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Insights

WHEN CAN INSURERS AVOID FOR NON-DISCLOSURE?

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SUMMARY

Since the Insurance Act 2015 (the "IA 2015") came into force on 12 August 2016, the Courts have not been called upon yet to interpret its provisions. Jones v Zurich Insurance Plc handed down on 18 May 2021, considers the interpretation and application of certain provisions of the Consumer Insurance (Disclosure and Representations) Act 2012 (the "CIA 2012"), some of which are materially the same as comparable provisions in the IA 2015.

Jones also gives insight as to the nature and extent of evidence that would be required for an insurer to be entitled to avoid a policy for breach of the IA 2015 duty of fair presentation.

While the 2019 Scottish Case of Young v RSA may have been the first case to consider a breach of the IA 2015 duty of fair presentation, the outcome of that case turned on an issue of waiver (on which the law remains unchanged by the IA 2015) and the Court was not required to determine matters relating to the construction of provisions of the IA 2015.

Although Jones required the Court to consider provisions of the CIA 2012, the case sheds some light as to how the Court might interpret and apply certain parts of the IA 2015, since the CIA 2012 and IA 2015 share similar provisions, a number of which were in issue in Jones and considered further below.

In particular, both Acts distinguish between circumstances where an insurer may avoid an insurance contract and circumstances where insurers would have entered the contract on different terms. Further, both Acts provide remedies to an insurer if the insurer would not have underwritten the policy at issue, or would have underwritten on different terms, but for the insured having breached its duty:

(a) of fair presentation, in the case of the IA 2015, and
(b) to take reasonable care not to make a misrepresentation to the insurer, in the case of the CIA 2012.

AVOIDANCE

Where such a breach has occurred, the insurer can avoid the policy if it can show:

(a) the breach (IA 2015) or misrepresentation (CIA 2012) was “deliberate or reckless”; or
(b) the “breach was neither deliberate nor reckless” (per IA 2015) or the “misrepresentation was careless” (per CIA 2012), but the insurer can show it would not have underwritten the policy on any terms had the applicable duty been complied with/not been breached.

Evidence as to whether the underwriter would have underwritten the contract at all is therefore critical to the relief available to the insurer under both Acts where the insurer is unable to assert the breach was “deliberate or reckless”. Where a breach is “deliberate or reckless” the insurer still needs to show that it would have underwritten on different terms (including for higher premium).

VARIATION OF TERMS

If an insurer successfully shows that, but for the breach, it would have underwritten the contract on different terms, the insurer is entitled to apply those terms. This may be, for instance, that a particular exclusion would have been written into the contract, limiting the extent of loss.

An insurer may also assert that, but for the breach, it would have charged a higher premium, in which case under each Act, the insurer may “reduce proportionately the amount to be paid on a claim”. The term “reduce proportionately” is defined in the same way in each Act: the insurer would be liable to pay X% of the claim where X is the premium actually charged as a fraction of the higher premium that would have been charged, multiplied by 100.

The Insurer’s success depends on the evidence it can adduce to prove it would have written the contract on different terms, the nature of those terms and/or whether it would have charged a higher premium will be critical to the relief available under both Acts.

JONES V ZURICH

Mr Jones made a claim for the loss of a Rolex watch, said to have come off his wrist while skiing, on a policy of insurance underwritten by Zurich. It was not disclosed to Zurich that Mr Jones had previously made a claim for a vintage diamond which was lost after it fell out of its setting in a ring, notwithstanding that Zurich had asked questions of Mr Jones’ broker regarding his claims history.

Zurich argued that Mr Jones had made a misrepresentation and Zurich would not have written the policy, or would have written it on materially different terms, had the true state of affairs been disclosed (i.e. Mr Jones had breached his CIA 2012 duty). Zurich did not plead that the misrepresentation was deliberate or reckless – rather, Zurich submitted that it did not matter since

Zurich would not have underwritten the policy at all had it known the true state of affairs in any event. In the alternative, Zurich argued it would have charged a substantially higher premium (25% higher) and the claim should be reduced proportionately.

As a preliminary point, the Judge made clear that if an insurer wishes to assert that a misrepresentation (or in the case of a IA 2015 claim, a breach of the duty of fair presentation) was reckless or deliberate, the point must be "distinctly pleaded". As Zurich had not specifically pleaded that the misrepresentation was deliberate or reckless, it was required to prove that it would not have underwritten the policy at all (rather than that it would have underwritten on different terms).

THE BREACH OF DUTY

The Court did not hesitate in finding a misrepresentation that constituted a "clear breach of… duty" in Jones, having had the benefit of transcripts of telephone calls with Mr Jones' broker, copies of information supplied to Zurich and the underwriter's notes. Mr Jones had previously claimed for a lost diamond and when asked if he had made any claims in the previous 5 years, his broker confirmed he had not.

The Court also readily found that the insurer would have either underwritten the contract on different terms (including at a higher rate of premium) or would not have underwritten the contract at all. Both parties' experts agreed that the misrepresented claims history would have been material to the underwriter when underwriting jewellery including the lost Rolex, and ought to have been disclosed.

EVIDENCE THAT THE INSURER WOULD NOT HAVE WRITTEN THE POLICY

Relying on fact and expert evidence, Mr Jones argued that Zurich would have underwritten the policy had it known the truth, but would have charged a higher premium. Given that Zurich had not pleaded deliberate or reckless breach, if Mr Jones had succeeded in this argument, it appears Zurich's remedy would have been limited to proportional reduction in the claim value, rather than avoidance.

Mr Jones' legal team placed weight on what was described as the insurer's underwriting manual – a macro enabled spreadsheet or rating tool that the underwriter used to price the risk. It was argued that the rating tool produced an increased premium rate when the details that had not been disclosed to Zurich were added, and so Zurich would have written the risk at a higher premium. The underwriter's evidence, which was accepted, was that the rating tool does not indicate whether a risk should be accepted or rejected, but is merely a pricing tool and the decision to accept or reject a risk lies with the underwriter.

The Court also heard expert evidence as to whether, having the benefit of the information that was not disclosed, the risk would not have been underwritten at all. Both experts agreed that some underwriters might accept the risk at higher premium and others would refuse to underwrite altogether, but differed in emphasis as to how usual a refusal to underwrite would be.

The Court ultimately appears to have been swayed by the underwriter's fact evidence, in that the underwriter had already imposed a very heavy weighting above the rating tool's indicative rate as he was not particularly keen on the risk. He had also expressed concern in his notes about the jewellery element of cover and had a discussion with the broker about the possibility of the jewellery being insured elsewhere. His evidence was that "the answer to whether or not there had been any previous claims was extremely significant to my assessment of the risk… it was already a case which was a borderline declinature… it's just not one which would fit our underwriting strategy". The underwriter's evidence was accepted.

LESSONS

The evidence in Jones was relatively substantial and the underwriter in question had considered the risk that resulted in the loss and had expressed his concern about it within his files. It remains the case that it will not be an easy task for any insurer to prove that it would not have underwritten the risk absent clear and cogent evidence.

Although it is clear that the Court will be greatly assisted by expert underwriting evidence from underwriters with relevant experience of the market in question, Jones highlights the extent to which the evidence of the underwriter can be critical. The extent to which oral evidence can be corroborated with contemporaneous notes and records may prove key, underlining the importance of maintaining detailed underwriting files that contain a full and accurate record of the questions raised and answers provided on placement, the underwriter's notes evidencing potentially relevant thought processes (including where the underwriter has thoughts about limiting cover or charging higher premium), as well as copies of emails and documents provided by the insured and its agents.

Lastly, if there is evidence to support an allegation that an insured or its broker has been reckless or deliberately breached the insured's duty, the insurer should be careful to ensure it has pleaded as much.

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