Neutral Citation Number: [2012] EWCA Civ 1341

Case No: A3/2012/0460

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN BENCH DIVISION
COMMERCIAL COURT
THE HONOURABLE MR JUSTICE ANDREW SMITH

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/10/2012

Before:

THE RIGHT HONOURABLE LORD JUSTICE LONGMORE
THE RIGHT HONOURABLE LORD JUSTICE RIMER
and
THE RIGHT HONOURABLE LORD JUSTICE TOMLINSON

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Between:

1) AMLIN CORPORATE MEMBER LIMITED (on its own behalf and on behalf of all other members of Syndicate 2001 at Lloyd's in relation to policy reference B0738MC000720B) **2) TALBOT 2002 UNDERWRITING CAPITAL LIMITED (on its own behalf and on behalf of all other members of Syndicate 1183 at Lloyd's in relation to policy reference B0738MC000720B** **3) LIMIT (NO. 2) LIMITED (on its own behalf and on behalf of all other members of Syndicate 1036 at Lloyd's in relation to policy reference B0738MC000720B** **4) AEGIS ELECTRIC & GAS INTERNATIONAL SERVICES LIMITED (on its own behalf and on behalf of all other members of Syndicate 1225 at Lloyd's in relation to policy reference B0738MC000720B** **5) NOVAE CORPORATE UNDERWRITING LIMITED (on its own behalf and on behalf of all other members of Syndicate 2007 at Lloyd's in relation to policy reference B0738MC000720B** **6) BRIT UW LIMITED (on its own behalf and on behalf of all other members of Syndicate 2987 at Lloyd's in relation to policy reference B0738MC000720B**	**Respondents /Claimants**
- and -	

ORIENTAL ASSURANCE CORPORATION **Appellant/ Defendant**

"PRINCESS OF THE STARS"

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
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Tel No: 020 7404 1400, Fax No: 020 7404 1424
Official Shorthand Writers to the Court)

Mr Roger ter Haar QC (instructed by **Browne Jacobson LLP**) for the **Appellant**
Mr Peter MacDonald Eggers QC (instructed by **Norton Rose LLP**) for the **Respondent**

Hearing dates: 5th October 2012

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Judgment
As Approved by the Court

Lord Justice Longmore:

Introduction

1. This is an appeal from Andrew Smith J in a reinsurance dispute between English reinsurers and a Philippine insurer. He declined to order a stay of proceedings brought by reinsurers in England to establish that they are not liable under their contract of reinsurance.

The Facts

2. On 21st June 2008, the vessel "Princess of the Stars", a roll-on roll-off passenger cargo vessel ("the vessel") was lost, after she capsized off the coast of San Fernando, Romblon, in the Philippine Islands. The casualty occurred because the vessel sailed into the midst of typhoon "Frank". Tragically, the lives of more than 500 passengers and crew (including that of the master) were lost. We were not surprised to be told that the casualty caused enormous distress and anger in the Philippines.

3. The vessel had departed from Manila during the previous evening on 20th June 2008. It is said that the vessel departed upon her voyage, as the typhoon approached, after public storm warnings had been issued by the Philippine Atmospheric, Geophysical and Astronomical Services Administration with respect to the port of departure, the port of destination and the route along which the vessel sailed.

4. In at least 40 separate proceedings commenced in the Philippines, the owners of cargoes carried on board the vessel have made claims against the vessel's shipowner, Sulpicio Lines Inc ("Sulpicio"), for the loss of the cargoes. The value of each of the known individual cargo claims ranges from PHP 200,000 (approximately, £3,000) to PHP 8.8 million (approximately, £130,000); the average claim is PHP 3 million (approximately, £45,000).

5. The cargo claimants have also made claims in a number of actions in the Philippines directly against Sulpicio's cargo liability insurer, the appellant in this action ("Oriental").

6. Oriental had issued a marine cargo liability policy no. H05CD3787/R02 ("the original policy") in favour of Sulpicio by which Oriental agreed to indemnify Sulpicio "for all sums which the insured [Sulpicio] shall become legally obligated to pay as damages for loss or damage of merchandise or goods under his custody". The policy period under the Original Policy was from 31st December 2007 to 31st December 2008. The vessel was one of a number of scheduled vessels under the Original Policy insured within the Philippines. The limit in respect of the vessel was PHP500,000,000.00 (approximately £7.5 million) "any one loss at any one occurrence/event" in excess of a deductible of PHP1,500,000.00 (approximately £22,500).

7. The Original Policy contained a Typhoon Warranty in effectively the same terms as the Typhoon Warranty in the Reinsurance Contract, as set out below. It is under this policy that Sulpicio has claimed an entitlement to an indemnity in respect of its liability to the cargo claimants.

8. Oriental made a reinsurance contract with the respondents ("the reinsurers") in respect of the Original Policy. By policy no. B073MC000720B ("the Reinsurance Contract"), the Reinsurers agreed to indemnify Oriental in respect of its insurance of Sulpicio under the Original Policy for the period from 31st December 2007 to 31st December 2008, subject to an annual aggregate limit of PHP450,000,000 (approximately £6.7 million) "covering all vessels", excess of PHP50,000,000 (approximately, £750,000) "any one accident or occurrence each vessel each section inclusive of original policy deductible of PHP2,500,000 (approximately, £37,500) any one accident or occurrence each vessel.

9. The Reinsurance Contract incorporated the conditions of the Original Policy and included a follow settlements clause:

> "To follow all terms, conditions and settlements of the original policy issued by the Reinsured to the Insured, for the period specified herein, in respect of sums and interests hereby reinsured …"

10. The Reinsurance Contract contained the Typhoon Warranty already mentioned in these words:-

> "Notwithstanding anything contained in this policy or clauses attached hereto, it is expressly warranted that the carrying vessel shall not sail or put out of Sheltered Port when there is a typhoon or storm warning at that port nor when her destination or intended route may be within the possible path of the typhoon or storm announced at the port of sailing, port of destination or any intervening point. Violation of this warranty shall render this policy void."

11. In addition, the Reinsurance Contract contained an English law and jurisdiction clause as follows:-

> "This Reinsurance shall be governed by and construed in accordance with the law of England and Wales and each party agrees to submit to the exclusive jurisdiction of the Courts of England and Wales."

The Proceedings in England

12. On 22nd November 2010, the reinsurers issued a claim form seeking declarations that they are not liable to indemnify Oriental under the terms of the Reinsurance Contract with respect to the casualty and any liability associated with the casualty on the grounds that:

    i) there was a breach of the Typhoon Warranty in the Reinsurance Contract so that the Reinsurance Contract is void, alternatively the Reinsurers are discharged from liability.

    ii) Oriental is not liable under the Original Policy to indemnify Sulpicio by reason of a similar breach of the Typhoon Warranty in the Original Policy.

13. The claim form was served on Oriental at its offices in the Philippines on 5th May 2011, pursuant to permission granted by Mr Justice Beatson on 7th December 2010, if it were needed.

14. Oriental has now applied for an order that the action be stayed, as a matter of case management, because – it is argued – the action is "premature and should be stayed pending the outcome of various cargo claims presently before the Philippine Courts".

15. On 17th February 2012, Andrew Smith J dismissed Oriental's application for a case management stay. He held that a stay of the kind applied for should only be granted in rare and compelling circumstances, which were not present. He rejected Oriental's argument that the reinsurers would be bound by any factual findings made by the Philippine Courts pursuant to the follow settlements clause. He also rejected Oriental's argument that, assuming that the Original Policy and the Reinsurance Contract were back-to-back, the natural expectation of the parties was that any claim under the Reinsurance Contract will be resolved after the corresponding claim(s) under the Original Policy are determined.

16. He further held (1) that, although there was a risk of inconsistent decisions in the Philippines and in England, that risk resulted from the choice of the exclusive English jurisdiction which the parties had expressly agreed would govern the Reinsurance Contract, (2) that any evidence which might be of relevance to the claim under the Reinsurance Contract was likely to emerge before the trial of this action (currently fixed, we have been told, to take place in June 2013), (3) that, if the stay were granted, the delay in the English proceedings pending the completion of the proceedings in the Philippines would be substantial and of legitimate concern to the reinsurers.

17. Oriental now appeals on the following grounds:

    i) the risk of inconsistent verdicts of the Philippine and English Courts militates strongly in favour of a stay because the exposure to such risk is contrary to the intention of the Reinsurance Contract (including the follow settlements clause) and to the natural expectation of those trading in the insurance and reinsurance markets.

    ii) The learned judge gave excessive weight to the exclusive English jurisdiction clause in the Reinsurance Contract.

    iii) The learned judge gave excessive weight to the delays inherent in the Philippine Court system, which delays are inherent in the risk which the reinsurers agreed to reinsure, namely liability risks in the Philippines.

The Starting Point

18. CPR 3.1(2)(f) provides that the court may, unless the rules provide otherwise, "stay the whole or part of any proceedings or judgment either generally or until a specified date or event". Section 43(3) of the Senior Courts Act provides that nothing in the Act "shall affect the power of the Court of Appeal or High Court to stay any proceedings before it, where it thinks fit to do so, either of its own motion or on the application of any person whether or not a party to the proceedings".

19. These provisions were accepted by counsel as the necessary starting point but their submissions then diverged. Mr MacDonald Eggers QC for the reinsurers said that the true starting point must be that reinsurers had a right to bring proceedings in the agreed forum (England) and it was only in a rare and compelling case that a stay should be granted of a case so brought. He was able to cite the decision of Moore-Bick J (as he then was) in Reichhold v Goldman Sachs [1999] 2 Lloyd's Reports 567 as upheld by the Court of Appeal in a judgment given by Lord Bingham of Cornhill (with whom Otton and Robert Walker LJJ agreed) at [2000] 1 WLR 173 at 186C, see also Konkola Copper Mines v Coromin [2006] 1 Lloyd's Rep 410 at para 63 per Rix LJ. Mr ter Haar QC for Oriental submitted, however, that in reinsurance the starting point should, (at any rate in the normal case, where reinsurers were bound to follow the settlements of the reinsured) be that the reinsurers should wait for the reinsured to settle a claim (whether by agreement or by paying any judgment sum) and only then address the question of their own liability. How otherwise could they perform their obligation to follow the settlements of their reinsured? Mr ter Haar was prepared to accept that there might be exceptions to this if, for example, there was arguable non-disclosure or misrepresentation applicable solely to the contract of reinsurance but, apart from such cases, the normal rule should be that reinsurers should wait to see what happened to their reinsured and then respond. On this basis, it seems that reinsurance would be an exception to the normal rule that a stay of proceedings properly brought could only be granted in rare and compelling circumstances.

20. It is, however, important to point out that, in the light of Insurance Co of Africa v Scor [1985] 1 Lloyd's Rep 319, the "follow settlements" provision is of no application if the loss does not fall within the terms of the reinsurance. That is, of course, alleged to be the position in this case in which reinsurers say that, if there has been a breach of the typhoon warranty they are not liable, quite apart from any settlement or indeed of any decision of a court of the Philippines made on a different basis.

21. I do not myself think that reinsurance constitutes any general exception to the normal rule. Mr ter Haar was able to cite general dicta from distinguished judges in cases of high authority to the effect that a contract of proportional reinsurance is intended to be back to back with the relevant contract of insurance and the importance in that context of the "follow settlements" provision. Examples of such dicta are to be found in Vesta v Butcher [1989] AC 852, 892 per Lord Templeman and 895 per Lord Griffiths and Wasa v Lexington [2010] 1 AC 180 at paras 35 per Lord Mance and 55 per Lord Collins of Mapesbury. But those dicta, powerful as they are, do not (to my mind) negate or relevantly impinge on the more general principle espoused by Lord Bingham that any stay of an action properly brought in England should only be granted in rare and compelling circumstances. If Mr ter Haar were right a stay would be normal in reinsurance cases and that cannot in my view be right.

22. Mr MacDonald Eggers submitted that the presence of the exclusive jurisdiction clause (there was no such clause in the Reichhold case) meant that the circumstances justifying a stay had to be even more rare and more compelling than in a case where jurisdiction was founded for other reasons and he was even able to cite the judgment of Beatson J in Equitas Ltd v Allstate Insurance Ltd [2009] Lloyd's Rep IR 227 in support of that proposition. For myself, however, I doubt if it is useful to talk of degrees of rarity and compellability. It is better just to decide if the circumstances of

any particular case are rare and compelling enough. The presence of an exclusive jurisdiction clause conferring jurisdiction on the English courts to try a dispute is just one of the relevant circumstances to bear in mind when a judge exercises his discretion. That is what the judge did and the second ground of appeal is not, in my judgment, made out.

23. Nor do I consider that the judge made any error of principle in starting from the wrong point. Oriental are therefore just left with an attack on the judge's discretion.

Sufficiently rare and compelling circumstances?

24. Mr ter Haar here relied on the risk of inconsistent decisions in the English and the Philippine courts. He further relied on the inherent unfairness of Oriental's being placed in a position in which it would have to assert in England the precise opposite of what was its real case (in agreement with reinsurers) that the vessel had set sail in the teeth of a typhoon warning when her intended route would be in the path of that typhoon. Oriental would be placed in the position of having to assert what the cargo owners (and indeed the relatives of those who lost their lives) were likely to argue in the Philippines. This was that, although a storm warning had been given, it was only at a level which did not apply to vessels of the tonnage of "Princess of the Stars" and that, in any event, the Master intended to adopt a route which avoided any possible path of the typhoon. It is said that the Master informed one of the Port Officers of this intention before setting sail but, for whatever reason, did not adhere to this intention with disastrous consequences. It was most unlikely that the Philippine cargo-owners' (or any other Philippine interest) would seriously assist Oriental to advance this case in England when they knew that Oriental was maintaining exactly the opposite in the Philippine proceedings in seeking to defeat the cargo-owners claims. Indeed Oriental was already subject to hostility and indeed vilification in the Philippines because of the stance which reinsurers were forcing them to adopt in that country. It was adding insult to injury to expect Oriental to face proceedings in England which they might well lose because an English judge (in what would inevitably be mainly a paper exercise) might well hold that the Master never intended to adopt a route which avoided the typhoon when a Philippine court might well hold precisely the contrary. It is then said that the judge failed to take these considerations into account, his exercise of discretion was therefore vitiated and the court should exercise its own discretion by deciding that the circumstances of this case were sufficiently rare and compelling to justify a stay.

25. Forcefully as the arguments were advanced, I do not consider that they can prevail. Although they may have been given a somewhat stronger emphasis before us than before the judge, it cannot be said that the judge failed to give them consideration. When he came to deal with the possibility of inconsistent decisions the judge dealt with the risk that evidence might not be available in England which might be available in the Philippines and said this in para 37:-

> "Some risk of this kind, that different courts will have different evidence adduced before them, is inevitable where there are to be proceedings in different courts. However, only one specific illustration of this concern was given, that the Master might have told his employers or the port authorities or some other person before sailing what his intended route was and that the

> likelihood of such evidence being available in the English proceedings was slight. If there is such evidence, it would appear that the probability is that this will emerge in the judicial affidavits of Sulpicio's witnesses and cross-examination thereon, which, according to the pleaded defence, will start in about March 2012 and is likely to take several months. Any evidence is likely to emerge before these proceedings would come to trial in the normal course of events and it seems to me that the claimants can have no real objection to some modest deceleration in the progress of these proceedings to make it the less likely that they will. The risk of different evidence leading to different results is to be assessed in light of these circumstances and seems to me a relatively modest one."

26. It is therefore clear that the judge had the risk of different evidence and inconsistent decisions well in mind and his assessment of the risk as relatively modest was well within his discretion. This court should not lightly depart from the assessment of an experienced commercial judge on such a matter especially as the proposed modest deceleration he proposed for the English proceedings has now come to pass in that the projected date of trial is now June 2013. It may be added that the assertions of hostility and vilification (while perhaps not totally unsurprising) have not been supported by any actual evidence before the court.

27. It is true that the judge was to some extent influenced by the long delays before judgment is expected in the Philippines; estimates vary but it may be as long as 10 years and Mr ter Haar accepted, compared with England, progress was "glacial". I see no reason why the judge should not have taken this into consideration as part of the overall exercise of his discretion. In Reichhold Moore-Bick J considered that one of the reasons why, in the particular rare and compelling circumstance of that case, a stay should be granted of English proceedings, was that the foreign proceedings in Norway would be completed in about a year (see page 573 right hand column). Conversely long delay in the foreign proceedings can be one of the considerations militating against a stay.

Conclusion

28. I am therefore unpersuaded that the judge exercised his discretion on a wrong basis or took irrelevant (or failed to take relevant) considerations into account. I would therefore dismiss this appeal.

Lord Justice Rimer:

29. I have had the advantage of reading in draft the judgments of Longmore and Tomlinson LJJ. I would also dismiss the appeal but, like Tomlinson LJ, with little enthusiasm. At the conclusion of the argument in the appeal, I was left with an instinct that the apparent unfairness of the position in which the judge's order places Oriental must mean that there was something wrong with his decision.

30. I have, however, on further consideration come to the conclusion, in agreement with my Lords, that the judge directed himself correctly as to the principles that governed

the exercise of the discretionary jurisdiction invoked before him, that he properly took into account all the factors material to that exercise and that it cannot be said that his decision was obviously wrong. In those circumstances, there is no scope for this court to interfere with his order.

Lord Justice Tomlinson:

31. It is with little enthusiasm that I too agree that the appeal should be dismissed.

32. The six reinsurers are major players in the Lloyd's market. The Defendant, Oriental, is a small insurance company in the Philippines. Oriental has the difficult task of defending claims brought in the local courts in the highly charged aftermath of a maritime disaster in Philippine home waters in which there has been massive loss of life in controversial circumstances. By pressing ahead with their claim for negative declaratory relief, these giants of the London insurance market have placed their reinsured Philippine minnow in a hopeless and invidious position. They oblige Oriental, in defence of its own interests and in anticipation of what might transpire in the Philippine courts, publicly to put forward in London a case to the effect that there was no breach of the typhoon warranty and that there is therefore insurance cover available to indemnify those who make claims before the Philippine courts. As Mr ter Haar observed the reinsurers would be horrified if their reinsured adopted that stance in the Philippines. Yet they oblige them now to adopt that stance in the proceedings in London, or else concede that the warranty was indeed broken and that they have no reinsurance cover. On the evidence presently available to it Oriental takes the same view as do reinsurers as to there having been a breach of the warranty, but it is relatively early days and they may yet be proved wrong. At the very least, by adopting a contrary stance in proceedings in London, Oriental may undermine the credibility of their defence in the Philippines. They may in consequence be placed under greater pressure to compromise.

33. If this were proportional reinsurance it would not be immediately apparent that reinsurers were following the fortunes of their reinsured. As it is, it is excess of loss reinsurance and perhaps the considerations are different. However that may be, we are not ourselves market professionals, we have no evidence of market practice and we should be very wary of pronouncing on what is and what is not appropriate conduct in the market.

34. The judge took into account the risk of further evidence coming to light after the conclusion of the English proceedings. He thought that unlikely, and he equally thought modest the risk of "different evidence leading to different results". As Longmore LJ has already remarked, we should not lightly interfere with such an assessment carefully reached by an experienced commercial judge. However I would not by adopting that time-honoured mantra wish to imply that it is only grudgingly that I would uphold the judge's decision. Although it is of no relevance to our task, I have in the end concluded that there is in fact no material before us on the basis of which I could, if in the judge's shoes, have properly come to a different conclusion. A conclusion does not have to be reached with enthusiasm in order to be right.