GUIDANCE FOR POLICYHOLDERS IN THE CLAIMS CONTEXT: THE INSURER'S DUTY TO SPEAK

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UK Insurance Coverage Alert

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SUMMARY

It is widely recognised that insurers are not under a general duty to warn policyholders about the need to comply with policy conditions during the claims process. However, a recent Court of Appeal decision determined that, in certain circumstances, a "duty to speak" may arise. This duty obliges the insurer to correct any misapprehension held by an insured as to the nature of the parties' rights and obligations. Where the duty to speak does arise, failure to correct the insured's error may leave the insurer "estopped by silence", and potentially liable to pay out under an insurance policy in spite of non-compliance with relevant policy conditions by the insured.

THE FACTS OF THE CASE

The insured party, Ted Baker PLC, claimed under its Commercial Combined insurance policy with AXA Insurance UK PLC for substantial losses arising out of a prolonged series of thefts by an employee at one of its distribution centres.

AXA appointed a loss adjuster who, in turn, requested a "shopping list" of documentation from Ted Baker, the provision of which constituted a condition precedent to the insurer's liability under the policy. Ted Baker approached the insurer and declined to produce some of the requested documentation, as to do so would be expensive and time-consuming. Ted Baker and its broker suggested that they expected the insurer to admit liability in principle, or agree to cover the costs of production under the policy's Professional Accountant's Clause. This request was communicated to the insurer's loss adjuster, who said that he would take instructions from AXA and revert. As it turned out, the loss adjuster never responded to Ted Baker's request one way or the other.

Ted Baker issued proceedings in the Commercial Court to recover the insurance proceeds. Among the reasons for refusing to pay, AXA argued that Ted Baker failed to comply with the policy terms. Ted Baker disputed this, claiming that it was not in breach of any conditions precedent as it should have received a clarifying response from AXA if it had been mistaken regarding the status of outstanding documentation under the policy.

At first instance, Eder J found that Ted Baker's claim failed on the grounds (amongst others) of breach of conditions precedent by the insured. Ted Baker appealed the ruling. The Court of Appeal handed down its final decision, dismissing the appeal, on 11 August 2017.

While the appeal failed on other grounds (which relate principally to matters of quantum) the Court of Appeal unanimously held that (i) in the circumstances, AXA was under a duty to speak with regard to the shopping list of documentation; (ii) AXA had failed to comply with that duty; and (iii) such failure meant that AXA could not raise the failure to produce the documentation in its defence (referred to as "estoppel by silence or acquiescence").

ANALYSIS

In his judgment, Sir Christopher Clarke suggests that the duty to speak can arise where one party (A) is proceeding on the assumption that something is agreed and the other party (B) knows of A's assumption and also knows that is wrong or in dispute. If this is the case, the duty to speak will arise where a reasonable person would expect B, "acting honestly and responsibly", to bring the true facts as to their respective rights and obligations to A's attention.

This does not go so far as to suggest that there exists a general positive duty on contracting parties to advise each other as to the extent of (and ensure compliance with) each other's obligations. Nevertheless, AXA was held to have specific knowledge about what Ted Baker believed, including the expectation of a response from the insurer concerning whether the documentation requested was still due and outstanding. Sir Christopher noted that the duty did not arise specifically because of the good faith nature of insurance contracts, nor is the duty limited to the insurance context. He did state that "the fact that the contract is of such a nature will, if it does anything, increase the likelihood of a party having a duty to speak".

The party which has the duty to speak must act honestly and responsibly. At first instance, it was held that AXA had acted honestly and that no dishonest "hoodwinking" had taken place. The Court of Appeal agreed with this assessment of the insurer's honesty. The Court of Appeal also held that due to the expectations existing between Ted Baker and AXA, the failure to revert to the insured was "irresponsible" to such an extent that it was sufficient to constitute a breach of the insurer's duty to speak. The Court of Appeal stated that Ted Baker's expectation of a response was reasonable, particularly given that non-compliance with the condition precedent would be fatal to the claim.

Where the insured can establish a breach of the duty to speak, the Court of Appeal held that it would be "unjust and unconscionable" to allow an insurer to escape liability on the grounds of any resulting non-compliance by the insured.

CONCLUSION

This judgment is helpful for policyholders navigating often complex and onerous conditions precedent, compliance with which may be necessary for a successful claim. Some comfort can be taken in knowing that the courts will hold insurers responsible for failing to communicate their expectations fully to the policyholder where they know the policyholder to be under a misapprehension as to the extent of its responsibilities.

This decision is not a means for policyholders to waive compliance with onerous conditions unilaterally, and insurers will only be estopped by silence if the specific facts of the case are right. Knowing whether the factual scenario is right in any given case will be hard to predict without further judicial statements on the topic. In the meantime, where the scope or status of policy conditions is unclear, policyholders should communicate their

understanding of their obligations to the insurer in writing and should actively seek to clarify any misunderstandings. For more information about this case, or generally, please contact Sarah Turpin.

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