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Is inducement coming of age in the English law of insurance?*

In order to be entitled to avoid a policy of insurance for non-disclosure or misrepresentation in English law, the insurer must show not only that the non-disclosure or misrepresentation was material, but also that it induced the underwriter to enter into the contract, either at all, or on the terms on which it was made. However, one looks in vain in the Marine Insurance Act 1906 – which is treated as a codification of the English law of insurance and therefore as an authoritative statement of general principles applicable to all types of insurance – for any reference to inducement.

The 1906 Act provides that the insured must disclose to the insurer, before the contract is concluded, every material circumstance which is known to the insured, and that every material representation made by the insured to the insurer during the negotiations for the contract, and before the contract is concluded, must be true. Every circumstance or representation is material which would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk. If the insured fails to make a material disclosure, or makes a material misrepresentation, the insurer may avoid the contract.

As Evans LJ said in the Court of Appeal in *St Paul Fire & Marine Insurance Co (UK) Ltd v McConnell Dowell Constructors Ltd* [1995] 2 Lloyd's Rep 116, the 'prudent insurer' is 'no more than the anthropomorphic conception of the standards of professional underwriting which the Court finds it appropriate to uphold'. Against this background, the problem to which the missing requirement for inducement gave rise was pinpointed by Kerr J in *Berger and Light Diffusers Pty Ltd v Pollock* [1973] 2 Lloyd's Rep 442 when he said:

> '... one could in theory reach the absurd position where the Court might be satisfied that the insurer in question would, in fact, not have been so influenced but that other prudent insurers would have been. It would then be a very odd result if the defendant insurer could nevertheless avoid the policy.'

This remark was expressly approved in *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1995] 1 AC 501 in which, almost 90 years after the Marine Insurance Act 1906 came into force, the House of Lords stated unequivocally that actual inducement is required in addition to materiality, and that the requirement for inducement is to be implied into the Marine Insurance Act 1906 despite being absent from its wording.

In practice, one would expect a finding of inducement to follow fairly freely from a finding of materiality: if a non-disclosure or misrepresentation would influence a prudent insurer, then it is likely to be a fairly short step to finding that it in fact influenced the underwriter who underwrote the risk in question. There is no presumption of inducement, but as Rix LJ said in *WISE (Underwriting Agency) Ltd v Grupo Nacional Provincial SA* [2004] EWCA Civ 962, [2004] 2 Lloyd's Rep 483, the test of inducement is not a heavy one; and as Lord Mustill observed in *Pan Atlantic*, the facts may be such that it is to be inferred that the particular insurer was induced even in the absence of evidence from him.

However, more recently, it seems that the English Commercial Court may be going further in its willingness to test the evidence of underwriters on the question of inducement. Colman J said in *North Star Shipping Ltd v Sphere Drake Insurance plc* [2005] EWHC 665 (Comm):

> 'In evaluating the underwriters' evidence it is important to keep firmly in mind that all their evidence is necessarily hypothetical and that hypothetical evidence by its very nature lends itself to exaggeration and embellishment in the interests of the party on whose behalf it is given. It is very easy for an underwriter to convince himself that he would have declined a risk or imposed special terms if

> given certain information. For this reason, such evidence has to be rigorously tested by reference to logical self-consistency, and to such independent evidence as may be available.'

Recent reported cases suggest that challenges are increasingly being made to underwriters' evidence as to inducement: see for example *A C Ward & Son Ltd v Catlin (Five) Ltd (No 2)* [2009] EWHC 3122 (Comm) (Flaux J) and *Sugar Hut Group Ltd v Great Lakes Reinsurance (UK) plc* [2010] EWHC 2636 (Comm) (Burton J). The underwriter's evidence as to inducement was accepted in these cases, but it was rejected in *Synergy Health (UK) Ltd v CGU Insurance plc* [2010] EWHC 2583 (Comm), in which Flaux J said:

> '[The underwriter] was ... an intelligent and careful witness ... reflecting his attitude to underwriting. It seemed to me that [the underwriter] was an honest witness doing his very best to give evidence about what he believed he would have done if the true position had been disclosed to him prior to the 2006 renewal. However, although I found [the underwriter] to be honest and truthful, it does not follow that I have to accept his evidence on this issue of inducement, given that inevitably such evidence is all given on a hypothetical basis, with the benefit of hindsight.'

Separately, the concept of materiality has long troubled the courts, particularly in cases involving less sophisticated insureds. This resulted in a line of cases suggesting (often without any express consideration of the issue) that the test of materiality was whether a reasonable man with the insured's knowledge would have recognised that the knowledge was material. There is no doubt however that this does not represent the law. However, the issue has continued to give rise to concern, and has recently been addressed by legislation. As a result the English law applicable to consumer insurance will shortly diverge from the common law (and the Marine Insurance Act 1906) in important respects.

The Consumer Insurance (Disclosure and Representations) Act 2012 received Royal Assent on 8 March 2012. The Act, which is part of a comprehensive review of the law of insurance by the Law Commissions of England and Scotland, will not come into force until March 2013 at the earliest. When it does, the law as to non-disclosure and misrepresentation will cease to apply to consumer insurance contracts. Instead, consumers will be subject to a completely new statutory duty to take reasonable care not to make a misrepresentation to an insurer. There will be no general duty of non-disclosure. Instead, a failure by the consumer to comply with the insurer's request to confirm or amend particulars previously given is capable of being a misrepresentation; and the question of whether a consumer has taken reasonable care not to make a misrepresentation is to be determined in the light of all the relevant circumstances, including the clarity and specificity of the insurer's questions.

The 2012 Act requires the insurer, in order to obtain a remedy for a misrepresentation, to show that without the misrepresentation, it would not have entered into the contract at all, or would have done so only on different terms. This means that, although the term is not used expressly in the 2012 Act, which adopts a plain English approach, the requirement for inducement – which as we have seen was authoritatively implied into the Marine Insurance Act 1906 only in 1995 – has been retained for consumer insurance. At the same time, the long-established requirement for materiality has ceased to apply in consumer insurance and has been replaced with a duty to take reasonable care not to make a misrepresentation to an insurer.

Note

* Alison Padfield is the author of Insurance Claims (Bloomsbury Professional, 3rd edition, 2012). She represented the insurers (with Colin Wynter QC and instructed by Kennedys Law LLP and DWF LLP) in *Synergy Health (UK) Ltd v CGU Insurance plc* [2010] EWHC 2583 (Comm).