Zurich Insurance plc v Niramax Group Ltd (2021) EWCA Civ 590

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Introduction

The Court of Appeal has recently handed down its decision in the case of ***Zurich Insurance plc v Niramax Group Ltd (2021) EWCA Civ 590.*** This was a case which concerned a policy of insurance which was **not** subject to the Insurance Act 2015 ("the Insurance Act"). It was a case where the Court of Appeal explained what level of causation needed to be proved in order for an Insurer to avoid a policy under the pre-Insurance Act law due to material non-disclosure. It is interesting because it raises questions about how courts will deal with matters of causation where Insurers seek to exercise their remedies for a breach of the duty of fair presentation under the Insurance Act on the same facts of this case.

The Facts

Niramax - The Business

Niramax Group Ltd ("Niramax") was a waste collection and waste recycling business. Niramax was a substantial business, which at the relevant time had a turnover of £36 million and made a gross profit of £9.7 million. Niramax carried out its business from a number of premises including one which unfortunately was subject to a significant fire.

Niramax's Building Insurance

This case concerned the insurance obtained for various plant and equipment owned by Niramax. However, events relevant to insurance covering the premises in which the plant and equipment was stored formed part of the critical factual matrix.

Niramax obtained building insurance cover from Millennium covering certain sites subject to a survey being undertaken. On 14 February 2014, consultants undertook surveys of the sites. The consultants recommended that a number of risk requirements should be imposed. One of the critical requirements in relation to one of the sites (which is the subject of this dispute) was that there should be installed an automatic fire suppression system to protect three of the fixed shredders in the building within 30 days of the survey.

By mid-October 2014, Niramax had not complied with all of the risk requirements including the requirement that there should be installed an automatic fire suppression system to protect three of the fixed shredders ("the Outstanding Requirements").

On 22 October 2014, due to Niramax not having complied with the Outstanding Requirements, Millennium imposed special terms requiring Niramax to self-insure for 35% of any loss and to bear the first £250,000 of any loss ("the Special Terms").

Niramax's Mobile Plant Insurance

The Underwriting Process / Renewal of the Mobile Plant Insurance Policy

Niramax had in place with Zurich Insurance Plc ("the Insurer") a policy of insurance covering damage to its mobile plant. On 14 December 2014, that policy of insurance renewed covering the mobile plant owned by Niramax at that time ("the Mobile Plant").

The nature of the underwriting renewal process was of critical importance in the outcome of this case. It was described as "*commoditised and streamlined as a costs-saving exercise*". There was no proposal form. Only the three following pieces of information were required to be entered into a computerised rating system:

a. The amount of cover required.
b. The nature of the trade.
c. The claims experience.

Once the criteria had been entered, the system would generate a "technical price", a "target price" and a "walkaway price" with the latter being a price at which the Insurer would not write the risk. Unfortunately, a junior underwriter made a mistake in inputting data into the computerised system. This resulted in a significantly lower premium being charged to Niramax than otherwise would have been charged.

By the time of the renewal the existence of the Outstanding Requirements and the Special Terms under the building insurance had not been disclosed to the Insurer. However, this was not information required by the computerised system which transpired to be an important fact in this case.

An Extension of Cover

On 5 September 2015, a fixed shredding machine known as "the Eggersmann Plant" which had been acquired was insured under the Policy by way of an extension of cover. The Outstanding Requirements and the Special Terms under the building insurance had not been disclosed to the Insurer prior to the extension being agreed.

The Fire

On 4 December 2015, a fire broke out at one of Niramax's sites destroying the Mobile Plant and the Eggersmann Plant.

Avoidance of the Policy for Non-Disclosure – Pre Insurance Act 2015

The Insurer took the position that they were entitled to avoid the Policy from renewal on 14 December 2014 due to non-disclosure of the Outstanding Requirements and the Special Terms in respect of the building insurance. Alternatively, the Insurer said they were entitled to avoid the extension of cover for the Eggersmann Plant due to the non-disclosure. The Insurer further alleged that had there not of been non-disclosure in September 2015 it would have cancelled the policy.

The High Court's Decision

Was there non-disclosure?

The High Court held that the failure by Niramax to disclose to the Insurer the Outstanding Requirements and the Special Terms in respect of the building insurance amounted to material non-disclosure.

Was there inducement?

The High Court found that "but for" the non-disclosure of the Outstanding Requirements and the Special Terms the junior underwriter would have referred the matter to a senior colleague which would have resulted in the risk being written, but without the inputting mistake being made. Thus, the Policy would have been written with the correct premium being charged. However, the High Court held that the non-disclosure did not "induce" the Insurer to renew the policy on the terms it did on 14 December 2014 covering the Mobile Plant because it was not an "effective cause" or "efficient cause" of the decision by the Insurer to renew the Policy.

Beyond that, the High Court found had there not have been non-disclosure prior to the extension of cover being agreed on 5 September 2015 in respect of the Eggersmann Plant the Insurer would not have covered that. However, the High Court found that the Policy would not have been cancelled.

Accordingly, Niramax succeeded in part such that it was entitled to recover under the Policy for the Mobile Plant but **not** the Eggersmann Plant.

This note is focussed on an appeal by the Insurer against the decision of the High Court as regards the decision that the Insurer was liable to indemnify in respect of the loss / damage to the Mobile Plant.

The Court of Appeal's Decision - But For Causation & Efficient Cause

The Court of Appeal considered the nature of the causation required in order for an Insurer to avoid a policy of insurance due to non-disclosure of material facts.

The Insurer in this case had contended that it was sufficient to show that "but for" the non-disclosure different terms would have been agreed. Whereas Niramax had contended that Insurer was required to show that the non-disclosure had to be the "efficient cause" of the difference in terms.

The Court of Appeal referred to the decision in ***Pan Atlantic Insurance Ltd v Pine Top Ltd (1995) 1 AC 501*** which established the requirement to prove inducement in cases of non-disclosure (and misrepresentation). In that case Lord Mustill held:

"*if the misrepresentation or non-disclosure of a material fact **did not in fact induce** the making of the contract (in the sense in which that expression is used in the general law of misrepresentation) **the underwriter is not entitled to rely on it as a ground for avoiding the contract.**"* (emphasis added)

The idea is that the non-disclosure must have some effect on the mind of the underwriter when writing the risk or in other words it must have been an "efficient cause" of the underwriter's decision to write the risk on the terms that they did. If that test is not satisfied, the non-disclosure cannot give an insurer grounds to avoid a policy.

The Court of Appeal also referred to the decision in ***Assitalia v Arig (2002) EWCA 1642*** where Clarke LJ held:

*"In all the circumstances I would summarise the relevant principles of inducement in this context in this way. (i) In order to be entitled to avoid a contract of insurance or reinsurance, an insurer or reinsurer must prove on the balance of probabilities that he was **induced to enter into the contract by a material non-disclosure** or by a material misrepresentation….. In order to prove inducement the insurer or reinsurer must show that the non-disclosure or misrepresentation was an **effective cause** of his entering into the contract on the terms on which he did. He must therefore show **at least** that, **but for** the relevant non-disclosure or misrepresentation, he would not have entered into the contract on those terms. On the other hand, he does not have to show that it was the sole effective cause of his doing so."* (emphasis added)

In this case, the Court of Appeal explained that there was a distinction between "but for" causation, on the one hand, and an "effective cause" or "efficient cause", on the other hand. The Court of Appeal explained

that in order to show inducement an insurer needed to prove that the non-disclosure was an "efficient cause" of the insurer writing the risk on the terms they in fact did and that "but for" causation of itself was not sufficient. So, an "efficient cause" is a higher threshold for an Insurer to overcome.

The Court of Appeal also explained that on certain facts an insurer will be able to show that "but for" the non-disclosure they would not have written the risk or would have written in on different terms. However, they also explained on the same facts that an Insurer may not be able to prove that the non-disclosure was an "efficient cause" of their decision to write a risk on the terms they in fact did in which case they could not avoid the policy. That was the position in this case. The Insurer could prove "but for" causation but not "efficient cause" as was the High Court's view.

The Court of Appeal found that the trial judge was correct to find that the Insurer was not induced to write the risk due to the non-disclosure of the Outstanding Requirements and Special Terms in relation to the building insurance at the time the Policy renewed. Essentially, that was because the underwriting process at the time of renewal was only via the computerised system used which **only** took account of: (a) the amount of cover required; (b) the nature of the trade; and (c) the claims experience. It did **not** take account of the Outstanding Requirements and Special Terms in relation to the building insurance in respect of which there was material non-disclosure. Therefore, these matters could not have been the "efficient cause" of the Policy being written on cheaper terms had full disclosure have been made.

Breach of Fair Presentation - Does Efficient Cause Survive under the Insurance Act 2015 in Similar Circumstances?

This case raises an interesting question as regards whether the Insurer would have a remedy under the Insurance Act for breach of the duty of fair presentation on the same facts. The facts being that "but for" the non-disclosure the Insurer would have written the Policy on different terms as to premium, although the non-disclosure was not an "efficient cause" of the Policy being written on the terms it was.

The Insurance Act provides that the Insurer has a remedy against an Insured for a breach of the duty of fair presentation:

"*.....only if the insurer shows that, **but for** the breach, the insurer – (a) would not have entered into the contract of insurance at all, or (b) would have done so only on different terms*" (emphasis added)

On the face of it, the Insurance Act seems to be more favourable as regards causation than the "old law" in relation to pre-Insurance Act policies and could provide the Insurer with a remedy on the same facts. However, the purpose of the Insurance Act was to provide Insurers with proportionate remedies in the event there was a non-disclosure resulting in a breach of the duty of fair presentation and, more broadly, to curtail some of Insurers' traditional remedies. Therefore, it is difficult to believe that Parliament intended to make Insurers position more favourable than under the pre-existing law where they were required to prove "efficient cause" and not mere "but for" causation in order to establish inducement.

It will be interesting to see how the courts deal with this issue when the time arises.

Further Information

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