BRIEFING NOTE

A Simple Claim, A Complex Defence, A Salutary Lesson
ABN Amro Bank N.V. v Royal & Sun Alliance Insurance plc and Others [2021] EWHC 442 (Comm)

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Introduction

The case of ABN Amro Bank N.V. v Royal & Sun Alliance Insurance plc and Others is a fascinating read on a number of levels. It has to be because the judgment runs to 260 pages. But it is compelling reading because it highlights the way in which contested claims can arise and the defences that Insurers may raise to avoid the obligation to indemnify their customers.

Factual Background

Put simply, the dispute arose out of the fact that the insurance cover was placed with the marine cargo market when it should have been placed with the trade credit insurance market.

In 2015, the Bank secured an open cover marine cargo insurance policy that, being written on standard terms, provided an indemnity in respect of the physical loss or damage of insured property. In addition, the Bank secured a bespoke "Transaction Premium" clause. The TP clause was drafted to provide an indemnity for financial loss in circumstances in which the Bank's customers defaulted on commodities repurchase transactions, a form of trade credit, and the Bank was forced to sell the underlying commodities at a loss against the debt owed.

In 2016, one of the Bank's customers, Transmar Commodities Group, went into liquidation and defaulted on multiple repurchase transactions. The Bank sold the underlying cocoa products at a shortfall of around USD 50 million and claimed against its open cover marine cargo cover, and particularly under the Transaction Premium clause, for its financial loss.

The Insurers' Defences

The lead underwriter, and 13 following underwriters, raised three main defences to the claim.

First, that the marine cargo cover was not triggered in the absence of physical loss or damage to the underlying security and that the TP clause merely explained the basis of valuation had physical loss or damage occurred. The Court rejected this argument on the basis that the TP clause was bespoke, and the language was very clear. The fact that it was underwritten by the marine cargo market did not create an ambiguity where none existed. The TP clause responded to the financial loss incurred by the Bank absent any physical loss or damage.

Second, that the marine cargo cover should be voided because the existence and purpose of the TP clause had not been specifically disclosed to the underwriters upon renewal in 2016. For 11 of the 14 underwriters, the Court rejected this argument on the basis that on renewal the Bank was not obliged to disclose the purpose and intention of the TP clause. The Court further held that the Insurers read, or should have read, the cover and knew, or should have known, the wording, purpose and intent of the cover that they had agreed to give.

In rejecting this defence, the Court also enforced a non-avoidance clause that prevented the avoidance of the policy for any reason other than fraudulent misrepresentation. It also held that the underwriters were estopped from raising, or otherwise had waived, the avoidance defence, having failed to raise it until one year after the Statement of Defence was served.

Third, that the Bank had failed to make reasonably endeavours, or had acted recklessly or negligently, in failing to independently test and certify the underlying products, and/or failed to "sue and labour" by hedging its exposure or selling those products more quickly. The Court dismissed these arguments on the basis that the Bank had taken all reasonable steps to minimise its loss and, in doing so, had discharged its duty to act as a prudent uninsured and had complied with normal banking practices in connection with the repurchase transactions.

Duties of the Insurance Broker

The Insurers also alleged that the brokers, Edge Brokers (London) Limited, failed to provide material information and to explain the purpose of the TP clause. The Court held that upon renewal there was a misrepresentation to three underwriters. Two were induced to enter the policy and were entitled to avoid liability. The brokers were held liable to the Bank for that portion of the indemnity for which these two underwriters would otherwise have been liable.

The Court held that the brokers owed a duty of care to their cover holder clients to secure the cover that their clients requested and to avoid any unnecessary risk of litigation. Specifically, that a reasonably competent broker would have presented the risk to the trade credit market and that in circumstances in which the broker had gone to the marine cargo market, it was under a duty to point out and explain the TP clause so as to avoid the risk of litigation.

Commentary

From a legal perspective, the judgment confirms the principles by which insurance contracts are interpreted and applied, the knowledge that the underwriter is presumed to possess, the obligations that the broker must discharge when disclosing and presenting risks and the steps that the cover holder must take following a significant loss or losses.

From an industry perspective, the judgment confirms what we are seeing in the non-marine insurance market. Namely that large claims falling within the four corners of a policy that has been designed and purchased to respond to the risk that has occurred are being contested on multiple grounds that have little or no basis in law or the practice of the industry insured. One can only speculate whether the claim would have been contested, and multiple defences raised, if the total losses were US$ 5 million rather than US$ 50 million.

The lesson for the Insurer is to understand the cover that is being written. For the broker, it is to be clear as to the risk that is being placed. For the cover holder, it is to pursue an insurance claim for which insurance cover has been designed and purchased. If the instructions to the broker are clear, the wording has been drafted by legal counsel and the clause explained to and accepted by the Insurer, the cover holder should have confidence to prosecute the claim in the knowledge that the obligation to indemnify will be triggered.

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