

High Court rules on meaning of 'deliberate non-disclosure'

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Introduction

The High Court has interpreted the phrase 'deliberate non-disclosure' to require dishonesty on the part of the insured. *Mutual Energy Ltd v Starr Underwriting Agents Ltd*⁽¹⁾ concerned the interpretation of a non-disclosure clause that limited the insurers' right of remedy to instances of "deliberate or fraudulent non-disclosure or misrepresentation" on the part of the insured. The High Court held that the term 'deliberate non-disclosure' implied a dishonest decision by the insured not to disclose material information. The insurers could not avoid the policy where the insured had failed to disclose material information in an honest but mistaken belief that the information need not be disclosed.

Non-disclosure clauses are likely to continue to be relevant despite reform of the duty of disclosure for non-consumer insureds under the Insurance Act 2015, which will enter into force on August 12 2016. The only remedy available for non-disclosure under the current law is avoidance of the entire policy *ab initio* (ie, from the outset), pursuant to Section 18 of the Marine Insurance Act 1906. This is a very blunt rule, widely considered to be out of keeping with good commercial practice and therefore often modified by contract.

The Insurance Act 2015 will limit the insurer's right to avoid where the failure to disclose is not deliberate or reckless, replacing avoidance with remedies intended to be more proportionate. Where the insurer would have entered into the contract on different terms had the information been disclosed, the contract may be treated as including such terms. Where the insurer would have charged a higher premium, any claim may be reduced proportionately; but insureds and brokers are likely to continue to negotiate for further limits on insurers' remedies for such honest or 'innocent' non-disclosure. This is perhaps all the more likely given that the scope of the insured's disclosure obligation will, under the new law, extend to all material information that would reasonably have been revealed by a reasonable search of information available to the insured, unless limited by contract.

Facts

Mutual Energy Ltd (MEL) owned and operated an undersea interconnector, which provided a link between the electricity systems of Northern Ireland and Scotland. Starr Underwriting Agents Ltd and Travelers Syndicate Management Ltd (the defendant insurers) and three other insurers provided insurance to MEL in respect of the interconnector. MEL submitted claims against the insurers owing to a series of cable failures. The defendant insurers refused to compromise the claim due to MEL's non-disclosure of certain previous cable failures, which they argued had been deliberate, although there was no allegation of bad faith. MEL had been aware of the previous failures, but did not disclose them to the insurers in an honest but mistaken belief that the information need not be disclosed.

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Term in dispute

The dispute concerned the wording of the proviso in Clause 6:

"the Insurers agree not to terminate, repudiate, rescind or avoid this insurance as against any Insured, or any cover or valid claim under it, nor to claim damages or any other remedy against any Insured or any agent of any Insured, on the grounds that the risk or claim was not adequately disclosed, or that it was in any way misrepresented, or increased, or that any term, condition or warranty was breached, or on the ground of negligence, unless deliberate or fraudulent non-disclosure or misrepresentation or breach by that Insured is established in relation thereto." (emphasis added)

MEL argued that 'deliberate non-disclosure' must mean a conscious decision not to disclose something which it knew it should disclose, importing an element of dishonesty. 'Non-disclosure' was shorthand for a breach of an insured's common law obligation to disclose all relevant material (as defined in Section 18 of the Marine Insurance Act 1906) and 'deliberate' implied a conscious breach of such obligation.

The defendant insurers' arguments included that the term 'deliberate' must be given a separate and distinct meaning from the term 'fraudulent', to make sense of the inclusion of both terms. Because fraudulent non-disclosure would involve the element of dishonesty, 'deliberate non-disclosure' should encompass an honest but mistaken decision not to disclose a document or fact.

Decision

The court held that 'deliberate or fraudulent non-disclosure' must involve dishonesty. 'Deliberate' in this context means a deliberate breach of well-known and well-understood insurance obligations. MEL's decision not to disclose something which was the result of an honest but mistaken belief that the document or fact did not need to be disclosed was not enough to allow the insurers to avoid the policy.

In his reasoning, the judge referred to the *Oxford English Dictionary* definition of 'deliberate', being "carefully thought out, studied, intentional, done on purpose". Case law also suggested that 'deliberate' in the context of a breach or default means an intentional breach. The judge was unconvinced by the defendant insurers' arguments that 'deliberate' should encompass honest decisions not to disclose, in order to distinguish it from 'fraudulent', which is dishonest. It is not always necessary to find distinct meanings, given that there is often overlapping and surplusage in the wording of commercial contracts. In any case, a deliberate breach could in fact be dishonest without being fraudulent in certain circumstances.

The judge also referred to the contractual context, which provided for very broad limitations on the insurers' remedies. Clause 5 of the policy contained an acknowledgement on the part of the insurers that they had "received adequate information in order to evaluate the risk of insurance, on the assumption that such information is not materially misleading". Moreover, the non-disclosure clause (Clause 6), taken as a whole, was worded so broadly that it embraced "every likely cause of action that might arise on the part of the Insurers, and every conceivable remedy". These provisions were designed to protect the insured from the remedies normally available to insurers for breach of the insured's duty of disclosure, misrepresentation, negligence or breach of any term, condition or warranty. Although there was an exception for 'deliberate or fraudulent' non-disclosure, a purposive interpretation would require a narrow view of that exception, covering only dishonest decisions not to disclose.

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Endnotes

(1) [2106] EWHC 590 (TCC).

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