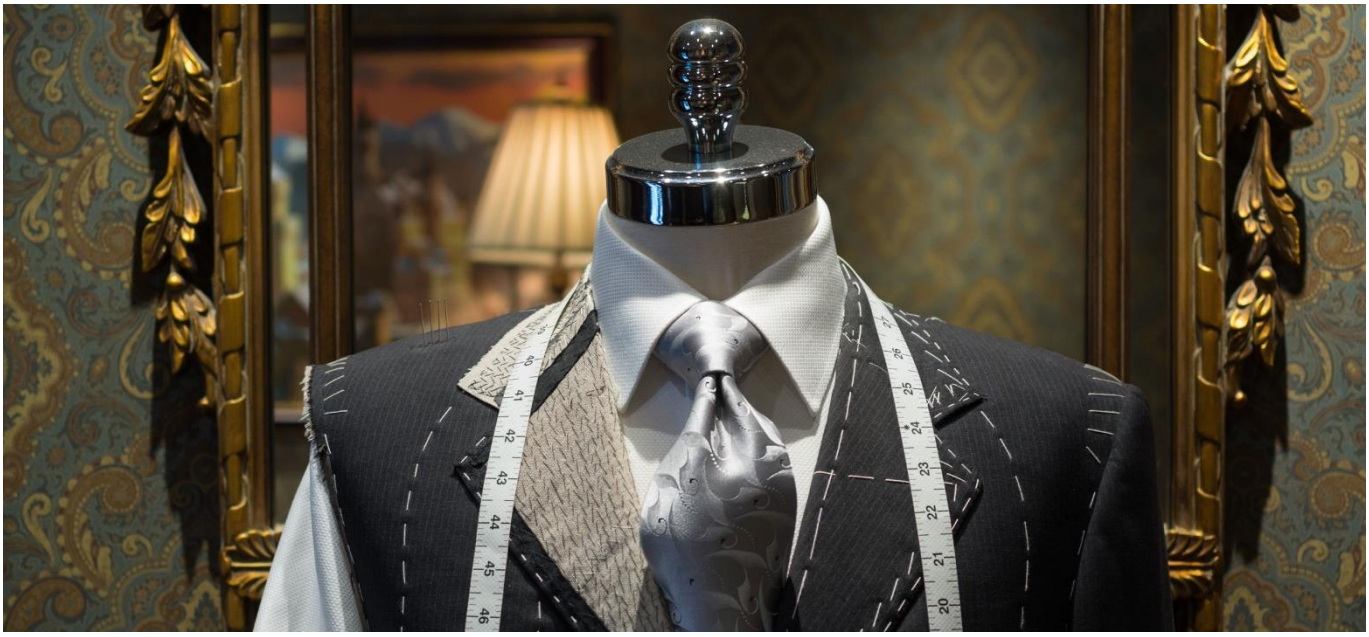
LESSONS LEARNED FROM TED BAKER VS AXA INSURANCE



The Court of Appeal ('**CoA**') has commented on the circumstances in which a policyholder might expect its insurer to speak in relation to policy terms.

Background

At first instance in *Ted Baker Plc and another v AXA Insurance UK Plc and others*, Eder J. held that Ted Baker's ('**TB**') failure to provide profit & loss and management accounts to its insurers was a breach of a condition precedent concerning the provision of information. Consequently, TB's claim failed. TB appealed that decision and in considering the claim the CoA commented on the extent of insurers' 'duty to speak'.

TB's claim concerned business interruption losses arising from thefts by an employee which took place between 2003 and 2008. Shortly after the claim was made, AXA had asked TB to provide a number of documents in order to assess the alleged loss, including the profit & loss and management accounts. These were not provided and AXA later relied on this failure to argue that there had been a breach of a condition precedent and that it was not liable under the policy.

At the time the request was made TB's position was that it would be time-consuming and expensive to provide the requested documents, and that it had the benefit of a 'professional accountants clause' in the policy which meant AXA should pay the reasonable costs of TB's accountants in providing the information. AXA did not accept this and TB refused to incur the costs of providing the documents until it knew that coverage had been agreed in principle.

In response to AXA's reliance on the condition precedent, TB argued that the question of whether the accounts should be provided had been "*parked*" by the parties, and in particular that at a meeting with AXA's loss adjustor he had stated that he would take further instructions on the point and revert, which he failed to do. There was no suggestion from AXA in subsequent correspondence that any information was outstanding.

As such, TB argued that AXA should be estopped from relying on a failure to provide the accounts / breach of the condition precedent.

Duty to speak

In its Judgment, the CoA noted that there is limited case law concerning the post-contractual duty of good faith in insurance contracts and referred to authority in relation to commercial contracts more generally in support of the proposition that there is a 'duty to speak' in certain circumstances.

Although it was found that an insurer is generally under no duty to warn an insured as to the need to comply with policy conditions, and that there was no evidence of bad faith in the form of "*hoodwinking*" on the part of AXA, nor of any agreement or representations made in relation to the provision of the requested documents, this was not necessarily the end of the matter.

It was held that "*whether an estoppel arises is not wholly dependent on whether the person sought to be estopped has made some representation express or implied. It may arise if, in the light of the circumstances known to the parties, a reasonable person in the position of the person seeking to set up the estoppel (here TB) would expect the other party (here the insurers) acting honestly and responsibly to take steps to make his position plain. Such an estoppel is a form of estoppel by acquiescence arising out a failure to speak when under a duty to do so*."

On the facts, it was held that it was reasonable for TB to expect AXA to say whether they regarded the requested documents as outstanding, due and "*unparked*".

However, whilst TB was therefore successful in its arguments concerning the condition precedent, its appeal was dismissed on other grounds concerning the quantification of its loss.

Comments

This decision provides some helpful commentary as to the circumstances in which a policyholder might expect its insurer to speak in relation to policy terms. In particular, whilst there is no positive duty on an insurer to warn its policyholder about compliance with policy terms, on the specific facts of a claim an estoppel may arise if that policyholder would expect the insurer, acting honestly and reasonably, to state its position.

On a practical level, policyholders should proactively engage with their insurers to place the onus on them to confirm that all requests or requirements have been met. Policyholders faced with a recalcitrant insurer may also want to have in mind that damages for late payment of insurance claims are now available in certain circumstances and may encourage more proactive claims management.

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