



Neutral Citation Number: [2011] EWHC 1761 (Comm)

Case No: 2010 FOLIO 1055

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2011

Before :

MR. JUSTICE TEARE

Between :

(1) The Seashell of Lisson Grove Ltd.
(2) Central Tax and Trustee Planning LLP
(3) Andre Misso

Claimants

- and -

Aviva Insurance Limited
and others

Defendants

David Lord QC (instructed by Fox Hartley Solicitors) for the Claimants
Graham Eklund QC (instructed by Greenwoods) for the Defendants

Hearing dates: 24 June and 27 October 2011

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....
MR. JUSTICE TEARE

Mr. Justice Teare :

1. This is the determination of three preliminary issues relating to the construction of terms in two insurance policies which were ordered to be tried by Field J. on 4 March 2011. The parties have reformulated the third issue.
2. The proceedings have arisen out of a fire at The Seashell Restaurant, a fish and chip restaurant and takeaway in Marylebone, London, which occurred on 13 August 2009. The First Claimant is the operator of the restaurant and the Second and Third Claimants are the trustees of a pension scheme who held the freehold of the building. The Defendants insured the Claimants under two policies. One was the Restaurant Policy and the other the Property Policy. The Defendants have declined liability for the damage caused by the fire. With regard to the Restaurant Policy they have alleged a breach of the Frying Range Warranty and misrepresentation of, and failure to disclose, material facts. With regard to the Property Policy they have alleged material non-disclosures. The Claimants deny these allegations. But they have also relied on certain terms of the policies to avoid the ordinary consequences of a breach of warranty, misrepresentation and non-disclosure. Those terms are, in the Restaurant Policy, clause 6 and the Non-Invalidation Clause and, in the Property Policy, the Non-Invalidation Clause.

The First Preliminary Issue

3. Clause 6 of the Restaurant Policy provides as follows:

“6. Warranty

Any Warranty shall from the time it is applied continue to be in force during the whole currency of this policy.

Failure to comply with any Warranty shall invalidate any claim for loss destruction damage or liability which is wholly or partly due to or affected by such failure to comply.”

4. The first preliminary issue is in these terms:

“On the true construction of Condition 6 of the Restaurant Policy, are the Insurers obliged to indemnify the Seashell pursuant to the Restaurant Policy:-

(1) For any of the claim if any part of the loss, destruction, damage or liability caused by the Fire was wholly or partly due to or affected by a breach of warranty?

(2) For all the loss, destruction, damage or liability caused by the Fire which was not wholly or partly due to or affected by the breach of warranty even if the Insurers are not obliged to indemnify the Seashell for part of the loss, destruction, damage or liability because it was due to or affected by a breach of warranty?

5. The Claimants say that the answer to both parts of the question is Yes. The Defendants say that the answer to both parts of the question is No.
6. The clause should be given that meaning which it would convey to a reasonable man having all the background knowledge which would reasonably be available to the parties in the situation they were in at the time of the contract.
7. There is no dispute that the objective aim of clause 6 is to limit the common law effect of a breach of warranty which is to release the insurer from liability from the time of the breach notwithstanding that there is no causal connection between the breach of warranty and the loss, destruction, damage or liability which is claimed. The dispute between the parties is as to the extent to which that common law effect has been limited.
8. The manner in which the clause seeks to limit the common law rule as to the effect of a breach of warranty is to introduce the need for a causal connection between the breach of the warranty and the loss, destruction, damage or liability which is claimed. That seems to me to be the obvious meaning of the phrase "which is wholly or partly due to or affected by" a breach of warranty. That being the manner in which the common law rule is limited a reasonable man, in my judgment, would regard the clause as meaning that loss, destruction, damage or liability which is not wholly or partly due to or affected by a breach of warranty may be claimed notwithstanding the breach of warranty.
9. Thus where there has been a breach of warranty a claim for loss, destruction, damage or liability will only be invalidated if that loss, destruction, damage or liability has been wholly or partly due to or affected by the breach.
10. The Defendants' argument is that so long as there is a link between the breach of warranty and "at least some" of the loss destruction damage and liability then the breach of warranty discharges the insurers from liability. It was noted that pursuant to clause 6 it is "the claim" and not just part of it which is invalidated.
11. I am not persuaded that clause 6 should be understood in that sense. First, the clause does not state that the claim will be invalidated where "at least some" loss, destruction, damage or liability is caused by the breach of warranty. That which is invalidated is "any claim for loss destruction damage or liability" which is caused by the breach of warranty. Second, the phrase "which is wholly or partly due to or affected by" a breach of warranty would, I think, be regarded by the reasonable man with knowledge of the objective aim of the clause 6 as applying to "loss destruction damage or liability" rather than to "any claim".
12. The answer to part 1 of the first preliminary issue is therefore: Yes, provided that there is an item of loss destruction damage or liability which is not wholly or partly due to or affected by the breach of warranty. The answer to part 2 of the first preliminary issue is: Yes.

The Second Preliminary Issue

13. The Non-Invalidation clause in the Restaurant Policy provides as follows:

“EPUB.18 Non-Invalidation Clause

The Insurance by Section A [Buildings] and B1 [Contents] will not be validated by any

1) act

or

2) omission

or

3) alteration

either unknown to You or beyond Your control which increases the risk of Damage.

However, You must

a) notify Us immediately You become aware of any such act, omission or alteration

and

b) pay any additional premium required”.

14. The parties are agreed that the reference to “validated” in the clause is an obvious mistake and in order to make commercial sense of the Restaurant Policy should be understood as “invalidated”.

15. The second preliminary issue is in these terms:

“On the true construction of the Restaurant Policy Non Invalidation Clause:-”

(1) Did that clause operate to amend or ameliorate or limit the scope of or the effect of a breach of warranty?

(2) In particular, and on the assumptions, but without making any findings in relation thereto, that (i) the Seashell was in breach of warranty and (ii) the Seashell did not know of the breach of warranty and/or the breach of warranty was beyond the control of the Seashell, would such breach entitle the Insurers to refuse cover for any claim in relation to damage to the Building or the contents thereof?

16. The present case is one where the damage has in fact occurred and I therefore assume that the second part of the second preliminary issue refers to actual damage rather than to a risk of damage.

17. The Claimants say that the answers to these questions are respectively Yes and No. The Defendants say that the answers are respectively No and Yes, so long as there was the link between the breach of warranty and the loss destruction damage or liability as provided for in General Condition 6.

18. In order to appreciate the argument of the Defendants it is necessary to refer also to clause 5(c) of the Restaurant Policy which provides as follows:

“5. Rights and Responsibilities”

(c) Any Section of this Policy will cease to be in force if after the commencement of this insurance there is any alteration in respect of such Section which results in

(i) the risk of loss damage or injury or disease being increased

... ..”

19. The Claimants say that the words “act, omission or alteration” are apt to include a breach of warranty, that reference to matters beyond the “control” of the insured more naturally applies to breaches of warranty than to misrepresentation or non-disclosure and that “the insurance” means the insurance cover. Reliance is also placed on the decision in *Kumar v AGF Insurance* [1999] 1 WLR 1747 where, in an admittedly different context, a bar on repudiation and rescission of “this insurance” on any ground whatsoever was held to apply not only to repudiating, avoiding or rescinding the policy but also to being discharged from liability by reason of a breach of warranty.

20. The Defendants say that the clause is intended to ameliorate the effect of condition 5(c) which expressly refers to an alteration which increases the risk of loss, damage injury or disease. It is not intended to ameliorate the effect of a breach of warranty. That is done by clause 6. The Defendants further say that the clause is concerned with risk of damage. It is not concerned with cases where damage has materialised.

21. Clause 5(c) enables the insurers to decline liability where there has been “any alteration” which increases the risk of loss, damage injury or disease. This right to decline arises independently of any misrepresentation, non-disclosure or breach of warranty though an alteration of risk may also arise in the event of any misrepresentation, non-disclosure or breach of warranty.

22. The Non-Invalidation clause does not simply pick up the language of clause 5(c). If it had done so it would refer only to “any alteration which increases the risk of damage”. Instead it refers to “any act, omission or alteration....which increases the risk of damage”. That is an indication that the ambit of the clause is intended to be wider than clause 5(c).

23. The addition of the words act or omission has the effect that where there has been an act or omission which increases the risk of damage but which is either unknown to the assured or beyond his control the insurance will not be invalidated provided that the assured notifies the insurers immediately and pays any additional premium required. The words act or omission are capable of applying to misrepresentation, non-

disclosure and breach of warranty though in cases where the assured knows of the act or omission and does not immediately inform the insurers of it before damage is caused he will be unable to avail himself of the protection afforded by the clause.

24. Clause 6 gives express protection with regard to breaches of warranty and it was therefore said that the parties cannot have intended that the invalidation clause would also protect against breaches of warranty. However, it is plain that different sets of standard clauses (eg clauses 1-13 and the EPUB clauses) have been added to the policy and in such circumstances it is not uncommon to find that that a particular topic is covered by more than one clause. I therefore do not give much weight to this factor.
25. It was observed that the non-invalidation clause provides that "the insurance" will not be invalidated. This is to be contrasted with clause 6 which provides that "a claim" will not be invalidated. However, I do not consider that this evinces an intention that the non-invalidation clause was not to extend to breaches of warranty. The non-invalidation clause works satisfactorily in the context of breaches of warranty. If the assured becomes aware that he has breached a warranty which has resulted in an increased risk of damage and immediately informs the insurers of it and pays the additional premium the insurance will not be invalidated by the breach of warranty. The insurer will not be able to deny liability for any loss which is subsequently caused by that breach of warranty.
26. I have therefore reached the conclusion that the clause was intended to apply to breaches of warranty. The words "any act or omission" cannot reasonably be understood as meaning any act or omission except breaches of warranty.
27. However, the clause refers to matters which increase the risk of damage and does not in express terms refer to cases where damage has in fact occurred. After the first hearing (at which there was little argument concerning the application of the clause where damage had in fact occurred) I initially considered that the Defendants were correct to submit that the clause did not apply where damage had in fact occurred. However, in a marine insurance case which was before me shortly after the first hearing I was referred to "held covered" clauses which have been held to apply where damage has in fact occurred (see, for example, *Greenock Steamship Co. v Maritime Insurance Co.* [1903] 1 KB 367, *Mentz, Decker & Co. v Maritime Insurance Co.* [1910] 1 KB 132, *Hewitt v London General Insurance Co.* [1925] 23 Ll.L. Rep. 243 and *Liberian Insurance Agency v Mosse* [1977] 2 Lloyd's Rep. 560). Notwithstanding the difference in wording between held covered clauses and the non-invalidation clause in the present case I decided to invite further submissions from the parties in the light of the manner in which held covered clauses (which serve a similar purpose to the non-invalidation clause in this case) had been construed. I have accordingly received further written submissions from the parties and further oral submissions at a short second hearing.
28. Counsel on behalf of the Claimant has now advanced an argument which he had not advanced at the initial hearing. (He explained that the suggestion that the clause did not apply where damage had in fact occurred had not been pleaded and was not raised by the preliminary issues and so he had not addressed it. This may be so but the suggestion was made by counsel on behalf of the Defendant in his Skeleton Argument and oral submissions without objection.) The new argument may be summarised in

this way. The insurers' right to avoid cover does not depend on actual damage occurring but may be exercised where there has been a breach of warranty which has increased the risk of damage. To hold that the clause does not apply where damage has in fact occurred would deprive the clause of effect in those cases where the insured only learns of the increased risk of damage once damage has actually been caused. There is no justification for distinguishing between cases where a breach of warranty which increases the risk of damage is discovered by the assured before damage results and cases where the breach of warranty is only discovered after damage has resulted. Where a breach of warranty occurs which was unknown to the assured or beyond his control and which increases the risk of damage, the clause applies notwithstanding that damage in fact occurs before the assured discovers the breach of warranty. Counsel's industry had unearthed two cases in which the point now taken by the Defendants could have been taken by insurers but had not been; see *ENCB Ltd. v Barnet Devanney (Harrow) Ltd.* 1 July 1999 (unreported) and *Ansari New India Assurance Ltd.* [2009] EWCA Civ 93. The manner in which held covered clauses had been construed, so that they applied where damage had in fact occurred, was consistent with counsel's submission, and there was no reason to construe the non-invalidation clause any differently.

29. Counsel for the Defendant submitted that some effect had to be given to the words "which increases the risk of damage". It was not sufficient that the effect of a breach of warranty had been to increase the damage. Otherwise the assured would get the benefit of the non-invalidation merely by being unaware of the breach of warranty. If that had been intended the parties could easily have said that claims could be pursued by the assured notwithstanding that there had been a breach of warranty so long as the assured was unaware of the breach. What had to be shown in order to satisfy the words "which increases the risk of damage" was that an event, other than the breach of warranty, had occurred which increased the risk of damage beyond that assumed by the insurer at the outset of the policy. As to the two cases relied upon by the Claimant they do not assist because the point was not argued and so there was no decision on the point. The cases on held covered clauses also did not assist because such clauses have different wording from the non-invalidation clause.
30. Having considered these arguments I am persuaded that my initial view was in error. I accept the new argument advanced by counsel for the Claimant. There is no justification (and none was suggested by counsel for the Defendant) for denying an assured the benefit of the non-invalidation clause where, there having been a breach of warranty unknown to the assured or beyond his control which increases the risk of damage, damage is in fact caused before he learns of the breach of warranty. A breach of warranty will usually increase the risk of damage and so effect is given to the words "which increases the risk of damage". The argument advanced by counsel for the Defendant was, in effect (albeit not counsel's intention), an alternative way of suggesting that the non-invalidation clause, contrary to my view, did not apply to breaches of warranty. The clause enables the assured to advance his claim notwithstanding an act, omission or alteration which has increased the risk of damage, such as a breach of warranty, so long as the act, omission or alteration is unknown to or beyond the control of the assured and he gives immediate notice of it once aware of it and pays the additional premium required.

31. It follows that the answer to the first part of the second preliminary issue is Yes and that the answer to the second part is No.

The Third Preliminary Issue

32. The non-invalidation clause in the Property policy provides:

“Non-Invalidation

This insurance shall not be invalidated by any act omission or by any alteration which increases the risk of Damage unknown to or beyond the control of the Insured provided that the Insured once aware of the increased risk shall give immediate notice to the Insurers and pay [any] an additional premium if required.”

33. It is common ground that the word “any” in the last phrase must be a typographical error and should be ignored.

34. The third preliminary issue, as now reformulated, is as follows:

“Would the Trustees be entitled to rely on the Property Policy Non-Invalidation Clause to prevent the Defendants avoiding the Property Policy for misrepresentation and/or non-disclosure at the time the Property Policy was entered into assuming, (but without finding) that there had been by that date an act omission or alteration which increased the risk of Damage (above that actually disclosed) and which was unknown to or beyond the control of the Trustees.”

35. It is necessary to note two further general conditions of the Property Policy, namely, conditions 1 and 8, to which reference was made in argument. They provide as follows:

“1. Non-Disclosure

This Certificate shall be avoidable in the event of misrepresentation misdescription or non-disclosure in any material particular.

8. Alteration

The Certificate shall be avoided if

....

(c) the risk of Injury of Damage is increased....”

36. These conditions provide for the Insurers to have a right to avoid “the certificate”, which I assume means the certificate or policy of insurance, for misrepresentation, misdescription or non-disclosure (by condition 1) and for an increase in the risk of Injury or Damage (by condition 8). On behalf of the Insurers it was submitted that the

Non-Invalidation clause applied to avoidance pursuant to condition 8 but not to avoidance pursuant to condition 1. On behalf of the assured it was submitted that the non-invalidation clause applied to avoidance pursuant to both conditions 1 and 8.

37. The language of the Non-Invalidation clause does not mirror the language of condition 8. Whilst the words "any alteration" are capable of referring to alterations within condition 8, the words "any act or omission" are capable of referring to misrepresentation, misdescription or non-disclosure within condition 1 because such acts or omissions can increase the risk of damage. In my judgment there is no warrant for reading the words "any act omission or alteration which increases the risk of Damage" as "any act omission or alteration which increases the risk of Damage except any misrepresentation misdescription or non-disclosure".
38. The clause applies where there is an increase in the risk of damage unknown to or beyond the control of the assured and provides for the insurance not to be invalidated where the Insured gives notice of the increased risk once aware of it and pays any additional premium required. As with the non-invalidation clause in the Restaurant Policy and for the same reasons I do not consider that the assured is disabled from relying upon it where damage is in fact caused before the assured is able to give notice of the increased risk.
39. The answer to the third preliminary issue is therefore Yes.