SHERIFFDOM OF GRAMPIAN HIGHLANDS AND ISLANDS AT BANFF

14 December 2011

GAMMIE
v
ABBEY LEGAL PROTECTION

Before Sheriff PHILIP MANN

Insurance (professional indemnity) — Policy issued by coverholder — Whether coverholder personally liable to policyholder — Principles of construction — Agency.

Mr Gammie was a small trader and a member of the Small Business Federation (SBF). SBF were the policyholders under a contract of professional indemnity insurance evidenced by a Certificate of Insurance. The insuring clause opened with the words "We the insurers", and the Certificate then defined the policyholder as SFT, the "Insured" as "Any ... member of the Policyholder", the "Coverholder" as Abbey Legal Protection, and the "Insurer" as Brit Insurance Ltd.

Mr Gammie submitted a claim to Abbey under the Certificate. There was a dispute between the parties as to whether or not Abbey were obliged to indemnify Mr Gammie under the Certificate. Mr Gammie brought the present proceedings seeking indemnity. He argued that Abbey's name was in a prominent position and that the use of the plural in the phrase "We the insurers" meant that both Brit and Abbey were insurers. He relied upon the contra proferentem principle. Abbey argued that it was clear from the Certificate that they were not insurers under the contract, but simply administrators and agents, and had no liability to provide an indemnity. Abbey further claimed that Mr Gammie was using the contra proferentem rule to create an ambiguity where none existed

———*Held*, by Sh Ct Banff (Sheriff PHILIP MANN), that Mr Gammie's claim would be dismissed.

(1) The contra proferentem rule was one of the last resort. It was necessary first to look at the ordinary meaning of the words used and, if any uncertainty remained, to look at the context and purpose of the contract. It was only after that, if ambiguity remained, the contra proferentem rule was to be employed. Mr Gammie's state of mind was irrelevant (*see* paras 5.3 and 5.6);

———*Bank of Scotland v Dunedin Property Investment Co Ltd* 1998 SC 657, *R v Personal Investment Authority Ombudsman Bureau Ltd, ex parte Royal & Sun Alliance Life and Pensions Ltd* [2002] Lloyd's Rep IR 41, *Direct Travel Insurance v McGeown* [2003] EWCA Civ 1606, applied.

(2) The definition of "Coverholder" had been pressed into service as a shorthand reference to Abbey as administrators of the insurance on behalf of the insurers, in other words as agents of the insurers. It also happened to fit in with the concept of the Coverholder as being a broker who was authorised under so-called binding authorities to make contracts of insurance on behalf of insurers (*see* para 5.6).

(3) Looking to the plain and ordinary meaning of the words, Abbey were simply agents for Brit who were clearly disclosed principals. It was Brit alone who were liable under the contract. It follows that Abbey could not be made liable and that there is no foundation for the claim (*see* para 5.7).

The following cases were referred to in the judgment:

Bank of Scotland v Dunedin Property Investment Co Ltd 1988 SC 657;

Direct Travel Insurance v McGeown (CA) [2003] EWCA Civ 1606;

R v Personal Investment Authority Ombudsman Bureau Ltd, ex parte Royal & Sun Alliance Life and Pensions Ltd [2002] Lloyd's Rep IR 41.

Wednesday, 14 December 2011

JUDGMENT

1. Introduction and background

1.1 The pursuer is a sole trader. He was at the relevant time a member of the Small Business Federation ("SBF"). SBF were the policyholders in a contract of insurance, evidenced by a Certificate of Insurance ("the Certificate"), in which the term "Coverholders" was defined as being the defenders. The "Insurer" was defined as Brit Insurance Ltd ("Brit"). The pursuer was an insured person under the Certificate by virtue of his being a member of SBF.

1.2 The pursuer submitted a claim to the defenders under the Certificate in respect of certain matters. There was a dispute between the parties as to

whether or not the defenders were obliged to indemnify the pursuer in terms of the Certificate. There was also a dispute as to whether or not, in any event, the pursuer had adhered to the contract conditions and thus whether or not the claim was valid.

1.3 Having been advised by the defenders that they were not liable to meet his claim under the Certificate, the pursuer engaged the defenders on a private basis to undertake certain work on his behalf in relation to a contract of employment which was the underlying basis of the pursuer's claim under the Certificate. The defenders sought to charge the pursuer for their services and issued invoices. The pursuer has paid part only of the sums claimed by the defenders in these invoices.

1.4 The principal action is brought by the pursuer against the defenders seeking indemnity under the Certificate. The defenders resist this claim on the basis that they are not the insurers under the contract and thus have no liability to indemnify. In any event, say the defenders, the pursuer's claim is invalid because he failed to comply with the relevant contract conditions.

1.5 The defenders have, in turn, counterclaimed against the pursuer for settlement of the balance of their invoices. The pursuer resists this claim on the basis that he was induced to engage the defenders on a private basis by a misrepresentation by the defenders that they were not liable to meet the pursuer's claim under the Certificate.

1.6 The matter came before me on 8 November 2011 as a debate on the record number 20 of process certified on 12 August 2011. The pursuer was represented by Mr McKenzie, Advocate, and the defenders were represented by Mr Upton, Advocate. The interlocutor fixing the debate is dated 24 May 2011 and refers to the "Defender's first, second, third, fourth and fifth preliminary pleas". This seems to be a reference to the defenders' pleas in the principal action. The defenders' plea number 5 in the principal action is not, in fact, a preliminary plea and was not argued at debate. There is no mention in the interlocutor of the defenders' preliminary pleas one and three in the counterclaim. However, with the exception of the defenders' preliminary plea 1 in the principal action — a plea to jurisdiction in respect of which Mr Upton took no separate point — Mr Upton argued all of the defenders' preliminary pleas in both the principal action and the counterclaim. These included the defenders' preliminary plea 2 in the principal action which I note was not foreshadowed in the defenders' revised note of basis of preliminary pleas number 16 of process. I should say at this point that the defenders' note also refers to the defenders' fifth plea in law in the principal action which, as I have said, is not a preliminary plea. So, there was potential for a degree of confusion. Mr McKenzie took no issue with any of this and it was clear enough to me what was being debated. I therefore proceed on the basis that I am now to decide upon all of the defenders' preliminary pleas in both the principal action and the counterclaim with the exception of the defenders' preliminary plea 1 in the principal action.

1.7 The preliminary pleas for the defenders argued at the debate were as follows:

In the principal action:

2. The pursuer's averments being irrelevant et separatim lacking in specification, they should not be admitted to proof.

3 The pursuer's averments anent the construction of the insurance certificate being irrelevant, should not be admitted to proof.

4. The pursuer's averments being irrelevant et sepraratim lacking in specification, the action should be dismissed.

In the counterclaim:

1. The pursuer's averments in answer to the counterclaim being irrelevant et separatim lacking in specification, decree should be pronounced de plano in terms of the craves of the counterclaim.

3. In any event, the pursuer's averments in answer in the counterclaim being irrelevant et separatim lacking in specification, proof in the counterclaim should be restricted to quantum.

1.8 The Certificate which is at the heart of this litigation is incorporated into the pursuer's pleadings brevitntis causa. It is headed up "Federation of Small Businesses Legal Protection Insurance". Under the heading there are reproduced two logos. One relates to "Abbey Legal Protection" and one relates to "FSB". The operative words of the certificate are as follows:

"WHEREAS the Policyholder has supplied certain information to Insurers it is agreed this shall form the basis of this Contract and is deemed to be incorporated herein for the consideration of the premium specified in the Schedule.

NOW WE THE INSURERS hereby agree to the extent and in the manner herein provided to indemnify the Insured at the request of the Policyholder Legal Expenses, Jury Service Allowance and Awards of Compensation as specified in this Certificate and its Schedule in connection with the business activity of the Insured. . . . "

The following definitions are set out in the Certificate:

"Policyholder: The National Federation of Self Employed and Small Businesses Limited trading as Federation of Small Businesses.

Insured: Any full, joint, retired or associate member of the Policyholder not expressly excluded by the Coverholder.

Coverholder: Abbey Legal Protection, a trading division of Abbey Protection Group Limited which administers this insurance on Insurers' behalf.

Insurer: Brit Insurance Ltd, 55 Bishops Gate, London EC2N 3AS."

2. Submissions for the defenders

2.1 Mr Upton opened the debate. He moved me to sustain the defenders' preliminary pleas 2, 3 and 4 in the principal action and their preliminary plea 1, which failing their preliminary plea 3, in the counterclaim.

2.2 Mr Upton's main point was that it was plain from the Certificate that the defenders were not insurers but coverholders. Having regard to the definition of Coverholder in the Certificate, the defenders were simply administrators who were acting on behalf of the named insurers. The defenders thus owed no duty to indemnify the pursuer under the contract. The term "Coverholders" had not thus far been considered by any court so far as he could discover but he referred to the textbook *Jackson and Powell on Professional Liability*, 6th Edition, chapter 16, dealing with the duties and liabilities of brokers. In particular, he referred to para 16-023 for a brief explanation of the term. There it is said that:

"Contracts of insurance are not always effected between the insurer in person and a broker acting for the insured. Insurers give authority to insurance brokers and others to issue insurance policies on their behalf under binding authorities. These will give the holder of the binding authority (often called the coverholder) the authority to make contracts of insurance on the insurer's behalf, subject to restrictions as to class of risk, size of risk and, in some cases, the rate of premium to be paid."

It was clear from this passage in general and from the definition in the Certificate, in particular, that coverholders were simply agents of insurers. In this case the insurers, the principals in the agency relationship, were disclosed and accordingly the coverholders, the defenders, incurred no personal liability. Paragraph 19.27 of Gloag and Henderson, *The Law of Scotland*, 12th Edition, confirmed that:

"Where the agent names his principal, the general rule is that the principal alone is the contracting party, and that the agent is under no liability and has no title to sue on the contract."

2.3 Turning to the interpretation of the Certificate, Mr Upton maintained that in construing its meaning the starting point was to consider the ordinary meaning of the words used. In *Bank of Scotland v Dunedin Property Investment Co Ltd* 1988 SC 657 at page 661 the Lord President (Rodger) said:

"For my part, however, in the present case I am content to follow Lord Steyn's general guidance that in interpreting a commercial document of this kind the court should apply the 'commercially sensible construction' of the condition in question; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 3 All ER 352 at page 771A. I also find it helpful to start off where Lord Mustill began when interpreting the reinsurance contracts in *Charter Reinsurance Co Ltd v Fagan* [1997] 1 AC 313 at page 384B–C: 'I believe that most expressions do have a natural meaning, in the sense of their primary meaning in ordinary speech. Certainly, there are occasions when direct recourse to such meaning is inappropriate. Thus, the word may come from a specialist vocabulary and have no significance in ordinary speech. Or it may have one meaning in common speech and another in a specialist vocabulary; and the context may show that the author of the document in which it appears intended it to be understood in the latter sense. Subject to this, however, the enquiry will start, and usually finish, by asking what is the ordinary meaning of the words used.' I begin therefore, not by enquiring into the state of knowledge of the parties to the contract, but by asking myself what is the ordinary meaning of the words . . . "

2.4 Mr Upton maintained that the pursuer's reliance in his pleadings on the contra proferentem rule was misconceived. He referred to the case of *R v Personal Investment Authority Ombudsman Bureau Ltd, ex parte Royal & Sun Alliance Life and Pensions Ltd* [2002] Lloyd's Rep IR 41 in which Langley J said, under the heading "The Principles of Construction to be Applied" (at page 43 col 1):

"Counsel were (rightly) agreed that the maxim, still commonly known as 'contra proferentem', is only of use as a last resort in a case of real ambiguity, for example, where two reasonable meanings are equally open. The first task is to seek to construe the relevant words using the normal canons of construction and only where that fails may the maxim assist. Moreover ambiguity is not the same as lack of clarity. Nor can the maxim be used to create the ambiguity it is then employed to resolve."

He also referred to the case of *Direct Travel Insurance v McGeown* [2003] EWCA Civ 1606 and to the judgment of Auld LJ at para 13 where he said:

> "In my view, the Judge erred in his exercise of construction in two respects. The first was the route of his reasoning, taking as his starting point the conclusion that the words of the second limb of section 6.3, 'all your usual activities', looked at on their own, were ambiguous, and then applying the contra proferentem rule in favour of the claim unless ousted by a purposive and/or contextual analysis. A court should be wary of starting its analysis by finding an ambiguity by reference to the words in question looked at on their own. And it should not, in any event, on such a finding, move straight to the contra proferentem rule without first looking at the context and, where appropriate, permissible aids to identifying the purpose of the commercial document of which the words form part.
>
> Too early recourse to the contra proferentem rule runs the danger of 'creating' an ambiguity where there is none . . . "

2.5 The pursuer sought to rely on the contra proferentem rule to fix the defenders as insurers under the Certificate. There was a logical flaw in the pursuer's reliance on the rule. Before the rule could be relied upon it was first necessary to establish who the proferens was. If the pursuer succeeded in persuading the court that the defenders were the proferens it would have to be on the basis that the defenders were insurers under the Certificate and reliance on the rule would thus be unnecessary.

2.6 In any event, said Mr Upton, the contra proferentem rule was a rule of construction to be employed as a last resort if there remained a genuine ambiguity after employing what he described as the hierarchy of rules as explained in the cases to which he referred. Applying that hierarchy of rules there was no difficulty in construing the Certificate. There was no suggestion to be found anywhere in the Certificate that there was any obligation on the coverholders to indemnify the insured.

2.7 On an esto basis Mr Upton briefly submitted that if the defenders were liable to indemnify the pursuer in terms of the Certificate the pursuer had not relevantly averred that he had complied with all of the terms and conditions of cover, such as notifying the insurers of circumstances giving rise to a claim and obtaining insurers' consent in writing before incurring legal expenses. Accordingly, the principal action fell to be dismissed on that basis if not for the reasons set out in his primary argument.

2.8 Mr Upton submitted that his primary argument in relation to his preliminary pleas in the principal action applied equally to his preliminary pleas in the counterclaim. The pursuer's position in relation to the counterclaim was, firstly, that he had a right of set-off in respect of the debt which he claimed in the principal action and, secondly, that he had been induced to engage the defenders on a private basis by the defenders' misrepresentation that they were not liable to meet the pursuer's claims under the Certificate. The pursuer maintained that he was entitled to rescind his contract with the defenders and sought to do so in the event that he had not already done it. However, if the defenders' interpretation of the Certificate was correct the defenders did not owe any duty to indemnify the pursuer and their statement that they were not liable to meet the pursuer's claims was not a misrepresentation but was a true statement. Accordingly, the pursuer could not have been induced to enter the contract by the defenders' misrepresentation. The pursuer had pled no alternative basis upon which he could avoid performance of his contract with the defenders and accordingly decree deplano was the appropriate outcome.

2.9 In summary, Mr Upton's position in relation to the principal action was that it fell to be dismissed. His position in relation to the counterclaim was that decree de plano should be granted, which failing any proof should be restricted to quantum only.

3. The pursuer's submissions

3.1 Mr McKenzie began by pointing out that the Certificate had the defenders' name in a prominent position at the beginning. He pointed out that under the operative provision it was "We the Insurers", plural, who agreed to indemnify the insured. The definition section defined "Insurer", singular, as Brit. Accordingly Brit was only one of the plural insurers who undertook to provide indemnity. According to the *Oxford English Dictionary* "cover" could mean "insurance". Therefore a coverholder was an insurance holder. Thus, the defenders could be regarded as an insurer under the Certificate and this reflected the use of the plural "Insurers" in the operative section.

3.2 Mr McKenzie maintained that anyone, such as the pursuer, looking at the Certificate as a whole might think that the Coverholder was an insurer. The term "Coverholder" was therefore ambiguous and fell to be construed contra proferentem, the proferens being the defenders. The pursuer averred in article 2 of condescendence that the word "coverholder" means, or at least may mean, a person who underwrites insurances risks in terms of contracts of insurance. Construing the word "coverholder" confra proferentem it did have that

meaning. Construed in that way the term "Coverholder" meant "Insurer" and the defenders were accordingly liable to provide the indemnity that was agreed to in the operative section of the Certificate. As regards these matters the pursuer's case was relevantly pled and ought to go to proof.

3.3 As regards the defenders' complaint that the pursuer had no averments to demonstrate compliance with the conditions under which indemnity had been offered under the Certificate, it was clear that the pursuer was offering to prove that the defenders had wrongly declined to entertain the pursuer's claims and that the pursuer had thereby been disabled from complying with the conditions. The defenders were not entitled to profit from their own wrongdoing (para 20.21 in the textbook McBryde, *The Law of Contract in Scotland*, 3rd Edition) and the pursuer was entitled now to claim from the defenders that which he would have been entitled to claim from them had it not been for their wrongful actings.

3.4 Turning to the counterclaim, Mr McKenzie maintained that the crux of the defence of misrepresentation was that the pursuer was induced by a misrepresentation that he could not have indemnity from whoever. In other words he had been wrongly advised that he was not entitled to cover under the Certificate. Therefore, even if the principal action were dismissed he was still entitled to defend the counterclaim.

3.5 In summary, Mr McKenzie urged me to assign a proof before answer in both the principal action and the counterclaim.

4. The defenders' response

4.1 In a brief response, Mr Upton suggested that the pursuer's analysis of the meaning of the word "Coverholder" by employing the dictionary definition of the word "cover" might only have some force if the Certificate referred simply to "Coverholder" and "Insurer" without definition of those terms. He maintained that nothing turned on such minute detail as the use of the plural "Insurers" and the singular "Insurer" or the fact that the defenders' logo appeared at the beginning of the Certificate. He pointed out, as an example, that missives for the purchase and sale of heritable property are typically issued by solicitors, on behalf of clients, on their headed notepaper, yet no one would suggest that solicitors thereby assumed personal liability on the contracts thereby entered into. He maintained that it was ridiculous and nonsensical to suggest that there were two parties liable to provide indemnity under the Certificate.

4.2 He referred to the need for the pursuer to obtain consent before incurring the liability for which he sought indemnity. The pursuer did not aver, as he ought to have done, that he had been deprived of the opportunity to obtain consent because of the defenders' wrongful repudiation of liability but that the circumstances were such that the defenders would have been obliged to give their consent had they been asked to give it.

4.3 Turning to the counterclaim, Mr Upton pointed out that the pursuer's averment about misrepresentation was that the defenders had falsely represented that the defenders were not liable to meet the pursuer's claim. On a proper analysis of the Certificate that representation was not false.

5 Discussion and decision

5.1 It is fundamental to the pursuer's claim in the principal action that the defenders are held to be insurers under the Certificate. If they are not, then the pursuer's case has no foundation. The question whether the defenders are insurers depends on a proper construction of the Certificate.

5.2 First of all I need to decide how to approach the task of construction. I reject Mr McKenzie's assertion that the contra proferentem rule falls to be employed to determine whether or not the defenders are insurers. The rule can only be employed against the proferens. That being the case, it is necessary to know first of all who the proferens is. It stands to reason that the rule cannot be employed to determine that question. In this case, the proferens must be the party who offers the indemnity, in other words the insurer. Once the identity of the insurer has been determined the question has been answered and there is thus no need for the rule to be employed.

5.3 In any event, I accept Mr Upton's contention, based on the cases of *R v Personal Investment Authority Ombudsman Bureau Ltd, ex parte Royal & Sun Alliance Life and Pensions Ltd* and *Direct Travel Insurance v McGeown* that the rule is a rule of last resort to be employed only where there remains an ambiguity after all other rules of construction have been deployed. I agree with his submission that it is necessary first to look at the ordinary meaning of the words used and then if uncertainty remains to look at the context and purpose of the contract. It is only after that, if ambiguity remains, that the contra proferentem rule is to be employed.

5.4 Looking to the wording of the Certificate, "Insurer" is defined as being Brit. In my view nothing turns on the fact that the operative section of the Certificate refers to "Insurers". On a common-sense reading of the Certificate as a whole this can be seen as a simple error. The plain and simple fact is that only one person is defined as the insurer and only that person is liable to provide the indemnity offered.

5.5 "Coverholder" is defined to mean the defenders "which administers this insurance on Insurers' behalf". "Coverholder" being a defined term, it can only be employed in the sense given to it in the definition — otherwise I fail to see the point of defining it. It is nothing to the point that the word "cover" can bear the meaning "insurance" according to the *Oxford English Dictionary* and I am quite unconvinced by Mr McKenzie's argument that that affords a basis for making the defenders liable as insurers. It is not the dictionary definition that we are concerned with here but the definition given in the actual document. In the document, the word "Coverholder" could just as easily have been replaced with the word "Agent" or, indeed, any word. It is simply a word that is pressed into service as a shorthand reference to the defenders as administrators of the insurance on behalf of the insurers, in other words as agents of the insurers. It also happens to fit in with the concept of Coverholder described by *Jackson and Powell* as being a broker who is authorised under so-called binding authorities to make contracts of insurance on behalf of insurers.

5.6 Nor is it anything to the point what might be in the mind of the pursuer as he reads the Certificate. If state of mind has any part to play in the construction of a contract it must be the state of mind of a party to the contract at the time that he entered into it. The pursuer is not a party to the contract in this case. His right under the contract is a ius quaesitum tertio solely by virtue of his membership of SBF. He had no part to play in the creation of the contract and he cannot seek to influence the meaning or the purpose of it by asserting that it must conform to what is in his mind as he reads the Certificate after the event. He must take the contract as it is. In any event, I would follow the approach of the Lord President (Rodger) in *Bank of Scotland v Dunedin Property Investment Co Ltd* and favour an examination of the ordinary meaning of the words of the contract over an enquiry into anyone's state of mind.

5.7 Looking to the plain and ordinary meaning of the words, the defenders are simply agents for Brit who are clearly disclosed principals. I need go no further than that to determine the construction of the Certificate. Applying the general rule of the law of agency described in para 19.27 of Gloag and Henderson it is the principals alone who are liable under the contract. It follows that the defenders cannot be made liable and that there is no foundation for the pursuer's claim in the principal action. The pursuer's averments in the principal action are therefore irrelevant and the principal action falls to be dismissed.

5.8 My construction of the Certificate also determines what needs to happen in relation to the counterclaim. The pursuer relies on what he maintains is a misrepresentation by the defenders. In debate, Mr McKenzie suggested that the representation by the defenders was that the pursuer was not entitled to indemnity under the policy at all. What the pursuer actually pleads is that the defenders represented that the defenders were not liable to indemnify the pursuer. That is a significantly different state of affairs. On the basis of my determination in the principal action that representation is true. It is not a misrepresentation. It follows that, as pled, the pursuer's defence to the counterclaim is bound to fail. Mr McKenzie did not seek leave to amend and the proper course of action is to grant decree de plano in the counterclaim.

5.9 I have given effect to the above by sustaining the defenders' preliminary pleas 2, 3 and 4 in the principal action and their preliminary plea 1 in the counterclaim.

5.10 I need go no further in order to dispose of this matter today. But it is right to say that if I had held the defenders to be insurers under the contract and thus liable to indemnify the pursuer I would have reserved judgment on the defenders' preliminary pleas and would have allowed parties a proof before answer. In my view, on the hypothesis stated, it would not be possible to determine the question of relevancy until the facts surrounding any failure of the pursuer to comply with the conditions of cover and the reasons therefor have been established by evidence. I think that the pursuer has said enough in his pleadings to bring that matter into focus and, on the hypothesis stated, I am not persuaded at this stage that the pursuer's case in either the principal action or the counterclaim would necessarily fail.

6 Expenses etc

6.1 I have provided for interest on the amount for which decree de plano has been granted at the judicial rate from 21 April 2010 which is when the counterclaim was initially lodged.

6.2 I was not addressed on the question of expenses and I have therefore assigned a diet to determine that issue. If parties are agreed on this matter they can lodge a joint minute, in which case, and assuming that all matters are addressed therein, the diet can be discharged and I will issue a further interlocutor to reflect the terms of the joint minute.

6.3 I assume that parties will wish to address the question of sanction for the employment of counsel. I will express my preliminary view without in any way wishing to inhibit the parties in the event that this matter is contentious and I require to hear parties' submissions. I would have thought that the cause hardly qualifies for certification on the basis

of either complexity or value. I suppose, however, that it is a matter of some importance to parties to have it judicially determined whether the defenders are insurers or merely agents. If parties are agreed that the cause should be sanctioned as suitable for the employment of junior counsel I will not demur but I remain open to submissions should that be thought to be necessary.