Claim No. 2007-1085
Claim No. 2008-105

Neutral Citation Number: [2008] EWHC 2677 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

First Avenue House
42-49 High Holborn
London
WC1V 6NP

Date: 24th October 2008

Before:
MR JUSTICE DAVID STEEL

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BETWEEN:

(1) AMERICAN RELIABLE INSURANCE COMPANY
(2) ASSURANT GENERAL INSURANCE LIMITED

Claimants

-- and --

WILLIS LIMITED

Defendant

AND

BETWEEN:

(1) CNA INSURANCE COMPANY LIMITED
(2) CX REINSURANCE COMPANY LIMITED
(formerly CNA REINSURANCE COMPANY LIMITED)
(3) CONTINENTAL CASUALTY COMPANY

Claimants

-and-

WILLIS LIMITED

Defendant

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
190 Fleet Street, London EC4A 2AG
Tel No: 020 7404 1400, Fax No: 020 7831 8838

Official Shorthand Writers to the Court)

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MR IAN HUNTER QC, **MR ANDREW LYDIARD QC** and **MR JERN-FEI NG** (instructed by CMS CAMERON McKENNA) appeared on behalf of CNA

MR MACDONALD (instructed by Field Fisher Waterhouse) appeared on behalf of ARI

MR CHRISTOPHER HANCOCK QC, MR JAMES DUFFY, MR KEALEY QC and MS JESSICA SUTHERLAND (instructed by Slaughter and May) appeared on behalf of Willis

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Judgment

1. MR JUSTICE STEEL: This is a difficult and somewhat unhappy application in a case management conference, and it is desirable I should give my judgment ex tempore, although it is towards the end of a Friday.

2. The application arises out of notification of an intention to amend the defence in what I will call the ARIC action. Notification of that intention was given about a fortnight ago in the run-up to the restored case management conference which took place last Friday, at which time the question of the list of issues for determination had to be adjourned, pending the determination of that application to amend. But decisions were taken about various aspects of the conduct of the trial, and in particular, a decision that the ARIC action should run concurrently with another action which I will call the CNA action.

3. It was also at the stage at which the timetable in the run-up to that joint set of proceedings was reaffirmed, the trial due to start in, I think, October 2009. As a consequence of the notification of an intention to apply to amend, I insisted that the application be made today, that is a week later, and I set a timetable for the production of any explanatory witness statements which the defendants, Messrs Willis, wished to put before the court in support of the application.

4. The parties are only too aware of the nature of the amendments that are being proposed. They broadly fall within three categories, namely amendments with regard to firstly admissions as to the knowledge of Mr Durling; secondly, admissions relating to the honesty of Mr Johnson; and, thirdly, admissions in regard to what I might call broad market issues relating to the position of reinsurers and others within the relevant market.

5. The background is somewhat unusual because the two proceedings are, in some respects, a potential rerun of the Sphere Drake action which took place before Mr Justice Thomas some years ago, and it is in regard to the findings which he made in those proceedings, to which Messrs Willis are not a party, which give rise to the present difficulty.

6. Since the defendants are seeking to withdraw various admissions that have been made in their original pleading in the ARIC action, the criteria for considering the application are laid down in paragraph 7.2 of the practice direction to CPR part 14. I will not solemnly read the paragraph aloud, but I shall revert to it subparagraph by subparagraph, in due course.

7. The outcome of my order for the production of any explanatory material relating to the proposed amendment was a witness statement of Mr Swallow, who is a partner in Slaughter & May, which is the firm instructed by Messrs Willis in both the ARIC action and the CNA action and Mr Swallow has overall conduct of the two cases.

8. In his witness statement he identifies the principal admissions which Willis now wish to withdraw. I hope that it is sufficient for present purposes to treat the three categories that I have identified as sufficiently specific for the purpose of considering the application.

9. In paragraph 9 and following, Mr Swallow explained what he headlined as the reasons for and timing of the amendments. He explained that Messrs Willis had made the admissions that they wished to withdraw in their original defence in the ARIC action because it had been thought:

> "... not to be realistic to challenge certain findings and conclusions of Thomas J in Sphere Drake as to the honesty of Mr Johnson, the nature of the GLMB, and the commerciality and honesty of the writing of that business."

10. However, Messrs Willis has now had occasion, it was said, to review the findings and conclusions of Mr Justice Thomas once again. The catalyst for the reconsideration was said to be the order that this court made in July that Messrs Willis should respond to a list of findings emerging from the Sphere Drake litigation which ARIC were saying they would seek to rely on.

11. Having received the proposed list, Messrs Slaughter & May explain that it was necessary to embark "on a substantial review of the judgment and the evidence, and to meet also with Mr Johnson". This exercise, it was said, was a course of action by way of scrutiny of every finding relied upon by ARIC in a way that had not been carried out before.

12. This scrutiny was accompanied by a change of leading counsel, and the outcome was that:

> "It became apparent during the course of the review that Willis could not admit many of the findings of Thomas J in ARIC's schedule, because from the information we had there was either insufficient evidence to admit such findings, or the evidence did not support them."

13. The statement goes on in effect to confirm that no new material had emerged in the course of these investigations and enquiries. Indeed so far as Mr Johnson was concerned, he was standing by the evidence which he gave in Sphere Drake, albeit it was evidence which was not accepted by Mr Justice Thomas.

14. By way of further explanation, it is said that if Willis had known what it knows now at the time of preparing the original defence, the defence would not have been pleaded in the form that it was, but in its amended form. The explanation for the decision to make the admissions is said to be that Messrs Willis felt "constrained" to accept the findings in Sphere Drake.

15. Willis, however, now wish to adopt a different stance to that which is contained in those admissions, and that in effect is, as I say, the reason for the proposed amendments being made. Mr Swallow goes on, and I'll come back to it, to make some observations about some of the discretionary considerations that emerge in an application of this kind.

16. There is, it seems to me, a serious threshold difficulty with regard to this application. Although it is only one of the circumstances which the court must have regard to in considering whether to give permission for a party to withdraw an admission, it nonetheless seems to me to be an important one. It is the first one in the list, namely: "the grounds upon which the applicant seeks to withdraw the admission, including whether or not new evidence has come to light which was not available at the time the admission was made".

17. There is, as I have already indicated, and this is accepted, no new evidence whatsoever. What is entirely absent, it seems to me, is any real explanation of the reasons why and justification for the application. All that is asserted is that, by way of re-examination of the material that was before Mr Justice Thomas, the conclusion has been reached that he was wrong in the findings that he made. But this is devoid of any particularity of the material on which that assertion is made. Notably even then the outcome is that the admission is being withdrawn and replaced, save in respect of Mr Johnson's position, with a non-admission. That is to say, simply putting the claimant to proof of the matters which were proved to the satisfaction of Mr Justice Thomas, without indicating in any respect what piece of evidence is being relied upon or what document is being relied upon in support of the conclusion that the finding that was originally made was wrong.

18. This, it seems to me, is, as I put it, a formidable threshold difficulty. Where a party makes an application of this kind in circumstances where highly important and, it must be accepted, prejudicial admissions are made, the court is entitled, it seems to me, to receive a fairly full and frank explanation of how things have gone wrong, or at least appear to have gone wrong, namely to identify the basis upon which the background to the admission is to be withdrawn, the reasons for it, how it came about that the admission was made in the first place, and so on.

19. I have to confess, I find the concept that the defendants felt "constrained" by the contents of Mr Justice Thomas's judgment to make the admissions as somewhat surprising, to put it no higher, not least because they have in fact chosen to adopt some findings and not others. It is perfectly plain that given Messrs Slaughter & May have been involved with Messrs Willis in the Sphere Drake proceedings, as well as these proceedings over many years. Indeed they acted for Mr Johnson and Messrs Willis at the time of the Sphere Drake action when an application was made by Willis to join those proceedings. They have been at the forefront of preparations of these two actions, have no doubt been fully informed about the contents of all the documents in the case and in the Sphere Drake case, are fully aware that no application (or at least no successful application) for leave to appeal was made in the Sphere Drake case, and so on and so on. It seems to me perfectly proper for the court to draw the conclusion that the decision to make the admissions that have been made was only reached after the most careful and thorough consideration. Therefore the absence of any detailed explanation is made all the more remarkable.

20. Nonetheless, as Mr Hancock reminds me, quite rightly, the explanation of the background is only one of the criteria that I must consider, and in any event I must have

regard to all the circumstances of the case against the background of the underlying objective.

21. The second criteria that I must have regard to under subparagraph (b) is the conduct of the parties including any conduct which led the party making the admission to do so. If and to the extent that is a paragraph focused on the possible proposition that one party has somehow induced the other to make an admission which it would not otherwise have made, that of course does not arise in this case.

22. Here, if there was a mistake, it is entirely Willis's own fault, and absent a coherent explanation, it is legitimate to take that situation as prejudicial to the application.

23. Paragraphs (c) and (d) of the practice direction invites the court to have regard to the prejudice that may be caused if the admission is withdrawn, on the one hand, or the application to withdraw it is refused on the other.

24. It is fair to say that the question of prejudice may well vary with regard to the identity of the particular class of admissions that is being considered. At one extreme it may be said that what I call the market issues, may give rise to prejudice in the form of extra work, extra delay, extra cost, whilst, say, the prejudice with regard to Mr Johnson's position, may be less exposed to those concerns.

25. But that all said, if the admissions are withdrawn, there can be no doubt in my judgment that this will have a significant effect upon the scale and size of the ARIC case, particularly having regard to the proposed withdrawal of the admissions about the nature of the market. I don't think it is suggested that this will give rise to the calling of any further factual evidence, but the court will have to review a large quantity of documentation, statements, transcripts, against the background of which Mr Justice Thomas made his findings, and have the benefit, I hope, of expert evidence on this topic. That, as I say, is inevitably going to increase the cost and length of the trial.

26. It may be that the admissions, or the attempt to withdraw the admissions with regard to Mr Johnson and Mr Durning would not have such a significant effect, and I say no more about it. So far as the prejudice that would be caused if the application to withdraw the admissions is refused, it is of some importance that there is no new evidence that the defendants wish to adduce whatsoever. Furthermore, they make actually no positive challenge to any of the points which had earlier been admitted. One has to raise an eyebrow as to whether, in those circumstances, the refusal to allow them to withdraw the admissions is going to cause any prejudice or, put another way, whether the prospects of success in challenging the findings that they were originally disposed to admit are anything other than remote.

27. As I say, one of the difficulties of forming a view about that, which seems to me to be a legitimate consideration, is further confounded by the absence of any particularity of what has been unearthed and what is to be relied upon.

28. Then the court must consider the stage which the proceedings have reached at the time of application. Here it is fair to say that the proceedings are at a relatively early stage,

as I have already indicated. We are still very much in the case management stage, the order for the joint hearing was only recently made by consent, and whilst a timetable has been laid out for the exchange of witness statements, and so on, that might well be able to readily accommodate the withdrawal at least of some of the submissions, perhaps most particularly with regard to Mr Johnson, who is going to be a witness in any event. Less so at the other extreme in regard to the nature of the market.

29. Subparagraph (f) deals with the prospects of success if the admission was withdrawn, or part of the claim in relation to which the offer was made. I confess I am having some difficulty with that paragraph as to whether it is implicit that the point only arises in the face of an offer. If that is right, this is a paragraph which is of no pertinence. If, however, it is directed at the prospects of success generally, and if the submission was withdrawn I suppose one has to approach it on the basis that the claimant's prospects of success, even if the admission is withdrawn, remain reasonably good, assuming, as for the present purposes I will, that Mr Justice Thomas analysed the relevant material more than adequately and sufficiently.

30. Lastly, there is the interests of the administration of justice. Again, one has to advent to the fact that there has been an enormous trial before Mr Justice Thomas, against which no appeal was brought. At the time when the original pleadings were being prepared, with the assistance of solicitors and leading counsel, it was not thought that there was any realistic basis for challenging the findings which were a lead-over into the present action. One has to ask the question as to whether it is in the interests of the administration of justice and, for that matter, the other users of this court, that this particular lawn should be mown in every respect yet again.

31. Pausing there, I am bound to say I am unpersuaded that, having regard to the factors laid down in the practice direction, that this is an appropriate case to allow these admissions to be withdrawn.

32. There is, however, a further complication. I indicated that there is another action which is due to be heard together with the ARIC action, the action brought by CNA against Willis. There is, at least as presently constructed, a considerable overlap in the two actions, not least because CNA are relying upon the details of the ARIC events by way of putting forward a case of "similar fact".

33. Originally it was I believe Messrs Willis's view that the two actions be kept separate, and indeed they have gone to the lengths of nominating a different team of counsel in each action, and propose to maintain that arrangement even if the two actions, as presently ordered, are going to be heard together. But the point for present purposes is this, that the original defence served by Messrs Willis in the CNA action did not make all the admissions which are now sought to be withdrawn in the ARIC action, and a further pleading was served concurrently with the amended defence in the ARIC action in which some of the admissions that were made Willis wished to withdraw, and to which CNA raised no objection.

34. It follows that there at least is the theoretical risk that the court could find itself in a difficulty if the ARIC admissions are maintained, but for some reason or other it is

persuaded in the CNA action that one or more of those admissions are not well-founded. There will be a potential disparity between the two judgments, and I suppose some potential practical difficulty during the course of the conjoined trial.

35. It seems to me that this is a problem that is probably substantially overestimated. I anticipate that a realistic review of the situation, either in the short or the long term, would be likely to greatly narrow the distinction between the two actions. In any event, if that prognosis is revealed to be unrealistic, the way forward may well be for the two trials to be segregated once again.

36. Trying to put all these matters together, the conclusion that I have reached is this. First, that Willis should not be allowed to withdraw what I call the Sphere Drake admissions, that is the admissions with regard to the nature of the market; secondly, they should not be allowed to withdraw the admission with regard to the knowledge and intention of Mr Durling. However, I will give them leave to withdraw their admission with regard to the honesty of Mr Johnson, but only on terms that they give particulars of the materials that they are relying upon which are said to demonstrate that Mr Justice Thomas's conclusion about Mr Johnson's honesty was misfounded.

37. I make this, in a sense, exception to the other two categories on these associated grounds. Firstly, that the issue of Mr Johnson's honesty is in issue in the CNA action; secondly, Mr Johnson is going to give evidence; and thirdly, the court should ensure that both Mr Johnson and his principals should feel satisfied they are getting a full and fair hearing with regard to the allegation of dishonesty.

38. When the parties have had time to review what I have said, they are welcome to equally review the question as to whether these two actions should continue in parallel or whether they should be separated. I, for my part, am not persuaded at this stage that the dangers which are threatened with regard to potential disparity in the issues is anything other than fairly remote.