Quadra Commodities S.A. v XL Insurance & Ors [2023]

The Court of Appeal upholds the High Court's finding on insurable interest

The Court of Appeal handed down judgment on 21 April 2023 in *Quadra Commodities S.A. v XL Insurance & Ors [2023] EWCA Civ 432,* upholding the findings of the High Court regarding whether a party held an insurable interest in certain goods when making a claim under its Marine cargo insurance.

Factual Background

A summary and analysis of the first instance judgement was published in our article in May 2022, to be found here. By way of recap, the Insured, Quadra Commodities S.A. ("Quadra"), made a claim against its Marine Cargo Open Policy when it transpired that grain which it had purchased had been sold multiple times over. The seller had done so by issuing fraudulent warehouse receipts against which payment was issued without goods being delivered.

Insurers rejected the claim on the basis that no physical loss or damage had been sustained since no grain was physically lost. Insofar as property was lost, insurers argued, this was property in which the Insured had did not have an insurable interest.

The first instance judge found, as a matter of fact, the grain had physically been present at the time the warehouse receipts were issued and that, as a matter of Ukrainian law, the insured had an immediate right to possession of the goods under those warehouse receipts. Therefore, goods physically existed in which the Insured had an insurable interest. As a matter of policy construction, the Judge proceeded to find the loss was covered under the misappropriation clause of the policy.

Grounds of Appeal

Insurers appealed the decision on four grounds:

1. The existence of the goods;
2. The identification of the goods;
3. The immediate right to possession; and
4. The practical consequences.

We will consider each ground in turn below.

(1) The existence of goods:

Insurers argued that the judge had erred in assessing the evidence, and been "plainly wrong", in finding the grain existed. They asserted that where a fraudulent scheme was being perpetrated, no

reliance could (or should) be placed on the warehouse receipts to support a finding that the grain existed at all.

Sir Julian Flaux C, giving leading judgment, set out that the Court of Appeal would only interfere with a factual finding of the first instance judge if it was satisfied that the finding was unsupported by the evidence or the decision was one which no reasonable judge could have reached. That approach applies not only to primary facts, but also to the evaluation of those facts and inferences drawn from them. As such, the threshold for Insurers to succeed on the first ground of appeal was high and, ultimately, unsuccessful.

Where the nature of the fraud was predicated upon grain being available for inspection by the various (multiple) traders to whom it was sold, Sir Julian Flaux C was satisfied that the judge's finding had not been outside the remits of what can be considered reasonable – indeed there was ample evidence supporting the trial judge's conclusion.

(2) The identification of goods:

Insurers' second appeal ground was that for there to be an insurable interest the goods must be identifiable and identified. In support of this argument, Insurers asserted that no case law exists where the Courts have held an insurable interest to exist in respect of unascertained goods forming part of a larger bulk. Counsel for Insurers argued that you cannot be said to own something unless you know what that thing is – the same being said of an insurable interest.

The Court of Appeal dismissed this argument, which it said was not only unsupported by the authorities, *'but confuses the concept of an insurable interest as between insured and insurer with that of proprietary interest as between buyer and seller…'* The trial judge had rightly identified three requirements for there to be an insurable interest, for the purposes of Section 5(2) of the Marine Insurance Act 1906, namely:-

a) *That the assured may benefit by the safety or due arrival of the insured property or be prejudiced by its loss or detention, or in respect of which he may incur a liability;*
b) *That the assured stands in a legal or equitable relation to the adventure or to any insurable interest in such adventure; and*
c) *That the benefit, prejudice or incurring of liability must arise in consequence of the legal or equitable relation of the assured to the property or adventure.*

Based on the above criteria, it was clear to the Court of Appeal that an insurable interest existed in respect of the grain, endorsing the judge's proposition that: *"if neither property nor risk has passed, payment or part-payment of the price will give the buyer an insurable interest, because if the goods were lost or damaged and the seller was insolvent the buyer might not be able to recover the money which he had paid for them".*

The Court of Appeal further pointed out that case law authorising this position does exist, namely the US case of *Cumberland Bone*[1]. In this case, porgy chum had been sold to the insured, but remained physically at the seller's premises unseparated from the seller's other stock. Applying principles founded on English law, the US court concluded that the buyer had an insurable interest in

[1] Cumberland Bone Co. v. Andes Insurance, 64 Me. 466 (1874)

the goods. Albeit an American decision, Sir Julian Flaux C noted the case is founded upon English law principles and is cited with approval in the leading textbook, MacGillivray on Insurance. As such, the principle established by *Cumberland Bone* should, the Appeal Court indicated, be recognised as a principle of English law.

(3) The immediate right to possession and (4) the practical consequences:

Noting that the first and second grounds of appeal were determinative of the Appeal, the Court of Appeal dealt with the third and fourth grounds only briefly, confirming the judge's finding that Quadra had an immediate right to possession as a matter of Ukrainian law.

As to the fourth ground, Insurers' argued that the judgment had two unintended practical consequences, namely that (1) the judge had effectively converted the policy from a physical loss one to a financial loss one; and (2) that the outcome meant Insurers potentially had to pay several indemnities for the value of the consignment of goods. In argument. Insurers accepted that this ground could not succeed on its own. The Court of Appeal found there was no evidence as to whether these, or other insurers, had paid a full (or any) indemnity to other insureds in respect of the same grain. However, even if such was hypothetically possible, there was no objection in principle to such payments being permissible if the respective policies so provided.

CPB Comment

The case makes it clear that there is no requirement to establish that the proprietary interest in goods has passed for an insurable interest to exist. Whilst recognising the ingenuity of the appellant's submissions, the Court endorsed the approach of the Court below - the principles identified by the trial judge at first instance remaining good law when seeking to determine when and whether an insurable interest arises.

The case also serves as a caution to appellants contemplating appealing issues of fact. Even in circumstances where fraud has been established, this does not necessarily render all surrounding documents as unreliable. The Court is entitled to consider such evidence in the light of all circumstances.

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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 Simon or Lisbeth.

You can also review a range of articles on similar insurance and reinsurance topics in the Publications section of our website.

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