be swift off the blocks (as Mr Howe put it) and issue the proceedings first. It would surely have been possible to send a letter rejecting the claim earlier, but Insurers believed that if they did so, this might provoke the commencement of proceedings by Sun Life in Ontario first. That was something that Insurers wanted to avoid. I also consider that Insurers genuinely believed that England was the proper jurisdiction in which to litigate the dispute and that they feared that if they allowed proceedings to be commenced first in Ontario, they would be at a procedural disadvantage in arguing for English jurisdiction.*
>
> *98. This is a case that was always bound to end up in litigation. There are large sums at stake, and I do not consider that there was any realistic chance that, had Insurers adopted a more courteous approach and written a letter declining liability, this would have led to a settlement. Litigation was inevitable, as was a dispute as to the appropriate jurisdiction.*
>
> *99. Insurers have derived no advantage in this Court by being "first out of the blocks" in the commencement of proceedings. I have to decide which is the most appropriate jurisdiction for the determination of the issues. There is no kind of presumption, rebuttable or otherwise, that because the English proceedings were started first, they should be allowed to continue (cf. the position under the Brussels Convention and the Jurisdiction Convention).*
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> *100. I do not accept the submission that this is a case of "blatant forum shopping", if by that is meant pejoratively that Insurers were attempting to achieve English jurisdiction improperly, any more than I regard the proceedings commenced by Sun Life in Ontario as blatant forum shopping. Both parties understandably prefer their chosen jurisdictions. To that extent both are forum shopping. There are, as I see it, respectable arguments both ways as to the right jurisdiction, which I have to resolve. As in the Du Pont case, I do not regard this as a case in which the dates of the beginning of proceedings are significant. The proceedings might just as well have been started the other way round. Neither action has made much progress to date."*

5. Matters relevant to the Convention

5.1. Where the case is governed by the 1968 Convention, the Council Regulation or the Lugano Convention the ordinary jurisdictional rules of the Convention and the special lis alibi pendens rules in Articles 21 to 23 apply to actions for negative declarations without drawing any distinction to reflect the fact that one set of proceedings is in the form of declaratory relief and the other is not[12]

5.2. Where negative declaratory relief is sought in circumstances where jurisdiction if founded under the Council Regulation or the Lugano Convention it is difficult to see how any charge of forum shopping can be made out: that charge of forum shopping could only be made good by assuming that a party which takes advantage of the Convention exceptions to the general rule of domicile is somehow doing something illegitimate; but that assumption cannot be sustained if in truth one of the exceptions is applicable.

5.3. ***Owusu v Jackson and others*** *(Case C-281/02,* 1 March 2005) has effectively overruled a number of recent English cases in which it was held that a forum non conveniens argument could be sustained where jurisdiction was determined either by the Regulation or the Convention. See in particular ***Travelers Casualty and Surety Company Of Europe Limited and Ors v Arkwright and Ors*** [2004] EWHC 1704 (Comm), ***Re Harrods (Buenos Aires) Ltd*** [1992] Ch. 72, ***Ace Insurance SA-NV v. Zurich Insurance Co***. [2001] Lloyd's Law Reps I.R. 504 and ***American Motorists Insurance Co. v. Cellstar Corp*** [2003] EWCA Civ 206; [2003] Lloyd's Rep. I.R. 295.

5.4. In ***Owusu v Jackson and others*** the ECJ held that a court of a state which was a contracting party to the Brussels Convention on Jurisdiction could not decline jurisdiction conferred on it by Article 2 of that Convention on the ground that a court of a non-contracting state would be a more appropriate forum for the trial of the action. This was so even if the

[12] Gubisch Mascheninenfabrick KG v Palumbo [Case 144/86 [1987] ECR 4861 cf case C-351/89 Overseas Union Insurance Ltd b New Hampshire Insurance Co [1991] ECR I-3317, [1992] QB 434, Case C-406/92 The Tatry [1994/92 The Tatry [1994] ECR 1-3439; [1999] QB 575; Kloeckner & Co AG v Gatoil Overseas Inc [1990] 2 Lloyd's Rep 177.

jurisdiction of no other contracting state was in issue and the proceedings had no connecting factor with another contracting state.

5.5. The claimant there was domiciled in the United Kingdom. He had hired from the first defendant, also domiciled in the United Kingdom, a holiday house in Jamaica with access to a private beach. An accident had previously occurred at the beach due to an obscured sandbank leaving a woman tetraplegic. The claimant suffered a similar accident with the same consequences. Proceedings were brought in England against the first defendant and Jamaican defendants concerned with the ownership and management of the beach.

5.6. The Court at first instance refused a forum non conveniens application on the ground that article 2 of the Convention obliged it to assume jurisdiction. Article 2 stated that:

> *"Subject to the provisions of this Convention, persons domiciled in a Contracting State shall, whatever their nationality, be sued in the courts of that State.*
>
> *Persons who are not nationals of the State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State."*

5.7. On the defendants' appeal, the Court of Appeal referred to the European Court the following questions:

> *'1. Is it inconsistent with the Brussels Convention … , where a claimant contends that jurisdiction is founded on Article 2, for a court of a Contracting State to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a person domiciled in that State in favour of the courts of a non-Contracting State:*
>
> *(a) if the jurisdiction of no other Contracting State under the 1968 Convention is in issue;*
>
> *(b) if the proceedings have no connecting factors to any other Contracting State?*
>
> *2. If the answer to question 1(a) or (b) is yes, is it inconsistent in all circumstances or only in some and if so which?'*

5.8. The Courts answered "Yes" to the first question, holding that (at paragraph 46):

> *"the answer to the first question must be that the Brussels Convention precludes a court of a Contracting State from declining the jurisdiction conferred on it by Article 2 of that convention on the ground that a court of a non-Contracting State would be a more appropriate forum for the trial of the action even if the jurisdiction of no other Contracting State is in issue or the proceedings have no connecting factors to any other Contracting State."*

5.9. The Court declined to answer the second question on the ground that it in substance sought an advisory opinion.

5.10. The reasoning of the Court is equally applicable to the Regulation as it is to the Convention. In particular the Court stated at paragraph 37 that:

> *"It must be observed, first, that Article 2 of the Brussels Convention is mandatory in nature and that, according to its terms, there can be no derogation from the principle it lays down except in the cases expressly provided for by the Convention (see, as regards the compulsory system of jurisdiction set up by the Brussels Convention, Case C-116/02 Gasser [2003] ECR I-0000, paragraph 72, and Case C-159/02 Turner [2004] ECR I-0000, paragraph 24). It is common ground that no exception on the basis of the forum non conveniens doctrine was provided for by the authors of the Convention, although the question was discussed when the Convention of 9 October 1978 on the Accession of Denmark, Ireland and the United Kingdom was drawn up, as is apparent from the report on that Convention by Professor Schlosser (OJ 1979 C 59, p. 71, paragraphs 77 and 78)."*

5.11. It is clear in my view that this reasoning applies as equally to Part 3 of the Regulation in general and article 12 of the Regulation in particular as it does to Article 2 of the Convention, which is in equivalent terms to article 2 of the Regulation.

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