

Insurer Can Reopen Settlement to Revive an Allegation of Fraud – UK Supreme Court

In *Hayward v Zurich Insurance Company plc* [2016] UKSC 48 (27 July 2016) the United Kingdom Supreme Court ruled that an insurer which had settled a claim could revive it if the claim was fraudulent. Lord Clarke, delivering the leading judgment, ruled “I am not persuaded that the importance of encouraging settlement, which I entirely agree is considerable, is sufficient to allow Mr Hayward to retain moneys which he only obtained by fraud.”

The facts and judgment at first instance

The claimant was injured in a workplace accident. Liability was admitted and shortly before trial the parties negotiated a settlement whereby the employer/insurer agreed to pay £135,000 in full and final settlement of the claimant's claim. In its defence the insurer had alleged the claim was deliberately exaggerated and the settlement figure was less than a third of the claim of £420,000. After the settlement the insurer obtained evidence that the claimant had recovered from his injuries much earlier than he had claimed. The insurer sought to rescind the agreement and recover damages for deceit. The claimant argued that the insurer had not been induced to act to their detriment; this given they had no belief in the truth of the misrepresentation.

The trial judge held that the insurer was induced, saying belief in the truth of the statement was not required to prove inducement in the litigation context, where statements “will be viewed with healthy scepticism and weighed against the other material available” and the other party “will mainly concern himself

with how likely it is to be accepted by the court.”

The judgment in the Court of Appeal

The Court of Appeal reversed the judge at first instance. Lord Justice Underhill, who wrote the leading judgment in the Court of Appeal, said “parties who settle claims with their eyes wide open should not be entitled to revive them only because better evidence comes along later”.

The Supreme Court judgment

The Supreme Court unanimously allowed the insurer's appeal.

Inducement and litigation risk

To establish the tort of deceit it must be shown that the defendant dishonestly made a material representation which was intended to, and did, induce the representee to act to his detriment. The issue for the Supreme Court was inducement, whether it must be shown that the defrauded representee believed that the misrepresentations were true. We note in passing that while damages for deceit are dealt with in New Zealand under section 6 of the Contractual Remedies Act 1979, s 6 applies where a party to a contract (which includes a settlement agreement) has been induced to enter it by a misrepresentation, whether innocent or fraudulent, made to that party by or on behalf of another party to the contract. So the same issues of inducement arise under s6 claims.

On this key issue – whether to prove inducement it must be shown that the defrauded representee believed that the misrepresentations were true – Lord Clarke held in his opinion the answer is no.

Lord Clarke ruled: “As I see it, the representee's reasonable belief as to

whether the misrepresentation is true cannot be a necessary ingredient of the test, because the representee may well settle on the basis that, at any rate in a context such as the present, he (sic) thinks that the representation will be believed by the judge...the fact that the representee (Zurich) does not wholly credit the fraudster (Mr Hayward) and carries out its own investigations does not preclude it from having been induced by those representations. Qualified belief or disbelief does not rule out inducement...”

In other words, litigation risk. Lord Clarke even went so far as to suggest that knowledge of the untruth of a representation may not always be a complete bar to a claim; this on the basis that “Sometimes (a staged road traffic ‘accident’ for example) the other party may actually be certain from his own direct knowledge that the statement is a lie. But even then he and his advisers cannot choose to ignore it; they must still take into account the risk that it will be believed by the judge at trial.”

Conclusion

The “eyes wide open” approach of Underhill LJ is not without merit. Zurich had not only made an issue of the misrepresentations before the settlement, but positively asserted that they were dishonestly made. However, as a decision of the apex court of the United Kingdom, on an issue of law of direct relevance under s6 of the Contractual Remedies Act 1979, the Supreme Court's decision that belief of truth is not required for inducement will be of considerable persuasive force in New Zealand courts claims for relief under s6 of the Contractual Remedies Act 1979.

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