Court of Appeal landmark decision on the application of the Insurance Act 2015 to representations and warranties in an insurance policy

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06 March 2025

Overview

The Court of Appeal handed down judgment in ***Lonham Group Ltd v. Scotbeef Ltd*** [2025] EWCA Civ 203, overturning the decision of HHJ Kelly in ***Scotbeef Ltd v D&S Storage Ltd (In Liquidation)*** [2024] EWHC 341 (TCC).

This is the first guidance on the operation of Parts 2 and 3 of the Insurance Act 2015. The Court stressed the critical importance of properly characterising the nature of insurance terms as warranties or representations, which is fundamental to the correct application of the provisions of the 2015 Act.

The judgment provides important confirmation that underwriters are able to control the nature and extent of the risks they undertake through the use of appropriately worded duty of assured clauses, and warranties more generally, without contravening the provisions of the 2015 Act regarding the duty of fair presentation of risk (which the judgment of the lower court put in doubt).

Facts and procedural history

The original claim was made by Scotbeef Ltd ("Scotbeef") against D&S Storage Ltd ("D&S") seeking compensation for damage to a consignment of meat owned by Scotbeef, which had become spoiled while it was stored at D&S' warehouse facility.

D&S sought to defend the claim on the basis that the Food Storage & Distribution Federation Terms & Conditions ("the FSDF Terms") had been incorporated into its trading relationship with Scotbeef. D&S relied on (*inter alia*) a time bar in clause 11.10 and a limitation of liability in clause 11.7 of the FSDF Terms. Scotbeef denied that the FSDF Terms had been incorporated into the relevant contracts.

The issue of whether the FSDF Terms had been incorporated was the subject of a preliminary trial, and judgment was handed down on 14 October 2022 (***Scotbeef Ltd v. D&S Storage Ltd (in liquidation)*** [2022] EWHC 2434 (TCC)). The High Court found that the FSDF Terms had not been incorporated. D&S had failed to provide reasonable notice of incorporation of the FSDF Terms to Scotbeef during their business relationship.

Lonham Group Ltd ("Lonham") was D&S' underwriter, providing insurance cover for D&S' warehousekeepers' legal liability pursuant to a policy of insurance. The policy contained a 'Duty of Assured Clause', which provided (*inter alia*) the following *'conditions precedent to liability"*:

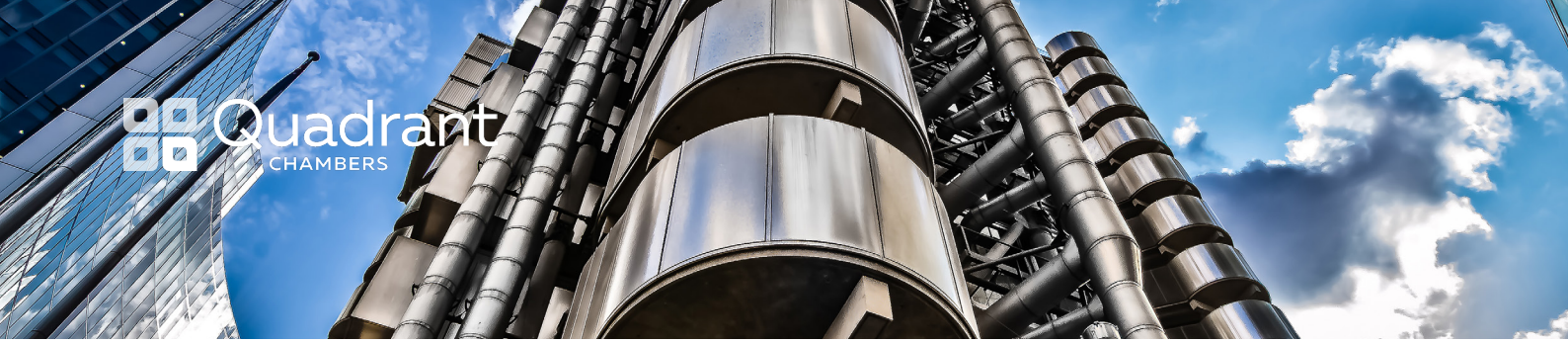
(1) Sub-clause (i): D&S would make a full declaration of all trading terms on inception of the policy. The declared terms were stated in the policy to be the FSDF Terms.

(2) Sub-clause (ii): during the currency of the policy, D&S would continuously trade under the conditions declared by D&S and approved by Lonham [the FSDF Terms].

(3) Sub-clause (iii): D&S shall take all reasonable and practicable steps to ensure that their trading conditions were incorporated in all contracts entered into. This clause further stated that if a claim arose in respect of a contract into which D&S had failed to incorporate the above terms and conditions, D&S' right to be indemnified would not be prejudiced providing that it had taken all reasonable and practicable steps to achieve incorporation.

The decision of the High Court

D&S subsequently went into liquidation and a second preliminary issue trial was listed to determine whether D&S had any right of indemnity against Lonham under the relevant insurance policy, which could be enforced by Scotbeef pursuant to the Third Parties (Rights Against Insurers) Act 2010.



Lonham's position was that D&S had failed to comply with the above conditions precedent (principally, sub-clause (ii)) by contracting with Scotbeef on trading terms other than the declared and approved FSDF Terms, in light of the judgment in the first preliminary trial. Accordingly, Lonham maintained that it was entitled to avoid the policy, and therefore Scotbeef could not enjoy the benefit of indemnity through the operation of the 2010 Act.

The lower court found, in favour of Scotbeef, that Lonham could not rely on the above sub-clauses to deny liability (***Scotbeef Ltd v D&S Storage Ltd (In Liquidation)*** [2024] EWHC 341 (TCC)).

The lower court found that sub-clauses (i)-(iii) all had to be read together, rather than as separate clauses. Sub-clause (i) was interpreted to be a pre-contract declaration of D&S' trading terms and therefore could not stand as a warranty or condition precedent pursuant to s. 9 of the 2015 Act.

Sub-clause (iii) was found to have placed the assured *'in a worse position"* within the meaning of s.16 of the 2015 Act on the basis that this clause was interpreted by the learned Judge to the effect that, even if the FSDF Terms had been incorporated into the relevant trading relationship, the assured would still be in breach if it had not taken all reasonable steps to incorporate the terms. It was found that a breach of sub-clause (iii) would therefore permit the Second Defendant to avoid indemnifying an assured in respect of a claim even if the loss was unrelated to the breach. The lower court further found that the three sub-clauses did not satisfy the transparency requirements in s.17 of the 2015 Act.

The lower court went on to find that there had been a misrepresentation by D&S (notwithstanding that Lonham never alleged any misrepresentation) and that it was necessary to consider sub-clauses (i)-(iii) in the context of the s.3 duty of fair presentation of risk and the remedies for breach of that duty as set out in s.8 and Sch.1 of the 2015 Act.

The Court noted that no claim had been advanced by Lonham for any remedy under Sch.1 of the 2015 Act (which might be said to be unsurprising, given that Lonham never alleged breach of the duty of fair presentation). As the breach was not deliberate or reckless, in order to avoid the contract, Lonham would have to show that it would not have entered the policy on any terms, which had not been established.

The decision of the Court of Appeal

The Court of Appeal reversed (in part) the decision of the High Court and found that D&S was in breach of either or both of sub-clauses (ii)-(iii), with the consequence that Lonham was entitled to avoid the claim under the policy. Therefore, there was no right of indemnity against Lonham which could be enforced by Scotbeef under the 2010 Act.

Characterisation of terms as warranties or representations

The Court noted that the issue which was at the heart of the appeal went to the proper characterisation of sub-clauses (ii) and (iii), and whether they were warranties. The lower court had erred in construing the three sub-clauses together, as though either all three of them had to be warranties, or all three of them had to be representations.

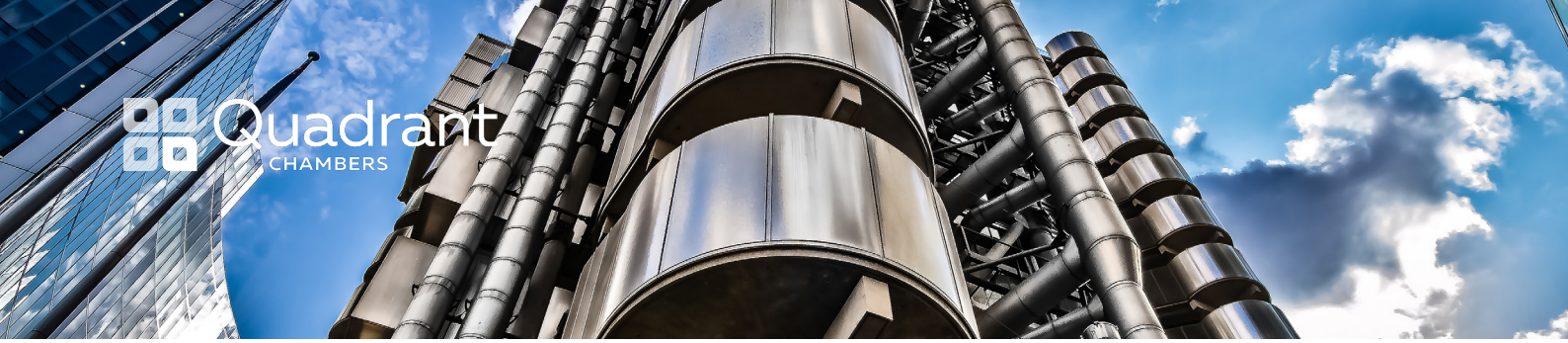
The Court of Appeal found that, on the true construction of the policy:

(1) Sub-clause (i) deals with the trading terms of all the existing contracts that D&S had with its existing customers at the time of inception of the policy.

(2) Sub-clause (ii), by its wording, deals with the future business operations of D&S from the date of inception of the policy, going forwards and during the policy period, both to existing and new customers. It is a future warranty, namely a promise by the assured that requirements will be satisfied, after the policy has been made. That promise is that the trading in which D&S engages during the period of cover will be on the trading conditions that the insurer knows about and has agreed.

(3) Sub-clause (iii) is aimed at D&S' new business relations. These could be contracts with new customers, or new contracts entered into with existing customers. This sub-clause is also a future warranty. The requirements that DS is promising it will satisfy go to the same subject as that in sub-clause (ii), namely incorporation of the trading conditions in business transacted by D&S after the date of inception of the policy.

Thus, as a matter of construction, each of sub-clauses (i), (ii) and (iii) were found to address all of the different permutations upon which D&S had traded and might trade in the future. Collectively, all of the different potential business arrangements by D&S were included, and all were subject to the same requirement, namely that the business is conducted on the standard



trade terms declared by D&S. The only potential liability which was covered under the policy for trading not on FSDF terms is where D&S has failed to achieve this, but has taken all reasonable and practicable steps to have them incorporated (which is the subject of sub-clause (iii)).

The Court of Appeal observed that it was entirely a matter for D&S as to how it conducted its business, and the terms upon which it trades with all of its customers is something that was uniquely in the power of D&S (as opposed to the insurer). However, in order for any trading contract to be covered by D&S' insurance policy, D&S would have to comply with sub-clauses (ii) and (iii).

Unlike sub-clause (i), sub-clauses (ii)-(iii) did not contain any pre-policy representations and did not seek to regulate pre-policy disclosure by the assured. The lower court incorrectly concluded that these provisions were within the scope of s.3 of the 2015 Act because a different clause, sub-clause (i), was a pre-contract representation and because the lower court found that the three sub-clauses (i)-(iii) should be read together. This was an error of law in terms of how the lower court construed those latter two sub-clauses. They were plainly future warranties which regulate the conduct of the assured during the policy term. They were also found to be conditions precedent for the simple reason that the clear wording of the policy stated that they were.

Application of the 2015 Act to sub-clauses (ii)-(iii)

In light of the finding of fact in the judgment following the hearing of the first preliminary trial that the FSDF Terms were not incorporated into the contractual relationship between D&S and Scotbeef, D&S was in breach of the warranties contained in sub-clauses (ii) and/or (iii). Their categorisation as warranties meant that rather than being governed by the provisions of Part 2 of the 2015 Act which deals with fair presentation of risk, sub-clauses (ii) and (iii) fell to be considered under Part 3 of the Act (ss.9-11).

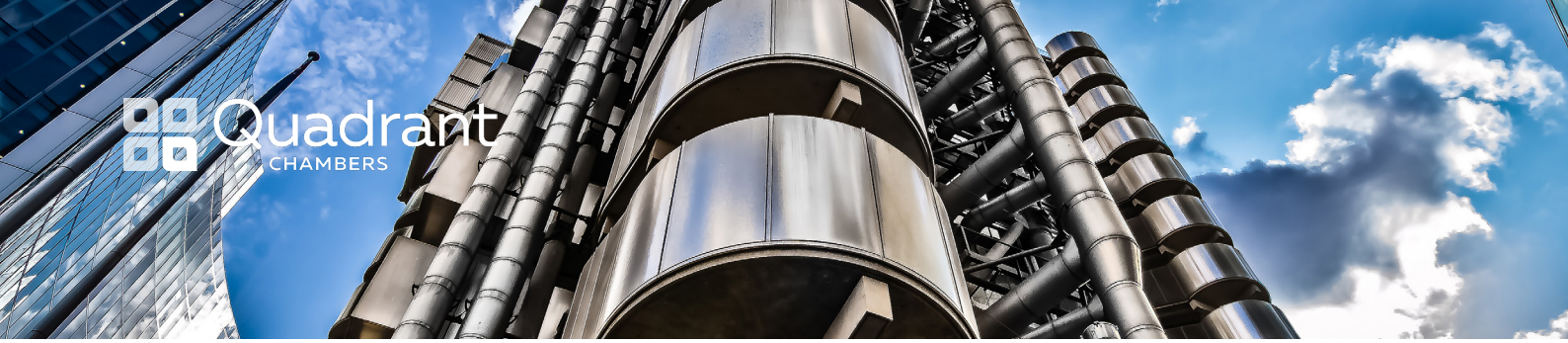
Given that these two sub-clauses were always future warranties, s.9 of the Act had no application. Lonham was not relying upon representations that it maintained had become warranties. S.10(2) of the 2015 Act explicitly provides that the insurer has no liability for any loss after a warranty has been breached but before it has been remedied. The provisions in ss.10(3)-(4) had no application to the present case, nor did any of the scenarios in s.11 apply. Therefore, s.10(2) continued to apply and Lonham was entitled to rely upon it to avoid liability under the policy.

Transparency requirements

The lower court had also erred in finding that the transparency requirements in Part 5 of the 2015 Act had not been met. The lower court's analysis followed on from the finding that ss.2 and 3 applied to sub-clauses (ii) and (iii). Under s.16(1), any term of a policy which seeks to put the insured in a worse position regarding representations is of no effect. However, that section did not apply, as the two sub-clauses are warranties, not representations. Any attempt to contract out of the legal effect of ss.10-11 of the 2015 Act would fall within the qualified prohibition within s.16(2). However, the first question for the Court on transparency is simply whether there is any term in the insurance policy which is seeking to have the assured contract out of the legal effect of ss.10 and 11. In the present case, there was no such attempt at contracting out. Sub-clauses (ii) and (iii) did not put the insured in a worse position than D&S would be under the 2015 Act.

The Court of Appeal emphasised the importance of properly construing policy terms as warranties or representations. That is always the first exercise that is required in deciding which part of the 2015 Act applies. If that exercise goes wrong, then it is inevitable that the wrong provisions of the Act will be applied.

Stewart Buckingham KC and Michael Proctor, instructed by Christopher Chatfield and Eleonore De Montule of Kennedys LLP, represented Lonham.



Stewart Buckingham KC

'Stewart has the ability to untangle knotty issues and present an apparently straightforward position where sometimes, the position is anything but straightforward." (Legal 500, 2024)

Stewart is a commercial barrister, specialising in commercial law, mainly focussing on commercial litigation and international arbitration. Stewart was shortlisted for Shipping Junior of the Year for the Legal 500 UK Awards 2020. He has been consistently ranked as a 'Leading Junior' in both the leading directories for several years.

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'Michael is an exceptionally bright and very motivated junior. He can hold his own effectively against more senior counsel." (Legal 500, 2025)

Michael undertakes a broad range of commercial work with a focus on shipping, aviation, commercial litigation and international arbitration. Michael has acted in respect of marine insurance and non-marine insurance claims. He has experience dealing with issues involving coverage disputes, nondisclosure, misrepresentation, breach of the duty of utmost good faith and insurable interests. He has acted and advised on matters concerning various issues regarding the international sale of commodities.

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