Neutral Citation Number: [2017] EWHC 2753 (Comm)

Case No: CL-2017-000452

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

IN THE MATTER OF THE ARBITRATION ACT 1996
AND IN THE MATTER OF AN ARBITRATION

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 06/11/2017

Before :

MR. JUSTICE TEARE

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Between :

TONICSTAR LIMITED (on its own behalf and on behalf of the other corporate members of Lloyd's Syndicates 62, 1861 and 2255)	**Claimant**
- and -	
(1) ALLIANZ INSURANCE PLC (formerly Cornhill Insurance Plc)	**Respondents**
(2) SIRIUS INTERNATIONAL INSURANCE CORPORATION (PUBL) (London Branch)	

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Andrew Burns QC (instructed by **DLA Piper LLP**) for the **Claimant**
Stephen Hofmeyr QC (instructed by **Weightmans LLP**) for the **Respondents**

Hearing date: 27 October 2017

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE TEARE

Mr. Justice Teare :

1. This application arises in the context of a reinsurance dispute which the parties have agreed should be resolved by arbitration. The dispute concerns the reinsurance by the Respondents of risks underwritten by the Claimant with regard to the liabilities of the Port of New York. As a result of the attack on the World Trade Centre in New York in September 2001 the Port of New York incurred considerable liabilities which were settled in May 2011 in the sum of around $47.5m. That gave rise to the Claimant's claim against the Respondents. In April 2017 arbitration was commenced.

2. The Contract of Reinsurance dated 12 February 2001 incorporated the "Joint Excess Loss Committee, Excess Loss Clauses" which were drafted by the said committee under the instructions of The Institute of London Underwriters and were published in January 1997. Clause 15 is entitled Arbitration and provided for each party to appoint an arbitrator. The respondent was to appoint an arbitrator within 30 days of receiving notice of the appointment of the claimant's arbitrator. In the event that the respondent failed to appoint an arbitrator, the claimant could apply to the Chairman of the Lloyd's Underwriters' Association and to the Chairman of the International Underwriting Association of London to nominate an arbitrator on behalf of the respondent. Clause 15.5 provided as follows:

> "Unless the parties otherwise agree the arbitration tribunal shall consist of persons with not less than ten years' experience of insurance or reinsurance."

3. The Respondents have appointed Mr. Alistair Schaff QC as their arbitrator. The Respondents' solicitor has said that Mr. Schaff has considerably more than ten years' experience of insurance or reinsurance. The Claimant accepts that Mr. Schaff has considerably more than ten years' experience of insurance or reinsurance law but says that he does not have more than ten years' "experience of insurance or reinsurance" within the meaning of the arbitration clause. What is required, submitted Mr. Burns QC, is experience in the business of insurance or reinsurance itself. The Claimant therefore seeks an order pursuant to section 24 of the Arbitration Act 1996 that Mr. Schaff be removed as an arbitrator on the grounds that he is not qualified to act as an arbitrator.

4. The application thus raises a short question of construction. As it happens Morison J. in July 2000 decided this very question by determining that a QC with considerable experience as a lawyer in insurance and reinsurance disputes was not qualified to act as an arbitrator within the meaning of clause 15.5; see *Company X v Company Y* dated 17 July 2000 but unreported. Mr. Burns QC urges me to follow that decision which has stood for 17 years and Mr. Hofmeyr QC urges me to depart from that decision on the grounds that the decision was wrong.

5. Where there is a previous decision at first instance a first instance judge should generally follow that decision unless there is a powerful reason for not doing so; see *Willers v Joyce* [2016] UKSC 44 paragraph 9 per Lord Neuberger.

6. The starting point must therefore be the decision of Morison J. in 2000, a copy of which is in the possession of the Claimant's solicitor. The judge held that it was reasonably clear that the parties who adopted the clause intended a "trade arbitration";

see paragraph 10 of the judgment. By that phrase I infer that Morison J. meant that the tribunal was to consist of persons from the trade or business of insurance and reinsurance. He noted that such an intention was supported by the circumstance that in default of appointment an arbitrator was to be appointed by the Chairman of the Lloyd's Underwriters' Association and the Chairman of the International Underwriting Association of London who were unlikely to be able to identify appropriate lawyers, but were, I infer, likely to know appropriate persons in the business of insurance and reinsurance; see paragraph 12. He also did not consider that it was the intention of the parties that those with experience of insurance or reinsurance acquired otherwise than by working in the business of insurance and reinsurance, for example, as auditors, PR consultants or shipowners, should be appointed arbitrator; see paragraphs 11 and 12.

7. Mr. Hofmeyr submitted that this decision was obviously wrong. The ordinary and natural meaning of "experience of insurance or reinsurance" included experience acquired not only from working within the insurance and reinsurance industry but also from working with or on behalf of that industry. The Claimant's construction, he said, imposed a limitation upon the clause when there was no basis for doing so. Lawyers or other professional advisers serving the industry could acquire "experience of insurance or reinsurance". The ordinary and natural meaning of that phrase is reflected in other standard wordings such as the IUA Arias wording:

> "Unless the parties otherwise agree the arbitral tribunal shall consist of persons….with not less than ten years' experience of insurance or reinsurance as persons engaged in the industry itself or as lawyers or other professional advisers. "

8. Mr. Hofmeyr submitted that if the parties had wished to confine their choice of arbitrators to persons working in the insurance or reinsurance industry or if they had wished to exclude lawyers they could have used language which made such intention clear. He further submitted that the (unlimited) ordinary and natural meaning of the phrase "experience in insurance or reinsurance" enabled the parties to have flexibility when nominating an arbitrator whose particular experience of insurance or reinsurance made him most suitable for the particular dispute. There was thus good commercial sense in the construction which he put forward.

9. There is undoubted force in Mr. Hofmeyr's submission and had I not been inhibited by the decision of Morison J. I might well have accepted it. But in circumstances where this court has decided this very question some 17 years ago and where the Joint Excess Loss Committee produced a further draft of the Excess Loss clauses in November 2003 and did not alter the drafting of clause 15.5 (save its numbering) there must, it seems to me, be a very powerful reason for the court not to follow the decision of Morison J. That is no doubt why Mr. Hofmeyr submitted that the decision was obviously wrong.

10. The particular contract of reinsurance which the court must construe is dated 12 February 2001. That is only some 7 months after Morison J's decision and well before the re-issue of the Excess Loss clauses in 2003. The re-issue of the Excess Loss Clauses in 2003 is therefore an irrelevant factor when deciding the true construction of a contract made in 2001. It is of course possible that in the small world of insurance and reinsurance the decision was known to the parties to the 2001 contract but there is

no evidence of that. However, the principle set out in *Willers v Joyce* is not a principle of construction but is a principle concerned with the importance of precedent.

11. The decision of Morison J. is not mentioned in most of the well-known texts on insurance and reinsurance. But it is mentioned in *Butler & Merkin's Reinsurance Law*. It is not known when it was first mentioned in that work but the present edition notes the decision at paragraph C-0729. In those circumstances I do not doubt the statement by Mr. Symons, the solicitor acting for the Claimant, that the decision is "fairly well known in the legal/reinsurance claims community".

12. The essential reason which Morison J. gave for his decision, that the parties intended a trade arbitration, is one which can be supported by reference to the context of the phrase in question, namely, that it is part of a set of clauses drafted by a trade body, the Excess Loss Committee. But, uninhibited by that decision I might well have decided that the ordinary and natural construction of the phrase in question did not limit the fields in which experience of insurance or reinsurance could be acquired and that the "context" argument was not sufficiently strong to justify implying the suggested limitation that the relevant experience be acquired in the business of insurance or reinsurance. However, despite the detailed and comprehensive written presentation of Mr. Hofmeyr's submission, I am not persuaded that Morison J. was obviously wrong. That being so, and given the circumstances that (a) the phrase in question was not altered by the Excess Loss Committee in 2003, (b) that the decision must be fairly well known in the reinsurance market and (c) the decision has stood unchallenged for 17 years I do not consider that there are sufficiently powerful reasons for departing from Morison J's interpretation of the phrase in question. The court's duty as a matter of precedent is to follow it. I must therefore accept Mr. Burns' submission that Mr. Schaff, notwithstanding his undoubted experience of insurance and reinsurance derived from acting as counsel in those fields, cannot be appointed as an arbitrator in this case.

13. Mr. Hofmeyr took two further points. The first was that the effect of sections 24 and 30 of the Arbitration Act was that the court had no power to grant the relief sought because the tribunal itself should first rule on its own jurisdiction. I do not accept that submission. It is right that the arbitral tribunal may rule on its own jurisdiction and in particular as to whether it is properly constituted; see section 30(1)(b). It is also right that "if there is an arbitral or other institution or person vested by the parties with power to remove an arbitrator, the court shall not exercise its power of removal unless satisfied that the applicant has first exhausted any available recourse to that institution or person"; see section 24(2). However, the two arbitrators appointed by the parties do not have power to "remove" one of them. They have power to rule on questions of jurisdiction which is different from a power to remove an arbitrator; see *Mustill and Boyd 20001 Companion Volume* to the second edition at paragraph 290. There is therefore no reason why the court's power to "remove" an arbitrator on the grounds that he does not possess the necessary qualifications pursuant to section 24(1) should not be exercised.

14. Mr. Hofmeyr's second point concerned the form of order which the court should make. The order sought is that the Claimant may invoke the default appointment procedure under clause 15.3 of the Joint Excess of Loss Committee Excess Loss clauses and so apply to the chairmen of the LUA and IUA to nominate an arbitrator on behalf of the Respondents. That order is sought on the basis that the parties'

agreement provides that in the event that the Respondents fail to appoint an arbitrator the arbitrator shall be appointed by the two chairmen, see clause 15.3 and section 27(1)(a). Mr. Hofmeyr submitted that where a vacancy arises (in this case because of the court's decision) then, for the reasons given by Rix J. in *Federal Insurance v Transamerica Insurance* [1999] 2 Lloyd's Reports 286, the appointment procedure provided by the parties' contract was intended to apply to the necessary re-appointment, albeit with "some degree of manipulation" of the words of the appointment procedure so that it applied to re-appointment. Mr. Hofmeyr submitted that Clause 15.3 provides that the respondent shall have 30 days in which to appoint an arbitrator. That same period should also apply to the necessary re-appointment. On that basis the Respondents were entitled to 30 days to appoint an arbitrator.

15. The case before Rix J. concerned an arbitrator who resigned on account of ill-health but it does not appear to me that that is a material distinction. The terms of the arbitration agreement were similar and not materially different. Rix J. considered that his approach, albeit involving "some manipulation" of the contractual wording, was consistent with the parties' agreement and the principle of party autonomy; see p.290. I consider that I should follow the same approach. The Respondents should therefore have 30 days from the court's decision to appoint a new arbitrator to fill the vacancy which has arisen.