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COURT GIVES JUDGMENT ON THE INSURANCE ACT 2015

Since the Insurance Act 2015 came into force in August 2016, there have been few judgments considering its provisions. Therefore, *Scotbeef v D&S Storage (in liquidation)*[1] will be of interest. The court has given some consideration to s9 (basis clauses) in particular, as well as the transparency requirements.

Background

The insured entered into a contact with the claimant to freeze and store meat. Some of the meat was later found to contain mould and the claimant sought damages from the insured. The insured argued that the Food Storage & Distribution (FSDF) terms were incorporated into the contract with the claimant which would have limited the insured's liability. However, in a previous judgment the court found that the contract did not incorporate the FSDF terms, as there was insufficient evidence that the insured had notified the claimant of a change in its terms to include FSDF conditions, and referring to them on an invoice was not enough for incorporation.

The insured became insolvent and so the claimant brought a claim against the defendant insured and its insurer pursuant to the Third Parties (Rights Against Insurers) Act 2010.

This judgment concerned whether the insured was entitled to an indemnity under the policy indemnifying it for its liability to the claimant (and therefore whether the claimant could recover pursuant to the 2010 Act).

Insurance Act 2015 – recap of relevant provisions

The Act replaced the insured's existing duty of disclosure when entering into a policy with a duty of fair presentation. If there is a breach of the duty, the insurer's remedy for a deliberate or reckless breach is to avoid the insurance contract and retain the premium. If the breach is not deliberate or reckless, then the remedy depends on what the insurer would have done were it not for the breach. If the insurer would not have entered the policy on any terms, then it may avoid the contract and refuse all claims but must return the premium. If it would have entered into the policy on different terms, then the policy will be treated as if it is on those terms. If the insurer would have charged a higher premium then it can proportionately reduce the amount paid in respect of the claim.

Under s9 of the Act, so called "basis clauses" are prohibited. The section provides that a representation made by the insured in connection with a proposed non-consumer insurance contract, or a variation, is not capable of being converted into a warranty by means of any provision of the insurance contract or any other contract, whether declaring the representation to form the basis of the contract or otherwise.

Finally, it is only possible to contract out of any provisions of the Act (except the basis clause provision in section 9, which cannot be contracted out of) if the transparency requirements in section 16 are met. These provide that if a term is more disadvantageous to the insured than the Act, then it is only effective if sufficient steps have been taken to draw it to the insured's attention and if it is clear and unambiguous as to its effects.

The policy

In a clause headed "*Duty of Assured*" it was stated that it was a condition precedent:

"(i) that the Assured makes a full declaration of all current trading conditions at the inception of the policy period; (ii) that during the currency of this policy the Assured continuously trades under the conditions declared and approved by Underwriters in writing (iii) that the Assured shall take all reasonable and practicable steps to ensure that their trading conditions are incorporated in all contracts entered into by the Assured [followed by a non-exhaustive list of particular steps that would be considered reasonable]

[1] [2024] EWHC 341 (TCC)

If a claim arises in respect of a contract into which the Assured have failed to incorporate the above mentioned conditions the Assured's right to be indemnified under this policy in respect of such a claim shall not be prejudiced providing that the Assured has taken all reasonable and practicable steps to incorporate the above conditions into contracts"

Judgment

Insurers argued that the Insured was in breach of sub-clause (ii) as it had not traded using FSDF terms and had not taken all reasonable steps to incorporate them. This was a condition precedent and so cover for the claim was denied.

Section 9

Her Honour Judge Kelly, in the Chancery Division, Leeds District Registry, indicated that the first issue was whether subclause (ii) was subordinate to sub-clause (i). So ie whether sub-clause (ii) was a freestanding warranty or condition precedent requiring the insured to trade on FSDF conditions even if they were misrepresented as incorporated under sub-clause (i).

The Judge found that the sub-clauses must be read together due to the wording of the Duty of Assured clause, as the end part of the wording referred back to all three sub-clauses in stating that the insured's right to be indemnified would not be prejudiced if it had taken all reasonable and practicable steps to incorporate the terms.

Then the Judge also held that sub-clause (i), that the insured must make a full declaration of trading conditions at inception, was plainly a representation. Therefore, if FSDF terms were not incorporated into its contracts the insured would be in breach of the sub-clause, which had the effect of turning the pre-contractual representation into a warranty. This was something that is prohibited by s9 of the Act. (This was despite insurer's submissions that this was not the mischief that s9 was aimed at.)

However, the court rejected the claimant's submissions that sub-clause (ii) was subordinate to sub-clause (i) or that subclauses (ii) and (iii) only related to new contracts.

Fair presentation/transparency

It was held that the insured did misrepresent its trading terms to insurers because it indicated that FSDF terms were in use.

Therefore, it was necessary to consider whether there had been a breach of the duty of fair presentation and the transparency requirements of the Act (which the insurers would need to satisfy to be able to rely on the consequences of the clause being a condition precedent).

The Judge found that the sub-clauses did not satisfy the transparency requirements for the following reasons.

- Sub-clause (iii) put the insured in a worse position than the Act as the insured would breach sub-clause (iii) if it did not take all reasonable and practicable steps to incorporate FSDF terms in its contract, even if in fact they were incorporated. A breach of (iii) would allow insurers to avoid indemnifying even if the loss was unrelated to the breach.
- There was no evidence that this disadvantageous term was drawn to the insured's attention (and its incorporation in a previous policy from a prior year was not by itself enough)
- In any event this disadvantageous term was unclear as the judge found that it was not certain what effect a breach of sub-clause (iii) had. Sub-clause (iii) provided that there was no breach of condition precedent if reasonable steps were taken to incorporate FSDF terms, but elsewhere the policy stated that the effect of a breach of condition precedent was that insurers were entitled to avoid the policy in its entirety and these two clauses could not be reconciled.

The judge held that the matter should be considered in the context of an insurer's remedies for a qualifying breach of the duty of fair presentation.

The qualifying breach by the insured was not deliberate or reckless (as it thought it was trading on FSDF terms). To avoid the contract the insurer would therefore have to show that it would not have entered into the contract with the insured on any terms. It was held that the insurer's evidence (witness evidence given by a senior underwriter and the senior claims adjuster) did not show this. In fact it was held that there was evidence for insurers being prepared to indemnify when industry standard trading conditions were not used. If individual terms were of importance to the insurer, then the insurer could have specified that they were incorporated into the insurance contract. Therefore, the judge held that the policy responded.

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