Neutral Citation Number: [2014] EWCA Civ 1010

Case No: A3/2012/0368, A3/2012/0369, A3/2012/0370 & A3/2012/0801

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE BURTON
[2011] EWHC 3381 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18th July 2014

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE RIMER
- and –
THE RIGHT HONOURABLE LORD TOULSON

- - - - - - - - - - - - - - - - - - - -

Between :

STARLIGHT SHIPPING COMPANY	**Appellant/ Claimant**
- and -	
1) ALLIANZ MARINE & AVIATION VERSICHERUNGS AG **2) ROYAL & SUN ALLIANCE INSURANCE** **3) ASSICURAZIONI GERERALI SPA** **4) REMBRANDT INSURANCE CO LTD** **5) BRIT UW LTD (Sued on its own behalf and on behalf of all underwriting members of Lloyd's Syndicate 2987 for the 2006 Year of Account)** **6) NICHOLAS BURKINSHAW (Sued on his own behalf and on behalf of all underwriting members of Lloyd's Syndicate 2003 for the 2006 Year of Account)** **7) HISCOX DEDICATED CORPORATE MEMBER LTD (Sued on its own behalf and on behalf of all underwriting members of Lloyd's Syndicate 0033 for the 2006 Year of Account)** **8) HILL DICKINSON LLP** **9) HILL DICKINSON INTERNATIONAL** **10) MICHAEL FRANCIS MALLIN** **11) ALEXANDRA JULIA TYTHERIDGE** **12) MARIA MOISIDOU** **13) DANIEL MCCARTHY**	**Respondents /Defendants**

14) DAVE VALE
15) MARK WATTERS
16) SIMON LANGRIDGE
17) WILLIAM GRAHAM HENSMAN
18) KEITH RICHARD POTTER
19) STEPHEN BISHOP
20) RICHARD CHOWN
21) SIMON VINCENT STONEHOUSE
22) MARION SUSAN FRASER
23) DANIEL TONY DOBISZ
24) IAN JAMES HENSTRIDGE
25) BRENDAN ALLAN FLOOD
26) CHARLES TAYLOR ADJUSTING LIMITED
27) GORDON ELLIOT

-and-

OVERSEAS MARINE ENTERPRISE INC	**Third Party/ Appellant**
-and-	
1) BRIT UW LTD (On its own behalf and on behalf of all underwriting members of Lloyd's Syndicate 2987 for the 2006 Year of Account **2) NICHOLAS BURKINSHAW (On his own behalf of all underwriting members of Lloyd's Syndicate 2003 for the 2006 Year of Account)** **3) HISCOX DEDICATED CORPORATE MEMBER LIMITED (On its own behalf of all underwriting members of Lloyd's Syndicate 0033 for the 2006 Year of Account**	**2011 Folio 702 Respondents /Claimants**
- and -	
1) STARLIGHT SHIPPING COMPANY **2) OVERSEAS MARINE ENTERPRISES INC**	**Appellants/ Defendants**
-and-	
1) BRIT UW LTD (On its own behalf of all underwriting members of Lloyd's Syndicate 2987 for the 2006 Year of Account) **2) NICHOLAS BURKINSHAW (On his own behalf and on behalf of all underwriting member of Lloyd's Syndicate 2003 for the 2006 Year of Account)** **3) HISCOX DEDICATED CORPORATE MEMBER LIMITED (On its own behalf and on behalf of all underwriting members of Lloyd's Syndicate 0033 for the 2006 Year of Account)**	**2011 Folio 1043 Respondents /Claimants**
-and-	
1) IMPERIAL MARINE CO **2) BRISTOL MARINE CO** **3) CYCLONE MARITIME CO** **4) SEAGARDEN SHIPPING INC** **5) WAVE NAVIGATION INC**	**Appellants/ Defendants**

"ALEXANDROS T"

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The **Appellants did not attend the hearing**
Mr Mark Howard QC & Mr Tony Singla (instructed by **Clyde & Co LLP)** for the **1st – 4th Respondents**
Mr Steven Gee QC & Mr Tom Whitehead (instructed by **Norton Rose Fulbright LLP**) for the **5th - 7th Respondents**
Mr David Bailey QC & Mr Jocelin Gale (instructed by **Mayer Brown International LLP**) for the **8th-12th Defendants**
Hearing date: 1st July 2014
- -

Approved Judgment

Lord Justice Longmore:

1. This is the resumption of the appeal from Burton J in the Alexandros T [2012] 2 All ER (Comm) 608 granting summary judgment to the Company Market Insurers ("CMI") and the Lloyd's Market Insurers ("LMI") against the shipowners and associated companies (to whom I shall refer compendiously as "the owners") for declarations, damages and indemnities in respect of the owners' proceedings in Greece seeking damages from the insurers, despite proceedings for sums due under the relevant insurance policies being settled as long ago as December 2007 and January 2008. The owners' application to stay the proceedings failed before Burton J but, on appeal, this court stayed the English proceedings pursuant to Article 27 of Council Regulation 44/2001 (EC) and expressed no view about the correctness or otherwise of Burton J's decision to grant summary judgment. The Supreme Court lifted that stay and we accordingly proceed to decide the rest of the owners' appeal.

2. The underlying facts (including the nature of the Greek proceedings) are set out in paras 1-16 of my judgment reported at [2013] 1 All ER (Comm) 1297 supplemented, as necessary, by paras 1-20 of the judgment of Lord Clarke of Stone-Cum-Ebony JSC reported at [2014] 1 All ER (Comm) 337 and need not be repeated. But for ease of comprehension I will repeat the terms of the respective settlement agreements. In each of the agreements "the Assured" were defined as being "[OME] and Starlight … as Managers and/or Owners and/or Associated and/or Affiliated Companies for their respective rights and interests in the ship Alexandros T".

3. The CMI settlement agreement then provided:-

> "1. Each Underwriter agrees to pay on or before 18th January 2008 … their due proportions of the sum of US$16m … being 100% of their due proportions of the sum insured being 50% of the US$32m … without interest or costs.
>
> 2. The Assured and claimant agree to accept the EURO equivalent of each Underwriter's due proportion of US$16m … in full and final settlement of all and any claims it may have under Policy No 302/CF000220Z against the Underwriters in relation to the loss of "Alexandros T", including all claims for interest and costs (including in respect of all costs orders made to date in the proceedings) but without effect to any other insurance policy in which each Underwriter may be involved.
>
> 3. The Assured and claimant agree to Indemnify each Underwriter against any claim that might be brought against it by any of the Assured's or the claimant's associated companies or organisations or by any mortgagee in relation to the loss of "Alexandros T" or under Policy No 302/CF000220Z. …
>
> 4. Following the signing of this agreement, and in consideration of the promises herein, the claimant and the Underwriters will apply to stay the proceedings as against the Underwriters, the proceedings to be stayed for all purposes save for the purposes [of] carrying the terms agreed herein into effect, such stay to

> have effect from the first obtainable date after 27th December 2007.
>
> 5. Following the due and proper payment by the Underwriters of the amount specified in paragraph 1 above, the Assured and claimant and the Underwriters agree to file a consent order dismissing the proceedings, with no order as to costs.
>
> 6. This agreement is subject to English law and to the exclusive jurisdiction of the High Court in London."

4. The LMI settlement agreement provided in similar but not identical terms:-

> "2. The underwriters … agree to pay on or before 24th December 2007 … the sum of US$8m … being 100% of their due proportions of the sum insured being 25% of US$32m … without interest or costs …
>
> 3. The Assured and claimant agree to accept the EURO equivalent of US$8m … in full and final settlement of all and any claims it may have under Policy No … against the Underwriters signing below in relation to the loss of "Alexandros T"…
>
> 4. The Assured and claimant agree to indemnify the underwriters signing below against any claim that might be brought against them by any of the Assured's or the claimant's associated companies or organisations or by any mortgagee in relation to the loss of "Alexandros T" or under Policy No …
>
> 5. This agreement is subject to English law and the jurisdiction of the High Court of London."

5. The current position is that some submissions were made on the matters that remain in issue when the appeal was last before us. The owners have elected not to appear on the present occasion but to rely on their previous submissions together with certain matters raised in correspondence. CMI and LMI have both appeared by counsel and made oral submissions as have the 8th-12th defendants (to whom I refer as "the HD defendants").

6. As it seems to me, the following issues remain for determination:-

> 1) Whether the claims in the Greek proceedings fall within the settlement and the indemnity provisions of the Settlement Agreements;
>
> 2) Whether the claims in the Greek proceedings fall within Clause 6 (the exclusive jurisdiction clause) of the CMI Settlement Agreement and Clause 5 of the LMI Settlement Agreement;

3) Whether the claims in the Greek proceedings fall within the exclusive jurisdiction clause in the original insurance policies;

4) Whether the claims for damages for breach of the settlement provisions and the jurisdiction provisions infringe EU law;

5) Whether the claims for associated declarations infringe EU law;

6) Whether the insurers are entitled to summary judgment for damages for breach of the jurisdiction provisions; and

7) Whether the indemnity provisions apply given the nature of the allegations being made in the Greek proceedings and the stage at which those proceedings have reached.

Do the Greek claims fall within the settlement provision and the indemnity provision of the Settlement Agreements?

7. In one sense it could be said that the indemnity provision is somewhat wider than the settlement provision since in the settlement provision the owners agree to accept the relevant sums in full and final settlement of all and any claims the Assured and the claimant may have under the policy in relation to the loss of "Alexandros T", whereas in the indemnity provision the Assured and the claimant agree to indemnify underwriters against any claim that might be brought against them in relation to the loss of "Alexandros T" or under the policy. The Greek claims (however much the claims may be tortious or delictual rather than contractual) are clearly brought in relation to the loss of the "Alexandros T" and thus, on any view, fall within the indemnity provision. Do they also fall within the settlement provision?

8. In my opinion they do so fall partly because it is the obvious intention of the parties that the settlement provision and the indemnity provision should march together and complement one another, but also because, ever since the decision of the House of Lords in Fiona Trust v Privalov [2007] Bus L.R. 1719, fine distinctions between words such as "under" or "in relation to" should no longer be made, at any rate when one is construing arbitration clauses. Jurisdiction clauses are very similar to arbitration clauses (and, of course, appear in the Settlement Agreements with which this court is concerned); settlement clauses are analogous to both arbitration and jurisdiction clauses and should likewise be given a sensible commercial meaning; the words "full and final settlement" point to the intention of the parties that all claims in relation to the loss of the "Alexandros T" should be included in the settlement and the parties be able to continue their existence without being disturbed by further litigation in relation to that loss.

9. The owners submitted that the Fiona Trust principle was not universal and should not apply to settlement agreements. They relied on Barclays Bank Plc v Nylon Capital LLP [2011] EWCA Civ 826; [2012] Bus L.R. 542 in which Fiona Trust was distinguished. But that case was about a clause requiring an expert to determine the allocation of partnership profits; any other dispute would have to be determined by the English courts in any event. In these circumstances the rationale of Fiona Trust (that sensible businessmen would not want their disputes to be determined partly by

arbitration and partly by another tribunal such as the court) did not apply because the parties had expressly agreed that such a division was to occur. As Thomas LJ (as he then was) put it (para 28):-

> "In contradistinction expert determination clauses generally presuppose that the parties intended certain types of dispute to be resolved by expert determination and other types by the court."

No such presupposition applies in the present case.

10. It follows that the Greek proceedings fall within both the settlement provision and the indemnity provision and Burton J was right so to hold.

Do the Greek claims fall within the (exclusive) jurisdiction clauses in the Settlement Agreements?

11. Once one is satisfied that the Greek claims fall within the settlement and indemnity provisions of the Settlement Agreement, it must follow that the Greek claims fall within the exclusive jurisdiction clause of the CMI Settlement Agreement and also fall within the jurisdiction clause of the LMI Settlement Agreement. The Fiona Trust decision must apply to jurisdiction clauses just as much as arbitration clauses. The Greek claims thus should have been brought in England.

Do the Greek claims fall within the exclusive jurisdiction clauses in the original insurance policies issued by CMI and LMI?

12. Again the answer is that they do, however much the Greek claims may be tortious or delictual. As Lord Clarke explained in para 4 of his judgment each party to the policy agreed to submit to the exclusive jurisdiction of the courts of England and Wales. Indeed the owners proposed to amend their claim to allege that they had sustained losses beyond the measure of indemnity in the relevant policy relying on the very facts on which reliance is now placed in the Greek proceedings. The fact that these claims are not permissible in English law and that Tomlinson J refused permission to the owners to make that amendment for the reasons given in para 6 of Lord Clarke's judgment is nothing to the point because the owners had promised to submit to the exclusive jurisdiction of the English courts and thus promised not to bring claims in other courts where such claims might (or might not) succeed.

13. To the extent that persons other than the parties to the policies of insurance (or indeed, the settlement agreements) have brought claims in Greece those claims will not be caught by the jurisdiction clause in the policies (or the settlements). That, of course, is why the Settlement Agreements had to contain the indemnity clause, by which the parties to the Settlement Agreements agreed to indemnify underwriters in the event that parties other than the parties to the policies (and the Settlement Agreements) initiated proceedings against underwriters in relation to the loss of the "Alexandros T".

14. In these circumstances the underwriters have (as they were entitled to do) issued proceedings in England claiming (1) declarations that the bringing of the Greek proceedings was a breach of the release in the Settlement Agreements and (2)

damages for breach of the release in the Settlement Agreements and for breach of the jurisdiction clause in both the policies and the settlement agreements (as more fully described in para 18 of Lord Clarke's judgment).

Do the claims for damages infringe EU law?

15. The owners assert that these claims for damages interfere with the jurisdiction of the Greek court to determine its own jurisdiction and, if appropriate, the merits of the owners' claims. For this purpose they rely on Turner v Grovit [2004] 2 Lloyds Rep. 169. This reliance is, however, misplaced because Turner v Grovit related to anti-suit injunctions and no such injunction is claimed in the present case. The vice of anti-suit injunctions is that they render ineffective the mechanisms which the Jurisdiction and Judgments Regulation provides for dealing with lites alibi pendentes and related actions. One of those mechanisms is provided by Article 27 which requires any court other than the court first seised to stay proceedings involving the same cause of action. Our earlier decision did precisely that because we considered that the Greek proceedings did involve the same cause of action as the English proceedings but the Supreme Court has now held that we were wrong about that and has also refused a stay under Article 28. There is therefore no question of any interference with the jurisdiction of the Greek court.

16. The Greek court is free to consider the Greek claims; it will, of course, have to decide whether to recognise any judgment of the English court that the Greek claims fall within the terms of the Settlement Agreement and have therefore been released. It will also have to decide whether to recognise any judgment awarding damages for breach of the Settlement Agreements and the jurisdiction clauses in both the settlement agreements and the insurance policies. But that is not an interference with the jurisdiction of the Greek court but rather an acknowledgment of the Greek court's jurisdiction. In these circumstances there is no infringement of EU law, nor is there any need for a reference to the Court of Justice of the European Union despite the owners' repetition of their request for such a reference in their new solicitors' letter of 26th June 2014.

17. In fact the owners appear almost to recognise that this is the position since they expressly accept that the claim for an indemnity pursuant to the Settlement Agreements is not contrary to EU law (see their supplemental skeleton, para 48). That is plainly right (see also the observations of Lord Neuberger at para 132 of his judgment in the Supreme Court). But if the claims to an indemnity do not infringe EU law, it is very hard to see why claims to damages should infringe that law.

Do the claims for declarations infringe EU law?

18. The claims for declaratory relief are set out in para 18 of Lord Clarke's judgment. The CMI claim set out in sub-para. (a)(1)(i) has been abandoned but the other declarations are still being sought and the same principles and the same result must apply to these claims for declarations as to the claims for damages, namely that they do not infringe EU law. The LMI claim set out in sub-para. (a)(2)(i) has not been abandoned but in circumstances in which the Supreme Court has not thought it right to make a reference in respect of that claim it would obviously be inappropriate for this court to do so. The remaining claims for declarations by LMI are, like those of CMI, claims which do not infringe EU law.

Summary Judgment for damages (to be assessed) for breach of the jurisdiction provisions?

19. The question whether the owners are acting in breach of the jurisdiction provisions is a question of law. It is clear to me that they are and the judge was therefore right now to give judgment for damages to be assessed pursuant to CPR Part 24. Damages were awarded in similar circumstances in Ellerman Lines Ltd v Read [1928] 2 KB 144.

20. It is suggested by the owners that any claim for damages is premised on the assumption that the Greek claims would have failed on the merits if they had been advanced in England. But, quite apart from the fact that Tomlinson J refused permission to advance the claims in England (with the result that they have failed in England), the owners' breach of contract lies in the bringing of the claims. Whether they succeed in Greece or would have failed in England is irrelevant.

Is it too early to invoke the indemnity provisions?

21. Burton J thought not and I agree. The underwriters have already incurred and are still incurring considerable expense as a result of the proceedings being wrongly brought in Greece. They should be indemnified in respect of those expenses as and when they occur. It is appropriate that a fund was established by Burton J and, to the extent that it is said he should not have made any such order, any such argument cannot be supported.

22. Owners have submitted a new argument that the underwriters cannot take advantage of their own wrong to maintain a claim to indemnity. But it is much too late to make that argument on appeal. It should have been pleaded and explained to the trial judge what wrong the underwriters had committed. Tomlinson J's refusal of permission to amend makes it clear, in any event, that the underwriters have committed no wrong in the eye of the law of England which is the law the owners agreed would cover their disputes with the underwriters, both in the insurance policies and in the Settlement Agreements.

The position of the HD defendants

23. Although we gave Mr David Bailey QC permission to address us on behalf of these defendants, it did not seem to me that these defendants had any specific point to make relevant to their own position, different from the points made by the underwriters. The owners' new solicitors in their letter of 30th June 2014 pointed out that Burton J had stayed the claims of these defendants until final determination of this appeal. The Supreme Court, however, lifted the stay in paragraph (2) of its order. In any event, it seems to me that they ought as necessary to be able to make any special point relevant to their position and to the arguments on the owners' appeal. Moreover, no prejudice can have been caused to the owners by our having listened to the points Mr Bailey sought to make, to which it is unnecessary to refer any further.

Conclusion

24. For all these reasons the remainder of this appeal fails and I would uphold the orders made by Burton J.

Lord Justice Rimer:

25. I agree.

Lord Toulson:

26. I also agree.