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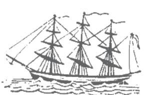
Home thoughts, from Abroad.



Issue 3
April 2007

After the fireworks in the first two issues papers (good faith and non-disclosure in the first and warranties in the second – see the first two issues of this newsletter), the Law Commission's recommendations on intermediaries come as a damp squib.

The Law Commission has produced its third issues paper which addresses the categorisation of intermediaries and the status of information held by them at the pre-contract stage. It reaches some intriguing conclusions.

1. Background

The Commission identified two main problems with the law in this area:-

1. The *Newsholme*[1] rule – arising from a case in which the insurers appointed a man named Willey to canvass and procure proposals for them. He completed the insured's proposal form inaccurately. The insurers were entitled to repudiate for breach of warranty (the policy contained a 'basis' clause) because Willey was the insured's agent for the purpose of completing the proposal form.
2. Section 19(a) Marine Insurance Act 1906 – which provides that an agent for the insured must disclose to the insurer at the pre-contract stage "…every material circumstance which is known to himself, and an agent to insure is deemed to know every circumstance which in the ordinary course of business ought to be known by, or to have been communicated to, him…"

Section 19(b) goes on to provide that the agent for the insured must disclose every material circumstance which the insured is bound to disclose, unless it came to the insured's knowledge too late to communicate it to the agent.

The *Newsholme* rule has been a feature of English insurance law for a long time but it has not generally been regarded as a significant problem because the use of 'tied agents' (as was the case there) is no longer common in commercial insurance which is normally placed by a broker acting as agent for the insured during the pre-contract stage. The position may be different for some types of 'consumer' insurance. However, the Law Commission seems to be concerned that the status of intermediaries is not always clear to consumers in the insurance context.

Section 19(a) Marine Insurance Act 1906 has been the subject of criticism because it imputes the knowledge of the proposer's agent to insure to the proposer – even though the proposer may be quite unaware of material matters known to the agent/broker. That said, the proposer will normally have a remedy against the agent/broker where the cover is avoided for non-disclosure.

1. *Newsholme Brothers –v- Road Transport and General Insurance Co Ltd* [1929] 2 KB 356

Again, the Law Commission seem to be uneasy about this in the consumer context[2].

2. Tentative proposals

As previously, the Law Commission has put forward 'tentative proposals' for reform in both the 'consumer' and 'business' contexts.

The Consumer context

The Commission is particularly concerned with the consumer context which has shaped its views:-

- The Commission's tentative view is that an intermediary should be regarded as the insurer's agent for the purposes of obtaining pre-contract information, unless the intermediary is genuinely searching the market on the insured's behalf.
- Views are invited on whether the test be that the intermediary is conducting 'a fair analysis' of the market as defined by the Insurance Mediation Directive.
- Views are also invited on whether FSA regulation should be extended to those selling, for example, travel or product insurance (typically retailers) who currently fall outside the regulatory net. The Commission's view is that an extension of the net is not necessary.
- The Commission's tentative view is that an intermediary who would otherwise be regarded as acting for the insurer in obtaining pre-contract information remains the insurer's agent when completing the proposal form (reversing the *Newsholme* rule).
- The Commission's tentative view is that in deciding whether the insured has acted fraudulently, negligently or innocently in relation to a misrepresentation[3], the insured's signature on e.g. a proposal form should not be regarded as conclusive of the insured's state of mind.
- The Commission asks whether section 19(a) MIA 1906 should cease to apply in consumer cases but with the rider that if an extended duty is retained then (in particular) a remedy in damages should lie against the intermediary rather than a remedy in avoidance against the insured.
- The Commission also asks whether section 19(b) MIA 1906 should be

2. In particular, the supposed necessity for the consumer to pursue remedies against both the insurer and the broker/agent (paragraph 6.11 et seq.).
3. And bear in mind that the Commission's earlier proposals (see especially Home Thoughts from Abroad, number [1]) on whether a misrepresentation was made fraudulently, negligently or innocently will have an important bearing on policy response to a subsequent claim.

retained but again asks whether a breach should give the insurer a right in damages against the intermediary.

The Business context

The Commission's views in the business context are comparatively limited:

- The Commission asks whether its tentative proposals for tied agents in the consumer context should apply to tied agents dealing with small businesses and whether the common law rules regarding disclosure should continue to apply to tied agents dealing with small businesses.
- The Commission also asks whether its proposals to abolish the *Newsholme* rule should apply to business insurance (presumably not just those dealing with small businesses).
- Finally, the Commission asks whether a breach of section 19(a) MIA 1906 should no longer result in avoidance of the policy against the insured but entitle the insurer to a remedy against the broker in damages.

3. Conclusions

Frankly, it is difficult to know what to make of these proposals. The topics dealt with in the first two issues papers (good faith and non-disclosure in the first and warranties in the second) went to the heart of concerns about the current state of the law. By contrast, this is a bit of a damp squib.

The Commission's concerns about confusion in the mind of consumers over the status of agents employed by insurers may be justified although the evidence of a significant problem seems sketchy. The *Newsholme* rule may be due for reform but it is difficult to see it as one of the larger problems in contemporary English insurance law largely because tied agents like Mr Willey are comparatively unusual in the commercial context (where cover is usually placed by conventional brokers). That said, it may have an impact on consumer covers such as payment protection insurance which are frequently sold by intermediaries whose status is not always clear.

At any rate, the Commission seems to have halted well short of any wholesale review of the status of brokers who will remain the agent of the insured. There are problematic situations in which the broker may act as agent of the insurer. They do give rise to difficulties but it is not easy to see a legislative solution to them. In any event, the Commission seems to have abandoned the unequal struggle.

Section 19(a) MIA 1906 may also be due for reform but it deals with fairly

unusual circumstances where material information is known to the broker but not the insured. Abolition may give rise to problems in the London market where a broker acting for an insured then places reinsurance for the insurer.

4. The way forward?

The next step is the publication of a Consultation Paper this summer dealing with the last three issues papers on the pre-contract stage (good faith and disclosure, warranties and intermediaries). The Commission intends to follow this with further issues papers on the post-contract stage. The post-contractual duty of good faith and fraudulent claims are likely to be reviewed then, possibly along with other areas such as subrogation.

All of this looks increasingly like a full review of the entirety of English insurance contract law with a final report (and recommendations for law reform) in about 2010 – three years time.

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This is a brief summary of the Law Commission's proposals and is not intended to be a complete statement of them or of the existing law. You should not rely on it without seeking legal advice.

The experience of other jurisdictions is always interesting and helpful. If any of you have any observations on the contents of our newsletters or the proposed reform, please let us know. We can, if you wish, make representations on your behalf to the Law Commission.

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