

AVOIDANCE

Insurer not entitled to avoid legal expenses policy for material non-disclosure; also insured had not failed to comply with claims notification provision - *Laker Vent Engineering Ltd v Templeton Insurance Ltd* [11.2.09]

This case arises out of a policy for legal expenses between Laker Vent Engineering Ltd, an engineering sub-contractor, and Templeton Insurance Ltd. The policy in question was renewed twice. Shortly following the second renewal, Laker Vent gave notice of a potential claim under the policy. It sought an indemnity in connection with a dispute with the main contractor arising from a construction contract under which it agreed to install specialist pipework.

Templeton declined the claim on the grounds that, prior to the renewal, Laker Vent had failed:

- To disclose a material circumstance, namely the potential dispute with the main contractor.
- To comply with a claims notification provision.

Templeton claimed that non-disclosure had induced the policy renewal for the renewed year and that compliance with the notification clause was a condition precedent to the policy. Therefore, it was entitled to decline indemnity.

Key policy terms

- The statement at the head of the policy terms confirmed, "This is a 'claims-made' Policy." Therefore, the policy indemnified Laker Vent in respect of claims made during the policy period.
- The definition of "Construction Claim" was such that the legal costs and expenses arising out of a formal dispute between Laker Vent and a third party were recoverable under the policy.
- Clauses 6.1 and 6.2 dealing with the notification of claims stipulated that Laker Vent must give notice in writing, "*... immediately the Insured is aware of any cause, event or circumstance which has given or is likely to give rise to a Construction Claim.*"

Court of Appeal

The Court of Appeal agreed with the finding of fact at first instance that, at the date of renewal of the policy, the differences between Laker Vent and the main contractor were not a "material circumstance" for the purposes of an insured's

duty of disclosure before an insurance contract is concluded or renewed (see s.18(4) Marine Insurance Act 1906). Therefore, the judge's conclusion that there was no material circumstance to be disclosed was an exercise of judgment weighing all relevant facts. The Court of Appeal agreed that it would not interfere with the judge's findings of primary fact.

Applying *Pan Atlantic Insurance Co Ltd v Pine Top Insurance Co Ltd* [1994], the Court of Appeal upheld the judge's conclusion that, even if there had been non-disclosure of a material circumstance, on the facts Templeton had failed to prove on the balance of probabilities that it had been induced by the non-disclosure to enter into a renewal of the policy, either at all or on the terms that were agreed. Therefore, in any event the appeal on the non-disclosure issue failed.

The Court of Appeal also held that the court had been entitled to hold that the dispute had not reached the stage where litigation was likely to be required and so there was no breach of the failure to comply with the claims notification clause.

Comment

This decision is one in a line of cases applying the tests laid down in *Pan Atlantic*. It serves as a reminder of the difficulties insurers can face when looking to avoid cover. Firstly, there has to be an actual non-disclosure of a material fact. Prior to the policy renewal, the dispute between Laker Vent and the main contractor had not escalated to a level that the court considered material, because the relationship between them remained fairly amicable until after renewal.

Secondly, it must not only be shown that the non-disclosure would have influenced a reasonable insurer, but it must in practice also have induced the actual underwriter to provide the policy in the terms that were actually written. This is the well-known two-tier test, and on the circumstances of this case the court was clearly sceptical of Templeton's claim that it would not have entered into the contract on the terms that it did.

This case demonstrates that the devil really is in the detail. However broad the principle, it is still necessary to ensure that the facts support the interpretation that is being advanced. In particular, if insurers want to know about certain facts or circumstances, they are going to need to ensure that their wording is more specific.

For further information contact Adetutu Bashorun, Kennedys, 020 7667 9364.

This article first appeared in Kennedys' *Insurance Brief* of March 2009.

London
25 Fenchurch
Avenue
London
EC3M 5AD
Tel: 0207 667
9667

Kennedys worldwide (including associated offices):

Auckland, Belfast, Birmingham, Cambridge, Chelmsford, Dubai, Dublin,
Hong Kong, Karachi, Lisbon, London, Madrid, Maidstone, Manchester,
Mumbai, New Delhi, Paris, Santiago, Singapore, Sydney, Taunton and
Warsaw.

www.kennedys-law.com

[Privacy statement](#)
[Disclaimer](#)
[Copyright](#)