Neutral Citation Number: [2011] EWCA Civ 620

Case No: A3/2011/1141

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT
The Hon Mr Justice Burton

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/05/2011

Before :

LORD JUSTICE STANLEY BURNTON
LORD JUSTICE ELIAS
and
LORD JUSTICE TOMLINSON

- -

Between :

ARASH SHIPPING ENTERPRISES COMPANY LIMITED for and on behalf of itself and those listed in Schedule 1 to the claim form	**Appellant**
- and -	
GROUPAMA TRANSPORT	**Respondent**
- and -	
SVERIGES ÅNGFARTYGS ASSURANS FÖRENING	**Intervener**

- -
- -

Simon Bryan QC, **Fergus Randolph QC** and **Guy Blackwood** (instructed by **Holman Fenwick Willan**) for the Appellant
Peter MacDonald Eggers QC (instructed by **Barlow Lyde & Gilbert LLP)** for the **Respondent**
Rhodri Thompson QC and **Elizabeth Prochaska** (instructed by **Reed Smith**) for the **Intervener**

Hearing date : 6 May 2011

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Approved Judgment

Lord Justice Stanley Burnton:

Introduction

1. This claim was commenced under CPR Part 8 on 7 April 2011. It was heard, with impressive expedition that is to the credit of the parties, their lawyers and the Commercial Court, on 18 April 2011 by Burton J.

2. The Claimant, now Appellant, is a representative of the co-assureds under a composite policy of marine insurance covering hull and machinery risks ("the Policy"). The Defendant Respondent was sued on its own behalf and as representative of the other underwriters ("the Underwriters") subscribing to the Policy. The substantive issue before the judge was whether, by reason of the provisions of Council Regulation (EU) No 961/2010 ("the Regulation") imposing economic sanctions on Iranian persons and entities, the Respondent was entitled to serve notice of cancellation under the express provisions of the Policy.

3. In addition, the Respondent contended that it was not properly joined as a representative defendant and that this was not an appropriate case for representative proceedings.

4. Burton J gave judgment on 20 April 2011. He held that the Respondent's cancellation notice was valid and effective under the policy. On the basis of his decision, cover under the Policy ceased on 9 May 2011. He made no order on the Respondent's application that it should not be a representative party, since in the circumstances he considered it unnecessary to determine that issue.

5. On 6 May 2011 we heard as a matter of urgency the Appellant's application for permission to appeal Burton J's order, on the basis that if permission was granted, the appeal would be heard immediately. We heard full submissions on one of the substantive issues, referred to as Issue 2, which I identify below. We declined to hear full argument on Issue 1. We granted permission to appeal. We ordered that the Respondent cease to be a representative party. We dismissed the appeal. We said that we should give our reasons for our decision in writing. My reasons are set out in this judgment.

The Policy

6. The Policy incepted in early May 2010, some 5 months before the Regulation came into force. It is governed by English law. The assets insured under the Policy comprise the Iranian fleet of oil tankers, which is one of the largest fleets of oil tankers in the world. The Appellant is a Cypriot Company, but is controlled by an Iranian entity. For the purposes of these proceedings it accepts that it (and each of the other co-assureds) is an Iranian person, entity or body within the meaning of the Regulation because it is controlled by an Iranian company and therefore comes within the definition *"an Iranian person, entity or body other than a natural person"* contained in Article 1(m)(iv) of the Regulation.

7. The Respondent is the leading underwriter on the Policy. It was sued as a representative of the underwriters subscribing to the Policy. It is domiciled in France. The Intervener, one of the Underwriters, is domiciled in Sweden. Five further

Underwriters are domiciled in the UK. One Underwriter, Gard Marine & Energy Limited, is domiciled in Bermuda. The parent of the Gard Marine & Energy Limited Bermudian subsidiary is domiciled in the Kingdom of Norway. One Underwriter, Samsung Fire & Marine Insurance Company Limited is domiciled in the Republic of Korea. One Underwriter, International General Insurance Company Limited was domiciled in either Bermuda or Dubai. One underwriter, Mellat Insurance Company, is domiciled in Iran. It was common ground that it can be ignored for the purpose of this appeal.

8. The provisions of the Policy include the following:

> "Period:
>
> Fleet C
>
> From 10 May 2010 to 9 May 2011 both days inclusive Greenwich Mean Time.
>
> Other Fleets
>
> From 21.00 hours 9 May 2010 to 21.00 hours 9 May 2011 Korean local time
>
> It is agreed to extend for a further period of Twelve Months at 2011 anniversary date(s) subject to Review Clause attached.
>
> Iran Sanctions Clause
>
> Insurers hereon may, on such notice in writing as the Insurer may decide, cancel the Insurer's participation under this Policy in circumstances where the Assured has exposed or may, in the opinion of the Insurer, expose the Insurer to the risk of being or becoming subject to any sanction, prohibition or adverse action in any form whatsoever against Iran by the State of the Ship(s) flag, or by the United Kingdom and/or the United States of America and/or the European Union and/or the United Nations.
>
> The participation of the Insurer on this Policy shall forthwith cease if any Ship is employed by the Assured in a carriage, trade or on a voyage which will thereby in any way howsoever expose the Insurer to the risk of being or becoming subject to or in breach of any sanction, prohibition, regulation or adverse action in any form whatsoever against or in respect of Iran promulgated by the State of the Ship(s) flag, or by the United Kingdom, and/or the United States of America and/or the European Union and/or the United Nations.
>
> The Insurer shall receive pro-rata premium for the period of the Insurer's participation until the time of termination or cessation under this Clause.
>
> …

> REVIEW CLAUSE
>
> Provided that, after 10 months of the policy period, the Credit Balance of this insurance is 50% or better for all fleets combined Underwriters hereon will extend the period of this insurance for a further twelve months on an unaltered basis.
>
> The Credit Balance referred to above shall be the percentage credit to Underwriters calculated at 21.00 hours 9 March 2011 Korean Time using the total net premium hereon and claims record (including estimated outstandings) for the 2010/2011 contract."

9. The wording of the Iran Sanctions Clause set out above still applies to three of the following Underwriters, namely the Intervener, Samsung Fire & Marine Insurance Company Ltd and Mellat Insurance. The first paragraph of the Clause was amended by way of Endorsement 001 to the Policy, which, however, applies only to the Lloyd's and IUA markets. The Iran Sanctions Clause as amended by the Endorsement provides as follows:

> "Insurers hereon may, on such notice in writing as the Insurer may decide, cancel the Insurer's participation under this Policy in circumstances where the Assured has exposed or may, in the opinion of the Insurer, expose the Insurer to the risk of being or becoming subject to *or in breach of* any sanction, prohibition, *regulation* or adverse action in any form whatsoever against or in respect of Iran *promulgated by the executive, legislative, other competent governmental agency, regulatory authorities or competent court or other judicial body of* the State of the Ship(s) flag, or by the United Kingdom and/or the United States of America and/or the European Union and/or the United Nations."

10. The amendments are in italics. It was common ground that they were irrelevant to the determination of the appeal.

11. In relation to one of the Underwriters, Gard Marine & Energy Limited ("Gard"), a different amendment to the Iran Sanctions Clause was agreed, which provided that, in addition to the regimes identified above, Bermudian sanctions and Norwegian sanctions on the Islamic Republic of Iran would also, in appropriate circumstances, give rise to the right of cancellation.

The Regulation

12. The object of the Regulation is the imposition of economic sanctions on Iran and Iranian persons and entities "with a view to supporting the resolution of all outstanding concerns regarding Iran's development of sensitive technologies in support of its nuclear and missile programmes, through negotiation" (Recital (5) to the Decision of the Council of the European Union of 26 July 2010). The recitals to the Regulation refer to this Council Decision. Article 26 of the Regulation is as follows:

> 1. It shall be prohibited:
>
> (a) to provide insurance or re-insurance to:
>
> (i) Iran or its Government, and its public bodies, corporations and agencies;
>
> (ii) an Iranian person, entity or body other than a natural person; or
>
> (iii) a natural person or a legal person, entity or body when acting on behalf or at the direction of a legal person, entity or body referred to in (i) or (ii).
>
> (b) to participate, knowingly and intentionally, in activities, the object or effect of which is to circumvent the prohibition in point (a).
>
> 2. Points (i) and (ii) of paragraph 1(a) shall not apply to the provision of compulsory or third party insurance to Iranian persons, entities or bodies based in the Union.
>
> 3. Point (iii) of paragraph 1(a) shall not apply to the provision of insurance, including health and travel insurance, to individuals acting in their private capacity, except for persons listed in Annexes VII and VIII, and re-insurance relating thereto.
>
> Point (iii) of paragraph 1(a) shall not prevent the provision of insurance or re-insurance to the owner of a vessel, aircraft or vehicle chartered by a person, entity or body referred to in point (i) or (ii) of paragraph 1(a) and which is not listed in Annexes VII or VIII.
>
> For the purpose of point (iii) of paragraph 1(a), a person, entity or body shall not be considered to act at the direction of a person, entity or body referred to in points (i) and (ii) of paragraph 1(a) where that direction is for the purposes of docking, loading, unloading or safe transit of a vessel or aircraft temporarly [sic] in Iranian waters or airspace.
>
> 4. This Article prohibits the extension or renewal of insurance and re-insurance agreements concluded before the entry into force of this Regulation, but, without prejudice to Article 16(3), it does not prohibit compliance with agreements concluded before that date.

13. It is paragraph 4 which is most directly relevant. Article 16(3), to which it refers, is as follows:

> 3. No funds or economic resources shall be made available, directly or indirectly, to or for the benefit of the natural or legal persons, entities or bodies listed in Annexes VII and VIII.

The Appellant is not listed in either of those Annexes.

14. Article 37 requires Member States to lay down rules on penalties applicable to infringements of the Regulation. Article 41 provides that it is binding and directly applicable in all Member States, and for its entry into force on the day of its publication in the Official Gazette of the European Union. It was so published on 27 October 2010.

15. In this jurisdiction, the competent authority for the implementation and enforcement of the Regulation is the Foreign & Commonwealth Office. Infringement of the Regulation gives rise to criminal penalties. However, the matters relating to this appeal are now within the authority of Her Majesty's Treasury's Asset Freezing Unit.

16. On 27 October 2010, HM Treasury published guidance on the effect of the Regulation. Paragraphs 55 and 56 were as follows:

> 55. Article 26 bans the provision of new insurance or reinsurance to:
>
> (i) Iran and its Government, and its public bodies, corporations and agencies;
>
> (ii) an Iranian person, entity or body other than a natural person; or
>
> (iii) a person acting on behalf or at the direction of a person referred to under (i) and (ii);
>
> It also bans the extension or renewal of insurance and reinsurance agreements concluded before 27 October 2010.
>
> 56. Compliance with agreements made prior to 27 October 2010 is not prohibited. This means existing contracts of insurance and reinsurance may run their course. However, they may not be extended or renewed. Activity pursuant to existing contracts, including the payment of claims, may continue, subject to compliance with any other relevant provision of the Regulation.

17. In January 2011, the International Underwriters Association of London issued advice on Iranian sanctions, in the form of questions and answers. It included the following passage:

> Europa Insurance purchased excess of loss treaty insurance, with London Re (UK domiciled) as the leading insurer, …
>
> (i) This reinsurance treaty incepted on 1 January 2010 and ran for 12 months, and includes a renewal clause at the option of

> either party if the claims performance falls within a given threshold (in this instance, the automatic renewal requirements have been fulfilled.
>
> London Re is permitted to pay the claim notified on 31 December 2010 because the claim falls within the original policy period and is deemed to be "compliance with agreements" concluded before the Regulation came into force … The Council Regulation expressly catches renewals except where these are pursuant to existing obligations. Since the renewal is not "automatic" because it is at the option of either party, such renewal would not be permitted except, possibly, where the renewal was pursuant to a clear and unambiguous contractual obligation contained in the contract between London Re and Europa Insurance."

18. On 3 February 2010, Mr Woolich of Holman Fenwick Willan, on behalf of the Appellant (although not naming it) made enquiry of HM Treasury by email. Referring to the Policy, he stated:

> The policy contains a Review Clause with automatic renewal on unaltered terms provided that the loss ratio is below a specified threshold …
>
> The fact that extension is on unaltered terms means that there is no new underwriting decision. Assuming that the loss ratio does not exceed the threshold, there is a clear and unambiguous obligation for the Underwriters/insurers to extend the period of insurance on the same terms.
>
> Please confirm that such automatic renewal on the same terms in compliance with the insurance policy would not infringe Article 26(4) of Council Regulation No 961/2010.

19. The Asset Freezing Unit replied by email on 16 February 2010:

> Compliance with insurance agreements made prior to 27 October 2010 is not prohibited. This means existing contracts of insurance and reinsurance may run their course. However, as is clearly stated in Article 26(4), insurance agreements already agreed may not be extended or renewed. We do not consider automatic renewal to be permitted under Article 26(4) of Council Regulation (EU) 961/2010. However, if you consider there are reasons to take a different interpretation and you wish us to consider this further, it would be helpful if you could set out those reasons in detail.

20. On 31 March 2010 Holman Fenwick Willan wrote to the European Commission seeking its opinion as to the effect of Article 26(4). Their letter set out the review clause and stated:

> 6. … The intention is clear from the use of the words "it is agreed" and "will" … which do not permit any discretion in the renewal process but provide for mandatory automatic renewal/extension. As such it is our view that this renewal/extension provision will not be prohibited from taking effect as the provision is contained in an insurance contract/policy which pre dates the Regulation. This view is supported by the opinion of our clients' English Queen's Counsel.
>
> …
>
> 7. The reason why we are requesting an urgent response is that HM Treasury ("HMT"), the public body tasked with overseeing the Regulation of this in England and Wales, has indicated a different view.

The proceedings and the cancellation notice

21. In December 2010 the Respondent served notice of cancellation of the Policy. Following correspondence with the Appellant's solicitors, in January 2011 the Respondent withdrew the notice, without prejudice to its rights.

22. In March and April of this year, there were again communications between the Respondent and the Appellant's solicitors, and a meeting between them, at which the effect of the Regulation on the extension of the Policy was discussed. As mentioned above, these proceedings were issued on 7 April 2011, and immediately served. On 8 April 2011, the Respondent served a notice of cancellation. Its letter stated:

> We refer to Holman Fenwick Willan's letter of 5 April 2011 and to our meeting last week. Groupama Transport ("GT") would like to co-operate with "NITC" in the contemplated proceedings so far as able. In part, the extent to which GT participates in the High Court proceedings will turn on whether (as GT hope) [HM Treasury] agrees to participate in the proceedings as an interested party and argues the case. [Barlow Lyde & Gilbert] will write to HFW on this later today.
>
> However, it is GT's view, supported by advice from BLG and Jonathan Hirst QC (in which GT does not waive privilege), that the 12 month extension contemplated by the Review Clause would be in breach of the prohibition within article 26 of EU Regulation 910/2010. This is further confirmed by HMT's message to HFW of 16 February 2011, which is also consistent with HFW's advice of 16 December 2010 (paragraph 18).
>
> …
>
> GT hereby gives notice of cancellation of its participation in the Insurance of Arash Shippping, NITC, the Owning Companies and the Management Companies … to take effect on 10 May

> 2011 for fleet C and at 21:00 hours Korean local time on 9 May 2011 for the other fleets. This notice is given because GT's participation after those dates exposes or may expose GT to the risk of being or becoming subject to or in breach of article 26, as above. Please be advised that this notice is given on behalf of GT alone and not on behalf of any following Insurer.
>
> GT does not accept HFW's interpretation of the first paragraph of the Iran Sanctions Clause, namely that the right to cancel only arises where the assured has done or has not done anything which has exposed GT to sanction, prohibition or adverse action in any form. In GT's opinion it is sufficient that continued insurance of NITC may expose GT to criminal sanction, for the right to cancel to arise under the Iran Sanction Clause.
>
> GT understands that NITC disagrees with GT's position and intend to challenge. If HMT alters its opinion or there is a final decision by a Court which binds HMT that the insurance can be extended beyond 9/10 May 2011 without breaching the Regulation, then GT shall reconsider its position.
>
> Finally, this notice is given on behalf of the GT alone. GT requests that JLT provide the following London and overseas markets with a copy of this notice. If JLT do not confirm within the next 24 hours that they have done so, GT will do so in respect of the followers known to it.

23. Other underwriters also served notices of cancellation.

24. On 5 May 2011, i.e. the day before the hearing of this appeal, the European Commission at last replied to Holman Fenwick Willan's letter of 31 March, in terms that were not entirely helpful:

> Regulation 961/2010 explicitly prohibits the extension or renewal of insurance and re-insurance agreements concluded before the entry into force of the Regulation, and does not provide for a derogation for automatic renewal of such contracts. It would therefore appear that the renewal of the contract under consideration is prohibited under Regulation (EU) No 961/2010, unless this can be construed as a mere continuation of the original contract.

The issues

25. Leaving aside the question whether the Respondent should continue to be a representative party, there are essentially two principal issues:

> **Issue 1**: is the extension of the period of the Policy prohibited by Article 26(4) of the Regulation?

Issue 2: was the Respondent entitled to serve its notice of cancellation, and was its notice effective?

The judgment below

26. Burton J held that Article 26(4), properly construed, did prohibit the extension of the Policy period, and that whether or not it did, the Respondent had validly and lawfully cancelled the Policy. In these circumstances, he considered it unnecessary to consider whether the Respondent should cease to be a representative party.

The appellant's contentions on appeal

27. At the beginning of the hearing of the appeal, we indicated that we were minded to make an order that the Respondent cease to be a representative party. We asked all three parties to give us their submissions on Issue 2 before we considered whether to address Issue 1.

The Respondent as a representative party

28. I have no doubt that the Respondent should not have been made, and therefore should not have continued, as a representative party. The Respondent's notice of cancellation was expressly served on its own behalf only. It formed its view as to the effect of the Regulation and the risk "of being or becoming subject to *or in breach of* any sanction, prohibition, regulation or adverse action in any form whatsoever against or in respect of Iran". Other Underwriters were not compelled to serve their own notices of cancellation, and were not bound by the Respondent's action. They served individual notices of cancellation, having presumably formed their own opinion as to whether they were entitled to do so. As I discuss below, the validity of a notice of cancellation may depend on their individual opinion. The Underwriters are incorporated and carry on business in different jurisdictions, not all of which were of Member States of the EU. The Iran sanctions legislation applicable to the various Underwriters was therefore not identical. Nor were the authorities responsible for enforcing those sanctions. It should also be borne in mind that the Underwriters carry on business internationally, and may well have to be concerned with sanctions legislation in more than one jurisdiction. Thus the risks of "any sanction, prohibition, regulation or adverse action" within the meaning of the sanctions clauses were therefore not identical in relation to every Underwriter. Manifestly, the positions of the various Underwriters, and therefore their interests, were not identical.

29. I mention also that the Appellant contended that the notices of cancellation had not been served in good faith. Such an allegation, if intended literally, in all but the clearest cases must be pleaded and the subject of disclosure of documents and oral evidence. Part 8 proceedings are, except possibly in a wholly exceptional case, inappropriate if such an allegation is made. Moreover, the good faith or otherwise of each contracting party would have to be determined individually. As will be seen, however, there was no real allegation of bad faith. What was said was that the notices, served after service of these proceedings, were premature.

Issue 2

30. The Appellant's contentions, in summary, were;

(a) The first paragraph of the cancellation clause requires that the Insured has exposed or may expose the Insurer to the specified risk. It requires an act or omission on the part of the Insured giving rise to that risk. It was common ground that there had been no relevant act or omission and that none was foreseen. The notice of cancellation was served solely by reason of the extension of the period of the Policy, which did not involve any act or omission on the part of the Insured. It followed that the right to cancel had not arisen.

(b) The notice of cancellation, having been served after service of these proceedings, was not served in good faith and was given unreasonably in the *Wednesbury* sense.

(c) The moment at which Underwriters are obliged to exercise their discretion is the moment when the notices take effect (9 May, 2011) and not when they are tendered. In the circumstances, if the Court of Appeal ruled in favour of the Appellant, Underwriters would be obliged to withdraw their notices of cancellation.

(d) If the relevant time for the exercise of Underwriters' discretion was the moment when the notice of cancellation was tendered, even if it takes effect at a later date, there was an implied term of the Policy that where, to the knowledge of the insurer, a real alteration in the risk of insurers being exposed to sanctions occurs between the tendering of notice of cancellation and its coming into effect, the insurer must exercise its discretion afresh before that notice takes effect. If the Court of Appeal ruled in favour of the Appellant, Underwriters would be obliged to withdraw their notices of cancellation.

(e) The Community law principle of the effectiveness of rights precluded the cancellation of the Policy

(a) Does the cancellation clause require an act or omission on the part of the Assured?

31. The Policy, including the cancellation clause, must be construed as a whole and given a sensible effect. As Mr MacDonald Eggers QC pointed out, sanctions are normally directed at persons and entities by reference to their nationality or residence. Individual persons and entities may be the object of specific sanctions, as is the case under the Regulation, but that may be by reason of their position or function within the country in question rather than by reason of their individual acts. Against this background, a reading of the cancellation clause that restricts it to exposure to the relevant risk caused by acts or omissions on the part of the Assured would be unduly narrow. Furthermore, the most obvious acts on the part of the Assured that might lead to the relevant risk are the subject of the second paragraph of the cancellation clause. The Appellant's reading of the clause would deprive the first paragraph of any, or almost any, practical effect. Lastly, the Appellant's interpretation would require the Insurer to predict the acts or omissions of the Assured in order to form the opinion that "the Assured … may, in the opinion of the Insurer, expose the Insurer" to the risk, which clearly looks to the future. This would be an improbable requirement.

32. I therefore reject the Appellant's contention (a).

(b) Bad faith and *Wednesbury* unreasonableness

33. I asked Mr Bryan QC to identify the facts relied upon by the Appellant in asking the Court to find that the Respondent's notice of cancellation was served in bad faith and/or unreasonably. They are twofold: the Appellant's interpretation of Article 26(4) is so obviously correct that the Respondent could not reasonably have formed its opinion that it would be exposed to the relevant risk; and the fact that the notice was served after proceedings had begun, when there was a real possibility if not likelihood of obtaining the Court's judgment on the correctness of the Appellant's interpretation.

34. As to the first of these allegations, I do not find the application of Article 26 to the Policy obvious. Article 26(4) expressly prohibits the extension or renewal of existing insurance agreements, and the only means of avoiding this prohibition is to construe the words "it does not prohibit compliance with agreements concluded before" the entry into force of the Regulation as including a contractual extension or renewal. However, the reference to Article 16(3) suggests that the exception is concerned with the payment of claims under existing policies.

35. It was suggested that only extensions or renewals that are not automatic and mandatory under the insurance contract are the subject of the prohibition in Article 26(4). If so, this would raise the question whether the exercise of an option to renew conferred on an assured is permitted. In such a case, the insurer is bound to comply with the agreement he concluded granting the option. So it is not obvious that such a case is distinguishable from the present.

36. Furthermore, this is not a case of automatic extension. Whether the Assured may be entitled to the extension depends on its claims, and at least in theory it may choose not to make a claim if to do so would disentitle it to the extension. There is also the question, which I do not have to decide, whether the Assured is bound to accept the extension of the Policy if the condition for the extension is met. As Lord Justice Tomlinson pointed out, the words "Underwriters hereon will extend the period" of the insurance may mean that they will do so if required to do so by the Assured.

37. What I think makes it impossible to accept the contention that the Respondent could not reasonably (in a *Wednesbury* sense) have formed the opinion that the extension of the period of insurance would expose them to the relevant risk is the fact that HM Treasury did not accept the Appellant's interpretation of Article 26(4). The fact that the Commission had not accepted that interpretation, and has now rejected it, also undermines the Appellant's case.

38. Finally on this point, the fact that an experienced judge of the Commercial Court rejected the Appellant's interpretation of Article 26(4) of itself renders it at least very difficult indeed to accept that that interpretation is so obvious that to reject it was perverse.

39. The contention that the Respondent acted prematurely is more attractive, but on examination it too must be rejected. This contention ignores the fact that the Policy confers the right of cancellation on the Insurer if it is of the specified opinion, not if the Court is of that opinion. Once the Insurer is genuinely and reasonably of the requisite opinion, it has a contractual right to serve notice of cancellation, and the Assured could not deprive the Insurer of that right by commencing proceedings and

seeking to obtain the opinion of the Court. The fact that neither the judgment of the Commercial Court nor that of this Court could wholly obviate that risk, for reasons I refer to below, only adds to the difficulties of this contention. I reject it.

(c) Underwriters are obliged to exercise their discretion at the moment when the notice takes effect (9 May, 2011) and not when it is tendered.

40. This contention is simply inconsistent with the terms of the cancellation clause. In addition, it would be a surprising and uncommercial interpretation of a cancellation clause. Both Assured and Insurer need to know whether the notice is effective when it is served, the Assured so that it may seek insurance elsewhere (or curtail its activities) before its cover expires, and the Insurer because it may have to take its own steps as a result of cancellation, in terms of reinsurance and otherwise.

(d) The implied term

41. This contention too is hopeless. The suggested implied term is not required to make the contract work. It involves reading considerable words into the cancellation clause. For reasons I have already given, it would produce an uncommercial contract. It would not be reasonable to imply it.

(e) The principle of effectiveness of rights

42. This is a Community law principle that applies to rights conferred by Community law. The Appellant's right to an extension of the policy period is not such a right. In any event, the right to which it is claimed effect must be given is that created by the Policy. That right is defined and qualified by the Policy, which is an agreement between the Assured and the Insurer. There is no principle that could entitle the Appellant to a right greater than that conferred by the Policy. That right was subject to the cancellation clause. There is no principle of Community or English law that could entitle the Appellant to a right greater or different from that for which it contracted.

43. I reject this contention.

General conclusion on Issue 2

44. For the above reasons, I had and have no doubt that the Respondent was entitled to serve its notice of cancellation and that its notice was effective.

Issue 1

45. As a result of our clear conclusion on Issue 2, it was unnecessary to decide Issue 1: as between the parties to these proceedings, Issue 1 became academic.

46. It was said that the parties had incurred the legal costs of preparing to argue Issue 1, and that the effect of article 26(4) is of general concern in the insurance market. However, the costs attributable to this issue must be relatively small.

47. In relation to the contention that the interpretation of article 26(4) is of importance in the insurance market, in my judgment this Court should be cautious indeed before deciding on the effect of legislation, such as the Regulation in question, creating a criminal offence, where that decision is not required in order to determine the rights

of the parties to the proceedings. That caution is all the more appropriate where the proceedings are taking place in the absence of the prosecution authority, which would not have presented any submissions or be bound by our judgment. We were referred to the speeches of the Appellate Committee of the House of Lords in *Imperial Tobacco v Attorney-General* [1981] AC 718, which make it clear that the criminal courts are not bound by decisions of the civil courts. Viscount Dilhorne said, at 741:

> "**Could the court in the proper exercise of its discretion grant the declaration sought?**
>
> Donaldson J. thought it could but did not grant it as he thought that the Spot Cash scheme was a lottery and an unlawful competition. The Court of Appeal, holding that it was neither, granted it.
>
> That decision, if it stands, will form a precedent for the Commercial Court and other civil courts usurping the functions of the criminal courts. Publishers may be tempted to seek declarations that what they propose to publish is not a criminal libel or blasphemous or obscene. If in this case where the declaration sought was not in respect of future conduct but in respect of what had already taken place, it could properly be granted, I see no reason why in such cases a declaration as to future conduct could not be granted. …
>
> Such a declaration is no bar to a criminal prosecution, no matter the authority of the court which grants it. Such a declaration in a case such as the present one, made after the commencement of the prosecution, and in effect a finding of guilt or innocence of the offence charged, cannot found a plea of autrefois acquit or autrefois convict, though it may well prejudice the criminal proceedings, the result of which will depend on the facts proved and may not depend solely on admissions made by the accused. If a civil court of great authority declares on admissions made by the accused that no crime has been committed, one can foresee the use that might be made of that at the criminal trial.
>
> …
>
> My Lords, it is not necessary in this case to decide whether a declaration as to the criminality or otherwise of future conduct can ever properly be made by a civil court. In my opinion it would be a very exceptional case in which it would be right to do so. …"

48. As appears from that extract, the *Imperial Tobacco* case was one in which a prosecution had already been commenced, and to that extent it differs from the present. However, the present case is concerned with the legality of future conduct, namely the extension of the insurance under the policy. None of the matters relied

upon by the Appellant is capable of leading to the conclusion that the present is "a very exceptional case".

49. Moreover, as mentioned above, this appeal was heard as a matter of urgency. The time available did not permit the full and considered argument on Issue 1 that it deserved.

50. Lastly, neither this Court nor the Supreme Court is the court of final decision in relation to the correct interpretation of article 26(4) and its effect. The court of final decision is the Court of Justice of the European Union. Our decision would not be binding on any court of any other Member State, such as Sweden, in which the Intervener is located. This is a further, and powerful, consideration why in the circumstances of this case it would have been wrong to make a decision on Issue 1.

The position of the Intervener

51. There had been an issue as to whether the Intervener had served what was in form a valid notice of cancellation. As a result of the service of a further notice, that issue became academic, and the Court did not address it. In all other respects, the Intervener supported the submissions of the Respondent, and it is unnecessary for me to address its position in my judgment.

Lord Justice Elias :

52. I agree with both judgments.

Lord Justice Tomlinson :

53. I, too, agree with the judgment of Stanley Burnton LJ and merely add a few supplementary observations of my own.

54. GT has been sued on behalf of itself and also on behalf of all the other underwriters subscribing to five separate policies of insurance. Yet GT subscribes to, and leads, only one of those policies. It is not known whether the terms of the other policies are the same as that of the policy to which GT subscribes. On this ground alone it is inappropriate that GT should represent the interests of underwriters subscribing to policies to which it is not party. For the reasons given by Stanley Burnton LJ it is equally inappropriate that GT should represent even those underwriters who subscribe to the policy which it leads.

55. The cover given by the policy is for one year. There is a contractual mechanism for extension which will involve no fresh exercise of underwriting judgment and hence generates no fresh duty of disclosure on the part of the assured. The mechanism is to be found only in the words appearing in the details of the period of cover in the slip "It is agreed to extend for a further period of Twelve Months at 2011 anniversary date(s) subject to Review Clause attached" and in the Review Clause itself. However these words are to be interpreted, no-one suggests that they convert the policy into a two-year policy. There was some inconclusive debate before us as to whether the Credit Balance refers to a loss ratio by reference to reported losses or rather by

reference to claims made. The second part of the Review Clause would seem to suggest that it is the latter, although on either view it is obvious that the conditions for an extension of the cover may not be met.

56. Although it may be rare in this class of insurance for a loss not to result in a claim, where and to the extent allowable under the policy, there is, as Mr MacDonald Eggers pointed out, no obligation upon an assured to make a claim. Furthermore, as Stanley Burnton LJ observed in argument and points out in paragraph 36 above, an assured may choose not to make a claim if to do so would disentitle it to an extension of the cover. In such circumstances, as it seems to me, the decision of an assured not to make a claim so as to preserve the entitlement to an extension may very well constitute an act or omission on the part of the assured such as would, on any view, trigger an entitlement in underwriters to cancel under the first part of the Iran Sanctions Clause.

57. I am not for my part convinced that extension of the policy should not in all cases be regarded as arising from a positive act of the assured, in the shape of an express or implied request for an extension. The limited language used in the policy is to my mind a slender basis from which to infer that the assured is compelled to accept cover for a second year. It is, I consider, strongly arguable that the language used has the effect that underwriters will in the circumstances prescribed extend the policy cover if requested so to do by the assured.

58. The significance of this is twofold. Firstly, it would if right render academic the debate whether the first paragraph of the Iran Sanctions Clause requires an act or omission on the part of the assured. Secondly, at the very least it demonstrates that underwriters can properly form the opinion that the assured has exposed or may expose them to the relevant risk by an express or implied request for extension of cover. Furthermore, I would add as a separate point that if an extension of the policy is not to be regarded as something which occurs automatically, it is the more likely that it is prohibited by Article 26(4) of the Regulation.

59. However I agree with Stanley Burnton LJ and the judge that it is not in any event a sensible reading of the first paragraph of the Iran Sanctions Clause that it requires an act or omission on the part of the assured. It should be noted that the paradigm acts of the assured which will expose underwriters to the relevant risk lead under the second paragraph of the clause to the automatic termination of the cover. That being so, it is I think unlikely that it is acts (or omissions) of the assured which is intended to be the trigger under the first paragraph, since if that is the correct approach the first paragraph lacks any real content. Furthermore, as Mr MacDonald Eggers pointed out, sanctions are often aimed not so much at acts of the target nationals but rather at the acts of those dealing with target nationals. I accept that the first paragraph of the clause is not happily drafted, but in my judgment it is plain that it seeks to invest underwriters with a right of cancellation which is triggered by the characteristic of the assured that it has become an entity further relevant dealing with which will, in the opinion of underwriters, expose them to the risk of being placed in breach of the relevant sanctions.

60. In support of his argument that underwriters are under an implied duty to reconsider the exercise of their rights under the Iran Sanctions Clause Mr Bryan relied by way of analogy upon the decision of the House of Lords in *Kodros Shipping Corporation v*

Empresa Cubana de Fletes (The"Evia" (No.2)) [1982] 2 Lloyd's LR 307. I find this analogy very unconvincing. The further and secondary obligation there in question arises in the context of an ongoing time charter which remains on foot notwithstanding that the nominated port has become unsafe and under which the charterer, assuming that he is in a position to give an effective alternative nomination and wishes to continue to trade the ship for which he is obliged to continue to pay hire, is also under a continuing obligation to employ the vessel only between good and safe ports. I do not think that this provides any support for the notion that a right of cancellation should be subject to an implied duty of reconsideration. Indeed, the implication of such a term would be wholly inimical to certainty as to the extent of the parties' obligations, the achievement of which is the touchstone of our commercial law.

61. In relation to Issue 1, I agree with Mr Bryan that an important part of the function of the Commercial Court and therefore, on appeal therefrom, of this court is, where possible, to give guidance to the commercial community. Obviously however that function remains subject to the overriding principle that the Commercial Court, no more than any other English court, is not an advisory court and will not ordinarily address hypothetical issues which do not arise as between the parties to the litigation before it. In this regard it was urged upon on us:-

(a) that Gard's notice of cancellation contains the following final paragraph:-

> "Gard Marine Energy is aware that Arash have indicated their intention to appeal the decision of Burton J. Should that appeal be heard and ruled upon prior to expiry of this notice and should the Court of Appeal hold that the risk can be renewed without breaching Article 26, then Gard Marine and Energy Limited will treat this notice as null and void."

(b) that in the light of a favourable decision by this court on the construction of Article 26, other underwriters might withdraw their notices and

(c) that two underwriters, Lancashire and IGI Bermuda had, as at the date of the hearing before us, served no notice.

Ultimately, Mr Bryan's plea on this point amounted to the suggestion that, if this court were of the view that the conclusion reached by Burton J on the construction of Article 26 is wrong, it would be an unfortunate and unattractive result to leave the market in ignorance of that view.

62. I have great sympathy with this approach and would have wished to assist if it were possible and sensible so to do within the bounds which must inevitably constrain the court. However any decision could only be of benefit to the London rather than the overseas market. Furthermore, it was the position of Mr MacDonald Eggers that Issue 1 is, in the light of our conclusion on Issue 2, academic. Moreover, he pointed out that it was the position of his clients that, if the decision of the judge stands on Issue 2 but is overruled on Issue 1, they could not in fact safely withdraw their notice of cancellation since so to do would amount to a voluntary and unnecessary act on their part, which would lead to the inevitable conclusion that the extension thereby granted was not automatic and the possible, perhaps likely, conclusion that it was on

any view therefore prohibited by Article 26. Since it was acknowledged, and is inherent in the availability of the extension, that this business is attractive to underwriters, this is a point which commands respect. Other underwriters, including Gard, might take the same view.

63. I appreciate that that still leaves the position of UK underwriters who have not declared their hand. They however would not, in practice, be assisted by a decision of this court to the effect that extension is not prohibited by Article 26 unless we were additionally of the view that the point is *acte clair*. Even then, the Supreme Court, or on referral the European Court, might take a different view.

64. On announcing our decision we made it clear that it should not be assumed that we considered that Burton J was wrong in his conclusion as to the construction of Article 26. I agree with Stanley Burnton LJ for the reasons which he has given that in the circumstances this court should be cautious before expressing a concluded view as to the effect of Article 26 and in particular Article 26(4), especially in circumstances where the matter came before the court on an expedited basis with the need for an immediate decision. But lest there be any lingering misunderstanding, and since the submission was made to us that the conclusion of Burton J is so obviously incorrect that no underwriter could reasonably have reached the same view, I think it is appropriate to indicate that my own preliminary view is that Burton J is plainly correct. Article 26 prohibits the provision of insurance after the operative date. Article 26(4) makes clear that this is not intended, save where Article 16(3) is engaged, to prohibit compliance with insurance agreements made before the operative date. However Article 26(4) also spells out that extension or renewal of an insurance or re-insurance agreement made before the operative date is caught by the prohibition on the provision of insurance or re-insurance. As at present advised, I do not read the final part of that article as exempting from the prohibition an extension or renewal which can be said to amount to no more than the compliance by underwriters with an agreement they have made before the operative date. The final words of Article 26(4) are not words of exception. The reference back to Article 16(3) points, in my view, to the limited scope or function of the second part of Article 26(4) as relating to the performance or run-off of existing insurance or re-insurance agreements, rather than preserving the ability to enter into a contractual extension or renewal. It is also my present view that the word "agreements" as last used in Article 26(4) means an insurance or re-insurance agreement, by which is intended, I think, a contract of insurance. Insofar as underwriters may be contractually obliged to extend the existing policy, that as it seems to me is compliance with an agreement which is not itself a contract of insurance or an "insurance agreement" but rather a contract to provide a contract of insurance or "insurance agreement". Thus the obligation to extend may be an agreement about insurance and it is of course contained within an insurance agreement, but I doubt whether it is an agreement of the type compliance with which is permitted by Article 26(4).