CLYDE&CO

All risks – no cover for non-existent cargo

Englehart CTP (US) LLC v Lloyd's Syndicate 1221 [2018] EWHC 900 (Comm) (Sir Ross Cranston)

The facts

1. The insured claimant purchased and paid for a containerised cargo of copper ingots. On discharge the containers were found only ever to have contained commercially valueless slag. The documents (bills of lading, packing lists and quality certificates) were fraudulent. The insured claimed indemnity under its marine cargo and storage insurance open cover ("the Policy"). The insurers declined cover.

The policy

2. The Policy insuring conditions were the Institute Cargo Clauses (A) 1/1/09, covering "*all risks of loss of or damage to the subject-matter insured*" and/or the American Institute Cargo Clauses (Sept.1, 1965) 32B-10 amended to insure "*against all risks of physical loss of or damage to the subject-matter insured from any external cause*".

3. The Policy contained typically detailed open cover terms, including extended "duration of cover" and "insurable interest" provisions, cover for shortage and/or difference in weight and/or guaranteed outturn and provisions as to the conclusiveness of pre-shipment certificates and for the decisions of independent surveyors to be binding as to losses. It included in particular a "Container Clause", covering shortage of contents notwithstanding apparently intact seals; and a "Fraudulent Documents" clause, covering physical loss of or damage to goods through the acceptance of fraudulent documents of title, including bills of lading and warehouse receipts.

The issues

4. This was a trial of policy construction issues based on agreed assumed facts. The claimant insured submitted that, properly construed, the Policy covered physical loss claims where an insured has been defrauded into taking up documents of title for non-existent goods. The defendant insurers submitted that the losses were uninsured economic losses.

The law

5. The Court identified and considered the legal principles, as follows:

5.1. In *Fuerst Day Lawson Ltd v Orion Insurance Co. Ltd.*[1]:

Drums of essential oil were insured against all risks and, on discharge, the drums were found only to contain water. The Court held that the insured claimant had not established that the oil ever commenced the insured transit, and the claim failed.

5.2. In *Glencore International AG v Alpina Insurance Co. Ltd.*[2]:

Oil in transit and storage was insured on all risks terms. Large quantities of oil were misappropriated from storage by the bailee storing it. In considering whether oil misappropriated prior to an in-tank sale to the bailee amounted to an uninsured credit risk, the Judge stated that it was important to bear in mind that the insurance was against physical loss and damage, not against conduct that constituted a technical conversion of goods in law[3].

5.3. In *Coven SpA v Hong Kong Chinese Insurance Co*[4]:

A cargo of beans was insured against "*all risks including shortage in weight but subject to an excess of 1% of the whole shipment*". An apparent short delivery of cargo was found to be the result of a measurement error and not a real physical loss, and the claim was held to be irrecoverable.

On appeal, the claimant assured accepted that there could be no all risks loss when there was no physical loss or damage to the beans, but argued that the "shortage in weight" wording covered the risk of a pure measurement error, even where the apparently missing beans did not exist.

The Court of Appeal rejected the argument, holding that this would be a most unusual kind of cover for which clear words would be necessary. In the absence of such words "*there must be physical loss of existing beans and not a paper loss of non-existent beans*"[5].

5.4. The leading text books also confirm the proposition that all risks policies apply only to physical loss of or damage to the cargo and do not extend to financial or paper losses unless clear words are used[6].

1 [1980] 1 Lloyd's Rep 656 (Com Ct, Mocatta J)
2 [2004] 1 Lloyd's Rep 111 (Com Ct, Moore-Bick J)
3 Per Moore-Bick J at [207]. In general, "*conversion is an act of deliberate dealing with [property] in a manner inconsistent with another's right whereby that other is deprived of the use and possession of it*": see *Clerk & Lindsell on Torts* (22nd Ed.) at paragraph 17-07.
4 [1999] Lloyd's Rep IR 565 (CA)
5 Per Clarke LJ at p.569.
6 *Arnould's Law of Marine Insurance and Average* (18th Ed., 2013 and First Supplement 2016) at paragraph 23-72; *Colinvaux's Law of Insurance* (11th Ed.) at paragraph 11-007; Dunt, J., *Marine Cargo Insurance* (2nd Ed., 2015) at paragraphs 1.14 and 13.17-13.21.

The decision

6. The Court rejected the insured's claim, holding:

6.1. On the agreed facts, no copper was ever shipped: there never was any cargo of copper, and thus no cargo to be physically lost or damaged. There cannot be a physical loss when nothing ever existed.

6.2. The authorities require that one starts from the commercial purpose of all risks marine cargo insurance, which is to cover physical loss of or damage to property. Neither the policy as a whole nor the specific clauses relied on evidenced a wider intention to cover situations where no cargo ever existed or a loss flowing from the acceptance of fraudulent documents of title. Clear words would be needed before a policy covering physical losses can be read to cover non-physical losses.

Comment

7. The following points may be noted:

7.1. As the Court observed, under English law the principle is well-established that all risks polices cover only physical loss of or damage to the goods insured and do not extend to financial or paper losses unless clear words are used. This case provides useful further confirmation of that principle and helpfully draws together the various authorities. It also clarifies that the commercial context within which an all risks policy must be construed is presumed to be that the policy is intended to insure only against physical loss or damage. The policy as a whole and any specific words relied on must then be construed in order to determine any broader intention.

7.2. The decision does not refer to other judicially identified problems in establishing cover in relation to non-existent goods, namely whether the insured can ever acquire an insurable interest in goods that never existed, or whether the insurance can ever "attach" under ICC (A) Transit Clause 8.1 [7]; or, where a contract of insurance is made by reference to goods as described in the contract, non-existent goods can ever be "appropriated" to a sale contract, and therefore to a related insurance contract [8].

Further Information

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[7] As observed by Clarke LJ in *Coven* at p. 570.
[8] It was held in *Wünsche Handelsgesellschft mbH v Tai Ping Insurance Co. Ltd.*[1998] 2 Lloyd's Rep 8 (CA), that non-existent goods cannot be appropriated to the contract of insurance, per Waller LJ at p.14.