

## ***Fair presentation under the Insurance Act – has anything changed?***

### **Berkshire Assets (West London) Limited v AXA Insurance UK plc**

In our review of the decision in *Ristorante Ltd v Zurich Insurance* ([here](#)), we considered the lessons to be learned by insurers and insurance brokers in relation to the wording of proposal forms and consequent entitlement to avoid.

On 8 October 2021, the High Court handed down the first decision dealing with a policyholder's duty to make a fair presentation under the Insurance Act 2015 (the "Act"). It confirms that pre Act caselaw on material circumstances remains relevant, and underlines the importance of insurers maintaining clear underwriting guidelines.

#### **Background**

In 2018, Berkshire Assets (West London) Limited ("Berkshire"), took out a Combined Construction All Risks and Business Interruption Policy with AXA Insurance UK plc ("AXA") for a property development project in Brentford.

In August 2019, Malaysian authorities charged a Mr Sherwood, a director of Berkshire (along with other individuals) with criminal offences relating to an alleged \$4.3bn fraud.

The renewal documents in 2019 stated that cover was provided on the basis that:

*"The proposer for insurance, its partners or directors or any other person who plays a significant role in managing or organising the business activities, have not, either personally or in any business capacity, been convicted of a criminal offence or charged (but not yet tried) with a criminal offence."*

Berkshire renewed the Policy, but did not disclose the charges against Mr Sherwood.

In January 2020, following substantial damage to the development caused by flooding, Berkshire made a claim under the Policy.

AXA avoided the Policy on the basis that Berkshire had failed to disclose the charges against Mr Sherwood at renewal. AXA argued that had disclosure been made, it would not have renewed the Policy, and was therefore entitled to avoid it.

Berkshire argued that Mr Sherwood was not personally involved in the transactions giving rise to the charges. Further, there was no suggestion that Mr Sherwood had acted dishonestly; the charges related solely to his capacity as a director of an investment banking company. In these circumstances, the charges were not material facts and that, in any event, had they been disclosed to AXA, AXA would nevertheless have renewed the Policy on the same terms.

The proceedings against Mr Sherwood were discontinued in October 2020.

### Key Issues

The Court dealt with two principal issues:

- was the fact that Mr Sherwood had been charged with criminal charges in Malaysia a material circumstance for the purposes of the “Duty of Fair Presentation” under the Act; and
- if yes, and had it been disclosed, would AXA have agreed to renew the Policy?

It was common ground that it was for AXA to establish both issues.

### Materiality – Duty to Disclose

The Court considered the definition of a material circumstance under the Act, which states that a circumstance is material if it would influence the judgement of a prudent insurer in determining whether to take the risk, and if so, on what terms.

The Court held that the Act does not alter the existing law as to materiality; it summarised the relevant principles, as follows:

- the materiality of a particular fact is a question of fact to be determined by the circumstances of each case;
- materiality is to be tested at the time of placement of the insurance and not by reference to subsequent events;
- facts raising doubts as to the risk are sufficient to be material. It is not necessary for the facts to be shown to have, in fact, affected the risk;
- the effect of the “prudent insurer” test is that whether there has been a fair presentation of the risk is assessed from the perspective of the insurer; and
- a circumstance does not have to be decisive for the prudent insurer in determining whether to take the risk or on what terms, it is sufficient if it amounts to something a prudent insurer would take into account when reaching a decision.

Applying these principles, the Court held that the charges did constitute a material circumstance and should have been disclosed upon the renewal of the Policy.

The Court noted (as set out above) that the issue should be considered from the point of view of a reasonable insurer at the time the decision (as to renewal) was made. At the time of renewal (had disclosure been made), AXA would not have been aware, nor in a position to find out, whether the charges involved dishonesty or personal wrongdoing on Mr Sherwood's part. Further, the subsequent discontinuance of the charges against Mr Sherwood was irrelevant.

As to whether the charges against Mr Sherwood amounted to a disclosable "moral hazard", the Court held that whilst there is no settled definition of moral hazard and each case will depend on its own facts, a charge of a criminal offence will very often be regarded as a moral hazard and a material circumstance.

### **Inducement – a Question of Fact**

The Court underlined the fact that the question as to whether an insurer would not have written the policy at all or would have done so on different terms had the material circumstance been disclosed, will always be assessed as a question of fact on the circumstances of the case.

AXA adduced evidence from both the Underwriter (Ms Harris) who wrote the Policy, and the Underwriter (Mr Sargant) who took the decision to decline the claim.

Ms Harris confirmed that she would have investigated the charges online had they been disclosed to her. Those enquiries would have revealed that the charges were criminal and accordingly she would have regarded them as material. She would have declined the renewal of the BI cover and would have wanted AXA to come off cover for the whole project.

Ms Harris relied on an internal practice note on the "*disclosure of previous insurance, financial or criminal matters*", which states that if criminal charges are disclosed, a risk should be declined.

Even if she had been informed that the charges did not allege dishonesty against Mr Sherwood personally, she would have had no choice but to refer the matter to her superiors.

Mr Sargant, who had not been involved in the renewal, but to whom the matter had been referred after the incident, took the view that there had been a material non-disclosure and made the decision to decline cover. He was a co-author of the internal practice note relied on by Ms Harris. His evidence (in line with that of Ms Harris) was that had AXA been given full details of the charges at the time of renewal, they would not have agreed to renew the Policy.

The Court accepted AXA's witness evidence, supported by the practice note, that AXA would have declined the risk if the charges had been disclosed to them. The Judge dismissed arguments put forward on behalf of Berkshire that AXA's approach (in giving evidence as to what steps it would have taken) should be treated with scepticism, as AXA would have, inevitably, written the Policy in any event to (amongst other matters) avoid alienating its relationship with Berkshire's broker. The Judge remarked that had such issues been of concern to AXA, it would not, in his view, have avoided the Policy when it did.

### **CPB Comment**

The judgment is a further illustration of the value of insurers ensuring their internal guidelines and proposal forms are fit for purpose.

The Judge was clearly influenced by AXA's internal practice note in upholding AXA's decision to decline the claim and avoid the BI section of the Policy. Further, in contrast to the facts in *Ristorante v Zurich*, the proposal form and policy wording were drafted in line with case law and were effective to protect insurers from non-disclosure of moral hazards.

Equally, policyholders and brokers should be aware that questions around criminal conduct and charges, whether proven or otherwise, are likely to be material. In this instance, the director responsible for arranging the insurance had not been informed of the charges made against Mr Sherwood. As such, insurance brokers would be well advised to ensure that policyholders carry out a proper enquiry of all directors on each renewal.

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### Any questions

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

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