THE MEANING OF "DELIBERATE OR FRAUDULENT" NON-DISCLOSURE IN INSURANCE POLICIES

Mutual Energy v (1) Starr Underwriting Agencies Ltd (2) Travelers Syndicate Management Ltd [2016] EWHC 590 (TCC)

What is the meaning of "deliberate" and "fraudulent" in non-disclosure clauses?

The Technology and Construction Court (the "TCC") recently considered the meaning of "deliberate or fraudulent non-disclosure" in relation to whether insurers could avoid a policy on the grounds of non-disclosure.

Background

The Claimant entered into a contract of insurance with the Defendants and three other insurers in December 2009 in connection with electricity systems owned and operated by it. There was a cable failure in 2010 followed by two further failures in 2011.

The other three insurers agreed to compromise the claims; the Defendants did not. The Claimant therefore pursued a claim for damages in the sum of £17,630,067.00. In response, the Defendants contended that they were entitled to avoid the policy for deliberate non-disclosure.

Clause 5 of the policy dealt with the scope of disclosure and contained an acknowledgement by the Defendants that (i) they had received adequate information in order to evaluate the risk, (ii) there was no information which had been relied on or was required by the Defendant(s) in respect of their decision to co-insure and (iii) no person had been authorised to make any representation on behalf of the Claimants in relation to their becoming or being co-insured under the policy.

The non-disclosure clause was contained in clause 6, with Clause 6(a) reading as follows:

"The Insurers agree not to terminate, repudiate, rescind or avoid this insurance as against any Insured, or any cover or valid claim under it, nor to claim damages or any other remedy against any Insured or any agent of any Insured, on the grounds that the risk or claim was not adequately disclosed, or that it was in any way misrepresented, or increased, or that any term, condition or warranty was breached, or on the ground of negligence, unless deliberate or fraudulent non-disclosure or misrepresentation or breach by that Insured is established in relation thereto".

The Defendants argued that problems which had been identified with the cables during the construction and commissioning phase between 2000 and 2001 should have been disclosed. Although the problems were resolved by the time the systems were in commercial use in 2002, the Defendants argued that they demonstrated poor design and manufacturing and were therefore significant enough to be disclosed.

The Parties' arguments

The Claimant argued that, in the context of Clause 6 (to be read as a whole) "deliberate…non-disclosure" must mean a conscious decision not to disclose something to the insurers which the Claimant knew that it should disclose. In other words, it imports an element of dishonesty - a particular document or fact should be disclosed but the Claimant deliberately failed to disclose it.

In response, the insurers argued that deliberate must be given a separate and distinct meaning from "fraudulent". They argued that fraudulent non-disclosure would involve an element of dishonesty but that "deliberate…non-disclosure" need only encompass an honest but mistaken decision not to disclose a document or fact to entitle insurers to avoid cover.

The Court was therefore asked to decide whether, as a matter of construction, "deliberate...non-disclosure" could be interpreted as honest but mistaken disclosure for the purposes of allowing the Defendants to avoid the policy.

The Relevant Law and Principles

Mr Justice Coulson considered that clauses 5 and 6 should be read together since clause 5 was the Insurers' acknowledgement that they had received adequate data. Since it concerned the scope of disclosure, the clause therefore needed to be considered when analysing the scope of non-disclosure. In a contractual context, the Court considered it a relevant factor that the Defendants had expressly acknowledged that they had received sufficient information.

In reaching his decision, Mr Justice Coulson looked at the principles of interpretation as laid down in *Wood v Sureterm Direct Ltd & Capita Insurance Services Ltd [2015].* Whilst due consideration should be given to the words used and the context in which they were used, due care should be given to business common sense and surrounding circumstances. The dictionary definition of "deliberate" led the Court to conclude that it suggested intentional failure on the part of an insured to disclose, with the knowledge that this is wrong.

The Court relied upon the decision in *De Beers UK Ltd v ATOS [2010]*, which held that "deliberate" was an "intentional act" and also that in *Astra Zeneca UK Ltd v Albermarle International Corp and Another [2001]* in

which the Court found there had not been a "deliberate" breach of contract because the policyholder had carried out his actions in the wrongful belief that he had been entitled to do so. Mr Justice Coulson held that no distinction should be drawn between a deliberate breach and a deliberate non-disclosure.

The Court considered whether "deliberate" and "fraudulent" should be given different meanings. Whilst accepting that the Court should give meaning to every word in the contract, it was recognised that some overlapping terms will often be found in commercial contracts. However, the Judge was not persuaded that "deliberate" and "fraudulent" carried the same meaning, stating that a representation could be deliberate or dishonest but where there is no intention to deceive such would therefore not be fraudulent.

Finally, Mr Justice Coulson looked at business common sense and considered, with reference to Lord Hobhouse's speech in *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank and Others [2003]*, "whether it is appropriate to place on the assured the full burden of disclosure with its attendant risk of the avoidance of the policy". The Judge concluded that if the Defendants' interpretation was correct, that 'deliberate' meant an awareness that information was not being disclosed but the insured held the honest, but mistaken, belief that it need not be disclosed (which was the case on the facts here), then such a position "would be the opposite of business common sense".

Held: "Deliberate or fraudulent non-disclosure" must involve dishonesty. In failing to disclose information about the previous cable failures, the Claimants had acted with an honest but mistaken belief that such information did not require to be disclosed as part of the proposal process. Accordingly the Defendants were not entitled to avoid the policy.

CPB Comment

Mr Justice Coulson made it clear that he reached his decision by looking at the particular policy in question. He derived little assistance from several decisions to which he was referred, including *HIH*, as to issues of construction. Therefore, whilst this decision sheds light on policy interpretation, care must be taken to ensure that a policy's wording accurately reflects the parties' intentions.

With the introduction of the Insurance Act 2015, insureds will have a duty of fair representation. Insurers will have the ability to avoid the policy if the insured acts deliberately or recklessly in this regard (whether or not there is wording to this effect in the policy). It will be interesting to see how this decision is applied where wordings fall to be interpreted under the scope of the new Act.

Bill Perry
Partner
T: 0203 697 1901
M: 07887 645261
E: bill.perry@cpblaw.com