Misrepresentation of Intention: Two Treaties and an Endorsement

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In *Limit No. 2 Limited v AXA* ([2008] EWCA Civ 1231) the Court of Appeal provided guidance on a number of important issues relevant to the placement of insurance and reinsurance, specifically: the effect of comments made by a broker at placement with regard to the reinsured's underwriting principles and whether those comments could be viewed as representations of fact or mere matters of expectation or belief; the effect of an endorsement extending the period of a contract of reinsurance; and the willingness to view two representations which were made at placement as 'continuing' for the purposes of a subsequent renewal.

The Treaties

This case involved two treaties. One was written on 1 July 1996, originally lasting 12 months, but later extended by endorsement dated 20 June 1997 for a further 7 months to 31 January 1998. The other was a 12 month treaty written in February 1998. AXA, who had taken over the original reinsurers on both treaties, sought to avoid the treaties as a result of a misrepresentation by the brokers for the reinsured, Limit No.2 Limited, a syndicate at Lloyd's.

The Representation

The representation at the heart of the dispute was contained within a fax sent by the reinsured's brokers, Newman Martin and Buchan Ltd (NMB). Prior to agreeing the 1996 treaty NMB attached a front cover to the draft slip and information sheet provided by the syndicates for the purpose of placing the reinsurances. On 4 July 1996 NMB faxed a bundle including the front cover to the reinsurers stating that *"as a matter of principle [the reassureds] maintain high standards and would not normally write construction unless the original deductible were at least £500,000 ($745,000), preferably £1m"*. This statement was not however repeated when the 1997 endorsement was made, nor when the 1998 treaty was agreed. NMB had represented that the reinsureds intended only to underwrite energy risks with the defined high deductibles, but this was arguably inaccurate because in the prevailing market conditions high deductible energy business was no longer available. Whilst the reinsured had written reinsurance with the stated deductibles before July 1996, the intention to continue to write such reinsurance had evaporated by July 1996 when the treaty was written. Moreover, it became apparent that most of the risks that were underwritten by Limit No. 2 had deductibles of £100,000 to £200,000.

First Instance Decision

In the High Court, Jonathan Hirst QC held that the broker's statement within the fax sheet was a misrepresentation of intention and therefore the 1996 treaty could be avoided. As a consequence of the avoidance of the 1996 treaty, the 1997 endorsement, which was an extension of the 1996 treaty, could also be avoided.

With regard to the 1998 treaty, the judge held that the representation was a continuing one and that the reinsurers were entitled to assume that the policy regarding deductibles remained for the 1998 year in the absence of any evidence to the contrary. The reinsurers were therefore entitled to avoid the 1996 treaty, the 1997 endorsement and the 1998 treaty.

Misrepresentation

The Court of Appeal outlined the requirements for a finding of actionable misrepresentation: (1) there must have been a representation, in this case the statement by the syndicate that they intended to write business with the stated deductibles; (2) the representation must have been untrue when the relevant contract was written and (3) the misrepresentation must have been material, however materiality was not a point on appeal. The court held that it was an *'inexorable conclusion'* on

a fair reading of the evidence, that the representation was untrue; on examination it transpired that it was only the broker that had made the representation and it was contrary to the intention of his client, Mr O'Farrell. The Court of Appeal was satisfied that the statement was a misrepresentation and for this reason it held that the first contract had fallen away. For judicial consideration on the test for misrepresentation where there are allegations of non-disclosure see the recent decision of the Commercial Court, *Crane v Hannover Ruckversicherungs AG* ([2008] EWHC 3165 (Comm)).

Representation of Intention

The court then considered whether the representation of intention was continuing such that it was still in effect when the 1997 endorsement was made and when the 1998 treaty was agreed. In his consideration of a *'representation of intention'*, Lord Justice Longmore suggested that it was an elusive concept primarily because a person's intentions were always subject to change. The court viewed the endorsement as part of the 1996 contract and suggested it would be 'artificial' to view it as a new contract because it was an agreement between the parties to amend the period clause in the 1996 contract. At the time the 1998 treaty was made the representation was not repeated and Longmore LJ commented that *"[a] representation of intention cannot last for ever; it only relates to the time when it is made"*. Moreover, Longmore LJ refused to put such *"weight on a representation of intention … to say that it must be taken to be still operative after a lapse of 19 months"*. Accordingly the endorsement fell away with the 1996 Treaty, but the 1998 treaty could not be avoided and so the syndicate's appeal was successful on this point at least.

There has been much criticism and discussion about the draconian nature of the right to avoid an insurance or reinsurance contract. Perhaps mindful of just how powerful the remedy of avoidance can be in the hands of an insurer or reinsurer, Longmore LJ concluded that *"a court should not struggle to hold that everything said at inception is to be impliedly repeated on renewal"*.

Comment

This case has to some degree clarified the effect of a misrepresentation of intention in the context of a renewal, and it provides some guidance on how much time must pass before a representation of intention will lapse. Clearly this will vary depending on the specific circumstances of the case, but it seems that the potential harshness of the remedy of avoidance was a factor which affected the weight that Longmore LJ was prepared to put on a representation of intent that had been made 19 months prior to the writing of the 1998 treaty.

The decision also acts as a warning to brokers to ensure that they have authority to include information in the presentation. Great care must be taken when making any statement on behalf of the reinsured. Clearly any losses suffered by its principal as a result of any shortfall in cover could well find their way back to the broker.

Clearly not all representations will continue at renewal, but extension endorsements are likely to be set aside if they are procured by non-disclosure or misrepresentation or if the contracts they extend are so procured.