Lessons from on high revisited

What does the recent International Entertainment Holdings coverage decision teach us about the approach to mistakes in insurance policies previously explored in *George on High*?

How should an insurance policy be applied when something goes wrong with the drafting of its terms? This article considers two recent cases with contrasting outcomes in which this question was explored, namely *George on High Ltd & Anor v Alan Boswell Insurance Brokers Ltd & Anor* [2023] EWHC 1963 (***GOH v Alan Boswell***) and *International Entertainment Holdings & Others v Allianz Insurance PLC* [2024] EWHC 124 (Comm) (***IEH v Allianz***).

GOH v Alan Boswell

GOH v Alan Boswell concerned The George, Rye, Sussex (**Hotel**) which was destroyed by fire in 2019. The Hotel was owned by the First Claimant, George on High Ltd (**Owner**) and operated by the Second Claimant, George on Rye Ltd (**Operator**).

The insurers, New India Assurance Company Limited (**NIAC**), paid the Owner's claim for damage to the Hotel, but refused to indemnify the Operator for its (business interruption and other) losses totalling some £2.2m because the policy schedule named the Insured as "*George on High Ltd [ie the Owner] t/a The George at Rye*" and neither the policy schedule nor the proposal form mentioned the Operator.

The Claimants sued the broker. The broker settled with the Claimants. The Claimants then adopted the broker's arguments against NIAC, including that the policy schedule should be correctively construed as referring to both the Owner and the Operator so as to provide cover for the claim.

The dispute about Insurers' knowledge

Central to the policy construction argument was the question of attribution of knowledge to NIAC.

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There was evidence that in previous years claims against the Operator had been handled as if covered and during this period, information about the Operator's role had been disclosed to NIAC's third party claims handlers. Nevertheless, at the time of inception of the policy, underwriters did not know that the Operator was operating the Hotel, either because the information had not been uploaded to the system or because the underwriters did not notice it when checking the system. The Judge found that there was no formal system in place for the claims team to pass on information to underwriters.

The Judge considered the principles of attribution of knowledge generally. Interestingly, he effectively followed the approach in s5(2) Insurance Act 2015, although it is applicable to the issue of fair presentation and therefore not directly relevant. S5(2) imputes knowledge to an insurers' underwriters where the information is held by insurers and readily available to the underwriters and/or where it is known to insurers' employees or agents who ought reasonably to have passed on the relevant information to underwriters.

The Court found that the claims team should have appreciated the significance of the information that the Operator operated the Hotel and should have passed it on to underwriters. As such, underwriters were deemed to know that the Operator was operating the Hotel.

Principles applicable to corrective construction

The Judgment cites various authorities, from which the following noteworthy points emerge:

- correction of mistakes by construction requires (1) a clear mistake on the face of the instrument (ie policy) and (2) clarity as to the correction which ought to be made to cure it
- the requirement for a clear mistake on the face of the instrument does not mean background or context must be disregarded
- whilst background and context can be considered, the fundamental difference between interpretation and rectification is that negotiations between the parties cannot be taken into account in the former
- the above notwithstanding, the courts' overall approach to policy interpretation is to ascertain the meaning of the words in the policy as they would be objectively understood by a reasonable person having all the background knowledge reasonably available to the parties at the time. This involves taking account of the policy as a whole, with more or less weight attached to elements of the wider context depending on the nature, formality and quality of drafting of the policy.

The Court's decision

By reason of the above, the Judge found that a reasonable person would conclude that "Insured" in the policy schedule meant both the Owner **and** the Operator, despite the latter not being named.

Having reached this view, the Court did not need to decide the Claimants' other arguments. Nevertheless, they confirmed that they would also have found that the policy should be rectified, and/or that NIAC was estopped from denying cover on account of its acceptance of claims from the Operators in previous years.

IEH v Allianz

IEH v Allianz concerned a claim against insurers for business interruption losses arising from the COVID-19 pandemic under a clause which provided cover in the event of a denial of access by a policing authority in response to an incident likely to endanger human life within a one-mile radius of the premises (the **NDDA Clause**).

A preliminary issue trial addressed a number of issues which arose on the wording of the NDDA clause, including questions as to (1) whether the Government was a "policing authority", (2) whether the mere presence of persons infected with COVID-19 amounted to an "incident" and (3) how the limits would operate if the NDDA were to provide cover.

The Court of Appeal agreed with the trial Judge that the Government was not a policing authority. For this reason alone, there was no cover under the NDDA Clause. Nevertheless, the Judgment went on to address issues 2 and 3.

As to issue 2, the parties' arguments included reliance on use of the term "incident" and other terms elsewhere in the Policy. The Court of Appeal's Judgment of Males LJ (with which the other Judges agreed) referenced the same essential principles of contractual construction as relied upon in *GOH*. In addition, it observed that as with many policies, the policy was not drafted as a coherent whole. Rather, clauses were seemingly inserted using a "pick and mix" approach. The Court therefore considered "*that the inference of consistent usage has little or no force, and that reference to the same or similar language in other clauses of the policy may shed little light on the meaning of the term in question*".

Taking this into account, the Court of Appeal considered that the meaning of "incident" in the context of the NDDA Clause required something inherently noteworthy that endangered life or property calling for a response by a policing authority. They considered that case(s) of COVID-19 satisfied this requirement and they therefore disagreed with the trial Judge's view that the mere presence of persons with COVID-19 did not amount to an incident.

As regards issue 3, there was an argument as to whether the limit applied per insured or per premises, which was decided in favour of the latter. There was a separate question as to whether there was an aggregate limit.

The NDDA Clause provided that "*The liability of the Insurer for **any one claim in the aggregate** during any one Period of Insurance shall not exceed £500,000*".

Allianz argued that this should be construed to mean "*any one claim **and** in the aggregate*" which, they said, is a classic phrase found in insurance policies and clearly intended. IEH argued to the contrary that the words "*in the aggregate during any one Period of Insurance*" should be disregarded. The effect of this would be that the £500,000 limit would only apply any one claim, allowing multiple limits to be claimed where there were separate claims.

Although the Judge at first instance acknowledged that no real meaning could be ascribed to the words used in the policy, he was not persuaded that there was a clear mistake. "*It is very common for commercial contracts to contain unnecessary and superfluous words.*", he added. Furthermore, even if there was a clear mistake, the answer to it was not clear.

The Court of Appeal did not agree that there was no clear mistake. However, there were two competing constructions. The reasonable policyholder could not be expected to know that "*any one claim **and** in the aggregate*" is a phrase commonly found in insurance policies. It was not clear which of the two competing constructions should be preferred, so the Judge's rejection of Allianz' case of construction by correction was upheld.

Key takeaways

Whilst these two cases both involved clear mistakes on the face of the policies, the corrective construction argued for by the insured in *GOH v Alan Boswell* was accepted, whereas the corrective construction argued for by insurers in *IEH* was not. This contrast in outcomes highlights the importance of not only establishing a mistake, but also satisfying the court that

it is clear what correction ought to be made in order to cure the mistake. If this is not clear, the Court will not interpret the contract in a way which corrects the mistake.

It may still be possible to correct a mistake by an application for rectification of the policy. Rectification allows evidence from negotiations to be considered to establish the common intention held and expressed by the parties. Ultimately, as with interpretation, the required correction needs to be clear.

Underlying this difference in outcomes is the contrasting approach to attribution of knowledge in these cases. In *IEH*, the Court of Appeal considered that the reasonable policyholder could not be expected to be aware of the common usage of "any one claim and in the aggregate" and no consideration appears to have been given to the potential argument that the brokers ought to have been consulted and that their knowledge of such usage could be imputed to IEH. By contrast, knowledge of third party claims handlers was readily imputed to underwriters in *GOH*.

A common feature in both claims was the criticism that the Courts directed at imprecise or inconsistent wording used in policies and, in the case of *GOH*, the proposal form. Often in past cases, a lack of precision has been resolved by using other clauses within a policy to aid interpretation. However, the limitations of this approach are highlighted by its rejection in *IEH* on account of the "pick and mix" nature of the policy.

Keeping these conclusions in mind, the key lessons arising from *GOH* and *IEH* include:

- insurers, brokers and claims-handling firms should strive to ensure that they have a system in place for the passing on of significant information and that any significant information is routinely recorded on the Insurers' electronic claims system so that it is "readily available" to underwriters at renewal. These are perhaps areas where AI may have a role to play in the future
- to avoid uncertainty and the potential for dispute, the language used in proposal forms, policy schedules and policy wordings should be sufficiently precise and reflective of information known to the insurer
- policy schedules and wordings should be drafted as a coherent whole
- claims teams should at an early stage review coverage thoroughly and either reserve rights or to decline cover as appropriate. Understandably, insurers' may be reluctant to take coverage points where the claim is modest or the prospect of making a payment is small. However, failing to adopt a consistent approach can lead to estoppel or waiver problems later, as seen in *GOH*.

Implementing these lessons from on high is easier said than done on the ground. *GOH* and *IEH* will undoubtedly not be the final words on the judicial approach to mistakes in insurance policies.

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