TRANSCRIPT OF PROCEEDINGS

Ref. CL-2018-000706
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IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

7 Rolls Buildings
Holborn

Before MR JUSTICE HENSHAW

IN THE MATTER OF

AEGEAN BALTIC BANK S.A.

- v -

RENZLOR SHIPPING LIMITED AND OTHERS

MR PETER MACDONALD EGGERS QC appeared for the claimant
MR SOCRATES PAPADOPOULOS appeared on behalf of the defendants
MR STEPHEN KENNY QC appeared for the applicant Axa XL

JUDGMENT
29th SEPTEMBER 2020
(AS APPROVED)

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JUSTICE HENSHAW:

1. The intended intervenor, Axa XL, applies to be joined to these proceedings pursuant to CPR 19.2 (2)(b) and for the reasons I am about to give, I have decided not to accede to that application.

Background

2. The background is set out in the evidence and skeleton arguments, but in order to give a short summary I shall draw from the precis given in paragraph 3 of the witness statement of Axa's solicitor, Alexander John Kemp, a partner in Holman Fenwick Willan LLP in support of the application.

3. The claimant bank lent money to the first defendant ship owner. The loan is secured by a corporate guarantee given by the second defendant manager of the vessel and a personal guarantee given by the third defendant, the managing director of the second defendant.

4. The ship owner insured the ship for hull and machinery or "H&M" risks across two markets, the Italian leader Generali taking 20 per cent, the London Lloyd's market followers 80 per cent. The claimant bank is the assignee and loss payee under the two policies.

5. The vessel suffered a casualty in 2015. Owners claimed for a constructive total loss or "CTL". The bank, exercising its rights as assignee, settled with Generali on a partial loss basis, Generali paying 20 per cent of the agreed partial loss amount, having disputed liability for a CTL.

6. The position under the following market remains unresolved even now five years after the casualty. Axa and the other Lloyd's followers have a 'follow the settlements' clause in their policy, under which they must follow the leader "*in respect of the settlement of claims*." I shall refer to this using the shorthand term "follow clause". They say that they must follow the Generali settlement, and pay 80 per cent of the partial loss amount settled as to 20 per cent by Generali; but no more. Alternatively they have various defences to the claim.

7. The owners were unhappy with the claimant bank's settlement with the Italian leader Generali. They launched what Mr Kemp calls "*Alexandros T*"-type criminal proceedings in Greece, prosecuting the individuals at the bank and the Italian leader who signed the settlement and paid the bank. Axa fears the same may happen to the Lloyd's following market if they settle for any less than the owners think they should.

8. In this present action, the bank has sued owners and their guarantors under the loan. In response, owners say the bank settled too cheaply with Generali and failed to recover anything from the Lloyd's following insurers. The owners also assert, Mr Kemp says, that the allegedly low settlement with Generali means that any settlement with Lloyd's insurers might now also be too low because of the follow clause.

9. The case is listed for trial over five or six days commencing on the 19th October 2020, i.e. three weeks from today.

10. Amidst all of this the London followers have hitherto been on the sidelines, with no proceedings initiated against them by anyone, and having already made an offer to pay their 80 per cent share of the partial loss of the amount agreed by the Italian leader, though the nature and details of that offer are subject to some dispute.

11. The bank has separately sued on its Mortgages Interest Insurance or MII in this court. In mid July 2020 and apparently without warning, the MII insurers served the Lloyd's H&M underwriters (in other words the applicants) with a draft Part 20 claim for a contribution in the event that the MII insurers are liable to the bank. Axa says that would bring the Lloyd's market followers into litigation in which the follow clause (and also an issue relating to the loss payee under the policy) would be litigated, but in the absence of the owners. The MII litigation is at a fairly early stage. Statements of case and further information were served between February and May 2020.

12. This development is what has apparently triggered the current application. Axa submits that it would be better for the follow clause issue to be litigated between the parties who are either privy to or assignees of the contract containing the follow clause, i.e. the applicants as insurers, the owners as assured and the bank as an assignee. It says that is preferable to the issue being left to be resolved in the MII proceedings, which will take longer and to which the present defendants are not parties.

13. More specifically, Axa says if the follow clause issue has to be resolved in the MII proceedings, it would ask for it to be resolved as a preliminary issue. However, Axa will still have to plead its case first, which in turn means putting forward all other available arguments. Axa says that would involve a colossal casualty investigation, which might well involve questions about whether any sufficient explanation exists for ingress of the large amount of water into the engine room that caused the loss of the vessel. Those types of issues have hitherto been dealt with by Generali as leader, rather than by the following market. By contrast, if the follow clause issue is decided now in the present proceedings in Axa's favour, then in reality Axa says the MII insurers will have to accept the outcome, and so multiplicity of proceedings will have been avoided as required by section 49(2)(b) of the Supreme Court Act 1981.

CPR 19.2(2)

14. CPR 19.2(2)(b) provides that the court may order a person to be added as a new party if there is an issue involving the new party and an existing party which is connected to the matters in dispute in the proceedings, and it is desirable to add the new party so that the court can resolve that issue. It contrasts with CPR 19.2(2)(a), which applies where "*It is desirable to add the new party so that the court can resolve all matters in dispute in the proceedings*." Thus limb (a) is focused on existing issues, whereas limb (b) relates to an issue between the new party and an existing party that is "*connected to*" the matters in dispute in existing proceedings.

15. CPR 19.4(1) and (2)(b) provide that (1) "*the courts permission is required to remove, add or substitute a party, unless the claim form has not been served*" and (2) "*an application for permission under paragraph (1) may be made by … (b) a person who wishes to become a party*."

16. The claimant bank submits that CPR 19.2.(2)(b) requires in effect the issue between the new party and an existing party already to be an issue in the existing proceedings. That is because the claimant says joinder is possible only if the new party could be affected by the outcome of the existing proceedings. By definition existing proceedings would not bind a non party by way of issue estoppel. They may in practice affect a non parties' rights, such as where A sues B in circumstances where if A succeeds, B would have a claim over against C.

17. In *Davies v The Department of Trade and Industry* [2006] EWCA Civ 1360, Waller LJ described CPR 19.2 as providing a power available to the court *"to enable parties who may be affected by a finding in any proceedings to be joined.*" In *Re Pablo Star Limited* [2017] EWCA Civ 1768, Sir Terence Everton MR said one of the two (inaudible) in deciding whether to add a new party was whether their rights may be affected by a decision in the case.

18. Snowden J in *PDVSA v Clyde and Co.* [2020] EWHC 2322(Ch) noted, however, in the context of a CPR 19.2(a) case, that those comments in *Re Pablo Star* were intended as guidance rather than a reformulation of the test. Snowden J considered that though the new party's rights would usually be affected by a decision in the existing case, 19.2(2) was wide enough to apply where for some other reason the new party's presence before the court was desirable in the broader interests of justice and the overriding objective, so that the court can resolve all matters in dispute in the proceedings between the existing parties.

19. By similar logic, CPR 19.2(2)(b) can apply where it is desirable to add the new party in order to resolve the issue between the new party and an existing party, being connected to an issue already in dispute between the existing parties, whether or not a decision on the existing issues would affect the new party's rights. Indeed, since that limb, unlike limb (a), can apply to an issue not already an issue between the existing parties, it is to be expected that resolution of the existing issues might not affect the new party's rights. Reviewing the authorities in *Gazprom v DDI Holdings* [2018] EWHC 3724 (Comm.) at paragraph 13, Peter Macdonald Eggers QC sitting as a Deputy High Court Judge said the provisions do not impose any restrictions on the nature of the new party's interests in the proceedings or their subject matter. He noted that for example in *Re L B Holdings Intermediate 2 Ltd* [2018] EWHC 2017 Ch, at paragraph 10, it was said by Mann J that an indirect economic interest of the new party may be sufficient to satisfy the requirements of the rule. Avoiding multiplicity of proceedings was one factor which might favour adding a new party: see the decision of David Richards J in *Heis v MF Global* [2012] EWHC 3415 Ch, paragraphs 28 to 31.

20. Having said all of that, the nature of the existing issues will still be very relevant in deciding whether the degree of connection to them that the proposed new issue has makes it desirable to add the new party to the proceedings in order to resolve the new issue.

Issues between the parties

21. Here it is accepted that there is an issue between Axa and the claimant bank, and possibly also the defendants, as to whether the Lloyd's liability for the claim is limited, pursuant to the follow clause, to 80 per cent of the partial loss settled as to 20 per cent by Generali as leader. That is illustrated by the fact that the point is in issue in the MII proceedings to which the MII insurers seek to join Axa. The MII insurers contend *inter alia*

that the Lloyd's H&M insurers were not liable to pay more than 80 per cent of a partial loss. The present claimant has in its Reply in the MII proceedings denied that, saying:

> "As a matter of law and or of the operation of the terms of the Lloyd's Policy (in particular the Follow Clause) the defence which was available to Generali under Italian law concerning the late tender of a notice of abandonment is not available to the Lloyd's H&M underwriters under the Lloyd's Policy governed by English law. In support of this contention, the Claimant will rely to the extent necessary upon clauses 4(v) and 5 of the Generali Settlement Agreement, which respectively provided that Generali was contracting "*on its own behalf and not on behalf of the Lloyd's underwriters*" and that the Generali Settlement Agreement did not "*in any way affect*" the rights of the Claimant and or the Owners against the Lloyd's H&M underwriters."

22. In the present proceedings it is common ground, as set out in the Agreed List of Common Ground and Issues, dating from prior to the CMC in July 2019, that a full recovery for a constructive total loss under the H&M policies would exceed the outstanding indebtedness, and also that as of today a full recovery for a CTL under the Lloyd's policy would exceed the outstanding indebtedness.

23. It is also common ground according to that document that *"the Generali Settlement is not binding on the London Market, and the Claimant and/or the First Defendant are entitled to maintain the full value of the insurance claim against the London Market under the Lloyd's Policy."*

24. The defendant's Amended Defence of July 2019 alleges in paragraphs 29(a) and 29(b) that had the bank complied with its duties, then it would have obtained full policy values totalling USD $10.75m. That would have comprised $2.15m from Generali and $8.6m from Lloyd's insurers. Instead, it is said, the bank recovered under the Generali policy only $1.04m by settling on a partial loss basis, and has to date recovered nothing from the Lloyd's market. The first defendant claims damages and or that the claimant must account for the difference. The first defendant says it can set this difference off against the claimant's claim. It accepts that the claimant would then be entitled to keep any proceeds from the Lloyd's insurance, accounting to the first defendant for any excess over the unpaid bank debt. The first defendant adds that the defendants understand that the Lloyd's insurers have said they intend to follow the Generali settlement so that their maximum liability, absent fraud, will be $4.16m. The defendants do not however advance here any positive case that the Lloyd's insurers are or are not entitled to limit their loss in this way.

25. The bank's amended reply makes the point, among others, that the settlement with Generali was reasonable given the defendant's failure to serve a notice of abandonment that was valid under Italian law, and also that the Generali settlement preserved the rights of the claimant and or the first defendant to seek separate recovery from Lloyd's insurers. The claimant pleads that there has been no loss of rights against the Lloyd's insurers and that recovery under the Lloyd's policy remains possible.

26. The defendants in a Part 18 response of 6 September 2019 say, by way of apparent elaboration, that the claimants are in breach *inter alia* by:

> "…entering into a wholly unreasonable settlement with lead hull insurers in Italy, which due to the "follow clause" in the Lloyd's Policy, may hinder a full and proper recovery under the Lloyd's Policy. For the avoidance of doubt, the Defendant's position is that the London Underwriters remain obliged to provide a full recovery under the Lloyd's Policy, including the Increased Value policy, notwithstanding the follow clause and the settlement under the Camogli Policy. However, in the event that the "follow clause" results in less than a full recovery, then the Claimant's settlement under the Camogli policy will have caused loss under the Lloyd's Policy as well."

I pause to explain that the references to the Camogli policy are to the policy entered into by Generali on Camogli policy terms.

27. The defendants (who support Axa's application) and Axa accordingly argue that the follow clause issue is connected to the present proceedings, because it affects "*whether and to what extent the Claimant Bank breached its duties to the Defendants, and the quantum of loss the Defendants suffered*".

28. On the other hand, on the existing statements of case neither party is advancing any case to the effect that the Lloyd's insurers are entitled to limit their liability by reference to the Generali settlement. Moreover, the claimant bank has not defined its claim by reference to any amount recovered or recoverable from the Lloyd's insurance: it simply claims the debt said to be due from the defendants, and says any right of recovery against the Lloyd's insurers remains available. It is thus hard to see exactly how the follow clause will arise in the present proceedings absent intervention by Axa. As a result, it is fair to assume that all parties to the existing proceedings have prepared for trial, now three weeks away, on the basis that the follow clause point forms no part of the issues to be determined.

29. As a result, it seems to me that there is a connection in a very broad sense between the follow clause issue and the present proceedings. However, the connection is limited to the extent that the outcome of the existing proceedings will not on any view affect Axa's rights and it is hard to see how the follow clause issue will arise in the present proceedings absent intervention by Axa.

Desirability of Joinder

30. Turning to the send limb of CPR 19.2(b), I have already noted Axa's point that resolution of the follow clause issue now may reduce multiplicity of proceedings and give rise to a ruling binding on the bank and the defendants as parties to the contract of insurance.
31. At the same time, considerations of practical ability and fairness are relevant, given that the parties to the present proceedings are ready for imminent trial. The question arises whether intervention by Axa in order to resolve the follow clause issue as between the claimant, the defendant and Axa could properly and fairly be accommodated now or whether, as the claimant suggests, it should be left to Axa to resolve the issue in the MII proceedings, joining the present defendants to those proceedings if necessary, or by separate proceedings.

32. Axa and the defendant say the issues can reasonably be accommodated within the present proceedings. Since the proceedings were set down for a five to six day trial, the scope of the evidence has reduced because the defendants are currently prevented from

relying on expert and factual witnesses, having failed to comply with an 'unless' order. Axa also questioned whether the defendants would take part at all, although counsel for the defendants in oral argument indicated that it was currently intended that they would.

33. Axa and the defendant say the follow clause and assignment issues (I shall come later to the assignment issue) are issues of construction requiring no expert evidence. In addition, the claimant and the Lloyd's underwriters have orally exchanged leading counsel's Opinions on the follow clause issue, and should therefore already be aware of each other's positions. It is said that the respective arguments have thus already been researched and honed, enabling the issue to be resolved in a focussed and streamlined manner. I have not seen the Opinions, and counsel for the claimant indicated that his in fact pre-dated the Generali settlement.

34. In his witness statement in opposition, the claimant's legal advisor Dr George Panagopoulos (previously a partner at Reed Smith LLP) says the follow the settlements clause issue raises questions as to the characterisation of and interaction between the relevant insurance policies (one governed by Italian law and the other by English law) as well as questions as to the effect of the Generali settlement (a contract governed by Italian law). Thus he says the question of Generali's agency (if any, and if relevant) in relation to the Lloyd's H&M underwriters would need to be defined in the parties' pleaded cases by reference to the relevant law.

35. The claimants' Reply in the MII proceedings, which I have already quoted, does not expressly refer to any issue of Italian law, and Axa submits that there could be no such issue: the follow clause is a standard provision of a Lloyd's policy, governed by English law. The policy is entirely freestanding, unlike for example a case of subscription to a single slip containing a follow clause where the first subscription of the leader can perhaps be understood in terms of an offer to act as agent for the following market. The Generali policy and later settlement cannot, Axa says, be relevant to the construction of the Lloyd's policy clause. Indeed, some of the scratches to the Lloyd's slip came before and some after the cover note for the Generali policy. It would be absurd if the participants had contracted on different terms, or to construe the Lloyd's policy by reference to a Generali policy not yet concluded.

36. I would accept that the point could turn out to be a simple argument about the construction of an English law policy. However I do not feel confident that that will be the position.

37. The follow clause in the Lloyd's policy said:

> "All underwriters hereunder agree to follow the leading underwriter Generali Assicurazione in respect of the settlement of claims excluding ex gratia claims…
>
> It is hereby understood and agreed that – irrespective of its share of the risk – the leader has the right as claims leader to decide in accordance with the Policy conditions in all respects – and on a 100 per cent basis – on behalf of all Co-Insurers all matters relating to the handling, adjusting and settling any claim made under this Policy, including but not limited to appointment of experts, issuance of guarantees, payments, payments on account, settlements etc."

38. The cover note for the Generali policy said in Article 12 that *"all matter [sic] concerning the policy will be dealt with only with the Leading Underwriters who shall in turn advise Co-Insurers"*; and that the following underwriters *"are to accept as valid and binding all ordinary acts made by Leading Underwriters for common interest*." Some provisions of the Generali policy are governed by English law, but Article 12 is not one of them.

39. The claimant's settlement with Generali was, I am told, not *ex gratia*, but it did on the other hand say that Generali was contracting "*on its own behalf and no on behalf of the Lloyd's underwriters*" and that the Generali settlement agreement did not "*in any way affect*" the rights of the claimant and or the owners against the Lloyd's H&M underwriters.

40. Thus, the Generali settlement made very clear that it did not seek to buy in the following market. The claimant suggests there was a particular reason for that, namely that the lateness of the notice of abandonment (I think about 10 months after the loss) resulted under Italian law in Generali not being liable on a CTL basis. The position under English law, bearing in mind the Court of Appeal's decision in *The Renos* [2018] EWCA Civ 230 (reversed on other grounds) is less clear cut. The Generali policy was, in relevant part, governed by Italian law, whereas the Lloyd's policy is governed by English law.

41. It might be thought counterintuitive that if Generali entered into a settlement on particular terms for a specific Italian law reason of that kind, then it would necessarily limit the liability of a following market contracting under a different system of law. Of course I make no decision on the point, even on a preliminary basis, but the particular circumstances here may give rise to questions about the impact of the Generali policy and settlement on the interpretation, or at least the application, of the follow clause in the Lloyd's policy.

42. It cannot be ruled out, at this stage, that the Camogli terms on which the Generali policy was placed could form part of the factual matrix, if at the time the Lloyd's policy was placed it was known that the leader was to be going to be contracting on those terms. It might further be argued that the reference in the Lloyd's follow clause to the leader deciding in accordance with the "*Policy conditions*" refers to the Camogli terms, which in turn refer to the concept of an "*ordinary act made…for common interest*" under the lead policy. Read alongside the Lloyd's wording about the leader having the "*right*" to bind the following market under the policy terms, the question may arise: if the leader, operating under the Camogli terms, makes a settlement for its own private reasons, which is expressly not made for the common interest, has it or has it not exercised the "*right*" referred to in the London policy? If the answer is no, then the question will arise as to whether that is what has in fact occurred under the Generali settlement, such that it does not engage the Lloyd's follow clause.

43. Thus, in addition to questions of interpretation of the follow clause, the application of that clause could necessitate consideration of whether the Generali settlement should, given its terms and against the backdrop of the Generali policy, be regarded as a settlement automatically binding the following market, and also limits the following markets liability.

44. All of those may turn out to be bad points. However, I do not consider that they can be so readily dismissed as to enable the court simply to assume that the follow clause issue would not involve any consideration of factual matrix evidence or of Italian law. I do not think I can therefore discount Dr Panagopoulos's statement, in his witness statement, that the

claimant bank has certainly not led in these proceedings the factual and expert evidence which it would have made if litigating the follow clause issue in the MII insurance proceedings.

45. Dr Panagopoulos also says there is not time in the next three weeks even to plead out and thereby define the issues that would arise in relation to this issue. Though there is some force in Axa's point that arguments about construction do not in general require to be pleaded, the potential complexities I have sought to outline indicate that some form of pleadings would be needed in this case in order for the parties properly to understand each other's positions. There is not nearly time now for this to happen in an orderly way, and then for the issues to be properly canvassed in the parties' skeleton arguments, even if it were to emerge that no factual or expert evidence were required. I bear in mind that the follow clause point is no mere detail: a considerable amount of money could ultimately turn on it.

46. Further, in considering the desirability of adding Axa at this stage it is also relevant to note the following three points:

i. To the extent that Axa's concern is to obtain a ruling binding on the defendants or indeed the bank, it would have been open to it to apply to be added at a much earlier stage. The evidence indicates that Axa has been aware of the present litigation since early 2019. The fact that no-one had until recently threatened litigation against it does not fully meet that point, because the pursuit of a claim under the Lloyd's policy must always have been in prospect.

ii. To the extent that Axa's concern relates to the prospective claim against it by MII insurers, it is questionable whether it really is desirable to enable Axa to seek to pre-empt that claim by having the issue resolved in short order in other proceedings to which the MII insurers are not party.

iii. To the extent that the defendants now say it would be desirable to joint Axa in order to litigate the following point, it is notable that the defendants have not at any previous stage sought to joint Axa or to advance any positive alternative case against the bank based on the follow clause.

47. For all these reasons, I do not consider that it would be desirable for Axa to be added as a party now in order for the follow clause issue to be determined at the trial due to commence in October. Nor do I consider that it would be just to adjourn the trial. That would be unfair for the claimant bank, which is ready for trial and which does not seek the resolution of the follow clause issue in these proceedings. It would also be unfair to other court users to adjourn the trial at this stage in order to accommodate the proposed intervention.

The loss payee issue

48. There is a second proposed intervention issue, namely whether by reason of the assignment to the claimant of the benefit of the insurance policies, the claimant is the correct

loss payee. I deal with this briefly since as I understand it, Axa sought the inclusion of this issue essentially as an adjunct to the follow clause issue.

49. The claimant is identified in each of the hull and machinery policies as the mortgage loss payee and assignee. It is therefore unclear what issue can really arise, although correspondence has failed to provide any clear confirmation from the defendants as to the position. I asked counsel for the defendants in oral argument what issue might arise. He indicated that the defendants may contend that the loss payee clause does not apply in circumstances where the claimant is in repudiatory breach of its duties to the defendant under the loan security document. I should say that I find it very difficult to see how any argument of that nature could affect the insurer's entitlement to follow the loss payee clause. In addition, counsel for the defendant said further points might arise following further study of the documents by the defendants' new legal team.

50. The alleged connection with the present proceedings is that if Axa were joined to resolve the follow clause issue, it would be appropriate to resolve any loss payee issue, so that Axa knew to whom to make payment.

51. Since I have decided not to add Axa as a party in order to resolve the follow clause issue, that point does not arise. In addition I am not persuaded that any issue about the loss payee clause has crystallised between Axa and the defendant, nor that it is sufficiently connected to the issues in the present proceedings to satisfy the first limb of CPR 19.2(b). Finally, the indication given by the defendant's counsel as to what issues might arise – whether or not those potential issues have any possible merit whatever – suggests that they could not be added at this late stage into the forthcoming trial.

52. Accordingly I would not add Axa to the proceedings for the purpose of resolving the loss payee issue, if such issue, exists either.

(There followed a discussion on costs – please see separate transcript)

We hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

This transcript has been approved by the Judge