An Insurer's Questions: Interpretation and Waiver

The questions that an insurer asks prospective insureds on an application for insurance, and the answers given in response, can have important ramifications on the parties' rights and obligations going forward. The proper interpretation of those questions can often prove crucial in determining whether the insured has complied with their obligation to disclose material facts and give a fair presentation of risk. The consequences of any misrepresentation or material non-disclosure can be significant, including denial of coverage by the insurer.

Mr Justice Snowden has recently considered these issues – that is, the interpretation of an insurer's questions and any consequent waiver by the insurer of disclosure of otherwise material facts – in the case of *Ristorante Limited t/a Bar Massimo v Zurich Insurance plc* [2021] EWHC 2538 (Ch). The judgment reaffirms the law as set out in *R & R Developments v Axa Insurance UK plc* [2010] 2 All EW (Comm) 527 and *Doheny v New India Assurance Co* [2005] 1 All ER (Comm) 382 (CA).

Roddy Dunlop QC and Jonathan Schaffer-Goddard appeared for the successful Claimant. The full judgment can be found here.

Background facts

The judgment relates to a trial of preliminary issues on agreed facts. The Claimant was the leasehold owner of property at which it operated its business as a restaurant and bar. The Claimant took out a policy of insurance with the Defendant in respect of the property for certain specified risks. The policy was first incepted on 12 October 2015, subsequently being renewed on 12 October 2016 and 12 October 2017.

Each time the Claimant applied or renewed the policy it (or, in reality, its broker) was asked a series of standard questions by the insurer via an online underwriting process. This process included, on each occasion, the Claimant being asked to "agree" or "disagree" with a number of statements posed by the insurer, including relevantly that:

> " *No owner, director, business partner or family member involved with the business:*
>
> (i)…
>
> (ii)…
>
> (iii) *has ever been the subject of a winding up order or company/individual voluntary arrangement with creditors, or been placed into administration, administrative receivership or liquidation.*
>
> (iv)…"

As Snowden J notes in his judgment, it is clear that the introductory words ("*No owner, director…"* etcetera) applies equally to each of the numbered statements in respect of which the Claimant was asked to agree or disagree. The

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statement or question relevant to the proceedings was number (iii) (the "Insolvency Question"). On each occasion the Claimant answered the Insolvency Question with "Agree", thereby representing that that statement was true (the "Representation").

The three directors/owners of the Claimant had in fact previously been directors of three other companies which had – prior to the policy's inception (and to each renewal) – gone into insolvent liquidation and been dissolved (the "Previous Liquidations"). As we will see below, this was central to the parties' dispute. For present purposes, it is worth noting:

(a) The parties agreed that, under the law, the Claimant had an obligation to disclose all material facts that would influence the Defendant in assessing and accepting the risk posed by the Claimant as an applicant for insurance (and thereby making a 'fair presentation of risk').

(b) The Claimant also accepted that, subject to the proper interpretation of the Insolvency Question and any waiver by the Defendant, the Previous Liquidations were material facts that normally ought to be disclosed.

On 3 January 2018 the Claimant's property was damaged by fire and it sought an indemnity from the Defendant under the policy for certain losses. On 16 March 2018 the Defendant purported to avoid the policy on the basis of material non-disclosure, namely the failure to disclosure the Previous Liquidations. The Defendant stated that, had the Previous Liquidations been disclosed, it would not have issued or renewed the policy. The Claimant issued proceedings for breach of contract claiming wrongful avoidance of the policy.

Issues

The issues that the Court had to consider were, in essence, two-fold:

(a) What was the proper interpretation of the Insolvency Question? Was it wide enough to include the Previous Liquidations as contended by the Defendant? Or was it limited to the insolvency events of the directors/owners personally (if any) as contended by the Claimant? The proper interpretation of the Insolvency Question would determine whether the Representation was true or false.

(b) If the Insolvency Question did not itself extend to the Previous Liquidations, had the Defendant waived its right to know about the (otherwise material) Previous Liquidations by limiting the Insolvency Question to just the directors/owners of the Claimant applicant?

The interpretation of the Insolvency Question

<u>The principles of interpretation</u>

The judgment proceeded on the basis of the usual (and uncontested) principles that govern contractual interpretation at [31]ff, as set out in the Supreme Court decision in *Wood v Capita Insurance Services Ltd* [2017] AC 1173. There is little point repeating those well-known principles, but there are two points worth mentioning:

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(a) The judgment contains a useful reminder that the approach to the interpretation of insurance contracts (including insurer questions) is the same as that which applies generally to commercial and consumer contracts. The task is to ascertain the objective meaning of the words used and not the subjective intention or understanding of the parties.

(b) That said, in the context of interpreting questions put to applicants by insurers, where the meaning of the question is genuinely ambiguous, the court should resolve any ambiguity in favour of the applicant/insured.

The Court's Analysis

The Court's judgment contains a detailed and thorough analysis of the proper interpretation of the Insolvency Question, which will be instructive for those considering how a court may approach similar exercises in other cases.

The Court ultimately agreed with the submissions made by the Claimant's counsel, Roddy Dunlop QC. The Court held that the Insolvency Question was not wide enough to include the Previous Liquidations and was, by its terms, limited to any insolvency events that had occurred in relation to the directors/owners personally.

In summary, the Court's reasoning was as follows:

1. The critical introductory words to the question ("*No owner, director…"* etcetera) clearly defined the subjects of the inquiry for the questions that followed, including the Insolvency Question. There was also no express reference to any corporate body in those introductory words. The literal meaning therefore favoured the Claimant.
2. Further, the Defendant's counsel accepted in oral argument that some of the other questions which were premised by the same introductory words would not themselves demand answers that extended beyond the individual directors/owners of the Claimant/applicant. That is, those questions did not capture companies in which the directors/owners were previously involved. Justice Snowden held it was unlikely that the parties would have intended those introductory words to have a different meaning for each of the questions that followed.
3. The Insolvency Question was part of a standard set of questions designed to be applicable to a range of different applicants. The fact that most of the insolvency procedures referred to were corporate insolvency procedures did not mean that the question had no purpose for natural persons; after all, the question did in fact refer to at least one individual insolvency process.
4. Furthermore, and relatedly, it was perfectly possible that the directors or owners of a hypothetical applicant were themselves corporate entities. As such, the references to corporate insolvency procedures in the Insolvency Question still had work to do without applying the interpretation advanced by the Defendant. It did not matter that those corporate insolvency events were not relevant to the present applicant.
5. The Court rejected the Defendant's argument that the directors/owners had nonetheless themselves "*been the subject of*" an insolvency process in their capacity as the directors of the now-insolvent companies. Such an interpretation was not grammatically or legally sensible.
6. The Court also noted that the Defendant's interpretation was difficult to apply in practice. For example, it was difficult to determine what level of ownership of a now-insolvent company would be required before a director/owner of an applicant would have to answer the question with "Disagree". The Court noted that the standard form template of the insurer's questions had to work for a range of different circumstances and had to be interpreted accordingly.
7. Lastly, the Court rejected the Defendant's argument that the Insolvency Question should be interpreted from the perspective of a reasonable insurance broker and that such a broker would prefer the Defendant's interpretation. First, there was simply no evidence of how a reasonable insurance broker would interpret the question. But

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second, there were no authorities which supported the argument that the correct perspective was that of an insurance broker.

In analysing the proper interpretation of the Insolvency Question, Snowdon J also distinguished the Court of Appeal case of *Doheny* on the facts. Crucially, when asking the applicant about previous bankruptcies, the insurer in *Doheny* expressly referred not only to the director/partner of the business but also to "*any Company in which any director/partner have had an interest*". The actual issue in dispute in *Doheny* was whether the word 'bankruptcy' in fact also referred to corporate insolvency events. The Court of Appeal concluded that it did particularly given the inclusion of the words quoted above. The case of *Doheny* therefore did not assist the Defendant insurer in the present case.

Rather, Snowden J held that the Insolvency Question in the present case was more like that in *R & R Developments*, where Nicholas Strauss QC held that a similarly worded question did not extend to companies in which the directors had previously had an interest and which were insolvent at the time of answering the question.

In fact, Snowden J agreed with Roddy Dunlop QC's submission that the present case was stronger than *R & R Developments* because, in that case, the insurer's question did ask about insolvency events in respect of the "*directors either personally or in connection with any business in which they have been involved…*" (emphasis added). Even that wording – which was absent in the present case – was not wide enough to include insolvent companies in which the directors had previously been involved.

Justice Snowden therefore held that, according to its clear and unambiguous meaning, the Insolvency Question did not require the Claimant to have disclosed the Previous Liquidations. In any event, had it been necessary, Snowden J would have held that the Insolvency Question was, at the very least, ambiguous such that its interpretation was to be resolved in the Claimant's favour.

Justice Snowden also affirmed the principle that insurers can be taken to know about the relevant case law (i.e. *Doheny* and *R & R Developments*) when formulating their questions. The suggestion being that it is up to insurers to make the wording as clear as possible in light of any judicial developments.

Waiver

As such, it became necessary for the Court to consider whether the Defendant had, by asking the Insolvency Question (properly interpreted), waived its entitlement to be informed of the Previous Liquidations.

There was very little dispute between the parties as to the principles to be applied. In the Judgment:

(a) Snowden J cited the relevant passages in *MacGillivray on Insurance Law* with approval (which were relied on by both parties) with emphasis on the following statements:

(i)That it was more likely that the questions asked by insurers "*will limit the duty of disclosure, in that, if questions are asked on particular subjects and the answers given to them are warranted, it may be inferred that the insurer has waived his right to information, either on the same matters but outside the scope of the questions, or on matters kindred the subject-matter of the questions*."

(ii) That, therefore, "*if an insurer asks whether individual proposers have ever been declared bankrupt, he waives disclosure of the insolvency of companies of which they have been directors*".

(b) Snowden J also noted that both the Court of Appeal in *Doheny* (obiter) and Nicholas Strauss QC in *R & R*

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Developments (ratio), found that on those cases' respective facts, if the question simply referred to the insolvency of the individuals, an insurer will have waived its right to know about the insolvency of companies in respect of which those individuals were involved.

Ultimately, Snowden J agreed with the submissions advanced by the Claimant and concluded that there had been a waiver in this case. In summary:

1. The Court accepted that the passages in *MacGillivray* accurately captured the present state of the law. The question was whether a reasonable person reading the Insolvency Question would be justified in thinking that the insurer had restricted its right to receive all material information.
2. The Court concluded that, having identified previous liquidations as a subject matter on which the Defendant required disclosure, and having specified the persons in respect of whom the question applied, the Defendant did limit its right to disclosure in respect of other persons or companies.
3. It was therefore reasonable for the Claimant to infer that the Defendant did not want to know about the Previous Liquidations.
4. Further, the Court rejected the Defendant's submission that it should be slow to conclude waiver in respect of information which represents a "moral hazard"; that is, information which is particularly important for an insurer to know. Justice Snowden held that such an approach was not consistent with the analysis in *Doheny* or *R & R Developments*.
5. The Court also rejected the Defendant's submission that the situation differed where the insurance was arranged via a broker. Again, there was no evidence or authorities to support this contention.

Accordingly, the Court concluded that the Representation was not a misrepresentation, nor was it an unfair presentation of risk.

Comment

On one level, the Court's judgment was a straight-forward application of the principles of interpretation and waiver. However, the case serves as a useful reminder on a number of important points:

1. Insurers should pay close attention to the way they formulate the questions they ask applicants. A few simple words in the present case would have gone a long way in supporting the Defendant's preferred interpretation.
2. Insurers should also pay close attention to how the questions are presented. The fact that the Insolvency Question in this case appeared in the context of other questions was of relevance to the analysis.
3. Relatedly, insurers should be regularly reviewing their questions in light of any case-law developments in respect of industry-standard questions. As Snowden J observed, the Defendant in this case could be taken to know about the decisions in *Doheny* and *R&R Developments* and formulated its questions accordingly.
4. It is not up to an applicant to guess what is intended by an insurer's question. If the question is ambiguous, the matter will be resolved in the applicant's favour.
5. The Courts have again affirmed the rules on waiver set out in *Doheny* and *R&R* (and now *Ristorante*). Explicit warnings to disclose every material fact were not sufficient in this case to overcome the waiver arising from the language of the question.
6. Lastly, despite the success of the Claimant insured in this case, it is nonetheless clear from *Doheny* that the courts are willing to resolve disputes about the interpretation of an insurer's questions in favour of insurers, especially where that is the clear interpretation. Applicants should be cognisant of their duty to disclose all material facts or otherwise risk an insurer lawfully denying coverage.

Author: Elliott Cook

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