Neutral Citation Number: [2019] EWHC 2671 (Comm)

Claim No: CL-2019-000516

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

(Hearing in Private)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 11/10/2019

Before :

MR JUSTICE ROBIN KNOWLES CBE

- -

IN THE MATTER OF THE ARBITRATION ACT 1996

AND IN THE MATTER OF AN ARBITRATION APPLICATION

Between :

(1) HISCOX DEDICATED CORPORATE MEMBER LIMITED AS REPRESENTATIVE OF SYNDICATE 33 AT LLOYD'S
(2) STARR MANAGING AGENTS LIMITED (trading as Syndicate CVS 1919)

Claimants/ Applicants

- and –

WEYERHAEUSER COMPANY
(A company incorporated in Washington State, USA)

Defendants/ Respondents

- -
- -

Richard Lord QC and Harry Matovu QC (instructed by **Browne Jacobson LLP**) for the **Claimants**
John Lockey QC and Jeremy Brier (instructed by **Addleshaw Goddard LLP**) for the **Defendants**

Hearing dates: 16-17 September 2019

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JUDGMENT

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version may be treated as authentic

MR JUSTICE ROBIN KNOWLES CBE

Mr Justice Robin Knowles:

Introduction

1. Weyerhaeuser is a wood products manufacturer based in Seattle. Its products include joists manufactured for use in residential homes. Weyerhaeuser maintains liability insurance. This includes an excess liability programme, placed in the London Market and taking the form of a tower of excess liability cover. The Claimants ("the Insurers") are liability insurers within that programme.

2. On 12 July 2017, Weyerhaeuser gave notice to its liability insurers of claims made against it in the USA in respect of allegedly faulty joists installed in newly-built residential homes.

The Lead Underlying Policy

3. The Lead Underlying Policy on Weyerhaeuser's excess liability programme for the 2016/17 year was issued by AIG Lex-London ("the Lead Underlying Policy"). This contains three material endorsements.

4. The first, Endorsement 7, provides for all disputes arising out of or relating to the Lead Underlying Policy to be determined in London under the Arbitration Act 1996.

5. The second, Endorsement 8, is in these terms:

> "It is hereby agreed that notwithstanding anything to the contrary in the followed policy, this Policy and any dispute, controversy, or claim arising out of or relating to this Policy, shall be governed by and construed in accordance with the substantive internal law (i.e. excluding procedural and choice-of-law rules) of the State of Washington, except insofar as such law (1) may prohibit payment in respect of punitive damages hereunder: (2) pertain to regulation under Washington Insurance Law, or regulations issued by the Insurance Department of the State of Washington pursuant thereto, applying to insurers doing insurance business, or issuance, delivery or procurement of policies of insurance, within the State of Washington or as respect risks or insured entities situated in the State of Washington; or (3) are inconsistent with any provision of this Policy; provided, however, that the provisions, stipulations, exclusions and conditions of this Policy are to be construed in an even handed fashion as between the Insured and The Company; where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions (without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favour of either the Insured or The Company or reference to parol or other extrinsic evidence). Insofar as the substantive internal law of Washington is inapplicable as provided herein or otherwise, and as respects arbitration procedure, the internal laws of England and Wales apply."

6. The third, Endorsement 9, is a Service of Suit endorsement, providing as follows:

> "Solely for the purpose of effectuating arbitration, in the event of the failure of the Company to pay any amount claimed to be due hereunder, the Company, at the request of the Insured, will submit to the jurisdiction of any court of competent jurisdiction within the United States …."

The Policy

7. Weyerhaeuser's policy with the Insurers ("the Policy") provides:

> "This Following Form Excess Liability Policy has been issued on the basis that it is following the same terms, definitions, exclusions and conditions (except to the extent inconsistent with this Policy) as are, at inception hereof, contained in the Lead Underlying Policy…"
>
> "CHOICE OF LAW
>
> AND JURISDICTION: NMA 1998 Service of Suit Clause (USA) (amended), as attached.
>
> As per Lead Underlying Policy".

8. An "Insuring Agreements" clause of the Policy provides as follows:

> "The [Insurers] agrees that, except as may otherwise be endorsed to this Policy, this Policy will follow:
>
> 1. the same terms, definitions, exclusions and conditions as are, at inception hereof, contained in the Lead Underlying Policy ...".

9. The NMA 1998 Service of Suit clause (USA) as amended is set out in the Policy. It is not in the same terms as Endorsement 9 to the Lead Underlying Policy. It does not include the words "solely for the purposes of effectuating arbitration" which appear in Endorsement 9 to the Lead Underlying Policy. It provides as follows:

> "It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States.
>
> It is further agreed … that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal …".

Proceedings in the US and in England & Wales

10. On 20 April 2018, Weyerhaeuser filed proceedings ("the First US Proceedings") in the US District Court (Western District of Washington at Seattle) ("the US District Court") for a declaratory judgment in respect of certain of its insurance excess policies in the tower of excess liability, including the Policy. Weyerhaeuser sought, among other things, a declaration that there is no valid arbitration agreement applicable to any coverage disputes between itself and various defendant insurers (including the Insurers) and that the US District Court is the appropriate forum for any such disputes.

11. On 30 April 2018, XL Catlin, another insurer participating in the tower, applied to the English Commercial Court for an anti-suit injunction restraining Weyerhaeuser from pursuing litigation before the US District Court rather than arbitration. An interim anti-suit injunction was made against Weyerhaeuser on 3 May 2018.

12. On 7 May 2018, Weyerhaeuser sought and obtained a temporary restraining order (a "TRO") from the US District Court in the First US Proceedings restraining certain insurers (including the Insurers, but not including XL Catlin) from seeking to obtain an anti-suit injunction from the English Commercial Court.

13. On 21 May 2018, the TRO obtained from the US District Court on 7 May 2018 in the First US Proceedings became a Preliminary Injunction. The Preliminary Injunction prevented the Insurers "from instituting or joining in any action, in any other forum, aimed at securing a determination on the issue whether Weyerhaeuser is required [under the Policy], to arbitrate disputes regarding coverage under those policies."

14. On 30 August 2018, Weyerhaeuser filed a motion for summary judgment against the defendants in the First US Proceedings (other than XL Catlin). On 19 November 2018, the defendants other than XL Catlin filed briefs in opposition to Weyerhaeuser's motion. The Insurers filed their own brief, supporting the case made in the other defendants' brief. On 30 November 2018 Weyerhaeuser filed a reply brief.

15. On 21 December 2018, I handed down judgment in the Commercial Court in England & Wales Catlin Syndicate (underwriting as XL Catlin Syndicate 2003) v Weyerhaeuser Co [2018] EWHC 3609 (Comm) and granted XL Catlin's application for a permanent anti-suit injunction against Weyerhaeuser ("the XL Judgment").

16. In January 2019, the defendants in the First US Proceedings (including the Insurers) applied for permission to file further briefs, in order to argue that the XL Judgment created a collateral estoppel against Weyerhaeuser in the First US Proceedings. Additional briefs followed.

17. In the event, the US District Court did not reach a decision on Weyerhaeuser's motion for summary judgment in the First US Proceedings. Instead, on 22 July 2019, the Honourable James L. Robart, US District Judge, ordered the parties to file written submissions within 7 days to show cause why Weyerhaeuser's claim should not be dismissed as "non-justiciable" on the ground that an "actual controversy" was required for a declaratory judgment. Weyerhaeuser and the defendants filed their responses on 29 July 2019. A hearing was fixed for 13 August 2019.

18. The day before, on 12 August 2019, Weyerhaeuser filed a substantive coverage claim against the Insurers in the King County Superior Court, a state court ("the Second US Proceedings"). Later on the same day, Weyerhaeuser filed a motion for a TRO against the Insurers in relation to this claim.

19. On 13 August 2019, Judge Robart heard argument on the issue of whether the First US Proceedings should be dismissed as non-justiciable. Judgment was reserved.

20. On the same day, the Insurers filed a motion to remove the Second US Proceedings from the state court to the US District Court. The next day, the Insurers filed a motion with the US District Court in the Second US Proceedings to stay those proceedings until after the US District Court had ruled on whether the First US Proceedings were non-justiciable.

21. On Friday 16 August 2019, the US District Court (Judge Robart) dismissed Weyerhaeuser's claim in the First US Proceedings, on the basis that the claims in those proceedings were non-justiciable.

22. Weyerhaeuser's US counsel applied for a TRO in the Second US Proceedings. Freed from the First US Proceedings, and the Preliminary Injunction in those proceedings, the Insurers applied the same day to the English court for an interim anti-suit injunction against Weyerhaeuser. The Insurers appeared on a "without notice" basis before the English Court that evening, 16 August 2019.

23. An interim anti-suit injunction was granted by the English Court (Snowden J) against Weyerhaeuser that evening (London time). A TRO was made a few hours later by the US District Court (the Honourable Robert S. Lasnik, US District Judge) in the Second US Proceedings. This ordered that the Insurers were "prohibited from seeking, obtaining, pursuing, or enforcing an injunction against the proceedings in the matter during the term of this Order".

24. The TRO ordered that the parties appear on 28 August 2019 before the US District Court to address whether the TRO should become a Preliminary Injunction. On 27 August 2019, the Insurers filed a motion dated 26 August 2019 requesting the US District Court to lift the TRO, to decline to convert the TRO into a Preliminary Injunction and to dismiss the Second US Proceedings "based on jurisdiction and collateral estoppel grounds". In the motion the Insurers requested in the alternative that the US Court stay the Second US Proceedings pending resolution of the dispute in the English Court.

25. Later on 29 August 2019, the US District Court (Judge Lasnik) converted the TRO into a Preliminary Injunction. Judge Lasnik adjourned the balance of the Insurers' Motion of 27 August 2019 to a hearing which was listed for 20 September 2019.

The present hearing

26. After an initial hearing before Phillips J, the question whether the interim anti-suit injunction against Weyerhaeuser should continue came before me on Monday 16 September 2019.

27. Before argument was complete it was established that Judge Lasnik had issued an order on Friday 13 September 2019 that all deadlines in the Second US Proceedings were "stayed … pending the resolution of the matter of the English Injunction".

28. I wish to record that I value and respect this course taken by Judge Lasnik. It is an example of a decision that helps the courts of the UK and the US ensure the orderly progress of matters that, as here, have come before them both.

Should the English Court reach a decision on the issue?

29. The interim anti-suit injunction, and its continuation, rests on a basis of holding the parties to their agreement to arbitrate rather than litigate, if that is what they agreed. It makes requirements of one of the parties, and not of any court.

30. Weyerhaeuser submits that it is for the US District Court to decide the issue of whether its claim against the Insurers should be resolved by litigation (in the US courts) or by arbitration.

31. First, Weyerhaeuser argues that the issue is already before the US District Court and has been since the commencement of the First US Proceedings in May 2018. It adds that both parties have spent considerable time and money developing their arguments in the First and Second US Proceedings.

32. The chapter that was the First US Proceedings ended with dismissal without a decision on the issue. The issue is now before the English Court as well as the US Court. The important thing is that it needs to be decided and has not yet been decided.

33. Both the US Court and the English Court will have experience of deciding this type of issue in a context such as the present. It is to be hoped that both courts would reach the same conclusion. In all the circumstances I do not find Weyerhaeuser's first argument persuasive.

34. Weyerhaeuser argues secondly that the Insurers have acknowledged, and submitted to, the jurisdiction of the US District Court to decide the issue. Weyerhaeuser highlights in particular the Insurers' actions in filing the Motion on 27 August 2019 in the Second US Proceedings, along with substantial evidence, and attending at the hearing before Judge Lasnik on 28 August 2019 to argue the issue. Other examples are given, and I have considered each of them.

35. Weyerhaeuser develops this theme by pointing out that the Insurers have advanced argument to the US District Court, and by reference to Washington State law, on why the US District Court should find that the Lead Underlying Policy is not in conflict with the Policy, that the XL Judgment gives rise to a collateral estoppel binding Weyerhaeuser on the issue, that Weyerhaeuser's claim should be stayed in favour of arbitration, and that extrinsic evidence of the Insurers' alleged subjective intention when agreeing the Policy should be considered and should lead to an order for "reformation" (or rectification) of the Policy.

36. However, it has in my judgment been clear to all parties at all times that the Insurers were not departing from their primary position that the issue should be decided by the

English Court. It is true that the Insurers could have chosen to argue only that the English Court, not the US Court, should decide the issue and have left it at that before the US District Court, as Weyerhaeuser points out. But that would have left the Insurers exposed on the issue.

37. As a further overall argument Weyerhaeuser argues that comity, as well as fairness, now demands that the US District Proceedings be allowed to run their course.

38. I respectfully disagree. The parties have between them ended up involving the Courts of two jurisdictions. In my judgment in the present case nothing has happened that prevents the Insurers from asking this Court to reach a decision on the issue. As I have said a decision on the issue is needed. To reach a decision here neither offends comity nor principles of fairness.

39. Weyerhaeuser added the argument that the terms of the Service of Suit clause in the Policy showed that it was for the US court to determine the issue. In my judgment this argument depends on the role and meaning of the Service of Suit clause in the Policy. As will be apparent from the next section I do not consider the Service of Suit clause is to the effect contended.

Interpretation and incorporation

40. It is common ground that the central question is one of interpretation: whether, on a true interpretation of the Policy, the Service of Suit clause entitles Weyerhaeuser to pursue its substantive claim against the Insurers in the US District Court or whether Weyerhaeuser is compelled to arbitrate. This requires consideration of whether the arbitration agreement in Endorsement 7 to the Lead Underlying Policy is incorporated into the Policy.

41. The first thing to say is that the parties each urged that their (different) answer to the issue would be the same under both English law and Washington State law.

42. This was unsurprising given the relevant principles of interpretation under Washington State law advanced by Weyerhaeuser. These were summarised as follows by Weyerhaeuser's leading counsel, Mr John Lockey QC (appearing with Mr Jeremy Brier): (a) Washington State law begins with the "plain language" of the policy and enforces the contract as written; (b) insurance contracts are interpreted as they would be understood by the average person purchasing insurance; (c) this is an "objective" approach and evidence as to subjective intent is inadmissible unless such intent was communicated; and (d) ambiguity in an insurance policy is resolved in favour of the insured having regard to whether alternative or more precise language was available. For present purposes it is possible to accept that these or similar principles are recognisable or arguably recognisable in English law too.

43. Mr Lockey QC relies on the fact that there are no words of express incorporation of the arbitration clause. He submits that express reference to the arbitration clause is required before it will be taken to have been incorporated.

44. In my judgment the words "As per Lead Underlying Policy" alongside the reference to Jurisdiction are amply sufficient.

45. Mr Lockey QC argues that the reference to the Lead Underlying Policy concerns only choice of law and not jurisdiction. Thus, he argues, "Jurisdiction" is governed by the Service of Suit clause which the parties have chosen to incorporate, whilst "Choice of Law" is governed by the Lead Underlying Policy. He points out that the Service of Suit clause says nothing about choice of law but does provide that "Underwriters . . . will submit to the jurisdiction of a Court of competent jurisdiction within the United States", whilst the "Lead Underlying Policy" does contain a choice of law clause.

46. In my judgment the Policy refers to "Choice of Law and Jurisdiction" compendiously not separately. It may be noted that if compartmentalised in the order appearing in the Policy, "As per Lead Underlying Policy" would attach to "Jurisdiction" rather than "Choice of Law".

47. Mr Lockey QC argues that the incorporation of the arbitration agreement in Endorsement 7 of the Lead Underlying Policy would contradict the express terms of the Policy, namely the Service of Suit clause.

48. In my judgment Mr Lockey QC's argument would not give effect to the words "As per Lead Underlying Policy". By contrast all the wording used by the parties is given effect if it is recognised that the Service of Suit clause in the Policy is concerned with enforcement. Each case has to be considered by reference to its own particular wording and context, but it is not unusual for the role of a Service of Suit clause to centre on enforcement.

49. This is shown by the review of the subject area by Christopher Clarke J. in Ace Capital Limited v CMS Energy Corp [2009] 1 Lloyd's Rep. IR 414, and also by the XL Judgment (above). The present case is not one where the relevant wording has to be seen as in conflict. The decision in Oakley, Inc. v Executive Risk Specialty Ins. Co. 2011 WL 13137931 (C.D. Cal. Feb. 24 2011), relied on by Mr Parris (an expert whose report was submitted by Weyerhaeuser), where the policy wording and the circumstances were not identical to the present case, does not provide the answer to the present case.

50. Mr Lockey QC attaches significance to the fact that (in contrast to Endorsement 9 of the Lead Underlying Policy) the Service of Suit clause in the Policy does not contain the introductory words: "Solely for the purpose of effectuating arbitration…".

51. This point of difference requires the Service of Suit clause in the Policy to be interpreted on its own terms, and as part of the wording of the Policy as a whole including the wording "As per Lead Underlying Policy". The conclusion that Endorsement 7 of the Lead Underlying Policy (dealing with jurisdiction) is applied to the Policy is not disturbed by the presence or absence of the introductory words to the Service of Suit clause in the Policy.

52. Mr Lockey QC argues that the use of a different Service of Suit clause in the Policy from that used in the Lead Underlying Policy is a plain indication that the parties did not intend to incorporate the arbitration agreement in Endorsement 7 in the Lead Underlying Policy.

53. In my judgment it does not follow at all that by using a different Service of Suit clause (Endorsement 9 in the Lead Underlying Policy) the parties did not intend to incorporate Endorsement 7 from the Lead Underlying Policy when providing "As per Lead Underlying Policy".

54. Mr Lockey QC also developed an argument to the effect that the Service of Suit clause attached to the Policy had been used to effect service and that as a result its provisions have engaged so as to give jurisdiction to the US Courts. I cannot accept that that follows, where (as I have held) there has been no submission to the jurisdiction and the Service of Suit clause attached to the Policy is concerned with enforcement.

55. Mr Lockey QC argued that, as a starting point, any Court should have in mind that as a matter of policy, Washington State law does not favour arbitration in insurance coverage disputes. I note that Mr Harry Matovu QC, joint leading counsel for the Insurers, highlighted expert evidence to the effect that there was also a strong pro arbitration policy as regards international arbitration. But even if I take Mr Lockey's point into account, and leave Mr Matovu's to one side, it does not reveal a different answer to the question, which is a question about what the parties agreed and one that in my judgment admits of a clear answer.

Other matters

56. At the hearing before the US District Court on 28 August, counsel for the Insurers (Mr Scheer) told the US District Court that if the Preliminary Injunction was made or the TRO was continued pending a decision on the Preliminary Injunction, the Insurers would abide by the terms of the relevant order and their English counsel would not participate when the UK Court was next due to consider the anti-suit injunction. The morning after the hearing, but prior to the judgment, the Insurers' US counsel wrote a corrective letter to Judge Lasnik.

57. I have, as requested by Weyerhaeuser, considered this episode but reached the view that it does not affect my conclusions. As Mr Richard Lord QC, joint leading counsel for the Insurers with Mr Matovu QC, contended, the episode had no material effect and there was no bad faith involved.

58. I should add that Weyerhaeuser also contended that it had not been validly served with the current proceedings before the English Court. As I understood it, it was not suggested that this contention produced a different answer on the substance of the issue. I will address any consequences when this decision is handed down.

Conclusion

59. I am satisfied to a high degree of probability that the parties have agreed to submit their dispute to arbitration. In my judgment an interim anti suit injunction should continue, unless Weyerhaeuser is ready to provide suitable undertakings to this Court to equivalent effect. This holds Weyerhaeuser to its apparent agreement to arbitrate rather than litigate.

60. Although fully argued, this was an interim hearing. This is not the trial of the litigation and it is open to the parties to take the issue to trial and to a final decision.

61. However, the parties are significant and experienced businesses. It is a matter for them but in light of this decision they may be able to agree that a trial of the issue is not useful and that it is instead sensible to proceed to arbitration.