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THE IMPORTANCE OF DRAFTING QUESTIONS IN INSURANCE PROPOSALS: A REMINDER

In a recent judgment, *Ristorante Ltd t/a Bar Massimo v Zurich Insurance plc [2021] EWHC 2538* (Ch) the court has set out the principles relating to interpretation of questions in a proposal for insurance and the extent to which those questions can lead to a waiver. The case is a reminder of the importance of clear and unambiguous drafting of questions and the form overall.

Facts

The insured company was the owner of a leasehold property carrying on a bar and restaurant business in Glasgow. In 2015, the insured took out a policy covering various risks, and this was renewed in 2016 and 2017. In 2018, the property was damaged by fire and the claimant sought to claim under the policy. Insurers rejected the claim and purported to avoid the policy for non-disclosure of a material risk.

At inception and each renewal the insured completed an application on the insurer's electronic automated underwriting system, and applications were evaluated by an algorithm without involvement from an underwriter. In this case, the insured used a broker in connection with the cover.

The insured selected *"Agreed"* in response to the following statement of fact:

> *"No owner, director, business partner or family member involved with the business:.....*
>
> *(iii) has ever been the subject of a winding-up order or company/individual voluntary arrangement with creditors, or been placed into administration, administrative receivership or liquidation".*

Three of the directors of the insured had been directors of other companies that had entered voluntary liquidation, and had subsequently been dissolved. Insurers argued that this meant there had been a material non-disclosure by the insured in making the statement above. It also relied on certain other statements in the form, reminding the insured to disclose all material facts. Insurers wrote to the insured avoiding the policy.

The insured disputed that insurers were entitled to avoid and the matter turned on the correct interpretation of the insolvency question set out above.

Issues

The issues before the court were as follows:

- The proper meaning of the insolvency question. The insured contended that the question had only been concerned with the disclosure of insolvency events of the relevant individuals themselves, and not any other company or entity with whom an individual may have been connected in some way. Therefore the answer given by the insured had been correct.
- If the insured was correct about the meaning of the insolvency question, then whether insurers had waived their right, by the wording of the question, to any further information about the insolvency of connected companies.

Judgment

The matter was dealt with by trial of preliminary issues.

Construction of the question

Mr Justice Snowden agreed with the insured on the correct construction of the insolvency question.

The Judge considered the general principles of contractual interpretation, which apply to insurance contracts, as set out in *Wood v Capita Insurance Services* [2017] AC 1173. These are that the court must find the objective meaning of the contractual language that the parties have used, considering the contract as a whole. If there is genuine doubt or ambiguity then the court is entitled to prefer the meaning that most accords with business common sense. However, in relation to insurance, where the court is interpreting ambiguous questions posed by insurers rather than a negotiated contract term, and where there are two objectively reasonable constructions, this should be resolved in favour of the insured.

Applying this to the facts, Snowden J considered the wording of the insolvency question including the sequence of questions of which it formed a part, and found that it was in fact clear. There was no express mention in the question of any corporate body with which any of the relevant persons had been involved or connected in some way. The literal meaning of the question supported the insured's position.

The insurer's various arguments as to how the question should be construed were rejected. It was noted that the insurer's construction gave rise to a lack of clarity, for example in relation to what degree of involvement or connection with another company would trigger the requirement for disclosure. The policy was arranged through a broker and the judge rejected the contention that a reasonable broker would have understood that the insurer was also interested in insolvency events of connected companies. There was no evidence of how a reasonable broker would have understood the question differently from its ordinary and natural meaning, and no authority to suggest that the hypothetical reasonable person for the purpose of interpretation is one who is advised by a hypothetical reasonable broker.

The Judge referred to two prior cases in this area, the Court of Appeal decision in *Doheny v New India Assurance* [2005] 1 All ER (Comm) 382 and *R&R Developments v Axa Insurance UK Plc* [2010] 2 All ER (Comm) 527. In both those cases (although one was in favour of insurers and one the insured) the relevant insolvency questions made express reference to other connected businesses with which the directors had been involved. Snowden J found that a reasonable insurer in 2015 could, at the very least, have been expected to have been aware of these judgments, and to understand the importance of using some words to refer to those other companies, if it wished to enquire into insolvency events at companies connected with the directors,.

The Judge therefore found that if he had found that the language of the insolvency question had been ambiguous he would have accepted that the insured's interpretation of it was a reasonable one.

Waiver

The second issue was whether the insurer, by asking a specific question, waived its right to be told about other insolvency events. The general position is that, where questions in a proposal form are on particular subjects and the answers are warranted, the insurer waives the right to information on the same matters outside the scope of the question or related subject matter. (The common example being that if an insurer asks how many accidents an insured has suffered in the last three years, it may be implied it does not wish to know of accidents before that time even though they are material). Whether there is a waiver depends on the construction of the proposal form in each case.

The insured in this case accepted that the other insolvency events relating to connected companies were material, and that the insurer was induced to enter into the policy by the representation.

The Judge found that there had been a waiver. The test was whether a reasonable person reading the insolvency question would be justified in thinking that the insurer had restricted its right to receive all material information and consented to the omission of specific information. Snowden J found that the insurers had identified previous liquidations as a subject on which insurers wished to obtain disclosure, and identified specific persons in respect of whom those previous liquidations would be disclosable. It was a reasonable inference for the insured that insurers did not wish to know about any other liquidations, and insurers had limited their rights to disclosure.

Snowden J also rejected submissions that the court should be slow to conclude that a matter of moral hazard would or could be waived by insurers, or that a reasonable broker would be expected to inform the insured that the other insolvency events were material facts the insurer would expect to have disclosed.

Therefore, in summary the Court found that the policy could not be avoided.

Conclusion

The judgment is a reminder about the importance of careful and clear drafting of questions in proposal forms.

Where the wording of a question posed by insurers is ambiguous it will be resolved in favour of the insured, so long as the insured's interpretation of the question is objectively reasonable. It will not matter what type the information is and it will not be treated differently if it goes to the issue of moral hazard. The case also makes clear that insurers are expected to take account of any relevant case law in drafting proposal forms.

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