

## FAILING TO PROPERLY ADVISE - WILL YOU TAKE THE RISK?

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### ***Pakeezah Meat Supplies Limited -v- Total Insurance Solutions Limited***

This recent case has shone the spotlight, once again, on the danger of a broker failing to give adequate advice when placing a risk on its client's behalf. In this case the broker was found to have failed to advise the insured of its disclosure obligations and on the adequacy of the cover placed. Damages were awarded against the broker, reflecting the sum the insured should have recovered from its insurance cover - the broker, in effect, being left to cover the risk.

### **BACKGROUND**

A number of companies were owned and controlled by members of the same family. In April/May 2012 three of the companies, controlled by three brothers, Mr Ul-Haq, Mr Jamil and Mr Haq, went into administration. The failure of these companies caused the brothers to fall out. As a result it was agreed that the businesses would be acquired out of the administration and split between the brothers who would then go their separate ways.

Mr Ul-Haq and Mr Jamil obtained the trade and assets of one of the businesses, an Asian food supermarket and delicatessen, 'Pakeezah'. They continued the business from its premises at Ingleby Road, Bradford. Pakeezah engaged Total Insurance Solutions Limited (TISL) to obtain a commercial combined policy ("the Policy"), including material damage and business interruption cover, for the period 24 August 2012 to 23 August 2013. TISL placed the Policy with Milburn Insurance Company Limited (Milburn).

On 18 July 2013 a fire occurred at Pakeezah's Ingleby Road premises causing significant damage. Pakeezah submitted a claim to Milburn but it was declined and the Policy avoided on a number of grounds. Milburn's principal reasons for the avoidance were: -

- 1) Pakeezah's misrepresentation of the capacity of the oil fryers in use at the premises in the Statement of Fact; and
- 2) Pakeezah's failure to disclose that its directors had been the officers and/or principals of various companies that had got into financial difficulties.

Pakeezah concluded that it was unable to challenge Milburn on its decision to avoid the Policy and so issued proceedings against its broker TISL, alleging that TISL: -

- 1) failed to disclose what it knew about the financial difficulties of the brothers' previous companies or alternatively failed to make proper enquiry in respect of that which it did not know;
- 2) failed to take proper instructions in relation to the Statement of Fact and was, therefore, responsible for the misrepresentation regarding the oil frying capacity; and
- 3) failed to give adequate advice or make proper enquiry in respect of the sums insured or the indemnity period for business interruption and, as a result, failed to identify that the sums insured for material damage ought to have been significantly higher, and failed to identify that the maximum indemnity period for the business interruption cover ought to have been 24 months rather than 12.

## JUDGMENT

The Policy was placed before the Insurance Act 2015 came into force and so the disclosure regime in place prior to August 2016 applied to the placement. TISL was in liquidation by the time of the hearing and so, although it had earlier filed a defence, it did not appear and was not represented. Judgment was subsequently entered in default with damages to be assessed. In determining damages, the Court had to address issues of causation and loss.

### The Disclosure Issue

TISL had maintained in its defence that Pakeezah was already well aware of its disclosure obligations, having purchased insurance for prior years via another broker. However, it was Mr Haq who had previously arranged insurance on behalf of Pakeezah and he was no longer involved in the business following the insolvency and the brothers parting ways. The judge accepted on the evidence that Mr UI-Haq had no prior experience or understanding of insurance beyond that of a lay person such that Pakeezah could not be expected to ensure disclosure was properly dealt with without advice from TISL.

Pakeezah maintained that TISL was well aware of the issues that Milburn contended were not disclosed to them and which formed the basis of Milburn's material non-disclosure/misrepresentation arguments. It argued that had TISL discharged its duty by asking the relevant questions and advising appropriately, the relevant information would have been disclosed to insurers. The judge said that he had no basis on which not to accept Pakeezah's evidence, in the absence of any evidence being put forward on behalf of TISL.

### Inadequate Level of Cover

The Court then had to consider what level of cover would have been sought. The judge found that had it been advised appropriately, Pakeezah would have sought a greater sum insured and a longer indemnity period in respect of business interruption. The judge awarded damages based on the longer indemnity period and higher sums.

Whilst the judge accepted that this was a standard type of risk and not plausibly uninsurable, he was prepared to recognise a fairly low risk that, had full disclosure been made, either Milburn or other insurers would not have written the risk due to the frying equipment or prior financial history. He therefore made a 25% reduction to take account of that chance.

## THE POST-INSURANCE ACT 2015 POSITION

If Pakeezah's Policy had been placed after August 2016 Milburn may not have been entitled to decline the claim and avoid the Policy. Milburn would have been required to demonstrate what its underwriting decision would have been, had the full facts been disclosed to it. A proportionate approach would seem the most likely outcome, with Milburn potentially calculating any additional premium it would have charged if it had known the actual capacity of the deep fat fryers and the directors' previous financial issues and reducing the claim payment proportionately.

However, even if these arguments had been used successfully against the insurer in this case, the broker may still have had a liability for the alleged failure to advise as to the adequacy of cover placed. So whilst a judgment under the 2015 Act may have significantly reduced TISL's potential exposure, it would still not have escaped scot-free.

## RISK MANAGEMENT MESSAGE

Although this case is fairly fact specific, not least because the broker was not represented at the hearing, it provides some useful reminders about a broker's obligations when placing business to:

- advise the insured of its disclosure obligations at first placement and each time a piece of business is renewed;
- Check that the insured's representative understands what is required, particularly where the identity of that representative has changed from previous renewals;
- Seek confirmation from the insured that sums insured remain adequate, particularly where a cover has been renewed many times, and that the overall level of cover remains adequate;
- Keep a record on file of all advice and guidance provided. Being able to demonstrate this will be essential should any issue arise concerning the information disclosed or the adequacy of the cover obtained.

It also serves as a reminder to MGAs/coverholders of the importance, where there is any issue of non-disclosure or underinsurance, of being able to demonstrate what the underwriting decision would have been had the full facts been available when the risk was presented.

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