MILLS & REEVE

briefing

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Genesis Housing v Liberty - the appeal

Do your clients understand what they are signing when they make a declaration on a proposal form? Proposal forms often contain basis of contract clauses and accuracy in completing the proposal is as important as it has ever been. This article explains why.

Appeal on "basis clauses"

In February 2013 we reported on the first instance decision in *Genesis Housing* v *Liberty*. Liberty were discharged from liability under a policy providing cover against building contractors' insolvency because the claimant insured (Genesis), the employer, made an error on the proposal form. It stated that the contractor was "Time and Tide Construction Ltd" instead of "Time and Tide (Bedford) Ltd". The proposal form contained a basis clause and so the warranty that the information in the proposal form was "correct and complete in every detail and (the claimant had) not withheld any material fact" had been breached.

Genesis appealed to the Court of Appeal which handed down its decision last Friday, upholding the earlier decision.

Decision unsurprising

Superficially, it seems harsh that incorrectly naming the building contractor should discharge the insurer from liability. However, the appeal decision is not unexpected and Genesis took some fairly technical points in their attempt to overturn previous decisions on basis clauses.

One of Genesis' key arguments was that the statements in the proposal form were not warranties. This was rejected because where a proposal form contains a "basis of contract" clause, the proposal has contractual effect (even if the policy wording itself doesn't refer to the proposal) and all statements in the proposal constituted warranties.

This has been the case for a long time and whilst it may seem punitive, it accurately reflects the current state of the law. Evidentially, it is simpler for an insurer to rely on breach of warranty than non-disclosure or misrepresentation where materiality and inducement have to be proved.

The law has recently been changed *for consumers* so that basis clauses are abolished for them and the duty to disclose material facts replaced with a new duty to take "reasonable care" not to misrepresent – see our briefing *Mulling over CIDRA* – August 2013. However, Genesis was a commercial insured. Had the Insurance (Disclosure and Representations) Act 2012 applied to this contract, Liberty might have been prevented from withholding cover for what seems a relatively minor error or another remedy could have applied. The Law Commission is considering a change in the law for commercial insurance customers with draft legislation expected next year. Nevertheless, the Court of Appeal declined to anticipate that legislation.

Genesis also argued that a policy condition stating “This Policy will be voidable in the event of misrepresentation, mis-description, error, omission or non-disclosure by the Policyholder with intention to defraud” limited Liberty’s right to rely on breach of warranty to situations where there had been fraud (dishonesty) by the insured. There is no indication in the judgment that the error in the proposal was fraudulent, yet the appeal judges rejected Genesis’ argument. They determined that this condition could not be read as restricting insurers’ rights to avoid or to rely on breach of warranty to situations where there was dishonesty.

We believe this is the most controversial part of the Court of Appeal’s decision. The clause seems only to restate the insurers’ common law rights where there has been dishonesty. Presumably the court’s decision would have been different if there had been a conventional innocent non-disclosure clause.

We may see a further appeal to the Supreme Court. In the light of the Law Commissions’ consultation/proposals, further litigation on the meaning and effect of basis clauses would be interestingly timed but perhaps for that reason an appeal will not be pursued.

Points to take away

- The punitive effect of basis of contact clauses remains (for now) for commercial insurance – although change is likely soon in the light of the Law Commission’s review.
- It is as important as ever for brokers to make sure that their clients understand the importance of providing accurate information to insurers at the proposal stage, and for the brokers to record their advice to their clients. Key to this is open questioning of clients without anticipating their answers.
- It is easy to forget that for commercial clients all material information must be disclosed to insurers. Even if there is no specific question on the proposal, the clients must still disclose that information. Again, it is key for brokers to ensure that their clients understand this – and the consequences of failure – and to keep a record of their advice.

We specialise in dealing with brokers’ negligence claims. We will be pleased to work with you to reduce the likelihood of such claims and to take steps to minimise their impact.

If you would like to discuss any of these issues or to find out more information about our (free) risk management tools for brokers, to complement your own risk programme, please contact the author or Neil Frankland, Head of Insurance Brokers Risks.

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