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INSURERS: DO YOU KNOW WHAT YOU KNOW?

The Commercial Court has delivered a noteworthy decision which deals with, among other things, whether "knowledge" held by a claims team can also be said to be in the "knowledge" of the relevant underwriters. The judgment considered this in the context of policy construction and potential rectification of the definition of "Insured" in a policy wording, and the case provides a useful discussion of estoppel by convention. The decision is also of interest in the context of the duty of fair presentation under the Insurance Act 2015.

Claim background

The case concerned a 16th century hotel in Rye, Sussex, which was largely destroyed by a fire in 2019. The first claimant, George on High Limited (**GOH**) owned the freehold of the hotel. The second claimant, George on Rye Limited (**GOR**), owned and operated the hotel business and restaurant. Both claimants were in common ownership.

The claimants' broker (and the first defendant), Alan Boswell Insurance Brokers Limited arranged property insurance cover, including business interruption cover, with the second defendant, New India Assurance Company Limited on an annual basis from 2013. Key to the issues in dispute, the relevant policy described the "Insured" as "*The George on High Ltd t/a The George in Rye*". Therefore, it did not expressly refer to GOR (which had never traded as "The George in Rye").

The claimants made a claim against their policy including: i) the damage to the building (a GOH loss), ii) loss of business during reconstruction (a GOR loss), iii) loss of stock and other contents (a GOR loss). The insurer accepted liability for the buildings damage, but declined the GOR losses, arguing that GOR was not actually insured under the policy.

The claimants commenced proceedings against the broker for negligently failing to arrange insurance for GOR. However, the broker argued that the insurer should have accepted cover in any event, and accordingly, the insurer was joined to these proceedings.

The dispute

The claimants' primary claim was against the broker for negligently arranging inadequate insurance. However, most of these claims were settled before the trial, and the broker accepted that it would be liable where the insurers were not liable for any of the claimants' insurance claims under the policy. Consequently, it was the broker that joined the insurers to the proceedings and advanced the arguments as to why the insurer should have accepted cover before the Court, which were four-fold:

1. that on the proper construction of the Policy, both GOH and GOR were covered; or
2. if GOR was not covered, then the policy ought to be rectified accordingly; or
3. the insurer should be prevented from declining cover using the legal principle of estoppel by convention; or
4. GOR should be considered covered in any event as GOH had acted as its agent, arranging the cover for GOR.

In summary, Mr Justice Tinkler agreed with the first three of these arguments, and did not need to consider the fourth. Consequently, both GOH and GOR (and their losses) were covered by the policy. There was a slightly separate issue wherein the broker had failed to arrange sufficient loss of rent cover for GOH, such that Tinkler J also found the broker liable for the lost rent due to it from GOR during the rectification period.

The proper construction of the "Insured" definition

Tinkler J set out the relevant test to ascertain the meaning of the policy wording, which is:

> "*the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*"[1]

As part of his assessment of the background knowledge, Tinkler J considered the previous course of dealing between the parties, which included both the presentation of the risk and the claimants' historic claims under prior policy years, alongside the insurer's "*internal systems for sharing of information*".

The key thing here was that the claimants had made previous claims for GOR losses, which had been accepted by the insurer's claims handlers (who were an external company) under prior policy years, and the relationship between GOH and GOR had been explained in this context. At no point had this discrepancy between the claimant entities been questioned prior to the claim at hand.

Insurers argued that this knowledge should not be attributed to them as underwriters, relying on prior case law including *Mahli v Abbey Life Insurance*[2] and *Mark Nicholas Kennedy Aldridge v Liberty Mutual Assurance Europe Ltd*[3] .However, Tinkler J noted that these decisions were authority for the principle that a matter that requires aggregation of multiple facts known by different people might not necessarily be a matter known to the underwriter.

Further, it was argued, information given to a person not authorised to receive it, nor able to appreciate its significance, will not be imputed to an underwriter. The claims handlers in this case were not only authorised to receive and appreciate the information; their entire role was to assess the extent to which an underwriter was liable to pay out. Tinkler J followed the earlier decision of *Evans v Employers Mutual*[4] in this regard.

Tinkler J listed a number of principles that will be relevant to an assessment of an underwriter's knowledge in his judgment. As part of this exercise, he noted section 5 of the Insurance Act 2015, which includes a provision concerning the insurer's knowledge in the context of the insured's duty of fair presentation. This provides that:

> "*an insurer knows something only if it is known to one or more of the individuals who participate on behalf of the insurer in the decision whether to take the risk, and if so on what terms .... (2) For the purposes of s3(5)(c) an insurer ought to know something only if – (a) an employee or agent of the insurer knows it and ought reasonably to have passed on the relevant information to an individual mentioned in subsection (1) or (b) the relevant information is held by the insurer and is readily available to an individual mentioned in subsection (1)*"

The Judge also noted that *MacGillivray on Insurance Law* indicates that the above provision will include matters known to claims handlers. This is true even where claims handlers are external, so the knowledge acquired in the course of the claims handlers' duties could be presumed to have been known by the underwriters in this case.

Considering this background knowledge, and the specific witness evidence that was put before him, Tinkler J concluded that underwriters knew[5] at the time of inception of the policy that GOR operated the businesses. The "*imprecise*" terminology used by the brokers to refer to both the entities involved and the separation of the business at risk presentation had resulted in the imprecise description of the "Insured".

Accordingly, a reasonable person with all the background knowledge available to the parties at the 2018/19 renewal would interpret the meaning of "Insured" as: "*George on High Limited* ***and the business operated by GOR*** *t/a The George in Rye*" as: all parties were aware that the business was operated by GOR; the policy covered business interruption and employers' liability risks; and GOR paid the premiums. Consequently, GOR could be considered to be insured under the policy, and its losses covered.

The first alternative: rectification

Tinkler J considered the test for rectification of the policy, as described in *Swainland Builders*[6], to be satisfied. There was a common continuing intention that both GOH and GOR were covered on the facts provided, and that there was demonstrable agreement of this by GOR paying the premiums and NIAC accepting them. In Tinkler J's view, the insurers' "*clear intention*" was to provide insurance for the hotel business, which "*included insurance for liability to*

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[1] Lord Hoffman, Investors Compensation [1998] 1 WLR 896.

[2] [1995] 4 Re LR 305.

[3] [2016] EWHC 3037.

[4] [1936] 1 KB 305.

[5] As well as, of course, GOH, the other contracting party.

[6] Swainland Builders Ltd v Freehold Properties Ltd [2002] 2 EGLR 71, 74, para 33.

employees, the public, and for business interruption". This was set out in the policy schedule, and had been the evidence from the witnesses of fact. This intention was found to have been continuing at policy inception, with the only indication that NIAC was not intending to insure GOR coming after this claim had been presented.

Therefore, even if Tinkler J was wrong on construction, he decided that the policy could be rectified to include GOR as an insured, thereby reaching the same conclusion.

The second alternative: estoppel by convention

The judge found significant overlap between the considerations for estoppel and the above issues. There must be a common assumption (as in rectification), and the insurer must have conveyed some understanding on which the insurer would have expected the claimants to rely. In his view, the insurer had done this when accepting liability for the historic claims, which related to losses from the hotel business.

GOH must then have relied on that common assumption, and the owner of the claimants confirmed that payment of the historic claims was a core fact underpinning his reliance that GOR was covered by the policy. The claimants could also demonstrate reliance through GOR's continued payment of the premiums for the insurance, an obvious indicator that it expected to be covered. However, it is not clear from Tinkler J's judgment whether the payment and subsequent acceptance of the premium payments (i.e., without the historical claims payments) would have been enough to ground the estoppel.

Nevertheless, this reliance continued over the course of the policy renewals, and, in Tinkler J's view, it would have been unconscionable to allow the insurer to assert its position to the clear detriment of GOR (i.e., premiums paid). Accordingly, Tinkler J also considered the requirements of estoppel by convention to be satisfied, such that the insurer could be estopped from declining cover on the basis that GOR had not been included as "Insured".

Key takeaways

The case provides an important reminder to insurers that there must be a clear dialogue between underwriting and claims teams regarding insureds. Any knowledge that a claims team has acquired about an insured may be presumed to be in the underwriter's knowledge, and this may result in unforeseen consequences as to the extent of the risk covered. It may also be relevant to the issue of whether an insured has met its duty of fair presentation under the Insurance Act 2015.

Insurers should also be conscious this may also apply where external claims handlers/loss adjusters are employed as their agents, so the availability and exchange of relevant information is essential for both underwriting and claims to operate on the same page.

(1) George on High Limited (2) George on Rye Limited v (1) Alan Boswell Insurance Brokers Limited (2) New India Assurance Company Limited [2023] EWHC 1963 (Comm)

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