INSURANCE ACT 2015: YOUNG -V- RSA
UPDATE ON THE APPEAL

In April 2019 we reported on the *Young v Royal and Sun Alliance plc* case (see Bulletin 19/04). This was the first case to come before the Courts involving a business insured's disclosure obligations under the Insurance Act 2015.

The Court was asked to consider whether the insurer, RSA, had waived its entitlement to receive material information. The first instance Scottish Court found there was no such waiver on the part of RSA and the duty to make a fair presentation had been breached. That decision was appealed and has recently been upheld by the Scottish Appeal Court.

The First Instance Decision

Mr Young used an insurance broker to place cover for commercial properties in Glasgow. The broker used its own software and question set to prepare the market presentation, in which the insured was identified as Mr Young and Kaim Park Investments Limited.

A fire occurred at the insured property causing extensive damage. RSA declined the claim and sought to avoid the policy, on the basis that Mr Young had failed to disclose material information (i.e. that he had previously been a director of four insolvent companies).

Mr Young argued that (i) the information he provided was correct as the specific questions asked had only focused on whether he, personally, had ever been declared insolvent and (ii) RSA had waived any entitlement to disclosure of his involvement in prior corporate insolvencies. Its email confirming cover included a subjectivity that the insured had never been declared bankrupt/insolvent, or had a liquidator appointed, but did not enquire about Mr Young's involvement in prior corporate insolvencies.

At first instance, the Judge held that that Mr Young should have disclosed his prior involvement in corporate insolvencies. The Insurance Act 2015 did not alter the law on waiver and the Judge rejected Mr Young's argument that the Insurer had waived disclosure of his history as a company director. This was because a reasonable person reading the proposal form, and the subjectivity, would not think that RSA had either restricted its right to receive all material information or had consented to the omission of certain material information. The Judge's view was that it could reasonably be assumed that a reference to the insured in the email would include directors acting in previous roles.

Mr Young appealed. Prior to the appeal, he accepted that the undisclosed information was material and that, had it been disclosed to RSA, RSA would not have entered into the policy (i.e. he conceded "inducement", the other necessary ingredient for avoidance). The appeal therefore solely concerned the waiver issue.

The Appeal Court's Decision

The Appeal Court refused the appeal. It analysed the insured's duty of fair presentation and noted that a potential insured should assume that any prospective insurer will want to know every relevant circumstance which would influence the judgment of a prudent insurer. Mr Young had accepted that his previous involvement in corporate insolvencies was material in

this case. His argument was that RSA had shown, by implication, that it was not interested in this information being disclosed to it.

The Appeal Court also confirmed that an insurer can impliedly waive an insured's duty to disclose information, if the insurer only directs that certain information needs to be provided. The question was whether RSA's actions could be interpreted as such a waiver. The Appeal Court found that they could not. RSA issued its insolvency subjectivity at the point that cover was being confirmed. It was beyond the stage of enquiry to seek any fuller presentation of the risk. Accordingly, a reasonable reader of the subjectivity would not have understood it as limiting the information Mr Young was required to disclose to ensure a fair presentation of the risk.

The Appeal Court confirmed that, in this case, RSA was entitled to avoid the policy. Whilst a Scottish decision, the Appeal Court applied English authority on waiver and accepted that the law on this issue was the same in both jurisdictions.

Risk Management Message

As we previously identified, this case raises some interesting risk management issues:

- It serves as a useful reminder of the need to ensure that clients understand their disclosure obligations and the consequences of failing to discharge them.

- It demonstrates the potential exposure where a broker uses its own software/question set to prepare the presentation and those questions are considered by the insured to limit the information required. For this reason we recommend that the question set is always agreed in advance with the insurer and that, where possible, the broker gives advice as to the scope and meaning of any "catch all" materiality questions raised in proposal forms.

- The email from RSA should have raised some alarm bells with the broker. The insured should have been asked to review what RSA had said and confirm that there was nothing to add. Subjectivities, in particular, should always be the subject of specific instructions from the client.

- It highlights the importance of accurate record keeping by MGAs or coverholders, acting on behalf of insurers. These records will be essential if an insurer principal is to successfully argue, after the event, that it would not have written certain business if full disclosure had been given by an insured.

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