MARSH

FINPRO Practice

THE OBLIGATION TO PROVIDE INFORMATION TO INSURERS WHERE A CLAIM HAS BEEN DECLINED

INTRODUCTION

Following the notification of a claim or circumstance, policies often require the insured to provide insurers with certain information regarding the claim or circumstances, in order for insurers to assess the merits and quantum of the claim. Insurers may make numerous requests, which can impose a heavy burden on an insured. An insured may be reluctant to provide information where insurers have not confirmed coverage. The recent judgment of the English Commercial Court in Ted Baker v Axa Insurance[1] contains some useful lessons for a policyholder finding itself in that situation. In particular, this case:

- Provides some guidance on circumstances in which policyholders may be able to resist insurer requests for information.
- Confirms that failure to comply with a claims-handling condition precedent can result in the forfeiture of an entire (and otherwise valid) claim.
- Reminds policyholders that the extent of the obligation to provide information will depend on the wording of the particular claims condition, the circumstances of the declinature, and the nature and extent of insurers' requests for information.

THE BACKGROUND TO THE CLAIM

The background to the claim involved an employee working at a Ted Baker warehouse, who had stolen stock over several years. After an anonymous tip-off, the employee was monitored and his fate was sealed when police arrived at his house to discover his family dressed in Ted Baker clothing and his house and garage jam-packed with Ted Baker clothing and accessories. Around GBP317,000 of stock was recovered from the employee's house. The suspect pleaded guilty and was sentenced to three years imprisonment.

Although the criminal case against the employee was straightforward, the insurance claim was not. At a preliminary issues hearing in 2010, the Court determined that the particular business interruption policy in place covered employee theft, and permission to appeal that decision was refused. The case then went on (in the main) to two further issues, namely claims conditions/claims co-operation and quantum of the claim.

THE FIRST CLAIMS CONDITION

One claims condition required the insured to deliver particulars of its claim within 30 days of the expiry of the indemnity period, or "within such further time as [insurers] may allow". The judge determined that insurers had allowed additional time (particularly as they continued to request further information from the insured, which was consistent only with allowing additional time) and so there was no breach.

1 Ted Baker Plc & others v Axa Insurance Plc [2014] EWHC 3548 (Comm)

THE SECOND CLAIMS CONDITION

The second relevant claims condition required the insured to deliver "such books of account... and other documents proofs information explanation and other evidence as may be reasonably required by [insurers] for the purpose of investigating or verifying the claim..."

The judge accepted that the requests under consideration made by insurers were "reasonable" in an abstract sense, but determined that this was not necessarily the case where insurers had refused to confirm even that employee theft was an insured peril (as had been the case here). The judge determined, therefore, that the vast majority of requests (compliance with which would have required the insured to undertake significant work) were not reasonable.

However, the judge did find that one category of requests (copies of profit and loss accounts) was reasonable. Having failed to provide these, the insured was in breach of a condition precedent and so the insurers had no liability (and the insured was not saved by their various waiver and estoppel arguments). The quantum issues were considered briefly by the judge, but were irrelevant in light of the decision on claims conditions.

LESSONS FOR POLICYHOLDERS

In some sense, the determination that insurers were not entitled to request anything and everything from the insured in these circumstances is helpful. That said, what is reasonable is subjective, not all clauses will contain the "reasonable" qualifier, and the particular denial of insurers (that employee theft was not covered under the policy at all) was an extreme position, which seems to have influenced the judge. The circumstances of the claim, the terms of the denial, the nature of the requests, and the policy wording will differ from case to case.

Additionally, the net result was still that the insured recovered nothing, as it was held to be in breach in relation to the profit and loss accounts. The Court's approach makes it clear that each request forming part of a list will need to be considered on its individual merits. It is not appropriate to view the list as a whole as unreasonable and, therefore, provide nothing.

The case cannot be taken as carte blanche to ignore insurer requests for documents and information where coverage has not been confirmed. The cautious and prudent approach remains to comply with requests. If an insured has reasons for resisting a request, it is preferable to have an open discussion with insurers about the requests and come to an agreement on what will be provided, rather than simply ignore requests. The judgment in Ted Baker v Axa may offer assistance to insureds engaging in such discussions.

CONTACTS

The consultant advocacy unit within Marsh's Financial and Professional Services Practice (FINPRO) focuses on the presentation and negotiation of clients' significant claims. It also provides a variety of other services including policy wording reviews and the provision of training, which are complimentary to FINPRO's client advisory, claims and placing divisions.

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