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INSURABLE INTEREST IN “DOUBLE SOLD” COMMODITIES: A GRAIN OF TRUTH?

The Court of Appeal considered the issue of insurable interest in its recent judgment in *Quadra Commodities SA v XL Insurance Company SE*. In this briefing we discuss the judgment and its implications for insurers and insureds.

Facts

The background to this matter was the "Agroinvest Group Fraud" which was uncovered in Ukraine in 2019. The fraud involved the Agroinvest Group obtaining parcels of agricultural commodity products from local farmers (such as grain, corn and sunflower seeds) before selling the same parcels of commodities many times over to multiple traders via the issuance of fraudulent warehouse receipts.

The insured, a commodities trader, entered into various contracts with entities in the Agroinvest Group for the purchase of grain. In performance of the purchase contracts, warehouse receipts were provided to the insured confirming that the relevant quantities of grain were held in common bulk in stipulated warehouses, or "Elevators".

It transpired that the Elevators issued multiple warehouse receipts in respect of the same goods to different buyers. Some reports suggested that up to five or six warehouse receipts may have been issued with respect to the same grain. The fraud unravelled when buyers sought to execute physical deliveries against the fraudulent warehouse receipts, and it became apparent that there was insufficient grain to go around. The insured sought to recover its losses under its Marine Cargo policy. Insurers denied the claim on the basis that there had been no physical loss of grain, and that the insured had, instead, suffered a purely financial loss on the basis of fraudulent warehouse receipts.

Key issue – Insurable Interest

Insurable interest was the main issue under consideration in this matter. Without an insurable interest in the subject matter of the insurance, the insured did not stand to suffer a loss or disadvantage upon the happening of an insured event.

In these circumstances, the key question was whether the insured could establish an insurable interest in unascertained grain it had purchased but may have difficulty physically identifying, due to the overselling at the Elevators.

First Instance

At first instance Mr. Justice Butcher found that the insured did have an insurable interest in the goods as payment had been made under purchase contracts, and an insurable interest could therefore be established in the unascertained goods of the relevant description in the Elevators. Further, as the Insured could show an immediate right to possession of the grain, this was further evidence of an insurable interest.

Court of Appeal

The insurers appealed the decision of Mr. Justice Butcher and argued that an insurable interest could not be established in the grain for the following main reasons:

- There was no grain of the corresponding quality and quantity in the Elevators at the time the warehouse receipts were issued (a challenge to the first instance factual findings).
- The insured's grain, which formed part of a common bulk, could not be sufficiently identified; and
- The insured did not have an immediate right to possession.

The Court of Appeal rejected the insurers' appeal.

On the first ground, the Court found that there had been ample evidence before the first instance judge entitling him to find that there was such grain present at the time the receipts were issued. It had been integral to the fraud that there was grain present in the Elevators which, on inspection, would match the amount being purportedly sold to any trader.

On the second point the Court found that the insured did have an insurable interest in the grain it had purchased. Even where property nor risk had passed in the goods, payment or part-payment of the purchase price will give the buyer an insurable interest because if the seller went insolvent, the buyer would stand to suffer a loss/be disadvantaged by this adverse development. Upon making payment, the insured stood in a legal or equitable relation to the grain and any subsequent loss arising as a result of over-selling or otherwise, was a loss arising out of the insured's legal or equitable relation to the property. This was a principle approved in the American case of *Cumberland Bone*[1] which, whilst consistent with English law commentary on the establishment of an insurable interest, had not until now been recognised in the English courts. The insurers' submissions, it was held, had confused the concept of insurable interest between insurer and insured with that of a proprietary interest as between buyer and seller.

Finally, although the decision on the first two grounds was enough to determine the appeal in the insured's favour, the Court went on to consider the issue of right to possession. It was held that the judge had been right to conclude that the insured had an immediate right to possession under the applicable Ukrainian law.

Conclusion

The Court of Appeal's decision will be welcome news to policyholders involved in the sale and purchase of commodities held in bulk. To establish an insurable interest in goods held in common bulk, a policyholder is not required to ascertain the goods or sufficiently identify them within part of the bulk. Whilst this exercise may still be necessary to establish a proprietary interest, evidence of payment for the goods held in bulk will now be sufficient to establish an insurable interest as a matter of English law. A word of warning for insurers: where multiple policyholders are able to evidence payment for the same commodities that have been oversold, this decision may result in insurers paying several indemnities in respect of the same parcels of goods.

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[1] Decision of the Supreme Judicial Court of Maine in *Cumberland Bone Company v Andes Insurance Co 64 Me 466 (1874)*

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