Neutral Citation Number: [2017] EWCA Civ 25

Case No: A3/2015/1562

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE EDER
[2015] EWHC 1000 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/01/2017

Before :

LORD JUSTICE LEWISON
MR JUSTICE ARNOLD
and
SIR STEPHEN TOMLINSON

- -

Between :

(1) WR Berkley Insurance (Europe) Limited **(2) Aspen Insurance UK Limited**	**Appellants/ Defendants**
- and -	
Teal Assurance Company Limited	**Respondent/ Claimant**

- -
- -

Colin Edelman QC and Alison Padfield (instructed by **Clyde & Co LLP**) for the **Appellants/ Defendants**
Christopher Butcher QC and Rebecca Sabben-Clare QC (instructed by **DAC Beachcroft LLP**) for the **Respondent/Claimant**

Hearing date : 18 November 2016

- -

Approved Judgment

Sir Stephen Tomlinson :

Introduction

1. This appeal raises a short point as to the proper construction or characterisation of a Payment Deed and associated Escrow Agreement entered into on 15 December 2010 by Black & Veatch Group Limited ("BVGL"), a major engineering group, pursuant to a compromise agreement concluded with one of its customers, Ajman Sewerage (Private) Company Limited ("ASPCL"). The Payment Deed by clause 3.2 required BVGL to "deposit US$13,460,531 in cleared funds (the Escrow Amount) into the Escrow Account", an account opened by the Escrow Agent BNP Paribas Securities Services "in the name of BNP Paribas Securities Services as Agent for BVGL and ASPCL . . . and operated pursuant to the Escrow Agreement". The Escrow Amount was paid into the Escrow Account on the same day as the Payment Deed was executed, 15 December 2010. The question is whether execution of that agreement, and/or the payment of the sum into escrow by BVGL on that day, generated in BVGL's professional liability insurers an immediately enforceable obligation to indemnify BVGL on the basis that the sum of US$13,460,531 was a sum which BVGL had "become legally obligated to pay as Damages", that being the relevant language of the insuring clause.

2. The question arises in the context of preliminary issues directed to be tried on the basis of a Statement of Facts agreed only for the purposes of the preliminary issues. Nothing that I say in this judgment therefore is intended to be conclusive of ultimate liability. The parties seek the resolution of this issue on the basis of assumed facts because it is critical to their interests to establish the time at which, and therefore the order in which, insured losses were suffered for the purpose of a programme of professional indemnity insurance and reinsurance. During the relevant policy period, 1 November 2007 to 1 November 2008, the Black & Veatch group companies had the protection of a "tower" of insurances in excess of a self-insured retention of US$10 million per claim and US$20 million in the aggregate per policy period. The first four layers of this programme provided worldwide cover up to US$60 million in excess of the self-insured retention. The fifth and final layer however, providing further cover of up to £10 million, excess of the cover of US$60 million provided by layers 1-4, excluded claims emanating from or brought in the USA or Canada. Layers 2-5 of the insurance programme in the tower were underwritten by the Respondent/Claimant Teal Assurance Company Limited, a captive insurer of the Black & Veatch Group. Layers 2-4 were variously reinsured by five major reinsurers. The reinsurance of the fifth layer was placed with two further reinsurers, the Appellants/Defendants WR Berkley Insurance (Europe) Limited and Aspen Insurance UK Limited, who had no exposure to layers 2-4.

3. During the policy period Black & Veatch faced a number of claims, two of which were substantial US-based claims. It is in the interests of Berkley and Aspen as reinsurers of the fifth layer in the tower to establish that the non-US-based claims rate for indemnity prior in time to the US-based claims and thus exhaust layers 1-4 of the insurance programme before the US-based claims attach. If their argument is well-founded, the remaining US-based claims will be irrecoverable under the fifth layer of the programme because excluded and Black & Veatch must bear those claims uninsured. If however the US-based claims attach prior to the non-US-based claims, the US claims will rate for indemnity under and exhaust layers 1-4 leaving layer 5

exposed to the non-US based claims to which it must respond. Hence this litigation between Black & Veatch's captive insurer Teal and the reinsurers of the fifth layer Berkley and Aspen.

4. The parties have already submitted an initial set of preliminary issues for resolution by the court. On that occasion, as it seemed to me, the captive insurer Teal was hoping to be able to manipulate recoveries of indemnity so as to enable Black & Veatch to access the fifth layer in the tower without first establishing that the cover on top of which that layer sits had burned through – see paragraph 20 of my judgment at [2011] EWCA Civ 1570. On that occasion Andrew Smith J, this court and the Supreme Court held with one voice that claims exhaust the insurance programme by reference to the order and timing of the establishment and ascertainment of the original insured's liability – see [2011] EWHC 91 (Comm), [2011] EWCA Civ 1570 and [2013] UKSC 57. That conclusion is hardly novel. It gives effect to the decision of the Court of Appeal in *Post Office v Norwich Union Fire Insurance Society Limited* [1967] 2 QB 363 and of the House of Lords in *Bradley v Eagle Star Insurance Co Limited* [1989] AC 957. The principle was pithily stated by Phillips J in *Cox v Bankside Members Agency Limited* [1995] 2 Lloyd's Rep 437 where he said, at 442(RH):

> "No obligation on the part of the insurer arises until the liability of the assured to a third party is established and quantified by judgment, arbitration award or settlement."

Quantified here means ascertained as to its amount, and in this context the words "quantified" and "ascertained" are synonymous. The question raised by this second set of preliminary issues is whether the liability of Black & Veatch Corporation to ASPCL for breach of the construction contract concluded between them was established and ascertained, or quantified, by entry into the Payment Deed and associated Escrow Agreement and/or by payment of the Escrow Amount. Eder J held that it was not – [2015] EWHC 1000 (Comm) and it is against that decision that the reinsurers appeal.

The facts

5. I gratefully adopt the following summary of the facts and the issues set out by Eder J, which was in large part taken by him from the agreed Statement of Facts, and which I have supplemented only by citation of certain further provisions of the relevant agreements:

> "3. Teal is an insurance company incorporated in the Cayman Islands. It is wholly owned by the Black and Veatch Holding Company and is one of the Black & Veatch group of companies. The Reinsurers are reinsurers of the Top & Drop layer of Black and Veatch's professional indemnity insurance as further described below.
>
> 4. Black and Veatch Corporation ("BVC") is another corporation in the same group of corporations and is incorporated in Delaware. BVC is a major engineering

company providing professional advice and services and carrying out engineering, procurement and construction contracts in various parts of the world either by itself or through subsidiary or associate companies and either on its own or in joint venture with others. All references below to "BVC" are to all Black & Veatch group companies, as the context requires.

5. Teal is a captive insurer i.e. its sole business is the insurance and reinsurance of the interests of members of the Black & Veatch group of corporations.

6. During the relevant period i.e. 1 November 2007 to 1 November 2008 (the "policy period"), BVC's professional indemnity insurance programme for the policy period comprised of 5 layers, as follows.

The Lexington policy

7. The bottom layer of the programme was a contract of insurance of BVC underwritten by Lexington Insurance Corporation and contained in or evidenced by policy no. 0101085 (the "Lexington policy" or "Primary policy"). The Lexington policy provided professional indemnity insurance to BVC subject to a per claim deductible of US$100,000, a per claim self-insured retention of US$10 million and an aggregate self-insured retention per policy period of US$20 million. The limit under the Lexington policy was US$5 million per claim and in the aggregate.

8. The Lexington policy provided in material part as follows:

> *"*...
>
> *1. INSURING AGREEMENT - COVERAGE*
>
> ...
>
> *The Company will indemnify the Insured all sums up to the Limits stated in the Declarations, in excess of the Insured's Deductible and/or Self-Insured Retention, which the Insured shall become legally obligated to pay as Damages if such legal liability arises out of the performance of professional services in the Insured's capacity as an architect or engineer and as stated in the Application provided:*
>
> ...

IV. DEFINITIONS

…

D. Damages means compensatory damages.

…

V. SETTLEMENT

The Insured shall not settle any Claim without the informed consent of the Company, such consent not to be unreasonably withheld.

…

VI. ACTION AGAINST THE COMPANY

No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this Policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured at the actual trial, arbitration or by written agreement of the Insured and the claimant, to which agreement the Company has consented.

…

ENDORSEMENT # 008

…

DESIGN BUILDER'S INDEMNITY ENDORSEMENT

Endorsement Specific Deductible: $250,000.00

In consideration of the premium charged, it is hereby understood and agreed that the coverage provided under this policy is modified as follows:

In addition to the coverage granted under this Policy, but subject to the same Self-Insured Retention and limits of liability, we agree to indemnify the Named Insured for the Named Insured's Actual and Necessary Costs and Expenses incurred in rectifying a Design Defect in any part of the construction works or engineering works for any project upon which you are providing design/build services provided …"

The upper layers of insurance

9. The next 3 layers were contracts of insurance of BVC underwritten by Teal (together the "tower policies"). The 3 layers were as follows:

   i) By policy No. 2007-009, a contract of insurance subject to a limit of US$5 million in aggregate, excess of US$15 million in aggregate (i.e. excess of the Lexington policy).

   ii) By policy No. 2007-010, a contract of insurance subject to a limit of US$30 million in aggregate, excess of US$20 million in aggregate (i.e. excess of the first tower policy).

   iii) By policy No. 2007-011, a contract of insurance subject to a limit of US$20 million per in aggregate, excess of US$50 million in aggregate (i.e. excess of the second tower policy).

10. The 5th layer comprised a contract of "top and drop" insurance, which was underwritten by Teal (the "Top and Drop policy"). The Top and Drop policy was contained in or evidenced by policy document no. 2007-012. In essence, it provided insurance to BVC subject to (i) a limit of GB£10 million or its equivalent in other currencies, excess of the Lexington policy and the tower policies; and (ii) an exclusion in respect of claims emanating from or brought in the USA or Canada.

11. All these upper layers i.e. the tower policies and the Top and Drop policy were, in effect, on terms substantially similar to the terms of the Lexington policy.

The Reinsurance of the Top and Drop policy

12. By a contract of reinsurance contained in or evidenced by a slip policy No. Y0050790U (the "contract of reinsurance" or the "Excess Policy"), the Reinsurers agreed to reinsure Teal in respect of its liability under the Top and Drop policy. Like the Top and Drop policy, the contract of reinsurance was subject to a per claim limit of GB£10 million or its equivalent in other currencies. The contract of reinsurance was subject to the same terms and conditions as the Top and Drop policy in relation to coverage, including the exclusion in respect of claims emanating from or brought in the USA or Canada.

Summary of claims faced by BVC during the Policy Period

13. During the policy period, BVC faced a number of claims, as follows:

    i) PPGPL: This is a substantial non-USA claim arising from BVC's design, procurement and construction of an expansion project at a gas processing plant in Trinidad.

    ii) Providence, Water One and City of Clovis: These are small US based claims.

    iii) FRP: This is one of two US based claims that arise from contracts between BVC and a company known as AEP or its subsidiaries to design, procure and install wet flue gas desulphurisation systems at AEP's power stations. Fibre Reinforced Thermostat Plastic failed as a result of a design defect, namely a lack of support.

    iv) Ajman: This is the second non-USA claim and arises out of the failure of a waste water treatment plant to process sewage to its contractual specification.

    v) JBR Internals: This is the second AEP, and therefore US based, claim and the largest of the claims, arising out of failure of jet bubble reactors in the USA.

14. Thereafter, BVC paid out various sums on remedial works in respect of these claims details of which were summarised in a Schedule attached to the Statement of Facts setting out the amount of such payments and the month in which they were incurred. At this stage, the Reinsurers make no admissions as to the accuracy of this Schedule but it is to be presumed accurate for the purposes of these preliminary issues.

History of proceedings

15. These proceedings were originally commenced in 2010. At that time, Teal contended as its primary case that it was entitled, under the insurances, so to order its claims as to enable the non-USA claims, namely PPGPL and Ajman, to fall within the Top and Drop policy.

16. That question was tried by Andrew Smith J as long ago as 2011 as the First Preliminary Issue. In essence, he found for the Reinsurers and held that the contracts of insurance within BVC's professional indemnity insurance programme responded to claims by reference to the order in which the original assured (i.e. BVC) suffered insured loss: see [2011] EWHC 91(Comm). The Order made by the Judge following that Judgment and dated 31 January 2011 is in material part in the following terms:

> "*On the true construction of the Excess Policy, the Excess Policy responds by reference to the order and timing of the establishment and ascertainment of an original Insured's liability or of the incurring of costs and expenses falling within the ambit of Endorsement 008 to the Primary Policy by an original insured to provide indemnity only upon exhaustion of the limits of liability of the underlying p.i.tower and an original insured thereafter becoming liable to make any payments in respect of any claims against it or incurring such costs and expenses, subject to the exclusion of US and Canadian claims and losses and subject to all other applicable policy terms and conditions.*"

17. The decision of Andrew Smith J was upheld by the Court of Appeal: see [2011] EWCA Civ 1570; and the Supreme Court: see [2013] UKSC 57.

18. In light of those judgments, Teal revised its case. As already noted, the Schedule sets out BVC's expenditure on remedial works as it occurred on a monthly basis. The left-hand columns of the Schedule set out the claims and the amounts paid out by BVC by month. The right hand columns show the resulting exhaustion of the deductibles, self-insured retention, the tower policies and finally the Top & Drop policy on the basis that exhaustion of the insurances occurs as BVC incurs expenditure.

Ajman

19. BVC were part of a consortium which constructed a sewage system for the emirate of Ajman. BVC were responsible for process, design and construction of the waste water treatment plant (less the civil engineering work). The plant was required by the construction contract to achieve a standard of effluent known as

10/10. It did not achieve that standard. Ajman alleged breach of this standard.

20. BVC reached a settlement with its contracting party i.e. Ajman Sewerage (Private) Company Limited ("ASPCL") in December 2010. Part of that settlement required BVC to place a net amount of US$13,460,531 (i.e. US$14 million less US$539,469) into escrow (the "escrow payment") on terms set out in an Escrow Agreement dated 10 December 2010 which provided in material part as follows:

> "*Payment* Deed
>
> *…*
>
> *Recitals*
>
> *…*
>
> *D. Under the terms of the MOA, BVGL has agreed to pay ASPCL the Payment.*
>
> *…*
>
> *It is agreed:*
>
> *1. Definitions and Interpretation*
>
> *…*
>
> *(f) New Contract means the contract for the construction of an additional aeration, activated sludge treatment or equivalent facility at the Ajman sewerage system (as such contract may be amended or replaced from time to time) to be entered into by ASPCL and a new construction contractor.*
>
> *(g) Payment means an amount not to exceed in aggregate USD 13,460,531 (…) to be paid by the Escrow Agent on behalf of BVGL to ASPCL under the terms of this Payment Deed and the Escrow Agreement.*
>
> *…*
>
> *2 Payment terms*
>
> *2.1 The Payment or parts thereof are due at the times and in the amounts set out in Appendix 1 and Payments shall be made by the Escrow Agent on behalf of BVGL pursuant to the Escrow Agreement.*

…

3 Escrow Account

3.1 BVGL and ASPCL agree that upon the execution of this Payment Deed they will designate and appoint BNP Paribas Securities Services, London Branch as escrow agent upon the terms and in the form of the Escrow Agreement.

3.2 Before the Effective Date, BVGL shall deposit USD13,460,531 in cleared funds (the Escrow Amount) into the Escrow Account.

3.3 BVGL and ASPCL agree that:

(a) any interest accruing in the Escrow Account shall be for BVGL's account and shall be paid by the Escrow Agent to BVGL as set forth in the Escrow Agreement; and

(b) the Escrow Amount shall be held on deposit and not used for making any investments by the Escrow Agent;

and neither BVGL nor ASPCL shall instruct the Escrow Agent otherwise.

3.4 BVGL and ASPCL agree that upon the earliest of (i) ASPCL's agreement that no further payment certificates will be issued under the New Contract; (ii) 2 May 2011 if the New Contract has not been awarded by ASPCL; or (iii) 31 July 2013, the Escrow Agent shall be immediately jointly instructed by BVGL and ASPCL to distribute any remaining funds in the Escrow Account to BVGL and the Escrow Agreement shall be terminated.

3.5 The escrow agent shall at all times be the Escrow Agent, provided that the Escrow Agent has the Required Rating. ASPCL shall monitor the credit rating of the Escrow Agent and shall notify BVGL of any downgrade in the long term financial strength of the Escrow Agent upon becoming aware of any such downgrade.

…

Appendix 1 – Payment Terms

ASPCL shall deliver claims for payment to the Escrow Agent and the Escrow Agent shall make

payment on behalf of BVGL in accordance with the provisions of the Escrow Agreement, in the amounts and at the times set out herein, provided that:

(a) the New Contract is awarded on or before 2 May 2011, failing which BVGL shall have no obligation to pay the Payment or any part thereof and such obligation shall become null and void;

(b) in the event the New Contract is awarded on or before 2 May 2011, all claims for payment must be delivered to the Escrow Agent in accordance with the provisions of the Escrow Agreement on or before 31 July 2013, failing which BVGL shall have no further obligation to pay any parts of the Payment in respect of which claims for payment have not already been delivered to the Escrow Agent by ASPCL; and

(c) no claim for payment shall be made by or due to ASPCL before the execution of the New Contract or the Effective Date, whichever is the later.

Payments shall consist of:

1. US$1,400,000 (...) less US$539,469 within 21 days of BVGL receiving written confirmation from ASPCL of the award of the New Contract.

2. US$1,262,000 (...) within 52 days of BVGL receiving written instructions from ASPCL for the new contractor to commence the works under the New Contract.

3. An amount not to exceed US$ 11,340,000, payable in instalments, such instalments to occur not more frequently than monthly, each instalment subject to independent certification by ASPCL's consulting engineer (Halcrow International Partnership) that the requested instalment amount does not exceed the value of the work performed in the instalment period; each such instalment due within 21 days of BVGL receiving the relevant certifications."

Appendix 2 – Form of Escrow Agreement

. . .

WHEREAS, ASPCL AND BVGL, have entered into a Payment Deed, dated as of [ ] 2010 in respect of the Ajman Sewerage System Project under which BVGL is required to pay to ASPCL an amount not to exceed in the aggregate US$13,460,531 . . . (the "Payment Deed");

WHEREAS, to secure funds for the payment to ASPCL in accordance with the payment provisions and requirements in the Payment Deed; and

. . .

NOW, THEREFORE, in consideration of the mutual promises and covenants contained herein, the parties hereby agree as follows:

2 Establishment of Escrow. Pursuant to the terms of the Payment Deed, BVGL shall deliver to the Escrow Agent US$13,460,531 (the "Escrow Amount") and the Escrow Agent shall deposit the Escrow Amount into an Escrow Account in the name of BNP Paribas Securities Services as Agent for ASPCL and BVGL (the "Escrow Account"). All amounts held in the Escrow Account shall be held and distributed pursuant to the terms and conditions of this Agreement. The Escrow Amount, as reduced by any disbursements therefrom by the Escrow Agent in accordance with the Payment Deed and this Agreement and increased by any interest accruing on the Escrow Account (the "Earnings"), save to the extent such Earnings have been paid by the Escrow Agent to BVGL as provided in this Agreement, is hereinafter referred to as the "Escrowed Amount". Except as ASPCL and BVGL may otherwise agree to in writing, no part of the Escrowed Amount may be withdrawn from the Escrow Account except as expressly provided in this Agreement. . . All Earnings are for the account of BVGL and shall be promptly paid by the Escrow Agent to BVGL . . .

6. Responsibilities and Liabilities of the Escrow Agent

6.1 The Escrow Agent shall deal with the Escrow Account and any Earnings thereon only in accordance with the Agreement and applicable English law . . ."

> 21. Pursuant to the Escrow Agreement, BVC paid into escrow on 15 December 2010, the sum of US$13,460,531, credit being given to BVC for US$539,469. Subject to the addition of some late allocations of minor project costs, the escrow monies were thereafter drawn down from time to time as set out in the far right-hand column of the Schedule.
>
> . . .
>
> 23. The preliminary issues are as follows:
>
> i) Issue 1.1:
>
> "In respect of the Ajman Claim, did BVC suffer a loss for the purposes of its entitlement to an indemnity under its professional indemnity insurance programme in respect of the sum of US$13,460,531, which was paid into an escrow account on 15 December 2010 pursuant to settlement agreements dated 15 December 2010 referred to in paragraph 60 of the Re-Amended Particulars of Claim:
>
> (a) On 15 December 2010; or
>
> (b) As and when ASPCL drew down the money paid into the escrow account."
>
> It is Teal's case that the answer to this preliminary issue is (b) and that issues 1.2 and 1.3 (see below) do not arise. It is the Reinsurers' case that the answer to this preliminary issue is (a).”

It is unnecessary to set out the remaining preliminary issues which, in the light of Eder J’s answer to the first preliminary issue, did not arise for decision by him and do not arise now in the event that we agree with him.

6. It was common ground before Eder J and before us that by the December 2010 settlement BVC’s liability to Ajman was established because, pursuant to the relevant agreements, on entering into a New Contract for the remedial works and having the relevant work performed on the terms set out, ASPCL became entitled to draw down on the escrow payment in the manner described. The only question for decision is whether BVC’s liability was likewise thereby ascertained. It was also common ground before us that Teal as insurer consented to BVC entering into the settlement with Ajman.

The argument

7. I hope that I do no injustice to the skilful and sustained argument of Mr Colin Edelman QC for the reinsurers if I summarise it succinctly. He submitted that clause 3.2 of the Payment Deed effects the ascertainment of BVC’s liability to Ajman. He

submitted, self-evidently correctly, that the search is for a loss suffered by the insured, not a gain secured by the third party claimant. He submitted that an insured will have suffered a loss if an established liability requires him to part with a sum of money. Ascertainment, he submitted, in this context means a quantified loss sustained by the insured which is caused by the established liability. The settlement required BVC to part with its money. The cash payment was of a fixed sum, to be regarded as the equivalent of an award of damages against BVC.

8. Mr Edelman submitted that support for these propositions was to be found in the judgment of Phillips J in *Cox v Bankside,* above. In that case Phillips J decided that an order made by the court pursuant to RSC O.29 r.11 that a defendant should make an interim payment to the claimant ascertained the liability of the defendant in the amount so ordered to be paid. An order for an interim payment would thus trigger the right to indemnity under a typical liability policy providing cover in respect of "all sums which the Assured shall become legally liable to pay as damages". Mr Edelman particularly relied on the following passage in the judgment of Phillips J at page 452RH:

> "An interim payment ordered under O.29, r.11 is ordered on account of and in anticipation of an eventual award of damages. Where a judgment for damages is subsequently entered, it will be for a sum that gives credit for the interim payment already made. In my judgment the subject matter of an interim payment ordered under O.29, r.11 can properly and naturally be described as damages and falls within the meaning of "damages" in the insuring clause of the policy."

I draw attention also to the following passage in the judgment of Phillips J, at page 452RH – 453LH, under the rubric "Ascertainment":

> "Does an interim payment order satisfy the requirement laid down by *Post Office v Norwich Union* that no claim can be brought under a policy of insurance against third party liability until the existence and amount of that liability has been established by action, arbitration or agreement?
>
> Mr Sumption argued that, because an interim payment order was provisional, it did not establish the amount of the assured's liability. Furthermore, the possibility that the order might be varied raised practical problems as to the operation of the cover. So far as these practical problems are concerned, it does not seem to me that they differ in principle from those inherent in the fact that a first instance judgment in favour of a claimant against the assured may be reversed or varied on appeal. So far as ascertainment is concerned, an interim payment order ascertains a quantified sum which is due and payable by way of damages – albeit on a provisional basis. Interim payment orders did not exist when *Post Office v Norwich Union* was decided, but in my judgment an interim payment order satisfies the requirements there laid down.

> Had I any doubts on this question, they would be dispelled by the consequences that would flow were Mr Sumption's submissions correct. An agent adequately protected by E & O insurance, would nonetheless be liable to be rendered insolvent by his inability to call upon his E & O underwriters to indemnify him against his liability to comply with an interim payment order. A liability policy which exposed the assured to such a possibility would provide an unsatisfactory cover and it is appropriate, where the wording permits, to adopt a construction that avoids this result. The terms of O.29, r.11(2)(a) indicate that those who drafted this order anticipated that liability insurers would be bound to respond to an interim payment order. In my judgment they were justified in so doing."

9. In my judgment Mr Edelman's arguments all fail. The first, although not the only reason for their failure, is that the settlement did not require BVC to part with its money. The settlement set up a procedure pursuant to which BVC was to deposit funds in escrow to be held by the Escrow Agent as agent for ASPCL and BVGL to secure funds for the payment to ASPCL in accordance with the payment provisions and requirements set out in the Payment Deed. This deposit was a sum from which there might be subsequent payments which would represent sums payable as compensatory damages, but it was not such a payment itself. As Mr Christopher Butcher QC for Teal submitted, putting money aside which can then be used for the purpose of making compensatory payments is not paying damages pursuant to a legal obligation. There was therefore no loss to the insured. The sum deposited in escrow was the maximum extent of BVC's as yet unascertained liability, in contradistinction I might add, as did the judge, to an interim payment order which is a determination by the court of the likely minimum extent of the defendant's ultimate liability. There was no ascertainment of the insured's liability, whether as to its minimum or as to its entirety, and thus no ascertained loss.

10. Elaborating on those points, by reference to the different strands in Mr Edelman's argument:

    i) The payment into escrow compensated no-one;

    ii) The sum paid into escrow was not irrevocably paid away. It was paid as security which would respond only in certain circumstances and which, in the circumstances defined in clause 3.4 of the Payment Deed, would be released or returned, in whole or in part, to BVGL;

    iii) There is nothing in the agreed Statement of Facts nor inherent in the settlement itself to the effect that it was recognised or accepted that the liability of BVC would be the amount, or at least the amount, paid into escrow;

    iv) Whilst in the escrow the money had to be dealt with according to the terms of the agreement but it bore interest for the benefit of BVGL. To that extent, BVGL had the financial use of the money pending its distribution pursuant to the terms of the agreement;

v) To the authorities pithily summarised by Phillips J in *Cox v Bankside* as set out at paragraph 8 above, one can add:

a) *Burns v Shuttlehurst Limited* [1999] 1 WLR 1449, where the Court of Appeal held that judgment for liability with damages to be assessed is not an ascertainment of liability so as to generate a right to indemnity under a typical liability policy; and

b) *Enterprise Oil Limited v Standard Insurance Co Limited* [2007] Lloyd's Rep IR 186 where at 219 Aikens J said:

> "The right of [an] insured to "sue for an indemnity" against a liability insurer only arises once it can demonstrate loss. But an insured cannot demonstrate loss if it cannot show the existence and amount of liability to the third party by judgment, award or settlement."

vi) The "Payment" to which the Payment Deed refers is defined at clause 1.1(g) as an amount not to exceed in aggregate US$13,460,531 to be paid (my emphasis) by the Escrow Agent on behalf of BVGL to ASPCL in the events specified in the Payment Deed and Escrow Agreement. The Payment thus regulated is the payment out of the Escrow Agreement, which occurs on the ascertainment of the extent of liability, and constitutes a loss, not the deposit of funds into the Escrow Account, which is in fact described in the agreement as delivery of funds – see clause 2 of the Escrow Agreement;

vii) The agreement identifies no specific sum which BVGL is without more required to pay ASPCL;

viii) The agreement spells out and gives effect to the clear distinction between the delivery of funds into the Escrow Account for the purpose of security and the payments out which will, to the extent that they happen, constitute compensatory damages;

ix) The closer analogy is judgment for damages to be assessed rather than interim payment. No sum is immediately payable to ASPCL and the agreement provides for circumstances in which there will be no payment to ASPCL. The timing and extent of any payments to ASPCL depend upon the conclusion of the New Contract and the performance of work under it and its certification as provided for in the agreement;

x) Insurers' consent to the arrangements is nothing to the point. Insurers did not agree to fund the provision of security and they did not agree that provision of security entitles the insured to an indemnity in the amount secured.

11. All the above reasoning amounts to no more than construing the Payment Deed and associated agreements and enquiring whether it gives rise, without more, to what can conveniently be described as the occurrence of an insured loss or, in the language of this (American) policy, to the insured becoming legally obligated to pay a sum as damages. Manifestly the Payment Deed and associated agreements perform no such function.

12. I do not for my part consider that there is any analogy to be drawn between the Payment Deed and an order for an interim payment. An order for an interim payment is determination by the court that the defendant is liable in damages and that the amount of such damages would be found at the subsequent trial to be greater than the amount ordered by way of interim payment. The Payment Deed is of a very different character. I leave on one side that it is a voluntary arrangement, which may as a matter of analysis be a distinction without a real difference, since ascertainment of liability can of course be by agreement. More importantly, the Payment Deed involves no payment being without more made to the third party claimant. Equally, it cannot be said that the parties to the arrangement have agreed that at least the amount paid into escrow is payable by way of damages to the third party claimant, ASPCL. As I have already remarked, the interim payment order represents a minimum amount which is due or will be payable by way of damages, whereas the escrow amount is a maximum which both may come down and, potentially, may be reduced to zero, in accordance with the terms of the agreement.

13. I also consider that Mr Edelman has attempted to read too much into the observation of Phillips J that "the subject matter of an interim payment ordered under O.29, r.11 can properly and naturally be described as damages". Phillips J did not I think thereby intend to suggest that any sum which is paid on account of and in anticipation of an eventual award of damages is paid "as damages". I pause to point out however that even if he did, still that would not avail the reinsurers here since the payment into escrow falls far short of even such a payment on account. Indeed it is a payment of a fundamentally different character. What Phillips J meant, I think, was that as an interim payment can be regarded as payment on account of and in anticipation of an eventual award of damages, so an interim payment could be regarded as being paid as damages. As I think Phillips J also recognised in the later passage in his judgment which I have set out at paragraph 8 above, his conclusion that liability insurers would be bound to respond to an interim payment order was an essentially pragmatic solution which might protect an insured from insolvency. No such considerations mandate a similar approach to the arrangements here voluntarily undertaken by a solvent insured.

14. Since there is no sensible or useful analogy to be drawn between an interim payment order and the settlement which the parties here agreed, it is unnecessary for the purposes of this appeal to decide whether *Cox v Bankside* was rightly decided on this point. I would only add that the liability policy or policies under consideration in that case did not contain a clause similar in effect to Clause 6 in the Lexington Policy, set out above. Had such a provision been present, requiring final determination of liability, it seems questionable whether Phillips J could have reached the same conclusion.

15. For all these reasons, which are essentially the same as those of the judge, I would dismiss the appeal.

Mr Justice Arnold :

16. I agree.

Lord Justice Lewison :

17. I also agree.