Don't count on cover if diamonds aren't forever…

Remedies for misrepresentation - Jones v Zurich Insurance Plc

The loss of a diamond, with a value of £15,000, from a ring is not the sort of thing that one normally forgets in a hurry. However, a policyholder's failure to disclose details of the claim made for that loss when proposing for insurance several years later formed the backdrop for the decision in *Jones v Zurich Insurance Plc [2021] EWHC 1320 (Comm)*.

Background

In 2018, Mr Jones sought insurance for a Rolex watch valued at £190,000. Mr Jones submitted a proposal in which he replied "no" both to whether he had made any claims in the prior 5 years and whether there was any claims history at the address provided. When providing its quote, via brokers, Zurich prescribed that the Statement of Fact was to form the basis for its quote and expressly sought confirmation of the accuracy of answers supplied as a condition to providing cover. With a second opportunity to answer the same questions, Mr Jones reaffirmed the previous responses – leading to cover being bound.

During a skiing holiday in March 2019, Mr Jones notified insurers of the loss of his watch. Subsequent enquiries by insurers uncovered the failure to disclose, pre-inception, the prior loss of the diamond which had occurred in August 2016 and the claim payment of £15,000 received by Mr Jones. Given that non-disclosure, Zurich declined the claim and gave notice of avoidance of the policy on the grounds that such amounted to a misrepresentation, in breach of the duties owed by Mr Jones under the Consumer Insurance (Disclosure and Representations) Act 2012 ("the Act").

The trial was heard by HHJ Pelling QC. In his Judgment, he recorded a number of instances where the credibility of Mr Jones' evidence was found wanting – noting that the Court should reject his evidence unless it was corroborated.

Zurich put Mr Jones to proof as to whether, and if so in what circumstances, the watch came to be lost and pleaded no positive case in respect of either aspect. In the absence of any positive pleading of fraudulent conduct by Mr Jones, the Court noted it was not for Mr Jones to have to prove the claim was not fraudulent but only that a loss occurred in circumstances where the policy provides cover for the loss. On balance, and where his account had been corroborated by witnesses and certain contemporary documents the Judge accepted that a loss to which the policy is capable of responding had taken place.

Avoiding the Policy – the Act

The relevant provision of the Act provides that *"It is the duty of the consumer to take reasonable care not to make a misrepresentation to the insurer"* (Section 2(2)). An insurer has a remedy against an insured *only* if the insured has breached its duty under Section 2(2) of the Act **and** the insurer shows by evidence that it would not have entered into the contract at all or would have done so only on different terms. A misrepresentation that satisfies these requirements is referred to in the Act as a "*qualifying misrepresentation*". The remedy then available to an insurer (those are set out in Schedule 1 of the Act) depends on whether the qualifying misrepresentation is either (a) deliberate or reckless; or (b) careless. The former permits the insurer to avoid the policy and refuse all claims (it may also retain the premium) whereas, for the latter, an insurer may avoid if it establishes that it would not have entered into the contract of insurance at all had the insured complied with its Section 2(2) duty. Alternatively, if the insurer would still have entered into the policy but on differing terms or would otherwise have charged an increased premium by reference to the information presented, the proportionate remedies prescribed by the Insurance Act 2015 will apply.

Avoiding the Policy – the Judgment

The Court noted that despite knowing in advance of trial that Mr Jones had failed to disclose the receipt of the £15,000 claim payment for the loss of the diamond, Zurich had not pleaded a positive case that the misrepresentation, when completing the proposal and Statement of Fact, was deliberate or reckless. Zurich submitted at trial that it was not incumbent upon it to do so "…where the *evidence establishes quite clearly now that there was quite deliberate and reckless conduct in relation to the representations given to the insurers and it is open to the court to make that finding, because you have to go through those hoops following what the Act lays out.* The Court rejected that submission. The Judge concluded that *"…as a matter of general principle, if it is to be alleged by an insurer that a misrepresentation that it alleges to be a qualifying misrepresentation under the Act has been made deliberately or recklessly then that must be distinctly pleaded. …. In the absence of an insurer pleading that a misrepresentation has been made deliberately or recklessly, it is not open to an insurer to assert that at trial where the only allegation pleaded is that the misrepresentations have been made carelessly."*

So, had Mr Jones made a misrepresentation and, if so, was that in breach of his duty contrary to Section 2(2)? On the evidence, the Judge concluded that Mr Jones *had* caused a careless misrepresentation to be made when failing to disclose the prior claim payment within the initial proposal and then in failing to correct that error when signing the Statement of Fact. He found that Zurich had *"gone out of its way to make clear the information that was required",* such had been understood by Mr Jones but he had failed to provide an accurate answer.

Having determined that the misrepresentation was material, and that as a minimum Zurich would have offered differing terms had the true position been known, the Judge had to consider whether, if Mr Jones had complied with his duty pursuant to Section 2(2), Zurich would not have entered into the policy on *any* terms.

Zurich was able to demonstrate, through a combination of recorded telephone calls, underwriting notes and oral testimony from the underwriter that the age and risk profile of Mr Jones, coupled with the Sum insured value of the Rolex, was a cause for concern leading to an increased rating being applied – even before the prior claim payment was known of. The Court, assisted by (albeit

contested) expert evidence as to underwriting practice for such items, to include market custom in the event of prior high value losses, found that, on balance, Zurich would, in this instance, not have offered alternate terms, rather it would have declined cover had the prior claim been disclosed in accordance with Mr Jones' obligations under section 2(2) of the Act. Accordingly, the Court decided that Zurich was entitled to avoid the policy and refuse the claim but it was required to return the premium paid since the remedy was in respect of careless, rather than deliberate or reckless, misrepresentation.

CPB Comment

There has been much discussion concerning the impact of the Insurance Act 2015 and whether the remedies previously available to insurers, to include the ability to avoid cover, would be preserved. Whilst this decision was fact sensitive, both as to the misrepresentation perpetrated by Mr Jones and the nature of the underwriting exercise carried out by Zurich, the Court concluded that avoidance does remain part of an insurer's armoury.

Zurich's failure to plead that Mr Jones' misrepresentation had been deliberate or reckless could have proved costly. However, although the prospect of offering cover on more onerous terms, or increasing premium, were considered as alternative remedies, the strength of Zurich's (internal) evidence of its underwriting decision-making ultimately allowed it to overcome the burden of establishing that it would not have offered cover on *any* terms. This emphasises the importance of good record keeping. However, it is better to be safe than sorry. Where there is evidence that a consumer has made a deliberate or reckless qualifying misrepresentation insurers should consider whether it is prudent to plead this.

Any questions

If you have any questions regarding the insurance-related issues highlighted in this article, please get in touch with Simon or Dean.

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