# WATCH OUT! THERE CAN BE VALUE IN SWEATING THE SMALL STUFF…..

What is losing a £15,000 diamond compared to losing a £190,000 Rolex watch? Well it was everything, as it happens, in the recent *Jones v Zurich* case. Failing to disclose the previous diamond claim resulted in Zurich avoiding cover for the watch. The case is a useful reminder of the obligation on consumer insureds to honestly and accurately answer questions on a proposal form, if they expect the cover to respond. It also serves to demonstrate the value of having a clear record of the underwriter's rationale, when a court has to determine the consequence of an insured's failure to disclose.

## Background

Mr Jones had a policy with Zurich which covered a watch he claimed to have lost whilst skiing in Aspen, Colorado in March 2019. Zurich sought to avoid the policy due to Mr Jones' failure to disclose the prior loss of a diamond from a vintage ring in 2016. The ring was apparently being worn by a girlfriend (now ex) of Mr Jones and a claim had been made in the sum of £15,000.

Mr Jones' uncle, Mr Thomas Trautmann, acted as his executive assistant and had dealt with the Zurich insurance. In particular, he had completed the proposal form and answered "No" to the question "Any losses or claims in the last 5 years?" When asked why he had given this answer by Zurich's barrister, Mr Jones indicated that Mr Trautmann did not know about the diamond loss. The judgment quotes Mr Jones as saying "… *It was a very irrelevant thing in that category of my life, so something, you know, human error I think you'd call it*." Despite this evidence from Mr Jones, further questioning established that Mr Trautmann *was* indeed aware of the previous claim.

The quotation included a Statement of Facts that Zurich made clear formed the basis of its quotation. Indeed, Zurich requested confirmation of the accuracy of the Statement of Facts as a condition of providing cover. The Statement included the following "… *has anyone who permanently resides with them, made any household claims or suffered any loss or damage, whether insured or not, in the last five years following those detailed in this quotation under previous claims details – no*". It was put to Mr Jones, at trial, that if that information was provided to the underwriters, "*it would by definition be false*". After some prevarication, Mr Jones confirmed that it would.

There were concerns identified during the trial in relation to the evidence provided by Mr Jones. Nevertheless, whilst the judge (HHJ Pelling QC) formed an unfavourable view of his credibility as a witness, he was not prepared to conclude that Mr Jones had masterminded a fraudulent claim in relation to the watch. On the basis of all the evidence available it was accepted that a loss to which the policy was capable of responding had been proved (ie the watch had indeed been lost skiing). The issue then was whether or not the Policy should in fact respond.

## Zurich's Position

Zurich sought to avoid the policy on the basis of misrepresentations made to it, by or on behalf of Mr Jones, prior to the policy being underwritten. Mr Jones was a consumer and so the Consumer Insurance (Disclosure and Representations) Act 2012 (CIDRA) applied. Under CIDRA if Mr Jones' actions had been deliberate or reckless Zurich would be entitled to avoid. If his actions were merely careless, Zurich would need to establish that it would not have entered into the contract at all had it known all the facts. Zurich's position was that it could

establish it would not have entered into the contract had it known of the prior loss and so Mr Jones' actions only needed to have been careless. It submitted that if it was unsuccessful in convincing the court of that, then it would certainly have charged a substantially higher premium for the risk and under CIDRA any recovery should be proportionately reduced.

Zurich based its case on a representation that Mr Jones had not suffered any losses in the five years prior, which had been made during a conversation between Mr Jones' broker and the underwriter. It also relied on the question included in the Statement of Facts regarding claims within the last 5 years, to which the answer "No" had been given.

On the basis of the evidence the judge found that the information provided verbally by the brokers, and contained in the proposal form that they presented, had come from Mr Jones via Mr Trautmann. He also found that both had known when the information was supplied that it was wrong, so the position had indeed been misrepresented. The question then was whether or not that entitled Zurich to avoid.

## Zurich's Underwriting Evidence

The evidence showed that Mr Green, Zurich's underwriter, had been concerned about the risk from the outset. In fact, he had loaded the premium by 25% on the basis of the information which *was* provided. He had been concerned by a number of factors such as the client's young age, how "jewellery heavy" the risk was and the lack of a previous relationship with the broker. He indicated that if he had also been advised of the claim in relation to the ring when considering the risk, it "*would have been a straight decline"*.

The judge found Mr Green's evidence convincing, not least because he had contemporaneous notes and a transcript of the call with the broker to support it. He held that, on the balance of probability, Mr Green would have declined cover for this risk had the prior claims history been disclosed. The judge also took account of (conflicting) expert evidence in deciding whether, objectively, it was reasonable for the misrepresentation to have affected Mr Jones' approach. He found that it was and ruled that Zurich was entitled to avoid the policy and refuse the claim, but that it must return the premium.

The case is relatively unusual in that the parties were prepared to incur the costs of a 3 day trial with leading counsel instructed on each side over a relatively modest claim for £190,000 (the combined legal costs would have comfortably exceeded the sum in dispute). Zurich was also willing to disclose its underwriting rationale and expose its underwriter to cross examination. Much has been said about hardening insurance markets and insurers' propensity to take coverage points. This case is a good example of a blue chip insurer willing to stand behind its underwriter and decline a claim even when the claimant obtained expert underwriting evidence supportive of its case.

## Risk Management Message

It is essential that clients appreciate the importance of accurately answering questions asked by insurers and that intermediaries can demonstrate clients have been warned of the potential consequences if they do not. Clients should be asked to check documentation carefully at the placement stage and brokers should always ensure that clients are given the opportunity to, and do, check the accuracy of any statement of fact.

Although the consumer disclosure process is simpler and more consumer friendly under CIDRA, insurers will still avoid policies when material information is withheld. In any such non-disclosure situation, both intermediaries and MGAs can be subject to a degree of scrutiny. We set out a number of tips to help intermediaries and MGAs protect themselves in this sort of scenario, in a bulletin last year (Deliberate or Reckless Statements – When a Consumer Policy Can Be Avoided) and these are repeated here for ease of reference.

## Tips For Intermediaries

Intermediaries should always consider at the outset whether their clients are consumer insureds or business insureds, for the purposes of ensuring that the correct duty of disclosure explanation is applied. It is important to remember that a consumer insured is an individual who buys insurance wholly or mainly for purposes unrelated to their trade, business or profession. Therefore, an insured may still be classified as a consumer even where it might not be an eligible FOS complainant.

Intermediaries have a duty to ensure that consumer clients understand their duties of disclosure to insurers and the need to answer questions accurately. Otherwise they risk the policy being avoided.

The intermediary should ensure that the consumer insured is aware of:

- the duty to take reasonable care not to make a misrepresentation to the insurer;
- when that duty applies – i.e. before a consumer insurance contract is entered into, when the contract is renewed or varied, and possibly (if the wording provides) throughout the duration of the policy period;
- the potential consequences of failing to discharge this duty (i.e. possible avoidance).

The intermediary should ensure the consumer insured understands the above, and that it has reminded its client of the above at all appropriate stages of the placement or renewal process. Keeping a detailed note when oral advice on this point is given is also important. Being able to evidence the advice may be crucial to defend the intermediary if a claim is made that its advice was inadequate.

Where a question posed by an insurer is not answered by a consumer, there is a risk that the answer will be deemed by insurers to be negative. It is therefore important to check that all questions have been answered. Where a client indicates that a question has not been answered because it is unsure of the answer, the intermediary should take additional steps to ensure the client provides an accurate answer. The intermediary should not complete any unanswered questions without specific instructions to do so which are separately recorded in writing.

Where the intermediary uses its own standard proposal form, or software to prepare a market presentation, the best approach will be to agree with the insurer in advance the question set which insureds will complete. It will also be important to ensure that the insurer is shown all of the options available to, and answers given by, the insured when completing the form (see Griffin's bulletin on the decision in *Young v. RSA* for further information).

Griffin has issued a number of bulletins on the duty of disclosure, and some recommended standard duty of disclosure warnings, all of which can be found on the website at [www.griffin-insurance.co.uk](http://www.griffin-insurance.co.uk). However, these should only be used as a starting point and the extent of the advice required to be given by the intermediary will always depend on the specific facts of each particular risk being placed.

THE GRIFFIN INSURANCE ASSOCIATION

## Tips For MGAs

MGAs should ensure that the questions being asked of consumer insureds, on behalf of insurer principals during the underwriting process, are clear. Where they are, it is more likely that the insurer will be able to rely on the statutory assumption that the consumer insured knows that the questions are relevant to the insurer.

Where MGAs produce questions (to be asked of potential consumer insureds on behalf of their insurer principals) it is also important that the insurer approves those questions. This will reduce the risk of an insurer arguing the questions were not appropriate for the risk being written.

This bulletin is for general information purposes only and does not provide a comprehensive or complete statement of the law relating to the issues discussed nor does it constitute legal advice. In addition, by its nature, this bulletin may be superseded by subsequent regulatory or legal developments. Professional advice should be sought where appropriate in relation to any particular circumstances.

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Managers: Griffin Managers
Regis House
45 King William Street
London EC4R 9AN
Telephone 020 7407 3588
Email griffin@tindallriley.com
www.griffin-insurance.co.uk

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