

Reinsurance notes

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Broker's statement as to reinsured's underwriting principles upheld as a representation of fact

Limit No.2 Ltd v AXA Versicherung AG

Court of Appeal (Ward, Longmore and Jackson LJs) – 12 November 2008

In this important decision, the Court of Appeal has provided valuable guidance on a number of issues of general interest to the insurance and reinsurance markets:

the status of comments made by a broker at placement as to the reinsured's underwriting principles, and whether they amounted to representations of fact or only matters of expectation or belief;

the status of an endorsement extending the period of a contract of reinsurance; and

the extent to which representations made at placement are 'continuing' for the purposes of a subsequent renewal

The facts

The case concerned two facultative reinsurance treaties that protected energy risks insured by certain Lloyd's syndicates. The first treaty was for 12 months from 1 July 1996, but was extended by an endorsement to run for 19 months from 1 July 1996. The second treaty ran for 12 months from the expiry of the first on 31 January 1996.

The dispute concerned a fax cover sheet that the broker had attached to the draft slip and information sheet that was sent to reinsurers prior to placement. The front sheet stated:

"As a matter of principle they [the syndicates] maintain high standards and

would not normally write construction unless the original deductible were at least £500,000 and preferably £1,000,000."

It came to light that most of the risks underwritten had deductibles of £100,000 to £200,000.

Avoidance

Reinsurers avoided the treaties on the basis of the broker's statement, alleging that it was a representation that:

(i) at the date of the fax or earlier, the syndicates had a practice of writing risks with the stated deductibles; or

(ii) at the date of the fax, the syndicates had an intention to write risks with the stated deductibles; or

(iii) as at 1 July (the date of inception of the policy), this practice could be relied on as an indication of their future underwriting practice.

Reinsurers also argued that the representation was a continuing one that applied equally to the extension of the first treaty by endorsement and the placement of the second treaty.

The first instance decision

Jonathan Hirst QC, sitting as a deputy judge of the High Court, found that the broker's fax sheet contained a statement of the syndicates' 'current policy' as to deductibles, namely, that it was not the syndicates' policy normally to write such risks unless the deductible was at least

£500,000 and preferably at least £1,000,000. There had therefore been a misrepresentation.

As the first treaty could successfully be avoided, he held that the endorsement could not survive that avoidance. As far as the second treaty was concerned, he found that the representation was a continuing one and that reinsurers were entitled to assume that the policy regarding deductibles remained for the 1998 year in the absence of any disclosure to the contrary. Reinsurers were therefore also entitled to avoid the second treaty.

The appeal

The Syndicates appealed on four grounds.

- (i) the judge's conclusion that it was not in July 1996 the syndicates' policy to write within the stated deductibles was 'unfair' because the syndicates' practice prior to July 1996 was not investigated at trial;
- (ii) even if the broker's comment did constitute a statement of the syndicates' intention in July 1996, it was no more than a statement of belief/expectation;
- (iii) the 1997 endorsement constituted a separate contract and was not just an amendment/extension, and the same arguments applied to it as the 1998 renewal; and
- (iv) the judge was wrong to hold that there was a continuing representation that was still effective at the time of the 1997 endorsement and the 1998 renewal.

The representation

Lord Justice Longmore, giving the principal judgment, agreed with the deputy judge that the broker's statement was a representation of present intention, and thus fact, which had been breached. The evidence showed that the syndicates' underwriter did not intend to write risks with the stated deductibles because market conditions at the time meant that this was not possible, and he was well aware of this. The policy (or intention) to write with the stated deductibles had been maintained before July 1996, but by July 1996 had 'evaporated'. Further, the deputy judge had made no incorrect findings about the syndicates' practice prior to July 1996.

On this basis the first and second grounds of appeal failed.

The 1997 endorsement

Longmore LJ held that the 1997 endorsement was not to be regarded as a new contract, rather it was an extension of the existing contract. It followed that the validity of the endorsement was dependent on the validity of the first treaty. As this was voidable for misrepresentation, so the endorsement could be set aside.

The 1998 renewal

Longmore LJ held that that on any view the 1998 renewal was a separate contract.

Further, a representation of intention cannot last forever, it can relate only to the time when it is made and there must come a time when it expires. Although not specifying when that was, His Lordship considered it would be well before the 19 months that had elapsed in this case.

Accordingly, there was no continuing representation in respect of the second treaty and reinsurers purported avoidance of that treaty failed. The syndicate's appeal was therefore successful to that extent.

Comment

The Court of Appeal has provided some valuable guidance on several important points: (i) the characterization of representations of current or present intention; (ii) the status of an extension to a contract of reinsurance, and clarification that such extensions stand or fall with the original contract; and (iii) the continuing nature of representations made at placement.

The decision also raises questions as to the role of the broker. Did they have authority to include the fax front sheet without prior approval of its contents? If not, how far is the syndicates' loss (if any) attributable to them?

If you require any further information in relation to the way in which these developments impact upon your business please contact Nicholas Bradley, David Breslin, William Sturge or Viran Ram on 020 7379 0000 at Lawrence Graham LLP.

These notes are intended only as a summary of developments and not as a definite statement of the law.

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