Neutral Citation: [2008] EWHC 1127 (Comm)

Claim No: 2006 Folio 167

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
COMMERCIAL COURT

Cardiff Civil Justice Centre
Date: Monday, 2nd June 2008

Before :

HIS HONOUR JUDGE CHAMBERS QC
sitting as a judge of the Queen's Bench Division

- -

Between :

ALLIANZ INSURANCE COMPANY EGYPT	**Claimant/**
(a company incorporated under the laws of Egypt)	**Reinsured**
- and -	
AIGAION INSURANCE COMPANY S.A.	**Defendant/**
(a company incorporated under the laws of Greece)	**Reinsurer**

- -
- -

Guy Blackwood (instructed by **Holman Fenwick & Willan**) for the Claimant
Philip Edey (instructed by **Clyde & Co LLP**) for the Defendant

Hearing dates : 3rd – 6th March 2008

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Judgment

HHJ Chambers QC :

Introduction

1. The Claimant ("Allianz") is an insurance company incorporated in Egypt. The Defendant ("Aigaion") is a reinsurance company incorporated in Greece. It is Allianz's case that on 30 March alternatively 2 April 2005, Aigaion agreed to reinsure 30 percent of the cover provided by Allianz in respect of a fleet of tugs that included the *Ocean Dirk*. The reinsurance is said to have been effected through Chedid & Associates Ltd ("Chedid"), a company of reinsurance brokers incorporated in Cyprus.

2. On 23 July 2005 the *Ocean Dirk* became a constructive total loss.

3. Allianz has sought payment from Aigaion of US$675,000.00 which is said to be its share of the loss. Aigaion has denied that it is liable to make the payment. The defences may be broadly described as follows. First, that there never was a concluded contract between Aigaion and Allianz. Second that, if there was such a contract, it contained a warranty to the effect that instalments of premium would be paid in the amounts and by the dates specified by Aigaion in a policy sent by Aigaion to Chedid in mid April 2005 and that, there having been no such payments to Aigaion, the cover had terminated automatically prior to the casualty.

4. It is common ground that the assured suffered the casualty and was indemnified by Allianz. It is also accepted that, if Aigaion was on risk at the time of the casualty, it became liable to pay Allianz the sum claimed.

5. In fact, Allianz paid the relevant instalments to Chedid but Chedid failed to pass them on to Aigaion.

6. It is now time to pass on to the detailed history but, before doing so, I should make one general comment.

7. It will be appreciated from what I have already said that the commercial background to this matter is that Aigaion feels that it was not on risk at the time that the casualty was suffered because the requisite instalments had not been paid. Whether Aigaion is right or wrong, it is easy to appreciate its stance from an ordinary business point of view. To the dough of this quotidien approach has been added the yeast of a forensic ingenuity that sometimes seems to lose sight of the fact that, although legal analysis may indeed produce results other than those the parties may have originally contemplated, it is no bad test to have in mind what the parties considered the position to be at the time. It is clearly established from the oral and written evidence that by the end of 2 April 2005 both parties considered Aigaion to be on risk.

The history to 2 April 2005

8. There are three people central to the story. Wael Wasfi, then marine underwriting manager at Allianz. Nassib Barbir, then account executive in the marine department of Chedid in Beirut. Nicolaos Tzimas, senior marine underwriter at Aigaion. Each of them gave evidence. Each of them was honest and straightforward. Their evidence was largely uncontroversial. For the most part the history emerges clearly from the documents.

9. On 27 December 2004 Mr Wasfi sent Farid Chedid an e-mail which read:

> "As agreed during your visit to our offices, I have the pleasure to attach herewith, the term and conditions together with the vessels schedule."

10. The terms and conditions were set out in a marine hull slip that identified the original assured as Ocean Marine Services, gave the period of insurance as twelve months incepting on 31 March 2005 and listed a number of conditions including one which read *"Deffered (sic) Premium Clause"*. The proposed rates were H & M 1% per annum and pro rata and Increased Value 0.4% per annum and pro rata. There was a schedule of eight vessels including the *Ocean Dirk*.

11. On the same day Mr Barbir sent an e-mail to Mr Tzimas in which he said *"We are pleased to offer you a share on the above account, details as per attached slips …"*.The terms were as set out in the slip which had been sent with Mr Wasfi's e-mail albeit that the commission was stated as 27.5% rather than the 20% in the earlier slip.

12. On 27 January 2005 Mr Tzimas e-mailed his reply as follows:

> "We are prepared to participate as follow on subject account:
>
> H&M rate 1.5%
>
> Warranted vessels IACS classed and class maintained
>
> Claims Co-operation Clause
>
> Order-50%
>
> All other terms as per your slip.
>
> We trust these terms are of interest and we await your confirmation accordingly."

13. After receiving Mr Tzimas' e-mail, Mr Barbir sent Mr Wasfi an e-mail that evening which read:

> "Further to our telecon this instance and our fax dated 13.01.05 in respect of the above account, kindly note that we are pleased to support you provisionally with a 50% share at terms and conditions as per attached slip."

14. The attached slip showed that to the original conditions had been added the two requested by Aigaion. The H&M rate now appeared as 1.5%.

15. Nothing further appears to have happened in respect of the placing until 10 March 2005 when Mr Wasfi sent Mr Barbir details of an improved loss position in respect of an earlier casualty and asked whether there might be a reduction in the rate even with a slight increase in deductibles. At that stage it appeared that Allianz needed Chedid's support *"for up to 75% of the top value"*.

16. The request was passed on to Mr Tzimas who answered by e-mail on 15 March 2005:

> "In light of the reduction in the claim from USD 780,000 to USD 550,000 the best we are able to do is reduce the rate to 1.4% (all other terms per email on 27 January 2005)."

17. The contents of the e-mail from Mr Tzimas were passed on to Mr Wasfi on the same day.

18. The next day Mr Wasfi e-mailed Mr Barbir; *"Thank you for your e-mail below* [*i.e.*above] *and would like to remind your goodself that we are still waiting for the sicurity (sic) list of this risk"*.

19. That evening Mr Barbir replied; *"It is a firm order"*.

20. I do not know how Mr Barbir came to write as he did but it does not matter because on 24 March 2005 Mr Wasfi sent him an e-mail in the following terms:

> "Had been requested to revise the quotation on an urgent basis to exclude the additional 1/4th Collision Liability and Fixed and Floating Objects.
>
> Your urgent and soon reply will be highly appreciated."

21. Mr Barbir passed on the request the same day.

22. On 28 March 2005 Mr Tzimas replied by e-mail:

> "To amend quote to 3/4ths and Excl FFO reduce price by 5% ie rate becomes 1.33%"

23. The reply was passed on to Mr Wasfi on the same day and Mr Wasfi replied that evening:

> "I had submitted the revised quotation to the shipowner and will revert to you tomorrow"

24. On 30 March 2005 Mr Wasfi wrote again to Mr Barbir:

> "Further to our previous correspondence in connection with the above, I have the pleasure to confirm the 50% share ceded through your esteemed firm.
>
> Our R/I documents will follow soon, but would like to ask you to grant additional 5% discount – if possible – as requested by the shipowner."

25. The same day Mr Barbir e-mailed Mr Tzimas as follows:

> "Thank you for your e-mail dated 28.03.05 in respect of the above account, kindly note that the cedant have secured a firm order and accordingly we are pleased to bind your participation with a share of 30% for 12 months as from 31.03.2005
>
> Kindly note that this decrease in share was due to the fact the this risk was Co-insurance.
>
> Our cover note will follow."

26. On 30 March 2005 Allianz issued its policy in respect of the *Ocean Dirk* with effect from the next day. It contained the following clauses:

> " LSW3000. PREMIUM PAYMENT CLAUSE (90 DAYS).
>
> …
>
> DEFERRED PREMIUMS.
>
> …
>
> WARRANTED VESSEL CLASSED AND EXISTING CLASS MAINTAINED.
>
> …"

27. Mr Wasfi was asked about the first two entries that are set out in the preceding paragraph. I understood his evidence to be to the effect that the original insurance had been in place for some ten years before the events in question. Initially the policy had referred to the LSW3000 clause which had been "embedded" in the policy although, at first, the premium had been paid in one lump sum. However, after several years, it was agreed that the premium should be paid in quarterly instalments and this was reflected in the clause that appeared at D/18/35. I understand the effect of this evidence to be that the reference to "deferred premiums" in the policy is to a clause in the terms of D/18/35 and that by 30 March 2005 it was understood between Allianz and the assured that this, rather than LSW3000, was the governing term. I further understand the effect of Mr Wasfi's evidence to be that, in light of the terms of the deferred premiums clause and the agreement between the parties that the premium

should be paid quarterly, the first instalment was due 45 days after the inception of the insurance and that the remaining instalments were payable on the quarter days following that inception date.

28. Mr Tzimas replied to Mr Barbir on 31 March as follows:

> "Thank you very much for the below which is duly noted. Please forward slip soonest for our agreement."

29. Mr Barbir replied the same day:

> "Further to your e-mail dated 31.03.05, kindly find attached the slip for the above account as requested
>
> Awaiting your urgent confirmation and thank you for your cooperation"

30. Unlike the slip that Mr Barbir had sent to Mr Wasfi on 27 January 2005, the slip that Mr Barbir sent to Mr Tzimas did not contain the condition *"Warranted Vessels IACS class and class maintained"* ("the IACS condition"). By an oversight it contained no reference to class at all. In all other respects it reflected the exchanges that had taken place between Chedid and Aigaion.

31. On 2 April 2005 Mr Tzimas sent Mr Barbir an e-mail that read:

> "Cover is bound with effect from 31.3,05 as we had quoted, i.e. 1.33% H&M and 0.4% IV for our 30% line.
>
> Our documents to follow."

Preliminary analysis

32. I can see no good reason to hold that there was a concluded agreement between Allianz and Aigaion on 30 March 2005. Emphatic as were the terms of the e-mail set out at paragraph 25 above, they bit on air: there was as yet no offer from Aigaion, only a quote. But, the subsequent exchanges are to a different effect. I have no doubt that the e-mail sent by Mr Tzimas on 2 April 2005 was intended to close the deal and that, unless the exchanges were in some way flawed, that is what it did. I shall deal later with most of the arguments relied upon to that effect but there is one that I think it opportune to deal with now.

33. It is submitted on behalf of Aigaion that the absence of a reference to the IACS condition in the slip sent to Aigaion on 31 March 2005 meant that the communication constituted a request for cover without the condition and that Aigaion's e-mail containing the words *"as we had quoted"* negatived an acceptance of that request. It seems to me that the submission is self-evidently wrong. Relying as it does purely on the wording of the exchange, that wording does not support it. The use of the letters

i.e. is unambiguous. They indicate that that which follows is what is meant by the words *"as we had quoted"* and that which follows contains no reference to the IACS clause. This is because the quotation that is being referred to is exclusively monetary.

34. Arguably Aigaion had agreed to provide cover that was limited to the terms of the slip. In reality, whatever the nature of the jurisprudential mechanism used to establish the fact, the parties had agreed that the terms of the policy should include the IACS condition.

35. I now return to the subsequent history.

Subsequent history

36. Chedid's accounts office was located in Cyprus and it was there that Allianz sent the first instalment of the premium on or shortly after 11 April 2005. It was US$ 24,596.00. Chedid made no onward payment to Aigaion.

37. On or about 15 April 2005 Aigaion issued a document bearing the legend "HULL RE-INSURANCE POLICY" ("the policy document").

38. The first page of the policy document bore the following entries:

> "PAYMENT TERMS
>
> WARRANTED THE ABOVE MENTIONED GROSS PREMIUMS ARE PAYABLE BY THE FOLLOWING DUE DATES:
>
> A. USD 18,447 OF GROSS PREMIUMS DUE 31st MARCH 2005
>
> B. USD 18,447 OF GROSS PREMIUMS DUE 30th JUNE 2005
>
> …
>
> HULL & MACHINERY RE-INSURANCE POLICY
>
> IN ACCORDANCE WITH YOUR INSTRUCTIONS WE HAVE ISSUED THIS INSURANCE POLICY SUBJECT TO THE TERMS AND CONDITIONS SET OUT & ATTACHED HEREON. PLEASE EXAMINE THIS DOCUMENT CAREFULLY AND IF IT DOES NOT COMPLY WITH YOUR INSTRUCTIONS PLEASE ADVISE US IMMEDIATELY IN WRITING."

39. Except in two respects, the second page of the policy document essentially replicated the contents of the slip sent to Aigaion on 31 March 2005. The first difference was that, unexceptionably, the policy document contained the IACS clause. The second difference was that there was no reference to the MAR(91) form.

40. Aigaion also issued a debit note. It bore the date 15 April 2005. It stated that the instalments were payable within 60 days of the same dates as those shown on the policy document. Each instalment was for US$ 13,374.08.

41. The debit note was addressed to Chedid's Beirut office. It bears a received stamp that indicates that it found its way to the Accounts Office in Cyprus. The date of the stamp is 26 April 2005.

42. Both the policy document and the debit note went unacknowledged by Chedid. Neither was forwarded to Allianz.

43. There was some controversy as to what happened to the documents. I think the reality is that they both went first to Chedid's Beirut office and were registered but not read by Mr Barbir who had the debit note forwarded to the Cyprus office. As the policy document bears no stamp, I think that the chances are that it remained unread in Beirut. If Mr Barbir did see it, I think that he must have thought that it contained an uncontroversial reflection of the slip policy. It was reasonable for him to have done so.

44. As the Cyprus office was not on notice of a payment warranty, the debit note was not put in the file that was kept to ensure that such warranties were complied with.

45. A second instalment of US$ 24,596.00 was paid to the Cyprus office on or about 23 June 2005. No onward payment was made to Aigaion.

46. The casualty was suffered on 23 July 2005. The next day Allianz notified Chedid of the claim. Aigaion was notified of the claim on 27 July 2005. That day Aigaion e-mailed Chedid as follows:

> "We regret to advise that policy automatically lapsed on 31 May 2005 due to non-payment of premium as per payment warranty.
>
> As such reinsurance policy is null and void."

47. Save for a burgeoning forensic analysis, that is how the matter has remained.

Further analysis

48. Aigaion has put forward an argument to the effect that there was no concluded agreement before the policy document was sent and that Chedid's failure to respond to the document created a contract by silence. My earlier finding as to the position by the end of 2 April 2005 is potentially fatal to that argument. However this would not be the case if, despite appearances, there was no contract because, as Aigaion contends, the term "Defferred Premium Clause" ("the clause") was so uncertain as to be of no contractual effect in itself and to vitiate the effect of the whole contract.

49. Obviously the clause was a form of shorthand; but shorthand for what? Aigaion says that, unless the riddle can be answered, the exchanges that ended on 2 April 2005 cannot have resulted in a contract.

50. The decision of McNair J in *British Electrical and Associated Industries (Cardiff) Ld v Patley Pressings Ld* [1953] 1 WLR 280 suggests that the legal analysis advanced by Mr Edey on behalf of Aigaion is correct and I propose to act on that basis. Can the riddle be answered? I think it can.

51. It seems to be that this is not a case in which it can be said that each party had its own deferred premium clause up its sleeve and, neither having been revealed to the other, there was no consensus.

52. When an insurer seeks reinsurance, the placing carries a quantity of 'baggage' upstream in the shape of the original insurance. Obviously a reinsurer may craft its rights and obligations in whatever way the insurer accepts, but absent clear words to the contrary, it is in the nature of the placing of a risk that shorthand will be used and inferences will arise from the manner of that placing.

53. In the present case Allianz clearly stated that it required a deferred premium clause. I think it clear that it was not inviting Aigaion to produce its own clause and, in any event, that was not something that Aigaion chose to do until well after it was on risk. The evidence of Mr Tzimas was clearly to that effect.

54. Assuming that Aigaion thought itself to be going on risk by 2 April 2005 at the latest, it would be absurd to think that it considered itself to be involved in a situation in which uncertainty vitiated that which it had been at pains to agree. The requirement for the deferred premium clause came from Allianz. The inference was that Allianz could say what it meant: not by drafting some new and expanded term but by pointing to that to which the phrase must be taken to have referred. Given the background, that meaning was to be found in the use of the phrase in the underlying insurance. It did not matter that Aigaion had not been notified of its terms. The question was whether they were ascertainable. As explained by Mr Wasfi and set out at paragraphs 26 to 28 above, they were.

55. I find that there was no uncertainty in the agreement concluded on 2 April 2005.

56. Given my findings, I think it hopeless to suggest that in some way silence by Chedid or Allianz in the face of the policy document and the debit note imposed upon Allianz obligations that did not exist under the agreement concluded on 2 April 2005.

57. Thus the position is that for the reinsurance to have been cancelled for non-payment of premium it would have been necessary to serve a cancellation notice. This was not done. Aigaion is therefore liable for its share of the loss.

58. Although the above findings are sufficient to deal with the matter, I have been asked to deal with an argument advanced by Allianz to the effect that, if there was a contract of reinsurance in the terms of the Aigaion policy, section 53(1) of the Marine Insurance Act 1906 provides that Aigaion is to be treated as having received the instalments.

59. The sub-section provides as follows:

> "Unless otherwise agreed, where a marine policy is effected on behalf of the assured by a broker, the broker is directly responsible to the insurer for the premium …"

60. Mr Blackwood submits on behalf of Allianz that the sub-section embodies a fiction to the effect that the broker is deemed to have paid the premium to the underwriter and to have borrowed from him the money with which he pays. Thus the fiction necessarily involves the assumption that the assured has been discharged of his duty to pay the premium to the insurer by reason of the fact that it has been paid by the broker.

61. Mr Blackwood's submission has been considered in a number of divergent authorities of which none is binding upon me. This is because the decisions have been either *obita* or at first instance. I have also had the benefit of Dame Elizabeth Gloster's useful Donald O'May Lecture on section 53 under the title *Who Pays The Piper – Who Calls The Tune?*

62. I do not propose to carry out an analysis of the recent authorities. It seems to me that the position is clear.

63. Despite its lengthy and occasionally choppy passage onto the statute book, the Act must be taken as a codification of the common law that constitutes its subject matter.

64. The fact that practically no one in the market is now aware of the fiction that enabled the insurer to look to the broker for payment is irrelevant to the interpretation of the statute. The statute falls to be interpreted against the background at the date of its enactment. Immediately prior to the enactment of the statute, the common law embodied the fiction. But the fiction was a means to achieving an end and not that end in itself.

65. I think it fair to assume that the function of a statute is to contain a self- contained statement of the law that it enacts. A statute may contain wording of a specialist nature only understood by a limited number of people. However, even those people are to be expected to derive the meaning of the statute either from its terms or from other documents to which it makes express reference. Statutes should not operate on the basis of inference, especially where no indication is given that an inference is to be drawn.

66. The wording of section 53(1) is clear. It procures a situation in which, absent agreement to the contrary, the insurer may look to the broker for payment of the premium. There is no mention of the fictitious mechanism by which that result was achieved at common law. Nor was there any need for such a mention. Statute has produced the necessary result.

67. I cannot imagine that that an intelligent member of the Lloyd's marine insurance market looking at the Act in 1906 could have been expected to read the fiction into the section with the consequence that, not only could an insurer obtain the premium from the broker but, without more, no policy could ever be treated as invalid for non-payment of the premium because the assured was always to be treated as having paid it.

68. I find that section 53(1) means what it says and no more.

Conclusion

69. There will be judgment for Allianz in the sum of US$ 675,000.00 minus net premium due to Aigaion of US$ 53,496.30 plus interest.

70. No one need attend the handing down of this judgment. All ancillary matters will be dealt with at a time and in a manner convenient to the parties. That hearing will be an adjourned hearing of that at which this judgment is handed down and no relevant time limit will start to run until then.