SHIPPING & TRADE LAW

Broker's liability for premiums – hitting the right notes?

The Law Commissions' Insurance Contract Law consultation is due to be closed on 20 March 2012. Ms Adebowale Awofeso discusses the Law Commissions' proposals as to reforming the broker's liability for premiums, and whether such reforms are welcome.

The English and Scottish Law Commissions in July 2010 published Issues Paper 8 seeking responses on whether s53 of the Marine Insurance Act 1906 is still needed in today's insurance market. The reader's attention is drawn to the *Shipping and Trade Law* article of October 2010 (vol 10, no 8), titled 'Marine insurance brokers and payment of premium', for a summary of Issues Paper 8. A follow-up consultation paper was recently published by the Commissions on 20 December 2011, covering a wide range of marine insurance issues, and this article will look into the reform proposals suggested by this consultation paper. Parts 18 and 19 of the second consultation deal with the broker's liability for premiums.

Part 18: need for reform

Part 18 discusses what the current s53(1) position is, and provides reasons why reform is needed. The section provides that unless otherwise agreed, brokers are directly responsible for the insured's premium. The Law Commissions point out that this provision was a codification of a marine insurance custom from the 18th and 19th centuries, and that applying some of these cases interpreting s53(1) could 'lead to some surprising results' (p182).

Issues Paper 8 sought consultees' views on whether s53(1) reflects current market practice in either the marine or non-marine markets. The Law Commissions conclude that in both markets the premium is still collected via brokers through a system of net accounting. The Law Commissions point out, however, that this differs from making the brokers directly liable to the insurer for the premium. The broker bears greater responsibility for the premium in marine insurance than in non-marine insurance under a net accounting system, as non-marine insurance brokers would not pay the premium to the insurer where the agency is terminated by the insured. But with the use of TOBAs (Terms of Business Agreement), non-marine brokers could assume direct responsibility for paying the premium, though this seldom occurs. Insurers primarily make use of payment default clauses as a means of enforcing premium collection, with the issuance of a policy cancellation notice usually enough to ensure that the premium is paid. Section 53(1), however, is occasionally invoked against brokers, where other methods fail. It therefore acts as a safety net for insurers, particularly for short-term policies, where cancellation is not available. The consultation paper states that although insurers are usually not in the position to assess the creditworthiness of insureds and take legal action against them, the insurance industry works smoother under a system of passing risk down the chain. The Commissions state that s53(1) is too complex to

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handle the task required of it by the market, and leads to less protection for insurers than originally contemplated.

Insured's insolvency

The Law Commissions state that where the insured is insolvent, s53(1) may not help the insurer in three instances: where the policy is not of marine insurance, as a result of the first instance decision in *Pacific and General Insurance Co Ltd v Hazell* [1997] LRLR 65; where there is an adjusted premium clause allowing premium to be increased when certain events occur, as the option of cancelling the policy for non-payment does not arise: see *The Litsion Pride* [1985] 1 Lloyd's Rep 437; and where the policy, although written in the UK, is governed by foreign law.

Broker's insolvency

The Commissions emphasise that interpreting s53 in light of case law behind it in this instance will lead to the undermining of TOBAs and statutory protection for client money, especially in the context of marine policies where s53 applies. Where the broker is insolvent, insureds can be sued for unpaid premiums by broker's liquidators on behalf of the broker, but not as the insurer's agent, and such money will not constitute 'client money' under the FSA (Financial Services Act) rules. The insurer is not able to counteract this by suing the insured in its own name, as it has no right to do so. Whether or not the insurer will be able to activate a premium default clause to cancel the policy is open to debate, but the Commissions are of the opinion that the case of *Universo Insurance Co of Milan v Merchants' Marine Insurance Co* [1897] 2 QB 93 makes it clear that it is not, as no responsibility exists between the insured and the insurer for the premium, a fact not fully appreciated by the industry.

In non-marine insurance policies where s53 does not apply, TOBAs usually make provision for the broker's insolvency. The risk of the broker's insolvency is either transferred to the insurer as the broker is only responsible to the insurer for premium paid to it by the insured (risk-transfer TOBA), or it is left with the insured, as the liability of the insured to pay premium is not discharged until payment has been received by the insurer (non-risk transfer TOBA).

The FSA rules do not apply automatically to marine business, although brokers often elect to extend the rules, and the Commissions fear that the common law interpretation of s53(1) makes it incompatible with CASS (Client Assets Sourcebook) rules, especially in regard to client money. The Commissions argue that where s53(1) applies, the premium might not fall under the CASS definition of 'client money', as the insured pays the premium to the broker as principal, not agent.

The Commissions conclude that parties are usually not aware of the full consequences of s53(1), and the section is difficult to contract out of, as there would need to be a tripartite agreement which has to be explicitly worded. The Commissions therefore propose that the section be reformed.

Part 19: reform proposals

The Law Commissions propose that s53(1) should be re-enacted, with its common law foundations unpreserved. The insured's liability is to pay the premium to the insurer, and this is to be done through the broker as *agent*. The Commissions ask four questions in relation to this proposal:

(1) Should the insured be liable to pay the insurer?

(2) Where the insured pays the premium to the broker, should this be in the broker's capacity as agent?

(3) Should the general rule that the broker holds the premium as agent of the insured be subject to contrary agreement between broker and insurer?

(4) Should the broker's liability to pay premiums to the insurer be subject to agreement between broker and insurer?

Insured to be liable to insurer for premiums?

In response to the first question, certainly the insured should be liable to pay the insurer. The broker's role should only be that of middleman/agent, as the policy is ultimately between the insured and insurer, a point made by the British Insurance Law Association (BILA) in their response to Issues Paper 8. The insured is the party bound by the terms of and who receives the benefit of the policy, and the insurer is the party responsible for paying up where a valid claim arises. The broker does not play an active part once the contract has been concluded, as far as the substance of the policy is concerned. Therefore ultimately the insured should be liable to the insurer for the premium. Although this might lead to the insured having to pay the premium twice where the broker is insolvent prior to paying the insurer, this will be less problematic than at present, as the insured should generally be able to recover the premium from the broker irrespective of insolvency under the FSA and CASS rules. Of course, the parties are free to agree otherwise.

The Commissions also propose that this should be the same across the board, irrespective of whether the policy is for marine or non-marine insurance; therefore payment to the broker is to be held on trust by the broker as 'client money', in accordance with the broker's TOBA. But is such client money to be held on trust for the insured or the insurer? The Commissions propose that the current position for non-marine insurance (discussed above) should be adopted. This would help prevent the current marine insurance situation whereby, upon insolvency of the broker, the insurer is unable to recover money paid by the insured to the broker easily.

Broker as agent?

As to the second question, there is no reason why the usual agency principles cannot apply here. The root cause of the problem with s53(1) is the fact that the broker receives the premium from the insured as principal, not agent. Are there really any practical justifications for this? The argument that the insurer is not able to ascertain the creditworthiness of the insured is a moot point, because there are many tools available to the insurer in the modern age for this, and this reason alone is not justification for the broker's responsibility to be one of principal, not agent. It is worth considering the argument made by the Lloyd's Market Association that having a chain of brokers makes it difficult for insurers to enforce insureds'

payment obligations, and brokers might take this responsibility more seriously if they could lose the whole premium, not just their commission. This could be the reason why the Law Commissions are not entirely in favour of leaving the broker with no liability whatsoever in regards to the premium, and that is where the third and fourth questions come in.

Broker's liability to insurer for premium?

The Commissions ask whether the general rule that brokers should hold the premium as agent of the insured should be subject to a contract between the broker and insurer. It does not seem as though this provision would lead to any problems, as the insured's liability remains unaffected: the insured would still remain liable to the insurer for the premium, and if the broker assumes liability for premium this would be in addition to the insured's liability, as 'the broker would become jointly and severally liable for the debt' (p202). This sounds good, but it is hard to think of why a broker would agree to this. The current market practice is that the broker is liable by default but, given a choice, why would a prudent broker go for this option? An insurer might want to push for such agreement where it is unsure about the insured, and one can imagine that a broker would be willing to assume such responsibility only where it is completely certain of the insured's credibility, or where a high payday is guaranteed. Whether or not such a provision will be taken advantage of will have to be seen, but as it is unlikely to lead to complications – and might even lead to more insurance business being concluded – it could be a welcome addition. Therefore, the author is in favour of the default rule being that the broker is *not* liable to the insurer for the premium, but is allowed to contract into this.

As to the fourth question on whether the broker's liability to pay premiums to the insurer should be subject to agreement between the broker and insurer, as mentioned, the position should be that this liability only arises where the broker and insurer explicitly agree to it.

Default rule?

The Law Commissions, however, are in favour of the default rule being that the insured and broker are jointly and severally liable to the insurer for this premium. The main change proposed by the Commissions is that the insured's liability for premium, instead of being owed to the broker, should be owed to the insurer. Therefore both the insured (indirectly) and the broker (directly) will be liable to the insurer for the premium unless the broker contracts out. The Commissions seek responses to four further questions:

(1) Should the default rule be that the broker is jointly and severally liable with the insured to the insurer for the premium?

(2) Can the broker and insurer contract out of it?

(3) Should the default rule apply equally to initial and adjusted premiums clauses?

(4) Should the default rule apply where the broker/insurer relationship is governed by English or Scottish law, regardless of the law governing the policy?

Setting the default rule as joint and several liability of the broker with the insured is not a viable option especially because of the reasons that will be given below.

The justification given by the Commissions is that this default rule 'most closely resembles current market practice and would cause minimum disruption to the way the parties currently do business' (p202). But the purpose of reforming the law is not to try to make it resemble the status quo but to improve it, and if the provision requires a major overhaul – which s53(1) does – there is no reason not to do it. Making the broker jointly responsible with the insured for the premium is not enough of a step forward in the right direction, even though it is an improvement on the present situation, and should only be subject to agreement between broker and insurer. This is how it works in non-marine insurance presently, and there is no reason why it cannot work for marine insurance too. The Commissions state that brokers can easily contract out of this in the TOBA with the insurer, but it should be the other way round – the TOBA should be used to contract *in* to such liability, where the need exceptionally arises. No valid justification has been provided by the Law Commissions for making the broker jointly and severally liable with the insured to the insurer for premium.

But as mentioned by Alex Denslow of CMS Cameron McKenna, 'insurers currently need only deal with brokers to recover unpaid premium. Insurers know those brokers well and have strong relationships with them. Such relationships count for a lot in the event of a dispute'.[1] This position does not have to change. Insurers can still collect premiums from brokers through net accounting; what needs to change is the capacity in which the broker is acting.

The Law Commissions add that if their proposed default rule is adopted it should apply to adjusted premiums too, as well as where the insurance is governed by foreign law provided the broker/insurer relationship is governed by English/Scottish law. This would reduce the current limitations on the applicability of s53(1) and will be welcome if this becomes the default rule, but again this will only be scant consolation, as the broker's liability for premium should not arise by default in the first place.

Conclusion

Section 53(1) should be redrafted without reference to any of the 18th or 19th century common law foundations, making the insured ultimately liable to the insurer. The default rule should be that receipt of premium by the broker from the insured should be in its capacity as agent, not principal. Joint and several liability should not be imposed on the broker, who should be able to contract into it, not out of it, when the need arises.

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[1] See L McMahon, 'UK Law Commission reform needed despite misgivings', *Lloyd's List*, 25 January 2012, p7.

Case update

Refusal to transit the Gulf of Aden

***Pacific Basin IHX Ltd v Bulkhandling Handymax AS (The 'Triton Lark')* [2011] EWHC 2862 (Comm)**

Charterers' instructed route presenting danger of piracy – Captain refusing that route – CONWARTIME 1993

As more than 20,000 vessels transit via the Suez Canal and the Gulf of Aden each year, this route is one of the busiest principal waterways in the world. However, this sea route is also notorious for being perilous due to the prevalence of Somali pirates for some years. It is therefore important for both shipowners and charterers to know whether a shipowner can refuse to obey its charterers' orders because of the risk of pirate attacks.

This case presented an opportunity to judicially discuss the widely-used CONWARTIME 1993 clauses and to provide direction as to whether owners can refuse, or elect not to, transit the Gulf of Aden under the clause.

The facts

By a time charter on the NYPE form dated 29 August 2008, the defendant Bulkhandling Handymax AS as owners agreed to charter the vessel *Triton Lark* to the claimant Pacific Basin IHX Ltd as charterers for carriage of 44,000 tonnes of bulk potash from Hamburg, Germany to Zhanjiang, China. The charterparty incorporated the CONWARTIME 1993 clause.

The vessel was under a chain of charters: the head owners, Triton, time-chartered the vessel to Klaveness on the NYPE form and Klaveness in turn chartered the vessel to Bulkhandling by entering into a Pool Participation Agreement. Bulkhandling chartered the vessel to Pacific which subsequently chartered her to Kali on the Gencon form. Each of the charterparties incorporated war risk clauses which were, for all material purposes, the same.

On 11 November 2008 Pacific notified Bulkhandling that the vessel was fixed on a voyage from Hamburg to Zhanjiang, China via Suez and the Gulf of Aden and expressed that the vessel needed to transit the Suez Canal. Although the head owners stressed their concern about the current piracy situation in the Gulf of Aden through Bulkhandling to Pacific, Pacific insisted that the vessel should proceed via 'the safe MSPA channel' on the basis that no vessels had been hijacked at night and that those vessels most susceptible to hijacking were those with a low freeboard and transit speeds of less than 20 knots.

The head owners subsequently offered five conditions to pass through the Gulf of Aden: the fourth of which was that there be an additional master on board paid for by Pacific, and the fifth of which was that if the vessel were seized by pirates the loss of hire was to be compensated by Pacific. Pacific rejected the fourth and fifth conditions and the vessel was ultimately ordered by the head owners through Bulkhandling to proceed via the Cape of Good Hope instead of via Suez and the Gulf of Aden. The extra cost incurred was US$462,221.40 and the disputes were referred to arbitration.

Three LMAA arbitrators formed the tribunal to decide the disputes, which turned on the construction of the CONWARTIME 1993 clause. The tribunal held that Bulkhandling were entitled to refuse to obey the order to proceed through Suez and the Gulf of Aden pursuant to the clause and, therefore, there was no deviation involved in proceeding through the Cape of Good Hope. Pacific took the view that such decision was an error in law and appealed to the High Court.

Relevant clauses of the charterparty

Clause 8:

> *'The Captain shall prosecute his voyages with due despatch and … shall be under the orders and directions of the Charterers as regards employment and agency …'*

Clause 75:

> *'BIMCO Standard War Risk Clause for Time Charterers, 1993*
>
> *Code Name: "CONWARTIME 1993"*
>
> …
>
> *(1)(b) "War Risks" shall include any… acts of piracy…which, in the reasonable judgment of the Master and/or the Owners, may be dangerous or are likely to be or to become dangerous to the Vessel, her cargo, crew or other persons on board the Vessel.*
>
> *(2) The Vessel, unless the written consent of the Owners be first obtained, shall not be ordered to or required to continue to or through, any port, place, area or zone… where it appears that the Vessel, her cargo, crew or other persons on board the Vessel, in the reasonable judgment of the Master and/or the Owners, may be, or are likely to be, exposed to War Risks.'*

The judgment

There were four issues of law required to be decided by Teare J, who heard the disputes and handed down his judgment on 8 November 2011.

Issue 1: the meaning of 'may be, or are likely to be, exposed to War Risks'

The judge held that the effect of sub-clauses (1) and (2) of the CONWARTIME 1993 clause is that the master or owners must form a reasonable judgment, first, that the vessel, her cargo or crew may be, or are likely to be, exposed to acts of piracy and second, that such acts of piracy may be dangerous or are likely to be or to become dangerous. Therefore, the principal issue to be decided by the judge was the meaning of 'may be, or are likely to be, exposed to War Risks'.

The judge noted that the words 'may be, or are likely to be, exposed to War Risks' do not clearly state what the degree of risk must be. He was minded that the right of

a charterer to give directions as to the employment of the vessel is a 'key right' of the charterer and any limitation on that right must be clearly expressed (*Whistler International Ltd v Kawasaki Kisen Kaisha Ltd (The Hill Harmony)* [2001] 1 Lloyd's Rep 147 considered). However, he thought that the reasonable construction of those words is that they intended to express 'a single degree of possibility or probability' rather than two different degrees, and the words 'may be' should be understood as 'likely to be'.

In the circumstances, the judge considered that the parties' intentions are best captured by the concept of a 'real likelihood' that the vessel will be exposed to acts of piracy. The judge explained that a 'real likelihood' should be understood as meaning that:

> (a) it should be based on evidence rather than a fanciful likelihood based on speculation;
>
> (b) it should include an event that is more likely than not to happen and, meanwhile, it also includes an event which has a less than even chance of happening; and
>
> (c) it does not include a bare possibility because the phrase 'likely to be' suggests a degree of probability rather than greater than a bare possibility.

The judge considered that the degree of probability inherent in a 'real likelihood' is or can be reflected in phrases such as 'real danger' or 'serious possibility'. As a result, the judge held that 'real likelihood' is to be understood in the sense of a real danger.

The arbitral tribunal had construed the phrase 'may be, or likely to be' as connoting a serious risk that the vessel would be exposed to acts of piracy. Teare J observed that there is probably little, if any, difference between a serious risk and a real likelihood. However, the judge agreed with the charterers' submissions that the arbitral tribunal had not understood serious risk in the sense of a real likelihood but had only focused on the quality or nature of the event of which there was a risk, rather than on the likelihood of the risk materialising. The judge considered that the tribunal's understanding of 'a serious risk' as a risk of an important event, demanding consideration, was wrong because the phrase 'may be, or are likely to be' connoted a serious risk in the sense of one for which it could be said that there was a real likelihood or real danger that the vessel would be exposed to acts of piracy. There was a difference between a serious risk that an event will occur, in this case being exposed to acts of piracy, and a risk that a serious event, being exposed to acts of piracy, will occur (such was the view of Teare J).

Teare J went on to say that the phrase 'may be, or are likely to be, exposed to War Risks' in sub-clause 2 of CONWARTIME 1993 requires an assessment as to whether there is a real likelihood of the vessel being exposed to acts of piracy. Thus there was no requirement in sub-clause 2 to consider the importance of the harm threatened by exposure to acts of piracy or in any other sense. Accordingly, the judge concluded that although the tribunal had adopted the concept of a serious risk as expressing the meaning of 'may be, or are likely to be' (which it would be difficult to say was the wrong legal test), they understood and applied that test in a manner which was not warranted by the true construction of the clause. Therefore, the judge held that the arbitral tribunal had erred in law.

Issue 2: was the owners' judgment reasonable?

Given that the arbitral tribunal was wrong in law as to their understanding of the phrase 'may be, or are likely to be, exposed to War Risks', the judge held that the tribunal's conclusion that Bulkhandling formed a reasonable judgment must also be wrong in law.

Issue 3: was there a duty to make reasonable enquiries?

The judge noted that the effect of CONWARTIME 1993 is that the owners must make a judgment, which must be reached in good faith and objectively reasonable. Otherwise, it would not be a judgment but a device to obtain a financial gain. The judge also noted that an owner who wishes to ensure that his judgment is objectively reasonable will make all necessary enquiries. If the owner made no enquiries at all it might be concluded that he did not reach a judgment in good faith. However, the judge did not consider that the owner's judgment would be judged unreasonable if in fact it was an objectively reasonable judgment and would have been shown to be so had all necessary enquiries been made.

Applying the above to the present case, the judge noted that the arbitrators had considered that Bulkhandling made all necessary enquiries. However, given that the test of necessity depended upon the arbitral tribunal's understanding of the phrase 'may be, or are likely to be, exposed to War Risks', and because its understanding was in error, its conclusion that sufficient enquiries had been made was also wrong in law.

Issue 4: were the owners entitled to order the vessel to proceed via the Cape of Good Hope?

The judge held that the arbitrators' conclusion that there was no deviation in proceeding via the Cape of Good Hope was not an error of law, although it was contrary to Pacific's order to take the route via Suez and the Gulf of Aden. The refusal of Bulkhandling to follow Pacific's order to proceed from Gibraltar to Suez was something 'done or not done' in compliance with sub-clause 2 of CONWARTIME 1993. Bulkhandling fulfilled its duty to execute the voyage with due dispatch by proceeding to China via the Cape of Good Hope.

Comment

This was the first judicial consideration of the application of the CONWARTIME 1993 clause, resulting in guidance on what constitutes a 'reasonable judgment' of whether a vessel 'may be or is likely to be' exposed to piracy risks. It clarified the validity of employment orders and the entitlement of refusal in the context of a charterparty which incorporates not only CONWARTIME 1993, but also includes all other war risks clauses such

as the CONWARTIME 2004 clause, and VOYWAR 1993 and 2004 clauses.

According to the judgment, owners bound by CONWARTIME clauses are not at liberty to make a choice as to whether to proceed via the Gulf of Aden. The word 'reasonable' imports an objective standard for owners/the master to make a judgment, which must be reached in good faith, based upon all necessary enquiries. However, it seems from the decision that the judge preferred a more commercial approach as to 'all necessary enquiries'. In the circumstances, in case of the fact that some owners/masters consider the situation dangerous and others have a different view, the owners'/masters' decision not to proceed via the Gulf of Aden would be justified if there were sufficient enquiries made in good faith at the time the decision was made.

Another point of significance is that the judge formulated a test of the phrase 'may be or is likely to be', which is merely one of probability, where the owners'/masters' burden of proof lies in whether actual physical danger or, at the very least, imminent danger exists at the time when the decision is made. Accordingly, unless the danger can be proved purely fanciful or very remote, the owners' refusal of charterers' employment order may be justified if the owners/masters would reasonably consider that there is a real likelihood of the vessel being exposed to piracy risks.

The heart of the matter as to whether owners can refuse to transit through the Gulf of Aden is the conflict between the owners'/masters' obligation to procure the voyage with utmost despatch and the obligation to ensure safety of the vessel. Given that the overwhelming majority of vessels still proceed via the Suez Canal and the Gulf of Aden and the risk of the vessel being hijacked is about 1 in 300 transits, it would be very difficult for the owners to justify their decision of deviating from the Gulf of Aden.

On 25 January 2011 the judge delivered a further judgment on a separate issue arising from the same matter. In this judgment he decided to remit the award to arbitrators to reconsider their decision according to the construction of the phrase 'may be or is likely to be' provided by the judge and the evidence submitted by the parties. It is yet to be seen whether the arbitrators will change their conclusion on the basis of the judge's construction as to the appropriate test and on the facts to determine whether there was a 'real likelihood', in the sense of a real danger, that the vessel would be exposed to acts of piracy.

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Marine insurance

Argo Systems FZE v Liberty Insurance Pte and Anr [2011] EWCA Civ 1572

Breach of warranty – Waiver by estoppel – Affirmation of contract – Misrepresentation – Damages

The facts

In March 2003 the floating casino *Copa Casino*, owned by Argo (claimant) and insured by Liberty (defendant), became a total loss while being towed from the US Gulf to India. Argo claimed against Liberty, but the claim was declined in July 2003. Litigation started in May 2004 in the Alabama court in the United States, where the court decided that it had no jurisdiction over the case against Liberty and dismissed the claim against the insurance brokers, DSI, on the merits. In February 2009 proceedings started in England.

The voyage policy was for a total loss against perils of the sea, subject to English law, on the terms of the Institute Voyage Clauses 1983. It contained a warranty, that '*no release, waivers or hold-harmless*' provisions would be granted to the tug and towers. The towing contract was subject to the TOWCON International Towage Agreement, where clause 18 mutually released the tug owner and the tow owner from specific kinds of liability towards each other. In March 2003 Argo also warranted to Liberty, inter alia, that 'no release, waivers or hold-harmless has been given to Tug or Towers' and in June 2003 it delivered to Liberty the towing contract.

HHJ Mackie QC sitting as judge in the High Court held as follows:

> (1) there was a breach of the 'no hold harmless' warranty;
>
> (2) there was a waiver by equitable estoppel of such breach;
>
> (3) there was an affirmation of the contract and a waiver of the right to avoid or an estoppel barring the misrepresentation/non-disclosure allegation; and
>
> (4) a claim for damages (under the Misrepresentation Act 1967, s2(1)) would not be bad in law, but damages would not be an appropriate remedy as they would bring the same result as the right to avoid, which was lost to the insurers.

Liberty Insurance appealed on the second and fourth issues.

The law

In the current case, only arguments on the first basis of the appeal were heard, and specifically under the following preliminary issues:

> (1) whether Argo was in breach of the no hold harmless warranty in relation to the towing contract; and
>
> (2) whether the breach of warranty was waived, or Liberty was estopped from relying on it, by express or implied means, or due to Liberty's conduct.

After recapitulating the parties' arguments and shortly presenting the legal frame regarding warranties in marine insurance, Aikens LJ proceeded to address each issue. As a finding of fact, he held that the 18 July 2003 letter, declining coverage of the loss, did not amount to an unequivocal representation. It was said that the letter was addressed in a general manner, that the no hold harmless warranty was not specifically referred to therein, and that therefore Liberty did not specifically indicate it was relying on the warranty

(or waiving it). Additionally, the words 'reserves the right to alter its position in light of discovery of previous undisclosed information which would materially alter the facts and circumstances presently known', along with the phrase 'the foregoing is without prejudice to all the remaining terms and conditions of the policy', in the context of the whole letter, were not construed as leading to a waiver of the warranty breach. On the contrary, it was concluded that Liberty clearly indicated its reservation of the right to rely on any terms and conditions of the policy as well as any other defences discovered through later investigations.

On the issue of Liberty's silence for seven years on the breach of warranty argument, Aikens LJ supported the principle that silence and lack of action, when considered objectively, are equivocal in their result. Therefore, they may not offer an unequivocal representation and, consequently, Liberty was not estopped from putting forward the breach of warranty argument.

Tomlinson LJ was in agreement thereto and only added that the 18 July 2003 letter had been the first response to Argo's claim and as such it would be highly unlikely for Liberty to be adamant at that stage on the legal basis it would use for the claim's rejection. Moreover Liberty had great reluctance in placing the risk. Liberty was doubtful regarding the exact circumstances under which the loss occurred and Argo was seen as providing very little information and assistance after the loss.

For all the above reasons, the appeal was allowed and the first instance judgment was unanimously overturned.

Comments

The legal foundation of waiver by estoppel is found in the Marine Insurance Act 1906 (MIA 1906), ss33 and 34 and its application to marine insurance warranties in *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)* [1991] 2 Lloyd's Rep 191, per Lord Goff and *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] 2 Lloyd's Rep 161. It is also commonly agreed that the cases of marine insurance warranties are highly fact sensitive (see Aikens LJ above and HHJ Mackie QC at para 32).

The first proof produced was Liberty's lawyers' letter of 18 July 2003 denying insurance cover for Argo's loss. Liberty reserved its right to 'alter its position in light of discovery of previously undisclosed information which would materially alter the facts and circumstances known' and that 'The foregoing is without prejudice to all the remaining terms and conditions of the policy, along with any other defences which may be discovered after further investigation'. Liberty was emphatic on retaining the ability to change its pleas in relation to important future events not yet known. Secondly, in the 'without prejudice' part, the words 'along with' could only have had a conjunctive application and not a disjunctive one, as they showed a willingness to link the previous sentence to the next. Therefore, one could transform the above into the following train of thought: Liberty reserved its right to plead any argument discovered in the future; ergo it had reserved the right to plead any argument save those already known. Secondly, Liberty was in knowledge of the no hold harmless warranty breach argument and, until that point, it had not presented it; ergo the insurers had not reserved their right to plead the warranty argument in the future. What is more, Liberty had made the reservation in relation to information that could materially alter the circumstances. The breach of a warranty is certainly of paramount importance and would alter Liberty's defence to the claim. As the breach was known at the time the letter was sent, but was not relied upon, one could reasonably conclude that it would not be used in the future.

Opposing Tomlinson LJ's opinion (on whether it was too early for Liberty to be firm on the reasons for declining insurance cover) is the fact that it would not be extraordinary for a legal representative to provide a certain response to a claim, even at an early stage and especially when justifying a declination of insurance cover. And it is for the reasons presented by Tomlinson LJ that the 'without prejudice' part was introduced, namely to ensure that any additional legal grounds would be available to the defendant's arsenal. After all, the binding result of the words included in the letter shows the significance it holds and the seriousness with which the document should be formulated.

The doctrine of equitable estoppel has three conditions: representation (and its communication, see *HIH Casualty and General Insurance Ltd v AXA Corporate Solutions* [2003] Lloyd's Rep IR 1), reliance, and inequity in going back on the representation. The argument on waiver of the warranty's effects is closely connected with the reliance requirement (see *Motor Oil Hellas (Corinth) Refineries SA v Shipping Corporation of India (The Kanchenjunga)* [1990] 1 Lloyd's Rep 391, per Lord Goff, at pages 397 to 399). Therefore, and in relation to the reliance and inequity parts and the US proceeding against DSI, it should be said that the examination of the English court would be better focused, not on whether the argument of the warranty breach against DSI would be successful, but whether it would be used by Liberty at a later stage (ie representation) and whether Liberty's representation was relied upon by Argo (ie reliance). The requirement for inequity in going back on the representation is fulfilled by the fact that the proceedings were concluded and any further claims (against DSI or LSR) were time-barred by the time Liberty brought forward the warranty breach argument in the English court. Regrettably, this point was summarily discarded as a whole, seeing as it was found by Aikens LJ that there was no waiver of the warranty breach on which to rely.

The last point relating to the doctrine of equitable estoppel was the construction of Liberty's seven-year silence (on the warranty breach). It is a fact of law that silence is equivocal, if one follows *Allied Marine Transport Ltd v Vale Do Rio Doce Navegacao SA*

(The Leonidas D) [1985] 1 WLR 625 (per Robert Goff LJ at page 937). But silence has also been held as bearer of certainty over a party's intentions and it can therefore be taken into consideration, eg *Simner v New India Assurance Co Ltd* [1995] LRLR 240. At this junction the first court elected to follow the latter view, while the Court of Appeal followed the former. In strict legal terms, so long as a right exists and is not barred (eg time-barred or waived), it can be exercised. But if equity is to intervene, then seven years is a time period worth recognising as fundamentally long.

An interesting addendum to the above was *Vitol SA v Esso Australia Ltd (The Wise)* [1989] 2 Lloyd's Rep 451, where Mustill LJ, at page 460 (following *Bremer Handelsgesellschaft mbH v Mackprang* [1979] 1 Lloyd's Rep 221; and *Société Italo-Belge pour le Commerce et L'Industrie SA (Antwerp) v Palm and Vegetable Oils (Malaysia) Sdn Bhd (The Post Chaser)* [1981] 2 Lloyd's Rep 695) said that if a party relies heavily on one argument, while another is severely overlooked, then a representation can be formed that the latter will not be relied upon. HHJ Mackie QC, at para 36, regarded this as perfectly relevant case law, while Aikens LJ found that the facts of the cases were dissimilar to the point of rendering the cases irrelevant. But a general principle of law is always transferable from one situation to another even if the facts are not the same; eg in marine insurance law the legal principles on warranties, inter alia, apply and are sourced from *HIH Casualty and General Insurance Ltd v AXA Corporate Solutions* [2003] Lloyd's Rep IR 1, which was a case on six films warranted to be produced.

Finally, the part referring to the ability to claim damages due to misrepresentation and non-disclosure was not examined. The reason was that Argo was held not able to claim against Liberty and so there were no damages on Liberty's behalf to claim. For the sake of completion though, a brief view is presented. First, one can find in law two remedies for the act of misrepresentation. In the MIA 1906 (ss 17 to 21) the appropriate and only remedy is avoidance; while in the Misrepresentation Act 1967 (s2(1)) it is damages. As the case was one related to marine insurance law, regulated by the MIA 1906, it would seem that the application of the Misrepresentation Act 1967, granting a different remedy, could only serve the circumvention of the former's provisions. As Steyn J (as he was at the time) observed in *Highlands Insurance Co v Continental Insurance Co* [1987] 1 Lloyd's Rep 109, at page 118, if the relief of s2(1) was to be granted, 'the efficacy of those rules [MIA 1906] would be eroded'. Moreover, the legal principle of 'generalia specialibus non derogant' (specific rules prevail over general rules) would clearly prove the MIA 1906 to be dominant over the latter. Undoubtedly, had the damages argument succeeded it would have significantly empowered the position of the insurers and also created a questionable legal precedent.

Contrary to the above, HHJ Mackie QC mentioned that a claim for damages based on s2(1) of the Misrepresentation Act 1967 would not be 'bad in law', but that he would still not recognise it. His reasoning was that Liberty would effectually not pay the claim, although it had failed in its argument as to the warranty breach. It should be noted here that the judge's conclusion is correct on law, but his logical justification is not concrete. If he is to recognise a valid right to Liberty, then this right should be allowed to be exercised in court. The fact that Liberty lost on one point should not by itself be a hindrance to the consideration of a second argument.

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