

Warranties and indemnities update

By a narrow 2 to 1 majority, the Court of Appeal finds in favour of insurers in the construction of an exclusion clause in a W&I policy

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The Court of Appeal has recently handed down its judgment in the case of *Project Angel Bidco Limited v Axis Managing Agency Limited & Ors* [2024] EWCA Civ 446.

The case involved a dispute under a warranties and indemnities (W&I) policy and whether a loss (if it was established) fell within the scope of an exclusion clause.

The Judge at first instance disagreed with the Claimant's argument that there was an error in the policy wording that needed to be rectified, finding that in order to justify a re-writing of a contract there needed to be an obvious error or an irrational outcome (read our article on the [Commercial Court decision](#)).

The Claimant appealed.

The background

The underlying facts concerned the extent of cover provided by a buyer side warranty and indemnity [insurance policy](#) taken out by Project Angel Bidco Ltd (PABL) for the acquisition of Knowsley Contractors Limited (the Policy). There were a number of warranties included in the Share and Purchase Agreement (the SPA) for the acquisition of the company, including various warranties related to Anti-Bribery and Anti-Corruption ("the ABC Warranties).

The Policy was negotiated between the underwriters and PABL and contained an exclusion of liability for any 'ABC Liability' which was defined in the Policy as: *"any liability or actual or alleged non-compliance by any member of the Target Group or any agent, affiliate or other third party in respect of Anti-Bribery and Anti-Corruption Laws"* (the ABC Exclusion), with that definition having also been the subject of detailed negotiations between the parties. The Policy included a spreadsheet which marked the ABC Warranties as being covered.

The dispute

PABL argued that there was a contradiction in the Policy as the ABC Exclusion meant that there could never be cover for the ABC Warranties, even though they were expressly marked in the spreadsheet as being covered. PABL argued that the ABC Exclusion should therefore be amended to read: *"any liability for actual or alleged non-compliance by any member of the Target Group or any agent, affiliate or other third party in respect of Anti-Bribery and Anti-Corruption Laws"*.

Court of Appeal decision

In the leading judgment, Lord Justice Lewison noted that where there is an alleged error in a contract, the court may correct the literal meaning of a provision if it is clear that a mistake has been made and what the provision is intended to say. However, the court must be satisfied as to both the mistake and the nature of the correction.

The argument presented by PABL was that there was an inconsistency in the Policy, which could be corrected by changing one letter in the definition of ABC Liability. Lewison LJ noted that, although there was an apparent conflict between the inclusion of the ABC Warranties and the scope of the ABC Liability and the ABC Exclusion, there was a coherent and rational explanation for why the ABC Liability exclusion took the form that it did: underwriters did not want to cover losses related to allegations of non-compliance with anti-bribery laws as it could still affect the share price even where the allegation was never proved. For the same reason, even if it could be established that there was a drafting mistake, it was not clear what the cure should be due to rational explanation provided by underwriters.

By a 2 to 1 majority, the Court of Appeal agreed with the finding of the lower court that there was no clear drafting error in the Policy, and no obvious cure even if there was a drafting error, and so the appeal was dismissed.

Comment

As noted from the lower court judgment, W&I policies are usually underwritten on a bespoke basis and negotiated in parallel with the negotiations between the vendors and the sellers meaning that any disputes arising out of them tend to be fact specific.

In this instance, the decision of the Court of Appeal was influenced by the fact that the wording of the ABC Exclusion was negotiated between the parties and that insurers were able to show a clear rationale behind the drafting.

This case is a reminder that, even where it can be shown that there is a conflict between different parts of a policy, the courts are unwilling to step in to correct it unless it can be shown there is an obvious error and an obvious rectification.

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