IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

6 December 2019

AXA S.A. v GENWORTH INTERNATIONAL FINANCIAL HOLDINGS INC & OTHERS

[2019] EWHC 3376 (Comm)

BEFORE: MR JUSTICE BRYAN

CASE SUMMARY

In a liability trial, Bryan J held that the Claimant was correct in its construction of the Defendants' payment obligations pursuant to Clause 10.8 of the sale and purchase agreement ("SPA") entered into by the parties. Bryan J also rejected the Defendants' counterclaim for breach of contract and rejected the Defendants' counterclaim for a declaration to be entitled to exercise subrogation rights.

BACKGROUND

Between 1988 and 2011, Financial Insurance Limited Company ("FICL") and Financial Assurance Limited Company ("FACL"), had been engaged in underwriting payment protection insurance products ("PPI"), which were marketed and sold by Santander. The marketing and sale by Santander of PPI underwritten by FICL/FACL has since given rise to extensive PPI mis-selling complaints by customers.

Until September 2015, FICL and FACL had been owned by Genworth, when, by an SPA, AXA indirectly acquired from Genworth the entire share capital of FICL and FACL.

In July 2015, Santander had informed FICL/FACL that it no longer accepted liability for losses flowing from PPI customer complaints in respect of policies sold prior to January 2005, and that it would no longer handle or pay redress for such complaints. However, because, FICL/FACL did not have sufficient in-house complaints handling capacity, a Claims Handling Agreement ("CHA") was entered into on 7 December 2017 between FICL/FACL and Santander. At the same time, the latent dispute between FICL/FACL and Santander was made subject a Standstill Agreement, by which they agreed not to take any steps to refer their dispute to dispute resolution.

THE CLAIMS

AXA claimed against Genworth for specific performance of an obligation to make payment of £264,953,912.18 under Clause 10.8 of the SPA; alternatively, a claim in debt under a guarantee for the same amount under Clause 15.1 of the SPA, or damages for the same.

Genworth counterclaimed for a declaration that its liability under Clause 10.8 did not extend to settlements with customers entered into without Genworth's consent (in breach of Schedule 5, paragraph 7.2 of the SPA), charges payable under the CHA, and claims subject to the Standstill Agreement. Alternatively, it claimed damages in respect of the same. Genworth also counterclaimed for a declaration that, in the event it made payment to AXA under Clause 10.8, it will be subrogated to FICL and FACL's claims against Santander in respect of the mis-selling of the PPI products.

THE ISSUES

The issues that Bryan J determined were various 'points pf principle' on liability, with the quantum hearing directed to be heard in March 2020.

The Nature and Construction of Clause 10.8 and Reasonable Defences Issue: is Genworth's liability under Clause 10.8 limited to losses in respect of which AXA is able to demonstrate that AXA/FICL/FACL asserted all defences reasonably available to them in respect of any complaints by consumers?

The Subrogation Entitlement Issue: if Genworth were obliged to make payment to AXA under Clause 10.8, is Genworth entitled to be subrogated to any potential rights that FICL/FACL may have against Santander?

The Consequences of Subrogation Issue: if Genworth is subrogated to FICL/FACL's rights against Santander, will Genworth be entitled to: (1) require each of FICL/FACL to lend its name to legal proceedings against Santander; (2) require each of FICL/FACL to take all steps necessary to commence and pursue such legal proceedings including terminating the Standstill Agreement; and (3) control the conduct of all such legal proceedings?

The Bundling Issue: in relation to the definition of PPI for the purposes of Clause 10.8(a) of the SPA, what is the meaning of 'Payment Protection Insurance', as such term was commonly understood in the insurance market at the time the SPA was concluded?

The Consent Issue: has AXA breached the provisions of paragraph 7 of Schedule 5 of the SPA by: (1) paying amounts of redress to PPI customers without first obtaining the consent of Genworth; (2) entering into the Standstill Agreement between FICL/FACL and Santander, without first obtaining the consent of Genworth; and/or entering into the CHA between FICL/FACL and SUKPLC without first obtaining the consent of Genworth?

The Consent Unreasonably Withheld Issue: to the extent that Genworth's consent was required for the entry into the CHA and/or the Standstill Agreement, or the payment of amounts of redress to PPI customers, was such consent unreasonably withheld?

The Allocation Issue: is the reference to a "claim under clause 10.8" in paragraph 8.2 of Schedule 5 of the SPA a reference to the sum claimed by AXA in respect of each individual PPI Complaint and/or FOS complaint (including any associated costs, expenses and fees)?

THE NATURE AND CONSTRUCTION OF CLAUSE 10.8 AND REASONABLE DEFENCES ISSUE:

Genworth submitted that Clause 10.8 was in the nature of an indemnity clause (and not a performance bond), that it was an inherent feature of an indemnity obligation that an indemnified is not entitled to recover for losses incurred where the indemnified has not asserted all defences reasonably available to it; and that to the extent that AXA did not advance reasonable defences, its losses fell to be reduced accordingly.

Bryan J rejected that submission. He held that Clause 10.8 was not an indemnity (nor a performance bond), but was instead a bespoke clause, which was not to be classified as any particular species of contractual obligation. In line with *Wood v Capita Insurance Services Ltd* [2017] AC 1173, there were both textual and contextual reasons for rejecting Genworth's construction. There were no express words in Clause 10.8 which obliged FICL/FACL to assert all defences reasonably available to them. This was in contradistinction to other clauses of the SPA where the parties had expressly adopted language comparable to that of a 'reasonable defences' obligation. Nor was there any such implied term.

Further, an obligation to advance all reasonable defences was inconsistent with the relevant regulatory complaints handling regime, which discouraged regulated entities from taking defences against customers. It was also known to both parties that FICL/FACL were inheriting an inadequate complaints-handling system, such that FICL/FACL did not have a regime in place that would allow for all defences reasonably available to be taken, particularly in circumstances where the complaints were very high in volume and low in value.

The true and proper construction of Clause 10.8 was that Genworth was obliged to pay on demand an amount equal to 90% of any all Relevant Distributor Mis-Selling Losses which (as a result of the embedded definitions) meant on a demand by AXA in an amount equal to a cost incurred by FICL/FACL that related to a claim or complaint, regarding the sale of a PPI product, underwritten by FICL/FACL, sold by Santander, prior to 1 January 2005.

THE SUBROGATION ENTITLEMENT ISSUE

Contractual, not equitable, subrogation was being relevant type of subrogation under consideration. Bryan J held that the juridical basis of this form of subrogation was accurately stated by Lord Hoffmann in *Banque Financière de la Cité SA v Parc (Battersea) Ltd* [1999] 1 AC 221. It is based on the common intention of the parties to a contract and where subrogation rights are not conferred expressly, subrogation rights are to be implied so as to reflect the common intention of the parties.

Genworth submitted that, in the event that it made payment to AXA under Clause 10.8, it followed from its construction of Clause 10.8 as an indemnity that it had a right of subrogation to any potential rights that FICL/FACL have against Santander.

Bryan J rejected this submission. On its true and proper construction, Clause 10.8 was a covenant to pay, not an indemnity. Further, he held that contractual subrogation rights depend on the paying party having indemnified the receiving party in respect of a loss suffered by the receiving party. Contractual subrogation requires the indemnified and the person who has the relevant rights against the third party to be the same. In the 300 years since the doctrine of subrogation was identified, no case has been found in which anyone has ever been entitled to subrogation rights where such rights belong to someone other than the counterparty to the contract. That was, however, Genworth's case: it claimed to be entitled to FICL/FACL's rights against Santander, by reason of meeting an obligation to AXA.

Bryan J held that if, contrary to his aforesaid finding, Clause 10.8 was an indemnity, no rights of subrogation arose in any event. There was no express right of subrogation in the SPA, and an implied right of subrogation was excluded by and/or inconsistent with, other express terms of the SPA.

THE CONSEQUENCES OF SUBROGATION ISSUE

In the event that it succeeded on subrogation, Genworth claimed certain be entitled to require FICL/FACL to lend their name to proceedings against Santander, to require FICL/FACL to take all steps necessary to pursue those proceedings, including terminating the Standstill Agreement, and to control the conduct of all such proceedings.

Notwithstanding that Genworth did not have any subrogation rights, Bryan J held that Genworth would not in any event be entitled to require FICL/FACL to lend their name, because of the well-established rule that subrogation cannot arise until an indemnifier has fully performed his obligations, and Genworth had not: *Page v Scottish Insurance Corp Ltd* (1929) 33 Ll L Rep. Nor would Genworth be entitled to control any such proceedings, because of the rule that until an insured has received a full indemnity for his loss, the insured retains the exclusive right to control proceedings against the third party: *Commercial Union Assurance Co v Lister* (1874) LR 9 Ch App 483. Bryan J declined to decide whether FICL/FACL could be required to terminate the Standstill Agreement, on the basis that the question was both hypothetical and premature.

THE BUNDLING ISSUE

The insurance products that were mis-sold by Santander on behalf of FICL/FACL were 'bundles' of products, which included 'pure' payment protection insurance (i.e. insurance against the risk of the customer not being able to meet credit payment through unemployment, sickness, death etc.), along with bolted-on policies of purchase protection (i.e. insurance against purchased goods being damaged, stolen etc.) and price protection (i.e. insurance against the price of purchased goods subsequently being reduced, e.g. in a seasonal sale). PPI was defined under the SPA as "'*payment protection insurance, as such term is commonly understood in the insurance market*". Genworth's submitted that any sums claimed by AXA under Clause 10.8 in respect of losses arising out of the selling of a product bundle that included price protection cover and/or purchase protection cover fell to be

reduced to reflect the fact that some of the losses were not pure PPI losses, because they were not PPI 'as such term was commonly understood in the insurance market'.

Bryan J rejected this submission and held that the common understanding of PPI in the insurance market extended to bundled PPI products, including purchase protection insurance and price protection insurance. He did so on the basis that by the time of the SPA, PPI was not being sold in any material quantity and was instead the subject of a substantial customer complaints industry and regulatory redress regime, which was also the focus of the SPA. In that context, PPI included bundled products.

THE CONSENT ISSUE

Genworth submitted that pursuant to paragraph 7.2(c) of Schedule 5 of the SPA, AXA agreed not to enter into any agreement or compromise in relation to any 'Third Party Claim', without Genworth's prior written consent. It further submitted that consumer redress payments, the CHA, and the Standstill Agreement were all agreements or compromises in relation to, or decisions not to defend 'Third Party Claims' without its consent, and accordingly AXA was in breach of paragraph 7.2(c) of Schedule 5.

Bryan J rejected that submission. He held that no consent was necessary in respect of the customer redress payments, the CHA, and the Standstill Agreement. A 'Third Party Claim' in paragraph 7 of the SPA meant a liability or alleged liability. However, the regulatory regime was not concerned with legal liability. As such, consumer complaints under the regulatory regime were not 'Third Party Claims'. Because consumer complaints were not 'Third Party Claims', neither the CHA nor the Standstill Agreement constituted an '*agreement or compromise in relation to the Third Party Claim*', and so no consent from Genworth was required.

THE CONSENT UNREASONABLY WITHHELD ISSUE

Bryan J further held that, that if, contrary to his aforesaid finding, AXA did need the consent of Genworth in relation to consumer complaints, the CHA, or the Standstill Agreement, Genworth was estopped by acquiescence from relying on the absence of such consent, and that the withholding of consent was in any event unreasonable.

THE ALLOCATION ISSUE

The issue was whether, under paragraph 8.2 of Schedule 5 of the SPA, AXA must account to Genworth for "excess" recoveries from Santander calculated by reference to: (1) the amount recovered from Santander, over and above the 90% paid by Genworth under Clause 10.8 of the SPA, in relation to each sub-set of amounts referable to individual customer complaints and directly associated administrative costs and other costs (the "claim by claim approach"); or (2) only for the total excess once AXA has been made whole, across all claims, by a combination of recoveries from Genworth under Clause 10.8 and from Santander (the "aggregated approach").

Genworth contended for the claim by claim approach; AXA contended for the aggregated approach. Bryan J favoured the latter, on the basis that it more accurately reflected the language of the SPA and was more consistent with its purpose. By contrast, Genworth's construction was uncommercial.

CONCLUSION

Bryan J concluded that AXA succeeded on its construction of the SPA, and Genworth failed on its counterclaims.