RPC

International risk team

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The Atlantik Confidence: precautions to take in respect dubious claims in the wake of economic crises

Insurers want to pay claims. However, insurance claims history shows that when certain businesses face an existential threat they are inclined to take a very aggressive attitude towards their insurance "assets" in a desperate attempt to generate liquidity. This is particularly so where the corporate governance regime within a business is not robust because of the ownership structure of that business or the jurisdiction in which it operates, or both.

Some parts of the shipping industry exhibit these characteristics. Also the shipping industry, along with many other global industries, has been very badly hit by the economic crisis caused by Covid-19. Historically the shipping industry has been no stranger to fraudulent behaviour in an insurance context, particularly in the wake of economic crises. However, fraud is not immediately obvious. It can take years to uncover what has *actually* happened.

Two recent cases illustrate this. The first case is the *Brillante Virtuoso*, which was tried in the English Commercial Court before Teare J last year. The loss happened in 2011 in the wake of the last economic crisis. It took a further 8 years for War Risks underwriters to establish the claim was fraudulent – Teare J found the owner had effectively bombed his own vessel. However, at first this claim was dealt with on the basis that it was not fraudulent. There was in fact a Commercial Court trial in 2015 before Flaux J on quantum – which the owner won. Thankfully, War Risk underwriters did not part with any money following that ruling because evidence of fraud on the part of the owner started to emerge.

The second case is the *Atlantik Confidence*, which is the subject of this article. As explained in more detail below, underwriters paid the claim only for it subsequently to be found by the English Admiralty Court in 2016 (by Teare J again) that the owners had scuttled their own vessel. The problem then for underwriters was how to get the indemnity back – which had been paid to the mortgagee bank. Looking to the future this case provides a useful lesson in precautions that underwriters might take when dealing with dubious claims, given that there are likely to be more of them in the wake of the current financial crisis and given how evidence of fraud tends to emerge slowly.

Background

Underwriters insured the Vessel under a Hull and Machinery insurance policy which valued the Vessel at US$22m ("the Policy"). The Policy was governed by English law and contained an exclusive English jurisdiction clause. Credit Europe NV ("the Bank"), a bank domiciled in the Netherlands, funded the re-financing of the Vessel and took mortgages over the Vessel and assignments of the Policy which identified the Bank as mortgagee, assignee and loss payee.

After the Vessel sank off the coast of Oman on 3 April 2013, the owners presented a claim for US$22m in respect of the total loss of the vessel. Thereafter a settlement agreement was entered into by Underwriters and the Vessel's owners and managers. As with the Policy, the settlement agreement also contained an exclusive English jurisdiction clause. Whilst the Bank was not a party to the settlement, at the owners' request, the Bank issued a letter authorising Underwriters to pay the insurance claim proceeds to the broker.

After the insurance claim was settled, the funds were remitted to the Bank via the broker in the usual way to pay off the mortgage and various other debts of the owners. In subsequent proceedings between the owners and cargo interests, Teare J held that the Vessel had been deliberately scuttled.

As a result of Teare J's ruling, Underwriters commenced proceedings against the owners and managers and the Bank in the High Court to set aside the settlement agreement and recover the settlement

funds. Underwriters sought to avoid the settlement agreement on the grounds of the owners' and managers' misrepresentation or Underwriters' mistake, and by seeking damages or restitution. Underwriters also sued the Bank on the grounds it was liable for misrepresentation and had "facilitated" the misrepresentations of the owners and managers which had resulted in the payment of the claim. In response, the Bank challenged the jurisdiction of the High Court over Underwriters' claim and asserted its right to be sued in the Netherlands.

The relevant provisions of the Regulation

The Bank's jurisdictional challenge turned on the interpretation of the Brussels Regulation Recast (Regulation (EU) 1215/2012) ("the Regulation"). Article 4 of the Regulation provides that a defendant domiciled in an EU member state must be sued in the courts of that member state.

However, pursuant to article 7(2) of the Regulation the defendant to a tortious claim may be sued in the place where the harmful event took place. This is subject to article 14(1) in section 3 of Chapter II ("*Jurisdiction in matters relating to insurance*") of the Regulation which provides:

"... an insurer may bring proceedings only in the courts of the member state in which the defendant is domiciled, irrespective of whether he is the policyholder, the insured or a beneficiary."

Recital (18) of the Regulation provides:

"In relation to insurance, consumer and employment contracts, the weaker party should be protected by the rules of jurisdiction more favourable to his interests than the general rules."

Previous decisions – The High Court and the Court of Appeal

At first instance, Teare J held that the exclusive jurisdiction clauses in the Policy and the settlement agreement did not bind the Bank. However, Teare J held the High Court had jurisdiction in respect of the claims for damages for misrepresentation under article 7(2) of the Regulation, but not in respect of the claims for restitution.

Both Underwriters and the Bank appealed to the Court of Appeal, where Teare J's decision was affirmed. The Court held that as the Bank was not party to the settlement agreement, it would not be bound by the exclusive jurisdiction clause in the agreement. Further, the Bank was also not bound by the exclusive jurisdiction clause in the Policy by asserting its right to payment as loss payee and assignee. The Bank would not be so bound unless its assertion of rights extended to the commencement of legal proceedings against Underwriters.

However, this decision did not avail the Bank because the Court of Appeal held that the Bank was not entitled to rely on article 14 of the Regulation. This was because the Bank's business of ship finance involved it in the settlement of insurance claims (a role analogous to that of an insurance professional) and the Bank fell within a class of persons not deemed to be a "weaker party", which section 3 was designed to protect.

The Supreme Court's decision

In last month's judgment (*Aspen Underwriting Ltd & Ors v Credit Europe Bank NV* [2020] UKSC 1), the Supreme Court agreed with Teare J and the Court of Appeal in finding that the Bank was not bound by the exclusive jurisdiction clause in the Policy. To be so bound the Bank would need to have clearly consented to the jurisdiction agreement. A person who is not a party to a jurisdiction agreement may be deemed to have consented to it where, for example, they commence proceedings under the contract containing said jurisdiction agreement (which the Bank did not do).

The Supreme Court also agreed with Teare J and the Court of Appeal's conclusion that these were clearly "matters relating to an insurance" (the title of section 3, Chapter II of the Regulation containing article 14). The foundation of Underwriters' claim was that there had been an insurance fraud by the owners and managers for which the Bank is vicariously liable. The Supreme Court was also in no doubt that the Bank was a "beneficiary" of the Policy as the assignee and loss payee.

However, the Supreme Court disagreed with Teare J's conclusion that recital (18) of the Regulation meant that the Bank would not be considered a "weaker party" and would therefore not benefit from the protections under section 3. The Supreme Court held that there is no "weaker party" exception which removes a beneficiary from those protections. The recital is an aid to interpretation, explaining the justification or rationale of the provisions relating to jurisdiction, as opposed to providing a determinative ground in and of itself.

Article 14 is there to provide protection to all categories of policyholder, insured and beneficiary because they would usually be considered the weaker party in that policy terms are often presented on a standard form basis.

In summary, as the named loss payee and assignee, the Bank was the "beneficiary" of the Policy and entitled to the protections of section 3, including the requirement under article 14 that they must be sued in the courts of its domicile. As such, Underwriters will now have to pursue the Bank in its domestic courts in the Netherlands in respect of all claims.

Comment

The circumstances which led Underwriters to commence proceedings against the Bank in order to set aside the settlement agreement and recover their money might appear unusual. However, as we explained at the beginning of this article fraudulent claims in the wake of economic crises are not unusual. Indeed, it is probably fair to say that there are many more fraudulent claims than the litigated cases suggest. Of course, underwriters always want to pay valid claims. However, the two biggest scuttling cases in the last decade, the *Atlantik Confidence* and the *Brillante Virtuoso*, both followed a similar pattern illustrating the point that it can take years before the true (fraudulent) nature of a claim is established.

The Supreme Court's decision in the *Atlantik Confidence* stands for the proposition that beneficiaries of a contract of insurance will not be subject to the law and jurisdiction agreement in the policy unless they are deemed to have clearly consented to it. And they will also be entitled to the jurisdictional 'protection'

afforded by EU law. One way of avoiding that result after the event is to make the assignee/beneficiary a party (along with the principal insured) to any claim settlement agreement and to include in that agreement the preferred terms as to jurisdiction. That way, if underwriters pay out on a claim which they believed was valid when it later turns out it was not valid because it was in fact fraudulent, they stand a better chance in a reliable forum of recovering their money.

The underwriters of the *Atlantik Confidence* may still recover their money and justice demands they should – but they will have needed to go through the three tiers of the English Courts (and to have paid for that journey) and then the Dutch courts to recover what is due to them. Hindsight is of course a wonderful thing and it is somewhat surprising, to the say the least, that the Supreme Court decided to reject the consistent rulings of the courts below, particularly given the underlying facts. Although impressionistic responses to cases are to be avoided, the result does not fit the merits, regardless of the technical accuracy of the Supreme Court's reasoning – and technical accuracy is a challenging concept when it comes to interpreting EC Regulations given the 'purposive' approach to their construction. However, the point remains that whilst EC law remains part of English law the Supreme Court's decision (right or wrong) in this case will need to be taken into account by underwriters when paying dubious claims, whether in a marine insurance context or otherwise.

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