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ENGLISH HIGH COURT'S RULING ON THE TERM "DELIBERATE OR FRAUDULENT"

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Legal Briefings

In this article we examine the recent case of *Mutual Energy Ltd vs Starr Underwriting Agents Ltd & Anor*[1], where the Technology and Construction Court ruled on a preliminary issue concerning the interpretation of certain provisions of an insurance policy applicable to an undersea electricity interconnector between Northern Ireland and Scotland.

This was a claim by operators of an undersea pipeline against their insurers in relation to a cable failure. The insurance policy contained an exclusion that would permit the insurers to avoid the policy for "*deliberate or fraudulent non-disclosure*". The insurers maintained that this exclusion would apply where the insured held an honest but mistaken belief that a matter need not be disclosed.

ANALYSIS

The court reviewed the relevant principles of construction for determining the scope of the exclusion. The court considered in particular the case of *Rainy Sky*[2] which decided that the aim of the court was to determine what a reasonable person, who had all the background knowledge which would have reasonably been available to the parties when they contracted would have understood the parties to have meant. The exercise of construction is essentially one unitary exercise, but also an iterative one: the court looks to see where different constructions lead and how they fit in with other provisions in the same clause or the contract. While one important consideration is whether a certain construction would be consistent with business common sense, it is recognised that business men sometimes make bad or poor bargains for a number of different reasons. If they do so, it is not the function of the court to improve a bad bargain or make it more reasonable by a process of interpretation that amounts to rewriting it. Where the parties agree a provision that is drafted in clear language, then that agreement will be upheld notwithstanding that the results could be characterised as un-business like.

It was relevant that the provision immediately preceding the "*deliberate or fraudulent non-disclosure*" exclusion contained an acknowledgment by the insurers that they had received adequate information in relation to the risk of insuring the claimant, assuming that such information was not materially misleading. The court considered that the overall purpose of this provision was to limit any future argument about non-disclosure of information; otherwise the acknowledgement would be redundant.

The court then turned to the interpretation of "*deliberate*". The claimant maintained that it meant a conscious decision not to disclose something to insurers which the insured knew they should disclose; in other words, it imported an element of dishonesty. The insurers argued that "*deliberate*" must be given a separate and distinct meaning from "*fraudulent*", and because "*fraudulent non-disclosure*" would involve the element of dishonesty, they argued that "*deliberate ... non-disclosure*" had to encompass an honest but mistaken decision not to disclose a document of fact.

The court started with the Oxford English Dictionary definition of "*deliberate*", and considered that the term "*deliberate or fraudulent non-disclosure*" suggests a situation where the insured intentionally failed to disclose something to the insurer which he knew he should disclose, in other words, he knew what he was doing was wrong. The court also referred to previous authorities that held that the word "deliberate" means an intentional act. For example, in the case of De Beers[3], "*deliberate default*" was held to mean an act that the person committing it knew was a breach or default. A contrast could be drawn with authorities that held that where a person had wrongly believed he was entitled to do as he was doing, would not be in deliberate breach of contract[4].

The court considered the context of the term used in the policy, as well as the fact that the insurers had accepted that their right to avoid the policy only arose in limited circumstances. It was consistent with business common sense that the insured should be penalised for dishonesty but not for an honest mistake. If the insurer considered the issue of disclosure arose from a mistaken view that something should not be disclosed, then the exclusion would not apply.

The court concluded that that "*deliberate or fraudulent non-disclosure*" means a deliberate decision not to disclose something which the insured knows should be disclosed, and does not extend to an honest mistake.

CONCLUSION

The case is a useful analysis of the term "*deliberate or fraudulent*" and the somewhat fine distinction applicable. The court was firmly of the view that, without the element of dishonesty, (whether or not there was an intention to deceive), the exclusion could not apply. Parties should always take care to comply with disclosure obligations in insurance policies, and this judgment is a welcome clarification of wording commonly used in exclusions.

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[1] *Mutual Energy v Starr Underwriting Agents Ltd & Anor* [2016] EWHC 590 TCC 23 March 2016

[2] *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900

[3] *De Beers UK Ltd v ATOS* [2010] EWHC 3276 (TCC)

[4] *Astra Zeneca UK Ltd v Albermarle International Corp and Another* [2010] EWHC 1574 (Comm)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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