England and Wales Court of Appeal (Civil Division) Decisions

Neutral Citation Number: [2005] EWCA Civ 1512

Case No: A3/2005/0252

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
COMMERCIAL COURT
Mr Justice Morison
[2004] EWHC 2963 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

08/12/2005

B e f o r e :

LORD JUSTICE WALLER
LORD JUSTICE TUCKEY
and
LORD JUSTICE MOSES

Between:

Bonner & Ors	**Respondent**
- and -	
Cox & Ors	**Appellant**

Jeffrey Gruder QC and Jessica Wells (instructed by Ince & Co, Solicitors) for the Appellant
Anthony Boswood QC and Robert Anderson (instructed by Clyde & Co, Solicitors) for the Respondent Underwriters
George Leggatt QC and Juliet May (instructed by CMS Cameron McKenna) for the Respondent Brokers
Hearing dates : 8th - 10th November 2005

HTML VERSION OF JUDGMENT

Lord Justice Waller: This is a judgment of the Court.

Introduction

1. After a trial lasting some 35 days spread over the period 3rd October 2003 to 11th March 2004, Morison J delivered a reserved judgment on 21st December 2004. The case was concerned with a claim made by certain Lloyd's syndicates parties to an open cover known as the '77 Cover 1999 (the Cover), on a contract of reinsurance of that open cover. Syndicate 535 held a 50% share of risks written under the cover which was reinsured initially with the 2nd to 7th Defendants (referred to as Euclidian), fronting for Tryg-Baltica (a party to associated Part 20 proceedings) and the 8th Defendant (referred to as "Syndicate 1688"). Tryg-Baltica was itself initially reinsured as to part of this risk by the 1st Defendant ("Cox"). In October 1999 this structure changed such that Cox reinsured 535 directly for that part in respect of which it had formerly reinsured Tryg-Baltica. Syndicate 228 held a 6.66% share which was also reinsured by Euclidian, fronting for Syndicate 1688 and Tryg-Baltica. Euclidian and Tryg-Baltica settled during the trial.

2. Syndicate 62 held a 25% share, Syndicate 187 an 8.34% share and Euclidian its own 10% share, all of which were reinsured by Syndicate 1688. In addition, Syndicate 228's 6.66% share, in respect of which Euclidian acted as a front, was reinsured by 1688 and Tryg-Baltica.

3. In those circumstances he felt that it was unnecessary to deal with claims by the claimants against the brokers (the 9th Defendants referred to as "Aon") who brokered the reinsurance as well as broking business to the Cover.

4. Cox and 1688 appealed on only three aspects of that judgment. First, 1688 appealed the judge's conclusion that they were not entitled to avoid their reinsurance by virtue of non-disclosure. 1688 asserted that Aon failed to disclose information relating to what became known as "the Elk Point issue" which related to a well blow-out which occurred on 23rd November 1998, and resulted in a substantial claim on the 1998 year of the Cover. The judge found that such information as Aon had prior to the conclusion of the relevant reinsurance contracts, (information which they obtained on 1st December 1998 after the scratching of the slip but before conclusion of the relevant contracts of reinsurance) was not material. He held that the information that they had as at 8th December 1998 was material, but that the relevant contracts had been concluded by that date. He held in the alternative that if he were wrong about the date of conclusion of such contracts, and if on that basis the information known as at 8th December 1998 should have been disclosed to Mr Woodgate, the underwriter, prior to the conclusion of the contracts of reinsurance, Mr Woodgate would still have written the risk on the same terms, and was thus not induced by any non-disclosure to enter into the contract. Longmore LJ would have refused permission to appeal this point on the basis that the judge's finding on inducement was a finding of fact, but Mummery and Mance LJJ granted permission to appeal.

5. Second, Cox who became reinsurers of Syndicate 535 in October 1999, appealed, with the permission of Longmore LJ, the judge's finding that they were not entitled to avoid that reinsurance. They asserted that the judge should have found that there was a material misrepresentation at the time of the placing in October 1999.

6. Third, Cox and 1688 appealed, again with the permission of Longmore LJ, the finding of the judge that losses on a declaration to the Cover, known as the Oceaneering declaration, was one for which the reinsurers were not liable. The reinsurers contended at the trial that a term should be implied into the contract of reinsurance relating to the duty of those accepting declarations into the Cover. At trial it was argued that many declarations were written in breach of that duty, that number being reduced to six by the time of final submissions. The judge held that some terms should be implied, but that no breach had been established in relation to any declaration. On appeal the reinsurers challenged the judge's decision on one declaration – Oceaneering. In challenging that decision a point of some importance arises as to whether any term imposing some duty of care or prudence in favour of the reinusurers should be implied at all and, if so, the nature of that term.

7. The points are self contained. At the hearing before us Mr Leggatt QC for Aon accepted that if 1688 represented by Mr Gruder QC succeeded on the Elk Point issue, Aon would be liable to the claimants. He also accepted that if Cox succeeded in avoiding, Aon would be liable to the claimants. In those circumstances Mr Leggatt argued the respondents' case on those points and

Mr Boswood QC, who appeared for the claimants, did not address us. On the Oceaneering declaration, Mr Boswood argued the respondents' case.

8. With that short introduction we can turn to the individual points.

The Elk Point

9. The Cover was a broker's cover operated by Aon in conjunction with Syndicate 535 (the Cover leader). The Cover was not a contract of insurance but a standing offer by the subscribing Cover Underwriters to be bound to risks accepted by the leader within the terms of the Cover. The Cover had a considerable history and was renewed from year to year. There was no obligation on those on the Cover in any one year to renew for the next, although in practice the participants remained pretty constant. The Cover had a good reputation and produced a lot of premium income. At the end of the 1998 year the Spalding syndicate did not wish to renew their 10% for the 1999 year. Euclidian was chosen to replace it and, as the judge found, Euclidian's underwriter, Mr Hegarty, was "delighted" to be given the opportunity to join the Cover.

10. The 1999 year was the first year for which reinsurance was to be arranged for the Cover as a whole. Indeed Aon, in broking the renewal with those to be on the Cover for the 1999 year, wished to be able to offer that reinsurance as part of the terms. Aon thus adopted a practice well known at Lloyd's of obtaining a promise from reinsurers before finalising matters with those wishing to renew.

11. The practice was described by Mustill LJ as he then was in *The Zephyr* [1985] 2 Lloyds Rep. 529 at 532.

> ". . . a practice has developed whereby a broker instructed to obtain a primary cover will on his own initiative approach potential reinsurers to obtain from them in advance a binding promise to provide reinsurance for whatever person may subsequently write a line on the primary cover and desire to reinsure the whole or part of that line. The reinsurer conveys this promise by initialling a percentage line on a slip, which identifies the subject-matter, the nature of the risk and the value. The slip does not, however, identify the reassured and could not do so: for at the stage when the potential reinsurer is approached, it is not known whether the primary insurance will ever be written at all, and if so by whom; or whether any of the primary insurers will desire to effect reinsurance; or whether any insurer who does desire to reinsure will be willing to do so with the reinsurer whom the broker has approached, and on the terms which he has offered. With this promise "at large" in his pocket, the broker can offer to an underwriter a package consisting of the opportunity to take a line on the primary cover, and at the same time to place an order for reinsurance."

12. In *The Zephyr* consideration was given to the question as to when, as a matter of law if at all, any binding contract came into existence where the practice was followed. The Court of Appeal approved Hobhouse J's approach whereby he held not simply that the above, as a matter of market practice, produced a binding promise, but held that on strict contractual analysis in law there was a binding contract once the reinsurance had been accepted, and even without communication of that acceptance to the reinsurers. This was the analysis that Morison J adopted in this case. He held that once the reinsurer had scratched the slip offering the reinsurance that was an open offer capable of acceptance simply by the offeree renewing the Cover for the 1999 year on the basis of that offer of reinsurance.

13. *The Zephyr* was not in fact concerned with any question of non-disclosure. Morison J was clearly inclined to feel that the scratch on the slip ought to be the moment in time up to which the duty of disclosure should run. He may well have had in mind paragraph 55 of the judgment of Lord Hobhouse in the *Star Sea* [2003] 1 AC 469 at 496 where he said having quoted Blackburn J in *Lishman v Northern Marine Insurance Co* (1875) LR 10 CP 179 at 182

> "55. Blackburn J is adopting a similar approach to that which he adopted in the leading case *Cory v Patton* (1872) LR 7 QB 304 which concerned whether there was a duty to disclose adverse facts discovered between the time that the underwriter had accepted the risk by initialling the slip binding in honour only, and the issue of the legally binding policy. Blackburn J said, at pp 308-309, that the underwriter cannot depart "from the terms thus agreed on [in the slip] without a breach of faith"; and the assured need not disclose to the underwriter "information which ought to have no effect on him, but would expose him to a temptation to break his contract . . . he is not bound to lead his neighbour into temptation". The duty of good faith is even-handed and is not to be used by the opposite party as an opportunity for himself acting in bad faith."

14. In that judgment Lord Hobhouse went on to refer to the fact that Blackburn J's view had been endorsed by the Marine Insurance Act 1906 under which the obligation to disclose is "before the contract is concluded" but Section 21 provides that a contract is "deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be then issued or not; and, for the purpose of showing when the proposal was accepted, reference may be made to the slip…"

15. The words of Section 21 do not cover at least with any precision the practice at Lloyd's described above, because under the practice there is strictly no "proposal of the insured" when the slip is scratched, and the experts who gave evidence before Morison J were agreed that where the above practice is adopted, the market would take the view that disclosure should continue until the contract is made i.e. the reinsured accepts the offer by (in this case) becoming a party to the Cover.

16. Mr Leggatt accordingly before Morison J, and before us, conceded that it was on that basis that he should argue the case, and it is on that basis that the case has been argued.

17. The experts however also recognised that if any participants to the Cover had accepted the same, and thus had accepted the reinsurance, before the broker became aware of material information that would have a considerable bearing on whether the underwriter of the reinsurance would in fact withdraw the offer in relation to those who had not accepted.

18. This is an important point in the context of this appeal and has been a key influence on the arguments run by Mr Gruder on the Elk Point issue. Mr Gruder acknowledges that the judge has made a finding of fact which he would have great difficulty disturbing in this court on the question whether Mr Woodgate was induced to write the risk by virtue of any non-disclosure. The judge made the following finding in case he were wrong on the date of contract :-

> "103. At this stage the question is whether the non-disclosure induced the contracts. This issue involves asking a hypothetical question, namely what, probably, would have happened had disclosure of the Elk Point loss been made to Mr Woodgate on or soon after 8 December 1998? This question is not truly a question of fact in the normal sense since the Court is looking at something which in fact did not happen. The Court's judgment must be based upon all the relevant circumstances, including taking account of what Mr Woodgate said he would have done. On the one hand, Mr Woodgate had paid attention to the loss figures when he made his offer and had made appropriate annotations against them. The Elk Point loss was material since its existence might have caused Mr Woodgate to reflect on, and adjust, the terms which he offered. On the other hand, Mr Woodgate was running a new Syndicate which needed a good start. The Energy Cover was regarded as good business and underwriters welcomed the chance to be a part of it. But the most important consideration, I think, is that the knowledge of the loss occurred after Mr Woodgate had scratched the slip and after, at the very least, the substance of the offer had been used to broke to two of the Cover Underwriters who were in a position to accept it. I am satisfied that at Lloyd's it is not unusual for events to occur during a broke and that it was common for the new event to be reflected in the following year's arrangements, rather than undoing or trying to undo the work that had already been done. As at 8 December 1998 Mr Amies was of the view that he had had a firm and binding offer from Mr Woodgate and on the basis of what he had been told, he believed that the offer had been accepted in principle by the two lead Underwriters. Just as the question whether there was in fact and in law a binding acceptance of the reinsurance by two or three of the renewing Cover Underwriters at this time has occupied the Court's time for many days, so the parties would have been debating the question had the Elk Point loss been disclosed as at 8 December, had Mr Woodgate been minded to withdraw his offer altogether. It would plainly not have been a commercial or sensible position for Mr Woodgate's offer to be accepted by some but not all of the Cover

> Underwriters, since they demanded and had agreed common account reinsurance arrangements. I agree with Mr Leggatt QC that it is inconceivable that Mr Woodgate would have felt able to withdraw his offer just from Euclidian or to have sought different terms just for them and 228. In my judgment the process of the broke had proceeded too far by 8 December to make it commercially sensible for the firm offer to be altered significantly, and that is so, whether or not as a matter of fact and law the offer had already been accepted by Syndicate 62 and 187. Mr Woodgate was never going to have to bear the loss himself; it affected only the Cover Underwriters for the 1998 year of the Cover and their facultative reinsurers. It was thought at the time that the Cover would be renewed for the 2000 year and that the reinsurance could be renewed also for that year. As a matter of probability I take the view that had the Elk Point loss been disclosed to Syndicate 1688 on or after 8 December 1998 Mr Woodgate would have not withdrawn his offer, even were it open to him to do so; although the experts say he could have done so before acceptance, the fact is that Mr Woodgate had never done so before. Withdrawing an offer is rarely done [and, I may add, pace the experts in this case, may arguably not be lawfully done] and the last thing the underwriter of a new Syndicate would want would be to have a row with an established broker and underwriting team in the market in the energy sector where Syndicate 1688 wanted to place part of their book of business. I agree with Mr Outhwaite that no sensible underwriter would ever dream of resiling from a firm offer which had been accepted in part. And I am not sure that Mr Woodgate was inclined to disagree with this. His answers in cross-examination were tentative at best and I think he appreciated the effect that withdrawal of his offer might have had on the market, and the ensuing chaos."

19. Mr Gruder suggests that the key factor in the judge's decision on influence is the fact that as at the 8th December 1998 certain of the syndicates were already bound. He submits it was on that basis that the judge found that, if Aon had disclosed the information known to Aon as at the 8th December 1998 which the judge held was "material", Mr Woodgate would still have maintained the offer on the same terms to those Syndicates still not bound. Mr Gruder on the basis of that submission argued two points. First he argued that the information that Aon had before <u>any</u> Syndicates were bound i.e. that which they had on 1st December 1998 was material and should have been disclosed. He argued that Mr Woodgate uninhibited by any Syndicates having accepted his offer would have withdrawn the offer or altered its terms if informed by Aon of what they knew on 1st December 1998. Second, he argued that if he failed to establish the materiality of the information known as at 1st December 1998 and could only rely on the information known as at the 8th December 1998, the judge was wrong in concluding that any Syndicates had actually accepted the offer by that date.

20. As is obvious, there was and is a need to analyse both the time at which Aon became aware of any information that might be said to be material to the risk that the reinsurers were offering to reinsure, and the dates on which those who participated in the Cover agreed to accept the offer of

reinsurance by accepting participation in the Cover for 1999.

Placing of the reinsurance

21. This is accurately set out in Aon's skeleton. In large measure we adopt the same but emphasise the loss history on which Mr Woodgate relied. In October 1998, Aon approached Mr Woodgate, an underwriter employed by HIH Casualty & General Insurance Limited, to see if they could obtain an offer of reinsurance of the Cover. The person primarily responsible for the broke was Mr Amies of Aon. A series of meetings and discussions took place, which culminated in agreement by Mr Woodgate to write a reinsurance of the Cover. The reinsurance discussed was to cover the Cover Underwriters for the 1999 year in respect of risks attaching during the period 1st December 1998 to 31st December 1999.

22. It was originally intended that HIH/1688 would write a 100% reinsurance of the Cover; however, it was then appreciated that 1688 could not reinsure Syndicate 535, as both syndicates shared the same managing agents (Cotesworth). Since 535 had a 50% line on the Cover, 1688's line on the reinsurance was therefore restricted to 50%. The terms of the reinsurance were set out in a slip, and were finalised on 23rd November 1998 when Mr Woodgate wrote a 50% line and scratched the slip. In making that offer Mr Woodgate had been interested in performing an "as if" calculation i.e. a calculation by reference to the history of the Cover as to what profit the reinsurers would have made if the Cover had existed in the relevant years. For that purpose Mr Amies produced a history for the years 1995 through to as much as remained of 1998.

23. When Aon approached the Cover Underwriters at the beginning of December 1998 to invite them to renew their participations on the Cover for the 1999 year, Aon was armed with Mr Woodgate's offer of reinsurance. The dates on which the various Underwriters agreed to participate on the Cover for 1999 and purchase the reinsurance were as follows:

    (i) On 3rd December 1998, Mr Seymour of 535 scratched an endorsement to the Cover renewing 535's 50% leading line on the Cover for 1999. As mentioned, the reinsurance offered by 1688 was not available to 535, but 535 were happy to renew their participation with or without reinsurance. In the event, Tryg agreed on 7th December 1998 to reinsure 535's line on the Cover, and Euclidian subsequently agreed to 'front' for Tryg (who were not acceptable security for 535).

    (ii) Also on 3rd December 1998, Syndicate 62 agreed to renew their 25% line on the Cover for 1999, and at the same time accepted the reinsurance offered by 1688 (by communicating their acceptance to Aon).

The Judge found that, although the relevant copy of the renewal endorsement had been lost, on the balance of probability Syndicates 187 and 228 each agreed to renew their lines (for 8.34% and 6.66% respectively) on the Cover and to purchase the reinsurance offered by 1688 either on

Friday 4th December or on Monday 7th December 1998.

24. As mentioned earlier, the other participant on the Cover for 1998, the Spalding syndicate, did not renew its 10% line for 1999, and was replaced by Euclidian, which finalised its participation and agreement to buy the reinsurance offered by 1688 on 31st December 1999. It was subsequently appreciated that 1688 could not reinsure Syndicate 228 because, like 535, 228 was also managed by Cotesworth. Accordingly, in early January 1999, Euclidian were approached and agreed to 'front' the reinsurance of 228. The arrangements were formalised with Mr Woodgate on 11th February 1999 when he scratched an endorsement confirming that 1688 was reinsuring Euclidian as to 16.66% (of which 6.66% related to 228's line on the Cover which Euclidian were now reinsuring).

Elk Point blow-out

25. On 23rd November 1998 there was a well blow-out at a well operated by Elk Point Resources. One of the declarations to the Cover, was itself an open cover known as the Petropac Facility. In April 1998 there had been accepted as a declaration to the Petropac Facility an OEE risk i.e. an Operators Extra Expense risk in respect of the interest of Elk Point Resources in that well. The insurance cover was limited to $20 million any one accident or occurrence in excess of $5 million.

26. There are three relevant dates so far as information reaching Aon in London are concerned.

> i) 1st December 1998 – In paragraph 16 of the judge's judgment he sets out what came through to Aon on this date. Mr Leggatt and Mr Gruder would summarise the position slightly differently seeking to shine the best light on their respective arguments. They would both agree that the news was of a serious well blow-out. They would both agree that no estimate of the size of any loss was given. Mr Gruder would however say that the information showed "there was a serious risk of a substantial claim to the 1998 year of cover even though no estimate could be given". Mr Leggatt would put it this way "there was no way of knowing at this stage whether there would be any claim on the policy". The judge supported Mr Leggatt's way of putting it as will be clear from the paragraph we shall quote below. It furthermore seems to us that having regard to the fact that the policy covered only extra operating expenses, and that it covered those only in so far as they exceeded $5 million, Mr Leggatt's description is accurate.
>
> ii) On 8th December 1998, Aon received by fax (dated 7th December 1998) a preliminary loss adjuster's report (dated 2nd December 1998) which recommended a *"tentative"* excess policy reserve of US$5m (i.e. reflecting an estimated loss of US $10m), and undertook "to provide underwriters with a proper reserve assessment as soon as possible".

iii) On 8th December 1998, Aon advised Syndicate 535, as the leader of the 1998 Cover, and Syndicate 62, of a potential claim under the excess OEE policy. The underwriters were also advised of an operation to drill a relief well, for which they were entitled to charge an additional premium under the policy. They declined to quote terms for additional liability insurance.

iv) On 11th December 1998, Aon received a fax (dated 10th December 1998) informing them that the loss adjusters had expressed a view that the initial reserve estimate was likely to be exceeded and that the loss might potentially reach US $20m – which would result in a claim of US$15m on the excess policy.

Materiality of information known to Aon as at 1st December 1998

27. The judge held as follows:-

> "88. In my judgment, as at 8 December Aon were aware of a loss which was material to be disclosed to any prospective Cover Underwriter or Reinsurer. I reject the submission that Aon had that knowledge as from 1 December 1998. At that date there were simply two newspaper cuttings and although there may have been telephone calls there was nothing sufficiently concrete to 'go on' to require disclosure in the context of the broke. Until there was some hard factual material, such as a loss adjuster's report and estimate, whether the insurance written to the Cover for the 1998 year was going to be hit was unknown. The un-contradicted evidence of Mr Outhwaite and Mr Holmes was clear on this point and I unhesitatingly accept it."

Submissions

28. It will be seen that in the above paragraph the judge recorded that Mr Holmes and Mr Outhwaite's evidence was un-contradicted. That was challenged by Mr Gruder, but supported by Mr Leggatt. Mr Gruder also relied on the fact that the judge when refusing permission to appeal on this point suggested that the above experts had not even been cross-examined on the point.

29. Mr Gruder showed us that Mr Holmes had been extensively cross-examined by him over some 12 pages of transcript, and it is unfortunate that in refusing permission to appeal the judge had clearly forgotten that, but as Mr Leggatt pointed out, at the time of writing his judgment he must have been aware of the cross-examination because in the next paragraph after the one quoted above he quoted a whole passage from that cross-examination.

30. The real question is whether the evidence of Mr Holmes and Mr Outhwaite was contradicted and, in any event, whether the judge's view as to materiality was wrong. Mr Gruder could not suggest

despite his powerful questioning that Mr Holmes altered his view as to the materiality of this information in any way. He could not thus say that Mr Holmes or Mr Outhwaite had given any contradictory evidence.

31. To support his submission that they were "contradicted", however, he showed us certain pieces of evidence.

> i) He showed us the supplementary statements of Mr Youell, the expert called by Mr Gruder. Mr Youell first gave some opinion on this aspect at a time when permission to plead the point was being sought, and when all that Mr Gruder or Mr Youell had seen was an e-mail dated (we emphasise) 19th July 1999 which said "We have one loss on Petropac EE9800168. The assured is Elk Point Resources Inc Well Blowout 23 November 1998 – estimate $16,160,517.97 100%. The loss was first reported to Aon on 7 December 1998". It was this e-mail which had alerted Mr Gruder to the possibility that there may have been non-disclosure. With that e-mail in mind Mr Youell said this :-
>
> > "53.In paragraph 6(1) of his statement, Mr Woodgate states that he was shown a "Claims Breakdown" for 1995 – 1998 as at 23rd November 1998, and that from these figures he calculated whether the reinsurance would have been profitable on an "as if" basis, that is without the inclusion of CAR premium and losses.
> >
> > 54. In paragraph 16, he records that he scratched and stamped a new slip on 16th December 1998, but that on that day he recalls no other "broke". I have been shown a copy of an email dated 19th July 1999 from Shoga Ogunbona that refers to a loss that took place on 23rd November 1998 on an account ELK Resources, which was reported to Aon on 7th December 1998.
> >
> > 55. I have been asked if, in my opinion, that was a matter that would be material to an underwriter and whether he would expect its disclosure on or prior to the meeting on 16th December 1998.
> >
> > 56. In the light of the nature of the loss, namely a blow-out, it is my opinion that this was material and a matter that should have been disclosed. Blowouts are often dramatic and expensive events, and since they often produce substantial losses, this event was likely to have changed the whole loss complexion of the proposed reinsurance. It would certainly have substantially altered the figures on which Mr Woodgate made his calculations in November 1998. This possibility is reinforced by the substantial loss figure that Miss

Ogunbona attributes to the loss."

ii) Once the full information had been obtained a further statement was produced by Mr Youell in November 2003 in which he said this:-

> "I have addressed the materiality of the Elk Resources loss in paragraphs 53 to 56 of my first supplemental report dated 20th October 2003. A prudent underwriter would consider that the information about this loss, whether it carried an adjuster's reserve of $10m at 10th December 1998, or a warning at that time that it was likely to increase to £20m, was material to an assessment of the reinsurance, and was information that should have been disclosed."

iii) That certainly cannot be said to have focused on the position as at 1st December 1998.

iv) Mr Holmes also put in a further statement in November 2003 in which he did focus on information known at 1st December 1998, and challenged the materiality of that information providing reasons. No further statement was obtained from Mr Youell focusing on that date.

v) It is also of relevance that despite the questions put to Mr Holmes testing Mr Holmes' view as to the materiality of this information, when Mr Youell came to give evidence he again did not focus on the information as at 1st December 1998 at all, or support the thrust of the questions which had been put to Mr Holmes. He in his oral evidence supported the view that once a sum had been identified even tentatively the information that Aon had became material.

32. Mr Gruder by a process of construction and the fact that the statement quoted under subparagraph (ii) above refers back to that quoted under subparagraph (i) suggested that the supplementary statements quoted in (i) and (ii) above "contradicted" the evidence of Mr Holmes and Mr Outhwaite.

33. Mr Leggatt took the view that in Mr Youell's statements and in his oral evidence he had not given any evidence which focused on the 1st December 1998 information, or its materiality. He therefore did not cross-examine on that aspect. In taking that view it seems to us that Mr Leggatt was clearly right.

34. It is unfair to criticise the judge for not thinking that Mr Youell had "contradicted" the evidence of Mr Holmes or Mr Outhwaite. The statements do not do so expressly, and cannot be said to do so without some elaborate construction of them. On a significant point such as this the expert should give his view clearly. That must particularly be so if he comes to give evidence following

the other party's expert where that expert has been cross-examined and clearly refuted any suggestion of materiality. The questions put by counsel are no evidence at all, and if the expert supports the view being put in cross examination, and thus disagrees with the evidence being given by his opposite number, that is something he should state clearly and unequivocally.

35. Mr Gruder then suggested that Mr Amies the broker had given evidence which contradicted Mr Holmes and Mr Outhwaite. That evidence was in the following terms :-

> "Q.Then you, yourself, receive these documents before the cover is finalised – before the reinsurance is finalised. I am asking you to assume that. Would you accept from me that the information which is received here would lead one to think that there might be a serious claim on the Energy 77 underwriters?
>
> A. There certainly does seem to be the possibility of a claim to underwriters, yes.
>
> Q. If you had provided to Mr Woodgate figures for claims which include claims for the 1998 year, would you have considered it right to draw Mr Woodgate's attention to the contents of the documents in 20 and 21 before he finally bound the reinsurance?
>
> A. On the premise that negotiations were ongoing at this stage, I would expect to advise Mr Woodgate of the possibility of a claim occurring on Elk Point."

36. As Mr Leggatt submitted this is not any evidence of materiality. Mr Amies was simply saying that if he had been in some form of continuous discussion he would have mentioned the fact that there was "the possibility of a claim", but Mr Amies was not in any continuous discussion.

37. Mr Gruder suggested that the judge had not properly understood the test of materiality. He made submissions along the line of the questions that he put to Mr Holmes to the effect that that there had been this serious well blow-out; that it could not be dismissed as "trifling" or immaterial; and that there was "a serious risk of a substantial claim". He suggested that Mr Holmes and Mr Outhwaite in giving evidence that the information as at 1st December 1998 was not material were confusing what information would be given to the claims broker to whom such newspaper cuttings would not be presented, and the contents of the cuttings which would (submitted Mr Gruder) be material to an underwriter writing the 1999 year risk. He suggested that the judge made the same error.

38. We do not accept that either Mr Holmes or Mr Outhwaite were confused or indeed that the judge was either confused or did not understand the test of materiality. Mr Gruder is attempting to build bricks without straw. There may be circumstances in which the court would hold information material even though there was no expert evidence to support it where it was obviously so. That however is not by any means this case. There was evidence from experts all one way and the

judge was entitled to find as he did.

39. There is in any event a further hurdle for Mr Gruder to surmount. Before he could succeed he would have to show that Mr Woodgate was induced to write the risk by the absence of the 1st December 1998 information. Mr Woodgate would have had to give evidence that if having scratched the slip as he had done on 23rd November 1998 Aon had come to him saying that they had some information which may or may not lead to a further claim in the 1998 year (and we stress with no effect on the 1999 year which he was being asked to reinsure) he would have withdrawn his offer of reinsurance or negotiated different terms.

40. Mr Woodgate gave no evidence whatever as to what he would have done if the 1st December 1998 information had been made known to him, and it cannot be inferred what he would have done. Again there might be some circumstances where what an underwriter would have done is so obvious that a court might infer it even if the evidence was not there, but this case is clearly not such a case.

41. In our view as regards the information known to Aon as at 1st December 1998, Mr Gruder's arguments fail.

Acceptance of 1688's offer of Reinsurance

42. Mr Gruder submits that the judge was wrong to conclude that binding contracts of reinsurance were concluded between Syndicate 1688 and syndicates 62 and 187 prior to 8th December 1998. The relevance of the fact if it be right that contracts were not so concluded, is to attempt to undermine the judge's reasoning as to why Mr Woodgate would not have attempted to withdraw the offer or amend it if he had been shown the information which Aon had as at 8th December 1998. In paragraph 18 above we quote the relevant paragraph of the judge's judgment in which submits Mr Gruder it is clear that the judge is influenced in the view he took by the fact that certain of the reinsureds had accepted the offer, and by the fact that it would have been "inconceivable that Mr Woodgate would have felt able to withdraw his offer just from Euclidian or to have sought different terms just from them and 228".

43. The first point which Mr Leggatt made was that paragraph 103 of the judge's judgment actually finds that Mr Woodgate would not have been influenced to change his offer even if Mr Gruder is right on his points as to whether Syndicate 62 or 187 were in law bound. He points out that the judge is saying "But the most important consideration, I think is that the knowledge of the loss occurred after Mr Woodgate had scratched the slip and after at the very least the substance of the offer had been used to broke to two of the Cover underwriters who were in a position to accept it", and later "In my judgment the process of the broke had proceeded too far by 8 December to make it commercially sensible for the firm offer to be altered significantly, and that is so, whether or not as a matter of fact and law the offer had already been accepted by Syndicate 62 and 187."

44. An answer that there were not binding contracts in relation to Syndicate 62 or 187 would not thus get Mr Gruder home. He would even then have to reverse the judge's conclusion that Mr Woodgate would not have altered his offer even if in fact or in law the offer had not already been accepted by those Syndicates. That would itself be a tall order since the finding is in essence one of fact and on any view dependant on the judge's assessment of the witnesses. It is tempting indeed to consider first whether that finding should be reversed. That is particularly so because Mr Gruder's points on whether there was or was not a binding contract are highly sophisticated points of contract law, and the judge's findings of fact which are not challenged would demonstrate that in commercial terms the reinsurance had been used to broke the Cover for the year 1999 prior to 8th December 1998, and indeed that it had been accepted in fact if not in law by Syndicates 62 and 187. The idea that Mr Woodgate, having got as far as he had, would, on the basis of the points that Mr Gruder now relies on for the proposition that there was no contract "in law", have sought to alter the terms of his offer seems to me very far fetched.

45. But since Mr Gruder does accept that if there were binding contracts, he cannot succeed in reversing the judge on whether Mr Woodgate was induced, it is right to examine the points he makes on whether binding contracts were made.

46. He took three points. He suggested that Syndicate 62, in accepting the offer of reinsurance, sought to impose a condition; that was thus a counter-offer; secondly, he submitted that Syndicates 62 and 187 both allegedly purported to accept the offer only in respect of risks attaching from 1st January 1999, when the offer was for a thirteen month period commencing on 1st December 1998 and thirdly, he submitted that the offer had lapsed once the 1st December 1998 had gone by.

Was Syndicate 62's acceptance conditional?

47. The argument in relation to Syndicate 62 arises out of the judge's findings in paragraphs 34 and 97. In paragraph 34 the judge found that on the 3rd December 1998 both Mr Watters, Syndicate 62, and Mr Seymour, on behalf of their respective Syndicates, scratched a document headed "Attaching to and Forming Part of '77 Energy Cover". That document contained reference to "common account reinsurance details as per policy number TBA(LU)". The judge found that Mr Hart of Syndicate 62 told Mr Backhouse of Aon that because of previous experience with reinsurers he wanted full disclosure of the understanding on which the Cover and reinsurance were being placed. It was in response to that request that the document known as the Memorandum of Understanding was ultimately produced.

48. Mr Gruder's argument before the judge was thus that Syndicate 62's acceptance was conditional on the production of that document. The judge's finding in relation to that argument was as follows:-

> "The fact that Mr Hart had asked that a document should be prepared to ensure that

> the reinsurer had no grounds for challenging the validity of the reinsurance on the basis that what was declared to the Cover was not what he expected, and that that document had not by then been given to Syndicate 62 for their approval does not make any difference to the analysis in my view. The stipulation was not so much a pre-condition which had to be fulfilled before the contract became effective in law; rather it was a condition which was to be fulfilled at some stage: the acceptance of the reinsurance was on condition that [at some stage] the reinsurers signed a document acknowledging the basis upon which the reinsurance had been tendered. In fact, Mr Watters rejected the suggestion that his acceptance of the reinsurance was "conditional" upon approval of the MOU at all, and I would be inclined to accept his evidence on this point. There was no subjectivity to the contract entered into between Syndicate 62 and the Lloyds Syndicate 1688 offering the reinsurance."

49. It seems to us that Mr Gruder's point essentially fails on the facts. What the judge is holding is that Mr Watters' evidence that the acceptance of the reinsurance was not conditional is evidence he should accept. Thus the position, as the judge held it to be, was that it was contemplated a document would be produced but it was neither a precondition that that should be so, nor a condition of the contract that it should be so.

Was there a mismatch in relation to the period of cover accepted by Syndicates 62 and 187?

50. The allegation that there was a mismatch between offer and acceptance is founded on Syndicate 62's manuscript note on their copy of the renewal endorsement for the Cover, which they scratched on 3rd December 1998 describing the reinsurance cover as "RAD, 12 months 1/1/99". Mr Gruder's argument is that what was being offered on the 23rd November 1998 slip was an offer to cover risks attaching to the Cover during the period 1st December 1998 to 31st December 1999. So, it is suggested, Syndicates 62 and 187 were purporting to accept an offer that was not being made, or alternatively were purporting to accept part of an offer. So it is argued there was no acceptance of the offer being made by the slip scratched by Mr Woodgate.

51. Mr Gruder submitted that the judge did not deal with this point. He suggested that the closest that the judge came to dealing with it was in paragraph 93 of the judgment, where the judge expressed the view that the 23rd November 1998 slip was "contradictory": "it was reinsurance for the Cover Underwriters but only in respect of the policies declared to the 77/1999 Energy Cover". The judge found that "on a proper construction of the slip, risks under those policies could not attach prior to 1st January 1999 and there could be no risks attaching to that Cover during the period 1st December to 31st December 1998". Mr Gruder suggested that if that was an attempt to deal with the point he was making the judge was in error because he was misconstruing the 23rd November 1998 slip.

52. We suspect that the judge was not dealing with Mr Gruder's point. The point, according to Mr Leggatt's submission, was a bad one. Mr Leggatt submitted that what the judge had found was

that the offer which Mr Woodgate had made to Syndicates 62 and 187 was the offer of reinsurance for the thirteen month period contained in the slip. The judge's finding was that in fact this slip was not shown to those Syndicates but that they were offered the reinsurance that that slip contained. The judge found that Syndicates 62 and 187 actually accepted that offer. Furthermore, Syndicate 62 was afterwards provided with a tidied-up version of the reinsurance slip, which Mr Watters scratched on behalf of Syndicate 62 on the 22nd December 1999 and this slip described the period of the reinsurance as 1st December 1998 to 31st December 1999. Syndicate 187 scratched the tidied-up version of the reinsurance slip on the 23rd December 1998. Neither Syndicate suggested on receipt of the tidied-up slip that their acceptance of any offer related to some different period.

53. Of course, so far as the 1999 year was concerned, the Cover could only relate to risks attaching during the period 1st January 1999 to 31st December 1999 and the note on Syndicate 62's renewal endorsement may simply reflect that reality. The note, however, simply cannot contradict the position which the judge has concluded to be so, i.e. that the 23rd November 1998 slip and its terms were accepted by the two Syndicates on the 3rd December 1998.

Did the offer lapse?

54. Mr Gruder's argument rested on evidence given by some witnesses at the trial that an offer of reinsurance lapses if it has not been accepted before the inception date. The argument thus was that as the inception date of the reinsurance was 1st December 1998, the offer made by Mr Woodgate was not capable of being accepted after that date.

55. Mr Leggatt suggested that what the witnesses regarded as a relevant date for these purposes was the date from which risks can attach to the insurance / reinsurance. Thus, he would argue that no risks attached during the period 1st December 1998 to 31st December 1998.

56. It would seem to us that the question whether an offer has lapsed is strictly one of fact and will depend on all the circumstances. As we would understand the position the question is whether, as at the 3rd December 1998, the offer being made by the 23rd November 1998 slip remained open for acceptance. As we would understand the judge's findings, Aon expressly offered that reinsurance to Syndicates 187 and 62, and there was never any suggestion that Mr Woodgate had withdrawn his authorisation for them to do so. We do not understand how in those circumstances it can be said that the offer had lapsed or was not capable of acceptance.

57. In our view none of the technical points taken by Mr Gruder can succeed. But in any event we re-emphasise the point we made at the outset in considering this aspect, which is that it seems to us inconceivable that if the factual situation was as described by the judge, with only some technical arguments remaining open as to whether contracts had been concluded in law, Mr Woodgate would have sought to withdraw the offer or vary the terms.

58. We would accordingly dismiss the appeal on the Elk Point issue.

Cox avoidance

Relevant facts

59. As we have said when dealing with the Elk Point issue Tryg agreed to write 50% of the Reinsurance. As Tryg was not acceptable security it participated as a 100% quota share retrocessionaire of Euclidian which fronted as 535's reinsurer of its 50% line on the Cover.

60. Tryg asked Aon to arrange stop loss reinsurance of its participation but this was not possible. Following a meeting with Tryg on 15 July 1999 Mr Matson of Aon was instructed to go out and look for other forms of reinsurance as a matter of urgency.

61. Mr Matson visited the Cox Syndicate the same day and spoke to Mr Jenks, the leading underwriter, who was already familiar with the business as Cox had participated in the Cover for the 1996 and 1997 years. Mr Jenks agreed in principle to write a 50% quota share of Tryg's participation. He was shown and initialled the December 1998 reinsurance slip which only covered losses attaching during the policy period. The judge found that he was not shown a later March 1999 slip under which reinsurers had also agreed to accept **"losses occurring during the period 1 January 1999 to applicable 1999 anniversaries on scheduled 1998 …Cover declarations"**. The slip designated these risks as Category B; the risks attaching in 1999 were Category A.

62. After Mr Matson supplied the further information which Mr Jenks had asked for Cox put down its line on a 50% quota share retrocession of Tryg on 30th July 1999. It excluded known or reported losses as at 19th July 1999 and the Petropac facility and, in the circumstances, did not cover Category B risks.

63. Shortly before the beginning of October 1999 Mr Matson was informed that Euclidian wanted to reduce its fronting income on the Reinsurance because it was an inefficient use of its premium capacity. So on 1st October 1000 Mr Matson went back to Cox with a view to taking Euclidian and Tryg out of the loop. This would not increase Cox's exposure and, because there would be less brokerage to pay, it would receive about 10% more premium. In the absence of Mr Jenks, he saw Mr Roberts, an assistant underwriter. In the course of the meeting Mr Roberts deleted the words "Retrocedant: Euclidian" from the quota share retrocession slip but did not delete the words "Retrocessionaire [Tryg] being retrocedant hereunder". In other words the deletion on the slip took Euclidian out of the loop but not Tryg. Following the meeting Mr Roberts noted on a copy of the slip "Possibility of this known previously. QS [therefore] no extra liability".

64. Once Mr Matson had obtained the agreement of Euclidian and 535 to Cox becoming a direct

reinsurer he returned to Cox on 26th October 1999 where he again saw Mr Roberts. On this occasion they went through the relevant documents and Mr Roberts scratched a copy of the March 1999 reinsurance slip. Following the meeting he noted:

> Simple tidy up QS [therefore] slip no longer a retrocession 10% RI brokerage removed No change in our exposure still part of [535] security…; now on original RI as seen by [Jenks].

Cox's participation was still subject to the two exceptions agreed in July.

65. Mr Roberts' evidence at trial was to the effect that he did not really know what was going on and that he had only done what Mr Matson asked him to do. The judge's findings of fact however on this part of the case were as follows:

> 221. Nothing that Mr Matson said during the broke to Mr Roberts was untrue or misleading. In the first place it is true that the possibility of Tryg and Euclidian being removed from the loop had been discussed in July; it was true that the effect of the reduction in the chain would be to increase Cox's income without increasing their exposure … and the exercise was something of a tidying up; … Following … Euclidian's approval of the position and 535's consent on 26 October 1999 Mr Matson returned to see Mr Roberts. I am satisfied on the evidence that Mr Roberts was both competent and authorised to write the slip; he understood the documents brought to him and he had them approved by [Mr Jenks' deputy], who also understood the effect of the changes. There is no doubt on the evidence that the failure to remove Tryg's name on 1 October 1999 was a pure oversight which was corrected later. There could be no commercial purpose in leaving Tryg's name there, without Euclidian, since it was known that Tryg were not acceptable security for 535. It was precisely that fact which had brought Tryg into the picture in the first place. Mr Roberts did not intend to leave the name on: he was prepared to do what Mr Matson told him, because he was satisfied with the objective outlined to him, although he thinks he was only told to remove Euclidian's name, (as indeed he may have been). Mr Matson was trying to complete the formalities in a hurry; there cannot have been any good, or nefarious, reason why he wanted to leave Tryg's name on the slip. This mistake was not spotted by Mr Matson or by [Euclidian] but that is understandable, if regrettable. The proposal was that both should fall out of the loop and therefore I am satisfied that a simple mistake was made.

66. As we have said Mr Jenks had been shown and initialled the December reinsurance slip. He was not told about the extension of the Reinsurance to Category B risks. Mr Roberts on the other hand was told that the Reinsurance did not increase Cox's exposure. As he scratched the March 1999 slip Cox alleged that the Reinsurance had been procured by misrepresentation because Cox's exposure had been extended to include Category B risks. However, neither the March 1999

reinsurance slip scratched by Mr Roberts nor any of the other documents he saw in October contained any schedule of the Category B risks declared to the Cover. The evidence was that when the March 1999 slip was signed by the other reinsurers the brokers had produced what was described as a "wish-list" of Category B risks which reinsurers were individually able to accept or reject. Tryg had rejected two of the five risks on this list. But Cox were not presented with any such list and did not agree to cover any Category B risks.

67. The judge found that before any reinsurer could be bound for a Category B risk it had to be identified and expressly accepted to the Reinsurance. So far as Cox was concerned, he said:

> No Category B risks were ever accepted to the Cover [he must have meant Reinsurance] so the failure to take the right slip on the first visit [in July] was of no significance and there was no extra exposure undertaken by the second slip scratched on 26 October 1999.

In fact none of the Category B risks declared to the Cover were loss making and so no claim was made against reinsurers in respect of those risks.

The Appeal

68. Cox advanced many reasons why it was not bound by the contracts it had made, all of which were rejected by the judge. Its appeal is confined to the single allegation of misrepresentation relating to the slip scratched by Mr Roberts on 26th October 1999. To counter the argument that Mr Roberts had already committed Cox to reinsure 535 on 1 October before the alleged misrepresentation, Cox say that there was no agreement on that date because, although Mr Matson may have intended that both Euclidian and Tryg should be deleted from the retrocession slip, that is not what happened and it was not Mr Roberts' intention that it should. So Cox remained Tryg's retrocessionaire and not 535's reinsurer until 26 October. On that day it was induced to participate in the Reinsurance by the misrepresentation which materially increased its exposure.

69. Aon (who, as we have said, accept that they are liable to the claimants if Cox successfully avoids the Cox Reinsurance) support the judge's conclusion that Cox's exposure was not increased on 26th October and contend that, even if it was, and Cox is entitled to avoid the Reinsurance then agreed, it was still bound by its agreement on 1st October 1999 to reinsure 535 directly on Category A risks.

70. Mr Gruder argued that the judge was wrong to conclude that the 26th October 1999 slip had not increased Cox's exposure. As a matter of construction of the March slip Category B risks did not have to be specifically accepted to the Reinsurance. Once they were declared to the Cover reinsurers were bound. The absence of a schedule attached to the slip which Mr Roberts signed or among the other documents which he was shown was not fatal. There were schedules of the

declarations to the Cover which identified the Category B risks and Cox was bound by these.

71. The wording of the Category B cover see (paragraph 61 above) is not easy. It contemplates, however, that such risks will be scheduled. There is no similar requirement for Category A risks. The need to schedule the risks suggests that the reinsurance cover was not automatic; some form of acceptance by the reinsurers was required. This is, as we have said, what happened in practice and was originally Cox's case before it became clear that none of the Category B risks were loss making. For these reasons we think the judge reached the right conclusion about this. Unless and until Cox accepted a Category B risk its exposure was not increased by the 26th October 1999 slip.

72. This makes it strictly unnecessary to decide whether, if Cox could avoid the 26th October 1999 slip, it was still bound to reinsure Category A risks by what happened on 1st October 1999. Here Mr Gruder submits that the judge found that Mr Roberts did not intend to delete Tryg from the quota share retrocession slip. He focuses on the judge's acceptance that Mr Roberts would have done what Mr Matson told him to do and that he was probably only told to delete Euclidian from the slip. So, Mr Gruder submits, whilst Mr Matson may have intended to delete both names, Mr Roberts only intended to do what he was asked to do. There was therefore a unilateral mistake and Cox continued to be Tryg's retrocessionaires until that cover was replaced and cancelled by 26th October 1999 slip.

73. We do not accept these submissions. They do not properly take account of the judge's findings which we have set out in paragraph 65. He found that there was no doubt that the failure to remove Tryg's name was a pure oversight. Mr Roberts understood what was proposed and "did not intend to leave the name on". The passages relied on by Mr Gruder do not undermine these clear findings. They simply explain how a clerical error came to be made. It follows that it was the common intention to delete both names from the slip with the result that on 1st October 1999 Cox became the direct reinsurer of 535 for all Category A risks.

74. For these reasons this part of Cox's appeal fails.

The Oceaneering Declaration

Relevant Facts

75. Oceaneering is a substantial offshore oil and gas contractor. In late 1999 it instructed Aon to obtain a package policy covering a wide range of risks including contractors all risks (CAR). Aon finally placed this risk in the London market led by the Catlin Syndicate whose line went down on 6 December 1999.

76. Before this happened however Aon approached Syndicates 535 and 62 with a proposal that the Cover should accept a reinsurance to pay the first US $15m of any loss to the package policy

excess of its basic deductibles. Syndicate 62 were concerned that this risk might be said to be outside the terms of the Cover (and thus the Reinsurance) and asked Aon to ensure that the reinsurers were informed of the risk before it was written. To this end Aon included it in a declaration list although no declaration had been made. None of the reinsurers raised any objection and Syndicate 62 were so informed.

77. Mr Brown considered the risk on behalf of Syndicate 535. On 24 November he verbally agreed to write it at a premium to the Cover of 70% original net premium (ONP). His underwriting notes show that he estimated the premium to the Cover would be US$1.865m. against a mean annual historical loss (burn) of $1.382m.. He noted "Hereto 1st $15m. [each and every loss] so we getting $1,865,000 against burn $1,380,000".

78. Mr Brown did not give evidence at trial but it appears that the day before he gave his verbal quote someone at Syndicate 535 had ascertained that the aggregate excess on the Reinsurance had been exhausted by 2 October 1999. Any declaration to the Cover would have the benefit of the Reinsurance for which the premium was 35% ONP. As the aggregate had been exhausted reinsurers would have to pay the first US$10m of any loss on this declaration other than for CAR risks where the Reinsurance only paid excess of US$2.5m each and every loss. US$5m of any loss excess of US$10m was of course retained by the Cover.

79. The risk was formally declared to the Cover on 14 December 1999. However the declaration was structured so as only to attach one part of the risk (Marine No. 7, a drilling rig in the Oceaneering fleet) with immediate effect but to attach other parts of the risk in the following months as and when existing insurances expired. The package policy documents show that Marine No.7, which had a declared value of US$84m, was to go to a shipyard for conversion in early December 1999 and that is why cover for this vessel was required from that time.

Reinsurers' case at trial and the judge's conclusions

80. As we have said Cox and 1688 originally contended that many of the 104 declarations made to the Cover were in breach of duty owed to them. They asserted that any claims made in respect of declarations accepted in breach of duty failed for circuity of action. However by the end of the trial only six risks, including Oceaneering, were in issue. The duties were expressed as implied terms of the Reinsurance. Their formulation however proved elusive. By the end of the trial Mr Gruder submitted that there were two implied terms:

> (i) that the Cover underwriters would not accept a risk to the Cover if they were indifferent as to whether a gross underwriting profit would be made by reason of the existence and terms of the Reinsurance;
>
> (ii) that risks written to the Cover would be written with the ordinary skill and care of a reasonable underwriter.

81. The claimants submitted that there were no such terms. Pre-contract there was a duty of disclosure; post-contract, absent fraud, there were no implied terms of this kind. The terms of the Reinsurance limited what could and what could not be declared to the Cover.

82. Many authorities were cited to the judge on this issue. He did not accept either side's arguments. He concluded:

> 255(5) … just looking at the terms of the Reinsurance, it covered on a risks attaching basis, insurance and reinsurance policies as may be declared to the Cover. It must have been plainly obvious to the parties that before such a policy was declared to the Cover it would be the subject of an underwriting judgment to be made primarily by the lead underwriter. So that, if for example, the lead underwriter simply from a practical point of view, gave his pen away to the broker and scratched everything the broker put in front of him without reading it or applying any judgment of his own, I would have thought that such policies if written in that way fell outside the terms of the Reinsurance. That is so because there must be implied into the contract a term to the effect that a policy is only declared to the Cover if it has been the subject of an underwriting judgment made by the lead underwriter. Such a term will protect the reinsurer against the risk that no underwriting judgment is made at all in relation to any particular policy.
>
> (6) In my judgment there is also room for another implied term: that the policies to be accepted to the Cover will be those which in the ordinary course of business the lead underwriter would write, taking account of the Reinsurance… If in fact the business written was written in the normal course of the business then that is what the reinsurers were agreeing to cover… here the book of business accepted to the Cover by [535] for the 1999 year was what might be called mainstream energy risks, comprising slightly more first loss level risks than before.

83. The judge then went on to apply these principles to the declarations in issue and rejected reinsurers' case on each of them. A number of criticisms of the Oceaneering declaration were made by Mr Youell which were not pursued on appeal. The main allegation however was that the risk was written knowing that because the aggregate was exhausted it represented an almost exclusive exposure to the reinsurers which would inevitably result in loss to them. The judge expressed his conclusions as follows:

> 311. I must approach the issue relating to this declaration on the basis that the Cover underwriters accepted the risk to the Cover because it would have the benefit of the Reinsurance and because they knew that the Reinsurance would cover the first $10m. in the event of a loss; and I infer that without this reinsurance the contract would never have been written. But even on that basis it does not seem to me that this was a policy not written in the ordinary course of the Cover

underwriters' business and nor was it written negligently. Nor was there any dishonesty involved. This was commercial opportunism. The deciding factor in favour of this view is that the Cover underwriters accepted part of the risk: this was not an arbitrage situation. Had they not retained any part of the risk I would have decided this point differently.

312. It seems to me that one cannot say that the retained exposure was theoretical: there is no evidence to show that that is so. In short I take the same position as Mr Holmes. The crucial point which makes all the difference is that the Cover underwriters retained an exposure. It may well be that the chances of the Cover underwriters having to foot any claim was small, but one cannot reassess the chances after the event. This was a declaration which was near the knuckle and the premium split between Cover underwriters and reinsurers did not fairly reflect their exposure to risk. The premium split was a feature of the commercial contract and the parties cannot now complain about the way it worked. Mr Woodgate chose to write the Reinsurance for 35% of the premium in relation to such risks as were declared to the Cover; he will, so to speak, win some and lose some. He was a loser in this instance. If a reinsured treated his reinsurer in this way on a regular basis I doubt whether his shelf life at Lloyd's would be a long one. It is one thing to act lawfully; quite another to act decently.

The Grounds of Appeal

84. Reinsurers contend that on the judge's findings set out above he should have held that the claimants were in breach of the duties which he found to exist. Alternatively they contend for an implied term that the claimants would conduct the business involved in the risks declared to the Cover "prudently, reasonably carefully and in accordance with the ordinary practice of the market" following the decision of Hobhouse J in *Phoenix v Halvanon* [1985] 2 Lloyds Rep. 599. If the judge had found that the Reinsurance was subject to such a term he would have found the claimants were in breach of it.

Duty

85. This is the most important issue on this appeal. The judge considered it under the heading of "Writing Against". A number of market witnesses gave evidence of what they understood this to mean, but it is clear that there was no consensus between them. An analysis in legal terms is therefore required.

86. Before considering the authorities we should first note a number of uncontroversial points. Before a contract of insurance or reinsurance is made the assured has the duties of disclosure embodied in sections 18 and 19 of the Marine Insurance Act 1906. The terms of the contract however govern the parties' relations after it has been made.

87. Reinsurance is very much the life blood of the market. It may be proportional, such as a quota share which is in the nature of a joint venture between the reinsured and his reinsurer. Or it may be non-proportional, such as an excess of loss, which is written to protect an exposure to a particular risk (facultative), a particular class of risk or a whole account; it is a way in which an underwriter manages an underwriting account. The fundamental difference between these two types of reinsurance is that the former involves a sharing of risks (premium and losses) between reinsured and reinsurer. The latter, (with which we are concerned) does not. As the judge put it:

> 255(3) The commercial interests of the [reinsured] and of the reinsurers do not, relevantly, overlap. They are not partners in a joint venture; each has their own separate commercial interests which will probably conflict: one profits at the expense of another. There is no sense in which the one undertakes to act for the other when deciding what business should be written to the Cover and no assumption of responsibility for the commercial fortune of the other. The [reinsured] make these decisions based upon their own self interest.

88. Each form of reinsurance enables an underwriter to write business which he would not otherwise have written, but it is proportional reinsurance which increases the underwriter's capacity. Non-proportional reinsurance does not: it enables an underwriter to assume a risk or size of risk which he might not otherwise write but for the protection afforded by his reinsurance, but it does not increase his capacity.

89. Other than in facultative reinsurance a reinsurer does not usually exercise any underwriting judgment as to the particular risks which he reinsures and that is so with both proportional and non-proportional reinsurance. The assessment a reinsurer makes at the outset relates to the skill which he believes his reinsured has. He will expect to follow the fortunes of that reinsured.

90. So with these points in mind we turn to the authorities to see what light they shed on the issue we have to decide. We start with *Phoenix v Halvanon* since this case is now the foundation for Mr Gruder's submissions. In that case Hobhouse J had to consider a number of preliminary issues concerning facultative obligatory (fac. oblig.) reinsurances of a variety of business. The issues included whether the reinsured was obliged to keep a retention and whether the writing of its business was subject to implied terms. It was in that context that both parties were suggesting that terms were to be implied. At page 613 of his judgment Hobhouse J. set out the pleaded implied terms and said:

> The implication of these terms was not controversial before me. Both [expert] witnesses thought them appropriate. Even though the opinion of the witnesses as to what is appropriate and reasonable does not itself suffice to show that such terms should be implied, I am satisfied that such terms are necessary in the present transactions. The fac. oblig. nature of the transaction which imposes no restriction on the reassured's right to chose whether to cede or not to cede, without giving the

> reinsurer any equivalent right, does necessitate that the reinsured should accept the obligation to conduct the business involved in the cession prudently, reasonably carefully and in accordance with the ordinary practice of the market. In the general formulation the word "reasonable" is to be preferred to "due" and the duty to act prudently as if not reinsured is not an alternative but it is really a restatement of the same obligation, provided it is realised that the obligation does not preclude the plaintiffs from taking into account the added capacity to write business that the availability of the reinsurances give them. Such is, after all, one of the important purposes of any reinsurance. In general terms, it must also be pointed out that the overrider commission being paid to the plaintiffs in part specifically covers the cost of carrying out these obligations.

91. Mr Gruder submitted that this passage means that in deciding whether to write a risk a reinsured is only entitled to take account of his reinsurance insofar as it gives him added capacity. We do not accept this. All Hobhouse J. was saying was that in conducting his business prudently, carefully and in accordance with the ordinary practice of the market an underwriter is entitled to take his reinsurance into account.

92. Mr Gruder also submitted that the Reinsurance in this case is similar to the fac. oblig. reinsurance in *Phoenix v Halvanon*. Unfortunately the report does not disclose the full terms of that reinsurance but it seems to have been a quota share, albeit a facultative one. Such a reinsurance contemplates a sharing of risk by way of retention by the reinsured (although he may select which risks he cedes) with the payment to him of an overrider for writing them. That is not the case with an excess of loss. There is no sharing of the risk and no payment is made to the reinsured for writing it. Mr Gruder suggests that the analogy is made good because here the reinsured could decide which risks to write to the Cover and which to write for themselves. But this was an open cover written by a number of underwriters to provide a substantial facility for underwriting large energy risks. They might have been able to write some of the risks themselves individually or collectively, but we do not think the analogy is at all exact.

93. No-one could doubt Hobhouse J's experience in this field. However, he was careful to say that the implied terms were necessary "in the present transactions". There was no argument before him, and we do not think that he could possibly have intended to say that the implied terms applied to all forms of reinsurance.

94. Nevertheless, the decision *Phoenix v Halvanon* has been endorsed and enlarged upon.

> (i) The passage has been approved and followed in Bermuda by Justice of Appeal Georges in *In the matter of Chesapeake Insurance Co. Ltd.* (Bermuda Civ. App. No. 7 of 1991, 28 November 1991: O'Neill & Wolonieki, The Law of Reinsurance (2004) 2nd Ed para. 7-08, footnote 49).

(ii) Hobhouse L.J. endorsed, in passing, his own earlier judgment as a general statement of the implied terms appropriate to reinsurance in *Toomey v Eagle Star Insurance Co. Ltd.* [1994] 1 Lloyd's Rep. 516 at 523:

> *Phoenix v Halvanon* deal[s] with the terms to be implied into such, and similar, types of contract in order to ensure that the interests of the reinsurers or those to whom risks are ceded, are sufficiently protected.

It is not clear from the last part of this sentence whether Hobhouse L.J. is intending to limit the operation of the implied terms to cases of **selective** cession by the reinsured (i.e. "fac.oblig.") or any form of treaty where the reinsurer is obliged to reinsure a share of what the reinsured writes (i.e. quota share and "oblig/oblig").

(iii) The editors of MacGillivray on Insurance Law (10th Edition 2003 para. 33- 69) appear to lay the emphasis on selection:

> [*Phoenix v Halvanon*] represents a significant and useful development of the law … [It] should apply to any treaty in which the reinsurer has bound himself to take business as ceded to him, and there is little or no restriction on the selection of cessions by the reinsured.
>
> The editors of Arnould also limit the term in this way (paras. 397-404 note 97):
>
> It has been held that terms are to be implied in a facultative/ obligatory treaty that the reinsured should conduct the business involved with reasonable skill and care and in accordance with the ordinary practice of the market.

(iv) Others believe that the term should not be limited to cases of selection. O'Neil and Woloniecki in 'The Law of Reinsurance', London, state (1998 para. 7-10):

> It is difficult to see why, following of Hobhouse J. in *Phoenix v Halvanon* the terms … should not be implied into every quota share treaty. Certainly a reinsured who expressly promised not to comply with such terms would find it difficult to obtain reinsurance.

(v) Similarly the editors of Barlow, Lyde & Gilbert on 'Reinsurance Practice and the Law' state at para. (15.3.1):

> It is likely that these obligations are of general application to treaty business and are not confined to facultative/obligatory contracts.

95. We next consider the decision of Tuckey J (as he then was) in *Economic v Le Assicurazioni d'Italia* (unreported 27 November 1996). In that case cover holders had written bonds for a pool of insurers which included *Economic*. But after some time, for practical reasons, the bonds were written solely for *Economic* who then ceded them under what was in effect a quota share reinsurance to itself (notionally) and to the other pool members. Following *Phoenix v Halvanon* he held that *Economic* (acting through its Cover holders) owed a duty to the other insurers to conduct the business prudently. But this was a proportional reinsurance with all risks being shared between reinsured and reinsurer. Mr Boswood submitted that in reality it was a co-insurance. Although this was not the legal position, we think this analogy is apt. Neither the duties owed by co-insurers to one another nor by a leading underwriter to those who follow him are for decision on this appeal. Surprisingly, this still appears to be an open question (see for the leading underwriter's duty the comment of Hirst J. in *The "Leegas*" [1987] 1 Lloyd's Rep. 471, 475 that the duty was "manifest" and the more circumspect comments of Mance J. in *Roar Marine Limited v Bimeh Iran Insurance Company* [1998] 1 Lloyd's Rep. 423, 430).

96. *Phoenix v Halvanon* and *Economic* are the only English cases cited to us in which duties of the kind contended for have been held to exist. We have been provided with a copy of a most illuminating lecture given by David Foxton in which he discusses the issue we have to decide and reports that two well known market arbitrators, when presented with submissions on *Phoenix* and *Economic* made the following observations:

> It would be surprising indeed if only two cases had come to the courts where a reinsurer had complained that his reinsured had ceded sub-standard business if there was an understanding in the market that a cedant's right to cover could only be enforced if the risks had been underwritten in accordance with an implied standard. If this were to be accepted throughout the market, almost every unprofitable treaty would be subject to challenge … In our opinion there would have to be exceptional reasons for an excess of loss reinsurer to be justified in declining to pay claims arising out of individual risks which were covered under the terms of a contract protecting a whole account.

We can understand the arbitrators' concern. Applied to all types of reinsurance, the implied terms open up the spectre of "retrospective" underwriting in arbitration or litigation at the suit of any reinsurer who has written loss making business with all the uncertainty and expense which this involves.

97. It is also difficult to reconcile the alleged duties with s55 (2)(a) of the Marine Insurance Act 1906 which says:

> Unless the policy otherwise provides, [the insurer] is liable for any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew.

This would suggest that the touchstone of breach should be recklessness rather than negligence: in the words of Diplock L.J. in *Fraser v Furman* [1967] 1 WLR 898, 906: "It must be at least reckless, that is to say made with actual recognition by the insured himself that a danger exists and not caring whether or not it is averted", which falls within the concept of "wilful misconduct" in s. 55 (2)(a).

98. Mr Boswood for the claimants relied on the decision of Thomas J (as he then was) in *Sphere Drake Insurance v Euro International Underwriting Limited* [2003] 1 Lloyds Rep. IR 525. This complicated case involved the reinsurance spiral of US workman's compensation business. Reinsurers were deliberately writing business which they knew and intended would make a gross loss, but only on the basis that they had outwards reinsurance in a way which enabled them to make a small profit. This was described as "arbitrage" or "net underwriting". It involved deliberately accepting business known to produce losses in excess of premium on the backs of reinsurers who would be expected to pay the losses for even less premium. So this was apparently a case of reinsureds taking unacceptable advantage of their reinsurers. The judge said:

> 329. It seems to me, as I am concerned with reinsurance, that the ordinary principles of disclosure suffice. If the nature of the business was properly disclosed, then in my judgment no complaint could be made about the writing of gross loss making business on the back of reinsurance.
>
> 331. Furthermore it must be recognised that markets must be free to function within the existing law and regulatory structure. In my judgment, the existing principles of the law in relation to fiduciaries, misrepresentation, conspiracy, deceit and disclosure already provide a sufficient legal framework to determine the issues in this action in relation to this market as between these parties. …

Earlier the judge had said:

> 284. If a participant enters the market when he does not understand those risks or miscalculates what those risks are, he has no one but himself to blame if he makes significant losses; he is presumed to know about the trade of the market in which he writes. The capital provider or the senior management of a company should not entrust such business to someone who does not understand it.
>
> 285. No other participant in a market owes a duty to protect those who knowingly enter a market but who do not understand it, are imprudent, or who miscalculate; indeed, it is likely that a person who is imprudent or foolish or who miscalculates

> in any market will be ruthlessly exploited by those who understand the market; he is at risk of having dumped on him, risks which no one else wants.
>
> 287. There are many examples in the relatively recent history of the insurance and reinsurance market of people who were so obviously imprudent that they are best described as fools, but who were nonetheless given the authority to write business by their capital providers and who then went on to incur very large losses for their capital providers. Some of these fools did so because they did not understand the market. It was no surprise that their foolishness had been exploited by their fellow underwriters and brokers; the insurance and reinsurance market is, in this respect, no different to any other market.

99. Mr Gruder would categorise this as the law of the jungle, but in a number of cases there is recognition that it is tempered by market reputation. Thus in *Glasgow Assurance v Symondson* [1911] 16 Com. Ass. 108, the earliest case cited to us, Scrutton J. had to decide whether reinsurers could avoid an open cover reinsurance on the grounds that cover holders had acted in breach of duty. In rejecting this allegation the judge said at 122:

> It is true the underwriter must have confidence in the broker to make such a treaty as this; but so he must have in every open cover where he reinsures part of risks of which he knows nothing except that they are to be written by someone else. No one has ever suggested in the latter case that the assured owes any duty of … selection to the underwriter, though without confidence such a contract will not be renewed.

100. In *Aneco v Johnson and Higgins* [2002] 1 Lloyd's Rep. 157, the facts of which do not matter since the issue before the House was one of damages, Lord Millett said at 192:

> Fac.oblig. treaties are naturally less attractive to reinsurers than quota share treaties. They are subject to the obvious risk that the insurer will retain good business for his own account and cede poor business to the treaty. There is, or at least is assumed to be, no obligation of good faith on the part of the ceding party when exercising his discretion whether to cede or retain a risk. The only constraint upon him is that he must exercise some restraint if he wishes to maintain a good reputation in the market and any hope of doing future business with existing and prospective reinsurers.

101. In the passage to which we have already referred in *Roar Marine* Mance J. said:

> Even if there was no such duty, it would mean simply that the following markets trusted in the leader, without legal recourse. If such trust was not justified, or was abused, it would not be extended or last. The law does not have to afford a legal remedy for every conceivable failure to behave properly or professionally…

102. From this review of the authorities it is self evident that there is no case which decides whether a reinsured owes duties of the kind contended for to his excess of loss reinsurers or what the extent of any such duty is.

103. It is also worth pointing out that what would (if terms were to be implied of the kind alleged) be sauce for the goose might also turn out to be sauce for the gander. If a reinsurer establishes an implied term in relation to the contracts with his reinsured, that reinsurer may have to accept similar terms down the chain in favour of his retrocessionaires. Is every excess of loss or stop loss down the chain subject to the same implied terms? Has Mr Woodgate's underwriting of the Cover been in breach of some duty owed, so as to affect the reinsurers' retrocession?

104. Furthermore, if terms are to be implied which give rise to breaches of duty sounding in damages, as opposed to being terms which do not allow the risk to be written at all, that will generate further issues, e.g., whether damages will always equal the claim with circuity of action as a defence, or whether some difference in premium will suffice, and/or possibly allegations of contributory negligence.

105. In deciding the issue, what considerations are relevant, bearing in mind that the touchstone for the implication of terms is necessity? Mr Boswood stressed the fact that in the case of non-proportional reinsurance the reinsured and the reinsurer had adverse and competing interests and we think he was right to do so. A reinsured owes contractual or tortious duties to his capital providers to act with reasonable care and skill in their best interests and make money for them. A reinsurer owes similar duties to his capital providers. The transaction in question is at arms length and each party will attempt to secure the best deal it can. In such a situation it is difficult to see the scope, still less the necessity, for implying a term that one of these counterparties owes some sort of duty to protect the interests of the other. How can either of them know what the interests of the other are? If an underwriter in such a situation is presented with an excellent risk from the perspective of those for whom he acts, he cannot be expected not to write it because to do so might or will have an adverse effect on his reinsurers. There is nothing wrong in taking advantage of an advantageous contract.

106. But the reinsurer is not defenceless or at the mercy of his reinsured. As a market professional he is able to protect himself by way of pre-contract disclosure. Before he writes the reinsurance or on renewal he is entitled to a fair presentation of the risk which includes the type of business his reinsured proposes to write or has written and its history. The wordings should clearly define the nature of the risks reinsured and could permit the reinsurer to monitor the progress of the business if necessary. If he fails to protect himself in this way he should not be able to blame his reinsured.

107. The fact that the reinsurer does not exercise his own underwriting judgement about the individual risks to be reinsured is a feature, as we have said, of almost all reinsurance. The reinsurer exercises his underwriting judgement as to which underwriter he will reinsure and upon what

terms.

108. We think all these considerations point strongly away from the implication of any general duty on a reinsured to act "prudently" or "reasonably carefully". In this case it was accepted that the Reinsurance had been written imprudently because, among other things, it had an aggregate deductible and no overall limit of cover. Mr Boswood asks rhetorically: why should an implied duty of prudence on the claimants be prayed in aid to protect the reinsurers against their own imprudence? We agree that it should not.

109. So what about the judge's term that risks would only be accepted to the Cover which the leading underwriter would write in the ordinary course of business? We cannot see the necessity for such a term. Pre-contract disclosure and the terms of the Reinsurance itself defined or should have defined what risks could be accepted to the Cover and, as necessary, what risks could not be accepted. Such a term also falls foul of the other touchstone for the implication of implied terms: uncertainty. How is one to determine with any certainty what the ordinary course of conducting a particular type of business is or should be?

110. So this leaves the judge's other implied term, which is to the effect that business will not be written recklessly and the *Phoenix v Halvanon* "in accordance with the ordinary practice of the market". We are as doubtful about ordinary practice of the market as with the term "in the ordinary course of business" because of the uncertainty. The ordinary practice of the market may be easy to state but not at all easy to ascertain. But some guidance might be available from s. 55 (2)(a) of the 1906 Act to which reference has already been made. "Dishonesty", "wilful misconduct" or "recklessness" might provide a basis on which a reinsurer could refuse to accept a risk, for example, if the underwriter exercises no underwriting judgment at all in accepting a risk, not caring whether it was good or bad, or deliberately took a risk knowing of a loss which would only fall on his reinsurers, or took a bribe to write the risk, a remedy might well be available. But if this is to be so we would think it likely to be on the basis that on the proper construction of the policy such a risk would not be covered at all. But whether that is via pure construction or an implied term, or indeed whether it is right at all, is not fruitful to explore further in this case because we are simply not concerned with conduct of that kind.

111. We think that the Reinsurance was not subject to any of the implied terms contended for. We would reach the same conclusion in respect of any non-proportional reinsurance. We do not have to decide and we do not decide whether the same applies to proportional reinsurance. We understand *Phoenix v Halvanon* to be a case of proportional reinsurance; *Economic* certainly was. It is therefore unnecessary to overrule these two cases.

Breach

112. Our conclusion about duty means that no question of breach arises. But as the point was argued we will deal with it on the assumption that the Reinsurance was subject to the *Phoenix v*

Halvanon implied terms. Most of Mr Gruder's argument was premised on his assertion that Hobhouse J had said that in deciding whether to write a risk a reinsured is only entitled to take account of his reinsurance insofar as it gives him added capacity. Thus, Mr Gruder argued that as in this case there was no problem of capacity, if the Oceaneering risk would not have been written without the reinsurance there was a breach. We have already said that this is not what Hobhouse J. meant. It would be quite nonsensical if an underwriter was not entitled fully to take into account his reinsurance protection when deciding whether or not to accept a particular risk.

113. The question then is whether the Oceaneering declaration was made "prudently, reasonably carefully and in accordance with the ordinary practice of the market"?

114. When the risk was presented Mr Brown obviously made an underwriting assessment of it from which he concluded, having regard to the projected premium and loss history, that the business would be profitable. Various criticisms were made of his calculation but at the end of the trial they had become muted and have not been pursued on appeal.

115. By the beginning of December 1999 the aggregate deductible had been exhausted for two months. It was not, and could not have been, suggested that this fact alone meant that no further declarations could be made to the Cover. The effect of declaring the Oceaneering risk to the Cover was that the Reinsurance would have to pay the first US$10m of any loss, but the next $5m. was for the Cover. For CAR losses the Cover paid the first US$2.5m of each loss. The division of premium on this risk obviously favoured the claimants but that was the consequence of the rate fixed by Mr Woodgate who knew that first loss business might be declared to the Cover. However, in his defence one should not forget that whilst the aggregate was intact it was the Cover which stood to pay losses or first losses to it.

116. Accordingly this was not a case of taking premium for no risk. It was not remotely a case of arbitrage or net underwriting as in *Sphere Drake*. Oceaneering was a genuine fortuity and not a guaranteed loss. It would of course have made a profit for both the claimants and the reinsurers if Mr Brown's calculation had been realised.

117. We do not understand the judge's comment that the risk was written "substantially in advance because it was desired that the risk should have the benefit of the Reinsurance". Aon were obviously anxious to have the risk declared to the Cover and if that happened of course the claimants would be protected by the Reinsurance, but it appears that there was a genuine need for the Cover at the beginning of December 1999 for Marine No. 7, a high value vessel, and nothing wrong with phasing in other parts of the risk over the following months as and when existing policies expired.

118. Mr Gruder asserted that this risk was not written in accordance with the ordinary practice of the market. To support this assertion he relied on the evidence of Mr Watters, Syndicate 62's deputy underwriter, about "writing against" which was:

> Writing against a reinsurer, I would suggest, is where you analyse the risk, work out that you probably would not write it, but with the benefit of reinsurance, you would write it anyway. I think you would not be doing your underwriting on a normal basis because you had reinsurance to protect you.

But this mirrors Mr Gruder's submission about what Hobhouse J. meant in *Phoenix v Halvanon*, which we have rejected, so it gets him nowhere.

119. None of the expert evidence supported Mr Gruder's assertion. Mr Holmes had suggested that there might have been writing against on this declaration, but withdrew his suggestion because the claimants retained an exposure and so this was not a case of taking a premium for no risk. The judge agreed and it was this evidence which persuaded him that there had been no breach of his implied terms.

120. The judge was obviously right to conclude that there had been no breach. For the reasons we have given we would have held that there was no breach of the *Phoenix v Halvanon* implied terms either. There was nothing imprudent or careless about the way the risk was written and no evidence that it was written otherwise than in accordance with the ordinary practice of the market.

121. We would thus dismiss the appeal on the Oceaneering point, and it follows that the appeal on all points is dismissed.
