CONTRACT CERTAINTY AND POLICY RENEWALS: UNDERWRITERS' RELIANCE ON BROKERS' "ALL AS EXPIRING" STATEMENT

In a recent article, *"Insurance brokers' E&O duties regarding unusual policy terms – is there a duty to nanny?"*[1] we discussed the insured bank's claim in negligence against its insurance broker ("Edge") in *ABN AMRO Bank –v-- [Underwriters] and Edge Brokers (London) [2021] EWHC 442 (Comm)*, a recent English Commercial Court decision which raises some novel arguments about the duty (if any) to disclose unusual policy terms to Underwriters.

1 https://www.hfw.com/Insurance-brokers-E-and-O-duties-regarding-unusual-policy-terms-is-there-a-duty-to-nanny-Mar-20

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Although it concerns a marine cargo policy with a non-standard, non-damage extension, Mr. Justice Jacobs' *ABN AMRO* decision deals with an extraordinary array of legal arguments and principles and could be said to "include the kitchen sink" in this respect – it is well worth a read for those interested in the London subscription market (both marine and non-marine) and its inner workings.

We now turn our focus to what the case says about the importance (to Underwriters in a subscription market) of carefully reading a slip policy when it is first presented to them and again when it is later renewed and the legal effect of a broker's assurance, on renewal, that all is "as expiring". We also highlight another interesting feature of the case, namely the difference between policy avoidance and estoppel by convention, when both arguments are based on the same misrepresentation of fact.

London marine market cargo Underwriters issued a slip policy to the claimant bank in 2015 and most of them renewed this in 2016. The policy insured cocoa product commodities which the bank financed for selected commodity-trader clients and which the bank temporarily came to own under so-called "repo" transactions. It was based on conventional marine "all risks" terms, including Institute Cargo Clauses 'A'. Underwriters' perception was that (apart from the usual, limited non-damage add-ons) policy cover was restricted to the risk of physical loss and damage and did not extend to the trade credit risks of customer default. However, at the bank's request, an unusual clause (the Transaction Premium Clause or "TPC") had been added by agreement in a mid-term Endorsement to the 2015 policy and this arguably extended cover to such default (non-damage) risks. The TPC was also included in the 2016 renewal slip policy.

When two of the bank's customers defaulted on their obligation to repurchase the commodities, the bank claimed £33.5 million under the 2016 policy. There had, of course, been no physical loss or damage and so Underwriters denied cover, based primarily on their interpretation of the TPC, but (should this fail) also on alternative grounds including non-disclosure, misrepresentation, rectification and estoppel (which would prevent the bank from relying on the TPC.)

The judgment contains a very helpful review of the now well-established "unitary" approach which the Court takes when interpreting contracts and it reminds us of the primacy of the language, i.e. it is the actual words which are chosen and recorded by the parties in their agreement which will usually carry the most weight in the interpretation exercise. This is especially so where, as here, the (TPC) clause in question had been "carefully drafted" by the insured and its external lawyers. The judgment also reminds us that it is no part of the Court's function to relieve a party from the consequences of an imprudent agreement.

The Court held, in the insured's favour, that the TPC clearly covered risks that were not dependent on physical loss and damage, including the trade credit default risk.

The placement had been a popular risk, underwritten for a desirable client, in a soft market. The written lines totalled more than 135%, with the consequence that the written lines of the following market "signed down" (apart from two Underwriters, whose lines were "to stand" - i.e. were not to be reduced by over-subscription.)

The Judge said that, with the benefit of hindsight, insurers had been "unwise" to agree to the TPC. He said the leading underwriter was a careful and meticulous underwriter, who on this occasion had failed to appreciate the complexity of the document that he was being asked to agree and that the evidence of the majority of the following underwriters – with few exceptions, such as those who, on the evidence, had read or skim-read the policy, was that none of them noticed the clause let alone read it carefully or asked questions about it.

As previously reported, Underwriters failed in their argument that the policy could be avoided due to Edge's failure (on behalf of the bank) to disclose/explain the relevant nature and effect of the TPC, when placing the 2016 renewal. It was held that there had been no non-disclosure of material fact because the TPC had been included in the 2016 slip policy, which Underwriters had been offered and had scratched, and so they either knew or were presumed to know of its terms.

Several Underwriters also raised misrepresentation and estoppel defences, based on the fact that the TPC had only been added to the 2015 policy by a mid-term Endorsement which had (unknown to them) been scratched only by the leading Underwriter on its own behalf (notwithstanding the terms of the delegated authority contained in the General Underwriters Agreement ("GUA")). At the root of their complaint was that, at the renewal presentations, they had (separately) asked Edge whether the 2016 policy had changed from its predecessor and Edge had responded to the effect that the 2016 policy terms were "as expiring".

The Judge concluded that good practice requires underwriters (leaders and followers) writing a risk for the first time to read the slip, even if it is lengthy: they do not necessarily need to do this under pressure of time at the box: a copy of the slip can be taken, and read later during a quiet moment. The evidence also indicated that most of the insurers had teams, including those doing peer review, and it may have been that the task of doing a detailed review of a policy wording could have been entrusted by the main underwriter to a more junior colleague. The work does not necessarily involve reading every clause in minute detail: some clauses may be standard market clauses, which are very familiar and do not require significant attention. However, non-standard clauses (like the TPC) will require more consideration. The Judge was in no doubt that a policy wording, at least when it is subscribed for the first time, must be read by Underwriters. Indeed, he said, the 2012 Code of Practice concerning Contract Certainty requires, as its first principle:

"The insurer and broker (where applicable) must ensure that all terms are clear and unambiguous by the time the offer is made to enter into the contract or the offer is accepted. All terms must be clearly expressed, including any conditions or subjectivities."

and he could not see how an insurer could fulfil this aspect of the Code if it has not taken steps to read the policy wording in order to ensure that all terms were clear and unambiguous.

However, he did not think that an underwriter, who had subscribed a policy on the expiring year, could be criticised for taking a short-cut on renewal: i.e. asking the broker whether the terms are as expiry and for relying on a positive response. However, if the underwriter does not do that, the Judge ruled, or does not receive an affirmative response and then does not read the policy, then he did not consider s/he was in a position to complain if they do not appreciate that the terms differed from the prior year.

This was important for one of the more interesting aspects of the decision, namely the interplay between Underwriters' (unsuccessful) non-disclosure argument and their related complaints regarding misrepresentation and estoppel by convention.

So, when the 2016 policy was placed with Underwriters, some following Underwriters had (separately) asked the broker whether there had been any material changes from the expiring policy. The broker had responded negatively, because, although the 2015 policy had not contained the TPC at inception, nevertheless the broker believed (incorrectly and innocently) that the TPC already formed part of the 2015 policy, via the mid-term Endorsement scratched by the leader (although, due to the inoperation of the GUA, it had not bound nor been shown to the followers.)

The fortunes of two following underwriters (for convenience, "X" and "Y") can be contrasted. As far as X was concerned, the Judge found that Edge's "as expiring" assurance would have been reasonably understood to indicate that there were no material changes to the policy as it was when it was last shown to X i.e. the policy as written at the beginning of 2015 (pre-Endorsement). He said the broker's statement as to *"all else as before"* would not reasonably be understood, in context, to refer to the 2015 contract as later varied by an Endorsement which had never been provided to the following market.

There was therefore, a misrepresentation made to X: the representation was false because there had been material amendments (the addition of the TPC) to the terms agreed in 2015.

Nevertheless, in a setback for X, the Judge was not satisfied that, on the balance of probabilities, X could show the necessary ingredient of having been "induced" by this misrepresentation into underwriting the 2016 policy: on the evidence, he considered it more likely than not that X would still have contracted, on the same terms if the representation had not been made: the evidence taken as a whole was to the effect that X's underwriter had read through the policy, had been content with what was there, and had been happy to renew the risk in the light of the good loss experience.

Y was in a similar position to X in that it too had neither been told of nor given the July 2015 Endorsement and so Y too was a victim of a misrepresentation similar to that made to X. However, when it came to inducement, Y's position was different, since Y's underwriters had not read through the policy at renewal. The Judge did not consider that Y could be criticised in this respect, because it was a following underwriter that had been told that the policy was as expiring.

The Judge found that if the representation had not been made, Y would not have written the policy on the terms that it did. He said that Y's underwriter was "an ardent note-taker" who had been concerned to note any changes to the policy; if he had been told that there had been

a number of changes to the policy which had been agreed during the course of the previous year by the slip leader; this would have led to a discussion as to what those changes were, and the TPC would have been identified in the context of such a discussion. Y's underwriter's evidence was that he would have asked why the bank wanted that clause included, and that he would not have agreed to the wording if he had been shown the terms and the reasons for their inclusion had been explained. On this basis, the Judge considered that his evidence was sufficient to establish Y's inducement in reliance upon the misrepresentation.

However, in a setback for both X and Y, the Judge found that all Underwriters had failed to maintain an adequate reservation of rights during their (lawyer's) correspondence with the insured, and so the Judge found that Underwriters had "affirmed" the policy and had lost any right they may once have had to avoid it on misrepresentation grounds. (This would also have been fatal to the non-disclosure argument, which had already failed on other grounds, of course.)

This is where the estoppel by convention argument came into operation: the Judge had accepted that inaccurate representations were made to X and Y and the potential advantage of the estoppel argument from their perspective was that they could potentially circumvent the difficulties in their misrepresentation/avoidance case, namely the effect of affirmation (and also, we should mention in passing, that of a "non-avoidance" clause which was in the policy) because the legal requirements for estoppel by convention were different.

An estoppel by convention can arise if: (i) there is a relevant assumption of fact or law, either shared by both parties, or made by party B and acquiesced in by party A, and (ii) it would be unjust to allow party A to go back on that assumption.

Here, the Judge had found that X and Y had each made the assumption that the terms which they were agreeing were "as expiry" and therefore did not include a new and unusual clause like the TPC, of which they were ignorant. That assumption was acquiesced in by Edge, and indeed it was the result of positive statements made by Edge during the broking of the 2016 renewal. The question was therefore whether it would be unjust to allow the bank, whose broker acquiesced in this assumption and was responsible for making the representation which induced it, to go back on that assumption.

In relation to X, the answer was no: it would not be unjust. X's underwriter, to his credit, did carry out a review of the policy as a whole. This, the Judge said, should have enabled him to ask any questions about the TPC, which was a lengthy and unfamiliar clause. He had asked none, even though the wording of the slip policy should have prompted a reasonably careful insurer to make further enquiries. In these circumstances, the Judge did not think it was unjust or unconscionable for the bank to be able to rely upon the TPC, which was contained in the 2016 policy and which X's underwriter read through, notwithstanding Edge's (mis)representation that the terms were "as before".

The Judge said that where an underwriter seeks to rely upon avoidance based on the same representation that is also alleged to give rise to an estoppel, and in that context has failed to establish inducement, it would be surprising if he concluded that there was sufficient injustice to give rise to an estoppel by convention.

In contrast, Y's underwriter's practice was always to ask if there had been any changes. He was an ardent note-taker, and his practice was to

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“note any material changes to the policy from the expiring year”. The consequence of his being told that there were no material changes, in response to his question, was that he did not carefully read the policy, did not make a note of any changes and did not ask any questions about them. The Judge was satisfied that if he had received a different answer to his question, this would have led to his declining the risk. In these circumstances, he considered that it would be unjust to allow the bank to go back on the assumption on which Y had proceeded.

Thus in the case of Y, the bank was estopped from asserting that the 2016 policy included TPC cover in respect of credit risks and/or financial default.

The bank’s claim against Underwriters therefore succeeded in full, save in relation to Y (plus one other follower who was in a similar position to Y), where it failed only by reason of an estoppel arising from the manner in which the risk was broked to its underwriters.

This case is unusual and fact-specific, but some lessons can be drawn from it. It is clear that when a policy is being renewed, the Court has found that it should be quite reasonable for a following underwriter to take a “short-cut” and to rely upon a broker‘s’ representation that “all is as expiry”. However, if this is to be of any value in a future dispute, this representation should be expressly recorded in the underwriter’s notes.

Furthermore, if the representation later turns out to be false (albeit innocently), then, somewhat ironically, X and Y’s contrasting positions show that it may (depending on the facts) be more beneficial for the underwriter to have relied on the broker by not having gone on to read the policy wording carefully if reading the policy would (or should) draw attention to a material difference from the expiring policy.

This may seem a little counter-intuitive but it reflects the law as it was up to early 2016 and probably reflects the position under the Insurance Act 2015, in that the broker’s assurance would not have put “a prudent insurer on notice that it needs to make further enquiries for the purpose of revealing … material circumstances.” and, in fact, would have deterred such enquiries.

Notwithstanding this, it is suggested that the prudent course for renewing underwriters, after asking the broker if there are any material changes since s/he last saw the risk, is also to read the slip policy carefully and, if there are any new or unusual terms which are not immediately fully understood, to ask specific questions about their purpose and scope and to carefully make a note of the answers and proceed accordingly.

Depending on when they were last reviewed, underwriters generally might be advised to check that their underwriting manual guidelines reflect this.

Whether there is to be an appeal against Mr. Justice Jacob’s judgment will be in the public domain soon.

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