

RR SECURITIES LTD v TOWERGATE UNDERWRITING GROUP LTD – BROKERS LIABLE FOR FAILING TO ADVISE CLIENT OF CONDITION PRECEDENT

Towergate Underwriting Group Ltd (the “Broker”) arranged insurance in the period July 2008-2009 for JBR Leisure Ltd (JBR). The cover was for an old church used as storage for arcade machines with the policy covering the premises and machines. The premises suffered an arson attack in which all the games machines were lost.

When JBR tried to make a claim on the policy it was declined because:

- (i) The premises did not comply with minimum security standards (MSS) imposed as a condition precedent to cover by the insurer, Equinox.
- (ii) JBR had allegedly not taken reasonable steps to prevent loss occurring in breach of a Reasonable Precautions Clause.

JBR accepted that the MSS were not in place but not that it was in breach of the Reasonable Precautions clause. The Broker conceded that it had not informed its client that the MSS were a condition precedent to cover but argued that the claim would not have been paid anyway. The parties failed to reach agreement and JBR’s assignee, RR Securities, issued a claim against the Broker.

The Broker unsuccessfully argued that JBR would not have paid for the extra security provision even if they had been advised that the MSS were a condition precedent of the cover. In addition, they argued that the insurer would have been able to avoid the cover due to a failure to take the reasonable precautions required.

The court found that for the insurer to be able to rely on the clause, the alleged failure to take reasonable precautions had, under English Law, to be reckless, not merely negligent. JBR would need to have recognised that a danger existed and not care whether or not it was averted. On the facts, the judge could not conclude that the insured had been reckless as there were a number of security provisions in hand. These included a system for locking windows and doors plus exterior lighting. There had also been a change of locks after a security breach by a disgruntled employee.

Interestingly, even if the MSS had been implemented, the judge did not believe that they would have prevented the fire. He did however recognise that if the MSS were in place, this would have prevented the insurer from avoiding on that ground.

The claimant recovered £360,000 from the Broker for damage to the machines together with interest and costs.

POSITION UNDER THE INSURANCE ACT 2015?

The Towergate case concerned a policy that was not subject to the provisions of the Insurance Act 2015. Had those provisions applied, it would have been open to JBR to try to rely on the provisions of the Act relating to terms not relevant to the actual loss. These give an insured the opportunity to argue that the policy term breached has not increased the risk of the actual loss which has occurred. The explanatory notes to the Insurance Act give the following example: *“Where a property has been damaged by flooding, it is expected that an*

insured could show that a failure to use the required type of lock on a window could not have increased the risk of that loss. In this case the insurer should pay out on the flood claim.” In the current scenario these provisions would have enabled JBR to argue that the insurer should not rely on breach of the MSS condition precedent to deny the claim, since that breach did not increase the risk of the loss from the arson attack that actually occurred. The onus would be on JBR to establish this and, on the face of it, one would expect that the failure to apply the MSS may well have increased the risk of a loss from arson. However, given that the judge concluded that the security provisions may not have stopped the determined arsonist in this instance, there would seem to be room for argument.

RISK MANAGEMENT MESSAGE

This case provides another good example of how important it is for a broker to highlight to the client important provisions in a policy, such as warranties and conditions precedent, and the consequences of failing to comply. Although the terms not relevant to the loss provisions of the Insurance Act may provide some comfort to a broker that has failed to do so, that should be considered a position of last resort. The onus will be on the insured to establish that their loss should be covered despite a policy breach, and whether or not they are successful will always depend on the facts of any case. Even where an insured is successful, the broker may find itself liable for the costs of any proceedings to achieve that result.

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