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POLICY NON-AVOIDANCE CLAUSE DEFEATS ESTOPPEL BASED ON NON-FRAUDULENT REPRESENTATION AS WELL AS DEFEATING MISREPRESENTATION

ABN AMRO BANK v RSA and others and Edge Insurance Brokers [2021] EWCA Civ 1789

ABN Amro Bank v RSA and others and Edge Insurance Brokers [2021] EWCA Civ 1789 concerns the insurers' and the broker's appeal against Mr Justice Jacobs' very comprehensive first instance decision earlier in 2021, and emphasises the importance of underwriters reviewing the terms of the slip, whether at initial placing or on renewal, in order to identify and understand any new or unusual term.

The facts and legal reasoning as set out in both judgments are fairly lengthy and at times very technical. We reported on the first judgment in two previous articles, as follows:

HFW | Insurance brokers' E&O duties regarding unusual policy terms: Is there a "duty to nanny?"

HFW | Contract Certainty and Policy Renewals: Underwriters' reliance on brokers' "all as expiring" statement

Background and first instance decision

This was a cargo insurance coverage case, coupled with an E&O claim over against the insurance broker. The first instance and appeal decisions throw a revealing light on the innermost workings of the London subscription insurance market. They also highlight some novel aspects of the panoply of issues which can arise in insurance coverage disputes, ranging from the limits on the authority of the leading underwriter to agree contract changes under the General Underwriters Agreement ("GUA"), to policy interpretation, rescission, affirmation, estoppel, Non-Avoidance Clauses ("NACs") issues and related broker E&O duties, including whether there was a duty to explain unusual policy terms to underwriters.

The claimant bank (ABN Amro) sued its 14 insurers ("Underwriters") and its insurance broker ("Edge") for £31.3 million allegedly due under a 2016 policy of marine cargo and storage insurance (the "Policy"). The alternative claim over against its broker, Edge, was brought on the basis of alleged breach of contract and negligence by Edge in placing the Policy.

Mr Justice Jacobs had decided that (i) all the Underwriters (except following underwriters Ark and Advent) were liable to indemnify ABN Amro for the financial loss it had sustained, pursuant to the Transaction Premium Clause (the TPC) contained in the Policy, and (ii) Ark and Advent were not liable under the Policy, because ABN Amro was estopped by convention from relying on the TPC as against them, and Edge was consequently liable to ABN Amro for Ark's and Advent's shares, which amounted to £3.3 million.

The factual background was that ABN Amro had advanced working capital by way of structured commodities financing to its clients T/E through a special purpose vehicle ('I') to finance their trade in cocoa beans and cocoa products (the "Goods"). These so-called “repo” transactions comprised T/E selling the Goods to I/ABN Amro on the basis that T/ E were obliged to repurchase the Goods from I/ABN Amro at a specified (later) time and (higher) price. T/E defaulted in doing so in 2016. The Goods were of poor quality and I/ABN Amro sustained consequent financial losses when the Goods were sold at a loss. ABN Amro sought indemnity against those losses under the TPC in the 2016 Policy, which provided, (in relevant part only) as follows:

> *"the Insured is covered under this contract for the Transaction Premium that the Insured would otherwise have received and/or earned in the absence of a Default on the part of the Insured's client.*

'Default' means a failure, refusal or non-exercise of an option, on the part of the Insured's client (for whatever reason) to purchase (or repurchase) the Subject Matter Insured from the Insured at the Pre-agreed Price."

Underwriters all contended that the TPC, which embodied a bespoke form of credit risk insurance which was unusual within a cargo insurance, should be construed so as to insure financial default only in the case where there was physical loss or damage to the goods. In this they failed at first instance, as a matter of contract interpretation, (discussed here)

Underwriters raised additional arguments based upon what Edge said/did not say during the renewal of the expiring (2015) policy into 2016. Thus, in July 2015, Edge broked a policy variation to the lead underwriter, who was informed that the amendments, which included the bespoke TPC and a non-avoidance clause (the NAC), had been drafted by ABN Amro's lawyers. The leading underwriter scratched the amendment (the 'July Endorsement'), but did not instruct Edge to circulate it to the following market, which included Ark and Advent.

Accordingly, Ark and Advent did not know about the TPC and NAC in 2015. Edge's brokers believed that the leader had agreed the TPC on behalf of the entire following market, including Ark and Advent, under a Policy provision (the GUA) allowing the lead underwriter to agree contract changes.

Edge were mistaken, however, and Mr. Justice Jacobs later held that only the leader, and not the following market, was bound by the TPC and the NAC which were contained in the July Endorsement to the 2015 policy.

When the prior year's policy was renewed into 2016, each of the Underwriters, including Ark and Advent, scratched or signed, and was given a copy of, the 2016 Policy wording, which explicitly included the TPC and the NAC.

The judge found that when Edge broked the 2016 renewal to Ark and (separately) to Advent, Edge told these Underwriters that the renewal Policy was "as expiry": Edge believed the Policy was the same as the expiring one since Edge thought the July Endorsement to the 2015 policy had bound all Underwriters, due to the GUA, notwithstanding that it had been scratched and seen by only the leader. Notably, neither Ark nor Advent's underwriters actually read the wording of the Policy at that stage.

As a result, the judge found that Edge on the one hand, and Ark and Advent on the other hand, were at cross purposes about the meaning of "as expiry":

- Edge understood "as expiry" to include the TPC and the NAC,
- but Ark and Advent understood "as expiry" to mean the 2016 Policy was unchanged from the 2015 policy, as it had been at inception, that is, not including the TPC and NAC.

Ark and Advent (amongst other Underwriters) had contended at trial that they could avoid the Policy on the basis of the "as expiry" representation. The judge, however, had held that the NAC prevented avoidance. The judge also held that Underwriters had affirmed the Policy by their conduct in dealing with ABN Amro's claim without reservation of rights between claim notification in October 2016 and the first suggestion of avoidance in April/May 2020, after proceedings had started.

Ark and Advent, however, had established before the judge that the "as expiry" representation had induced them to write the Policy and the judge upheld Ark's and Advent's additional defence that the "as expiry" representation constituted an estoppel by convention which prevented ABN Amro from relying on the TPC to make its claim for an indemnity against them. Consequently, the judge relieved Ark and Advent (alone amongst Underwriters) from liability for ABN Amro's claim and he held Edge liable for Ark/Advents' shares, due to Edge's negligence in failing to secure the cover which its banking client had wanted.

Appeal judgment

There were two appeals.

The first appeal

In the first appeal, Underwriters appealed the decision that the TPC, as a matter of interpretation, bound them to indemnify the bank against the risk of its clients' financial default. It was argued that the judge had not properly taken into account the factual matrix against which the policy had been agreed, for example that there was no precedent for this sort of cover in a marine cargo policy, and underwriters would not have the detailed knowledge of the trade credit market.

The appeal court rejected the Underwriters' arguments and approved the judge's treatment of the issues arising in interpreting the TPC (although by the time of the judgment, this appeal had in fact been compromised.)

The appeal court agreed with the first instance decision that the terms of the TPC were unambiguous and favoured the bank but, as the judge had acknowledged, elements of the factual matrix pointed against a literal interpretation of the TPC.

ABN Amro accepted that marine cargo insurance was normally a different class of business from credit risk insurance, and that this was an important part of the factual matrix. However, add-ons to standard physical loss and

damage cover were common in the cargo market, and there was no reason why such an add-on could not give protection for financial default.

The TPC was held to contain express words of coverage, not simply of a basis of valuation or measure of indemnity and so the Court dismissed the first appeal

The second appeal

By way of background, the second appeal concerned two forms of estoppel. Firstly estoppel by convention, which is established where parties to a transaction act on an assumed state of facts or law; and the assumption is shared by them both or made by one and acquiesced in by the other. The effect is to preclude a party from going back on the assumption if it would be unjust to do so. The second is estoppel by representation which arises, in essence, where a representation is made by one party to another intending them to act on it, and the second party reasonably relies on it to its detriment.

In the second appeal, Edge appealed the judgment against it on three main grounds that:

(i) estoppel by convention cannot arise when (as the judge found), Edge on the one hand and each of Ark and Advent on the other hand, were at cross purposes, so that the broker (acting for ABN Amro) and these two underwriters did not share a common assumption of fact or law (the 'cross purposes ground').

(ii) the estoppel by convention defence was precluded by the NAC.

(iii) the judge had been wrong to find that it would be unjust or unconscionable for ABN Amro to resile from the assumption made by Ark and Advent that the Policy they were writing did not include the TPC, as had they known of the inclusion of the TPC, Ark and Advent would not, have written the Policy (the 'injustice ground').

Edge made the argument on the second appeal, even though the true (estoppel) issue was between ABN Amro on the one hand and Ark and Advent on the other.

In response, underwriters clarified their case. First, they made clear that, on appeal, they maintained two species of estoppel: first, an estoppel by convention based on acquiescence rather than any common assumption, and secondly an estoppel by representation. Both cases were founded on the same "as expiry" representations.

The NAC provided as follows:

"The Underwriters will not:

(a) seek to avoid or repudiate this contract for non-disclosure or misrepresentation other than fraudulent non-disclosure or fraudulent misrepresentation; or....

(c) seek to reject a claim for loss on the grounds of: i. Non-disclosure or misrepresentation other than fraudulent non-disclosure or fraudulent misrepresentation"

The appeal court observed that it was strange that, in an insurance case, it should be suggested that underwriters who signed the slip, and were bound by it whether they read it or not, should be able to escape liability on the grounds of an estoppel by convention or representation. This oddity was compounded when the same underwriters failed to avoid the Policy on the grounds of misrepresentation and non-disclosure on the basis of the validity of the NAC, which bound all the Underwriters, including Ark and Advent, who sought to rely on the estoppels.

The estoppels

Edge argued that, firstly, an estoppel by convention cannot exist where the parties do not share a common assumption and are at cross purposes, and secondly an estoppel by convention based on acquiescence can only succeed where the party said to be estopped (ABN Amro) knows what it is said to be acquiescing in (namely that Ark and Advent were not bound by the July endorsement, or to put it another way, that Ark and Advent thought that the expiring policy did not contain either the TPC or the NAC).

The Underwriters submitted that the two limbs of estoppel by convention were separate doctrines and that the requirement for a shared assumption did not apply to estoppel by convention by acquiescence.

The appeal court held that, in one sense that is correct, but the real question is whether acquiescence involves the party said to be estopped (ABN Amro and its broker, Edge) knowing what it is said to be acquiescing in (namely that Ark and Advent were not bound by the July endorsement). Edge submitted that knowledge is an inevitable part of acquiescence, because one cannot acquiesce in something that one does not know about, and Ark and Advent submitted that acquiescence is an objective concept. Here, therefore, Edge represented that the Policy was “as expiry”, and Ark and Advent acquiesced in that being the case even though the parties were at cross purposes.

In short, the appeal court observed that if the NAC were applicable to prevent the Respondent Underwriters avoiding the Policy on the grounds of misrepresentation, it would be strange at least if an estoppel based on those same representations could succeed. But the court agreed that that must ultimately depend on the proper interpretation of the NAC.

Since the Underwriters now relied on an estoppel by representation, there was less need to resolve the question of whether an objective interpretation is sufficient for an acquiescence. Nonetheless, in the court's view, an estoppel by convention based on acquiescence could only exist where the parties were subjectively in agreement; i.e. where in this case, the party making the representation knows that the other party has a different understanding.

Since the judge held that there were misrepresentations, the question of whether there were also common assumptions or an assumption in which the Respondent Underwriters acquiesced was not significant to the outcome. Even if, as suggested, Edge was right about the subjective nature of a conventional understanding and acquiescence, the court opined that there is clear authority for the proposition that the meaning of a representation depends upon how a reasonable representee would understand it. Plainly, the reasonable representee in the position of Ark and Advent would have understood the representations that the Policy was "as expiry" to mean what it said, namely that the Policy was indeed on the terms of the expiring policy, which did not, in their cases, include the TPC and the NAC.

There was, therefore an estoppel by representation which was capable of preventing ABN Amro from relying on the TPC as against Ark and Advent.

Application of the NAC

However, it was important that the judge held that the NAC was included in the Policy written by Ark and Advent. That finding was not challenged on appeal.

The NAC had two important provisions, and the appeal court noted that only one of them had been relied upon by the judge (providing that underwriters would not avoid or repudiate the policy for non-disclosure or misrepresentation in the absence of fraud.).

The question for the appeal court was whether the second part of the NAC providing that "*[t]he underwriters will not … seek to reject a claim for loss on the grounds of … misrepresentation other than … fraudulent misrepresentation*" bit on the alleged estoppel by representation and/or convention.

Ark and Advent made a number of arguments including that the NAC did not expressly preclude reliance on an estoppel; it is a common exclusion clause in the marine market, and needed to refer expressly to an estoppel if it were to be effective in excluding it (following *HIH Casualty v. Chase Manhattan Bank* [2003] 2 Lloyd's Rep 61) Moreover, the representations embraced both the TPC and the NAC, though the judge had not dealt with the point, so that, if the estoppel succeeded as regards the TPC, it should also succeed so as to exclude the NAC.

However, the appeal court rejected these arguments finding that Ark and Advent's estoppel defence, however it was framed, depended on the "as expiry" misrepresentations. These were non-fraudulent representations. Ark and Advent relied on that estoppel claim in order to reject ABN Amro's claims for loss against them. That is precisely what the NAC said they could not do. Accordingly, construing the NAC strictly as was required, it bit on the estoppel whether it was an estoppel by convention or representation.

For completeness, the court added that the judge had been wrong to say that "*[t]he potential advantage of the [estoppel] argument from the perspective of [Ark] and [Advent] is that it potentially circumvents the difficulties in their avoidance case, and in particular the effect of the NAC and affirmation*". The judge had assumed that the NAC only prohibited **avoidance** for non-fraudulent misrepresentation and overlooked the fact that it also prohibited **rejection of a claim** for non-fraudulent misrepresentation.

That meant that Ark/Advent's estoppel arguments were precluded by the NAC, Edge's appeal was therefore upheld and Ark/Advent would be liable for their shares of the claim, thus relieving Edge of the corresponding liability.

Conclusion

Following the first instance judgment, we suggested here 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.

This has more force in view of a closing observation made by the appeal court. The first instance judge had found that it would be unconscionable for ABN Amro to resile from the assumption that Advent/Ark had made to the effect that the Policy did not include the TPC. It was not necessary for the appeal court to review that finding. Had it needed to do so, however, the court said it might have put more weight on the undoubted fact, as the judge had found, that neither Ark nor Advent had read the Policy before agreeing to it, despite the clear law that underwriters are bound by the terms of the slip to which they subscribe, whether they read it or not. Had it not been for the NAC, therefore, it seems that the appeal court might have had more difficulty finding for Underwriters on the estoppel argument.

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