Case No: 2005 1340 A3

Neutral Citation Number: [2005] EWCA Civ 1586
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION (COMMERCIAL COURT)
Hon Mr Justice Aikens
[2005] EWHC 1090 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Monday, 19th December 2005

Before :

LORD JUSTICE MAY
LORD JUSTICE LONGMORE
and
LORD JUSTICE JACOB

- -

Between :

G ABSALOM	**Respondent**
(an Underwriting Member of Lloyd's suing on his own behalf and behalf of all members of Lloyd's Syndicate 957)	
- and -	
TCRU Ltd	**Appellant**
(formerly known as Monument Insurance Brokers Ltd)	

- -

(Transcript of the Handed Down Judgment of
Smith Bernal WordWave Limited
190 Fleet Street, London EC4A 2AG
Tel No: 020 7421 4040 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

DAVID EDWARDS Esq (instructed by **Lovells**) for the **Respondent**

Miss REBECCA SABBEN-CLARE (instructed by **Dechert LLP**) for the **Appellant**

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Judgment

Lord Justice Longmore:

1. This case came before us as an application for permission to appeal with the appeal to follow if permission was granted. Permission was granted in the course of the hearing. The background facts are well-known to the parties and can be found in paragraphs 1 – 28 of the judgment of Aikens J [2005] EWHC 1090 (Comm); neither party quarrelled in any way with those paragraphs. The preliminary issue, which has to be answered for the purpose of the appeal, is as follows:-

> "Do the terms of the reinsurance contracts identified in Schedule 1, on their proper construction, entitle the defendant to charge brokerage on both (a) the deposit premium, and (b) the total adjusted premium (without deduction of the deposit premium)?"

2. This issue arises in connection with 4 excess of loss reinsurance contracts and 7 burning cost contracts. The relevant clause in chronologically the first of the excess of loss contracts, DN 97 7060, is as follows:-

> "PREMIUM Deposit Premium: US$1,000,000 payable in six equal instalments on 20th February 1997, 20th May 1997, 20th August 1997, 20th November 1997, 20th February 1998 and 20th May 1998.
>
> Settlement due dates in respect of each instalment will be 90 days in arrears of the instalment date.
>
> Adjustable at 100/70ths of the total claims paid hereunder. Subject to a minimum premium payable in all of 10% of the net premium income written under the Master Lineslip facility in the name of Lloyd Thompson Limited and or David Gyngell and Company Limited in respect of declarations attaching during the period 20th February 1997 (at noon Greenwich Mean Time) to 20th February 1998 (at noon Greenwich Mean Time) and a maximum of 35% of the net premium income written under the Master Lineslip Facility in the name of Lloyd Thompson Limited and or David Gyngell and Company Limited in respect of declarations attaching during the period 20th February 1997 (at noon Greenwich Mean Time) to 20th February 1998 (at noon Greenwich Mean Time).

BROKERAGE: 15% applicable to deposit premium and minimum rate."

The brokerage clause is in similar terms in the other reinsurance contracts.

3. The judge held that the reinsurance broker defendants before him (the appellants before us) were not entitled to 15% brokerage on both the deposit premium and the minimum premium (or rate) payable to reinsurers, but only on the deposit premium as it became payable and on the minimum premium as the premium came to be adjusted, taking into account the deposit premium already paid. In the light of this conclusion the preliminary issue could perhaps be better phrased by substituting in (b) the words "the minimum premium after adjustment" for the words "the total adjusted premium", but it is agreed that nothing turns on the precise formulation of the issue.

4. The brokers now appeal and, on their behalf, Miss Rebecca Sabben-Clare submits:-

(1) the natural and ordinary meaning of the word "and" is conjunctive and cumulative so that the applicable rate must be applied to both of the elements joined by the word "and";

(2) that is the end of the matter unless the reinsured can show that the natural and ordinary meaning cannot have been intended by the parties because e.g. it makes no commercial sense or much less commercial sense than the natural and ordinary meaning;

(3) in any event, the natural and ordinary meaning makes better sense than reinsured's meaning because

(a) it would neutralise or smooth out what she called the large "swing" between the minimum of 10% and the maximum of 35% of net premium income of the reinsured on which reinsurers' premium was to be calculated; and

(b) the brokers would otherwise be relatively under-remunerated in a soft market.

5. Mr David Edwards on behalf of the reinsured submits:-

(1) it is not a proper process of construction to look at one clause of a contract and determine the natural and ordinary meaning of the clause, apart from its context in the contract as a whole;

(2) once one reads the brokerage clause in its context, particularly in the context of the premium clause, one sees that the parties to the contract agreed to pay premium in separate parts, a "deposit" part and an "adjusted" part; the "adjusted" part is subject to a minimum and a maximum limit; the "deposit" part is

payable up front and the "adjusted" part takes into account the "deposit" part already paid;

(3) it cannot have been intended that while the reinsured should pay the deposit premium as part of the premium as a whole, the reinsured's brokers should be entitled to be paid commission on the deposit premium twice;

(4) consideration of under- or over-remuneration or the softness or the hardness of the market should play no part on a question of construction but, if they did, the brokers' overall position was that they were well (and, certainly, sufficiently) remunerated.

6. It is a curiosity of the law relating to insurance and reinsurance brokers that such brokers procure their remuneration by negotiation with the insurers or reinsurers and not by arrangements with their own principals who are the insured or the reinsured. In the first instance, at any rate, the insured or reinsured will usually not be told and will not know what part of the insurance premium will be collected by the broker by way of commission. All that the insured or reinsured will know is the amount of premium which he has to pay which will be inclusive of the brokers' remuneration, see Great Western Insurance Co v Cunliffe (1874) LR 9 Ch App 525. The premium will normally be paid by the insured or reinsured to the broker who will then normally pass the premium to the insurer or reinsurer after deducting his commission. In the present case the judge made no findings about any deduction of commission and we do not know how much (if any) of the reinsurance premium the brokers sought to deduct. All we know is that, in the context of a much larger dispute than is apparent to us, the accounting position between the brokers and their principals is such as to allow the brokers to assert vis-à-vis the reinsured Syndicate (their principals) that, before accounting to their principals for sums due, they are entitled to deduct sums equal to an amount of commission calculated in the manner for which the brokers contend. One legal mechanism by which this claim is asserted is a claim by the brokers that the reinsured Syndicate is in breach of an implied term of its appointment as broker by the Syndicate to the effect that the Syndicate will not interfere with or delay the brokers' right to be paid brokerage by withholding or delaying payment of premium or dealing directly with reinsurers. For the purpose of this claim, it is necessary to know how much commission is, in fact, due to the brokers.

7. The Law

The judge helpfully summarised the relevant principles for the purpose of the case, which he derived from Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 WLR 896, 912-3, Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251, 269 and Sirius General Insurance Co v FAI General Insurance Ltd [2004] 1 WLR 3251, 3257. Neither side dissented from this summary and I endorse it:-

"The key principles can be summarised as follows:

(i) the aim of the exercise is to ascertain the meaning of the relevant contractual language in the context of the

> document and against the background to the document. The object of the enquiry is not necessarily to probe the "real" intention of the parties, but to ascertain what the language they used in the document would signify to a properly informed observer.
>
> (ii) The interpretive exercise must not be done in a vacuum, but in the milieu of the admissible background material. That comprises anything that a reasonable man would have regarded as relevant in order to comprehend how the document should be understood, provided that the material was reasonably available to both parties at the time (ie up to the time of the creation of the document).
>
> (iii) However, evidence of negotiations and subjective intent are not admissible for the purposes of this exercise.
>
> (iv) A commercial document must be interpreted so as to make business common sense in its context. But if a "detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that flouts business common sense, it must be made to yield to business common sense", see Antaios Compania Naviera SA v Salen Rederierna AB [1985] AC 191, 201 per Lord Diplock."

8. Mr Edwards is thus correct to submit that the clause must be read in its context and that to my mind is, for the reasons given by the judge, determinative of this appeal. Once it can be seen that the deposit premium is part of the overall premium and that the final adjusted premium has to take into account the deposit premium already paid, it would be most surprising if the brokers were to be remunerated by being paid 15% of the deposit premium twice, once on payment of the deposit premium and, again, on the deposit part of the (minimum) premium received as a whole.

9. It is clear from the words "in all" in the second sentence of the third paragraph of the premium clause that the total premium payable is to be the deposit plus the adjusted premium. As Mr Edwards pointed out, one of the well-recognised definitions of a deposit is that it is "the first instalment of a payment", see The New Shorter Oxford English Dictionary. That is the meaning of the word "deposit" in the phrase "Deposit Premium" in the Premium Clause and must likewise be understood to be the meaning of the word "deposit" in the phrase "deposit premium" in the brokerage clause. In this way the premium clause and the brokerage clause march together; that is both the business sense of the matter and, in my view, the natural and ordinary meaning of the words in their context.

10. I would therefore reject Miss Sabben-Clare's submission that there is any burden on the Syndicate to displace what she would call the natural or ordinary meaning of the brokerage clause. It is perfectly possible for the court to determine its natural and

ordinary meaning in its context without recourse to any considerations of burden of proof.

11. Miss Sabben-Clare's argument in relation to the large "swing" contained in the adjusted premium (between 10% minimum and 35% maximum) asserts what it wishes to prove. It is no doubt true that, from the Syndicate's point of view, a premium adjusted on a basis of 100/70ths of the total claims paid would be uneconomic and the contract therefore required a bracket of a minimum and a maximum adjusted premium payable to reinsurers, based on a percentage of net premium income. But, whatever else might be said to be unclear about the brokerage clause, it was undoubtedly the "minimum rate" on which (apart from the deposit premium) brokerage was to be assessed. If the parties had wanted, for any reason, to ensure that the brokers would be generously remunerated, it would have been much more natural to remunerate them by reference to a rate other than the minimum rate (by eg selecting a median or some other rate based on the actual premium paid) than by giving them a double commission on the deposit premium.

12. As for Miss Sabben-Clare's further submission that the reinsured's construction would mean that the brokers were relatively under-remunerated in a soft market, the evidence that the market was soft was not challenged by the reinsured. In the light of the second of the key principles set out by the judge and agreed by the parties, the softness of the market is no doubt part of the background which is potentially relevant to construction. It is not, however, at all easy for an appellate court to assess what weight is to be attached to the softness of the market. The concept means no more than that the reinsured had a better negotiating position than the reinsurers in relation to the terms of the contract of reinsurance. It does not seem to me to follow that a broker is necessarily in a better negotiating position with regard to his own brokerage. A broker might be said to be better placed in a hard market, where the premiums will be higher, because he is always remunerated with a percentage of the premium. It may be the case that in a soft market where the reinsurer is keen to get the business, the reinsurer will be prepared to give the broker a higher percentage of the premium to keep the broker well-disposed to him but that can only be a very slender aid to any question of construction. The fact that a party may have a good negotiating position in the market cannot mean that, on any question of construction in relation to his remuneration, the brokers' interpretation must be preferred.

13. On the question of under-remuneration, Miss Sabben-Clare took us through figures set out in tables annexed to her skeleton but I fear I was not persuaded that any under-remuneration was apparent. Nor was I persuaded that the exercise was permissible at all since it was based on material which came into existence after the contract had been made and material which was, therefore, not within the second of the judge's principles of interpretation. It also failed to take into account the whole of the insurance and reinsurance programme put together by the brokers and the remuneration received in relation to the programme as a whole.

14. The judge next considered the terms of further excess of loss contracts M 98 0060, M 99 0060 and M 00 0060 which contained the clause "15% on minimum and deposit premiums". He came to the same conclusion as he had in relation to chronologically the first of the excess of loss contracts, DN 97 7060. He was correct to do so and, indeed, neither side suggested that any different conclusion could be reached as between the four contracts.

15. The judge lastly considered a third group of contracts which were called “the burning cost” contracts. That is because they covered losses which the reinsured syndicate might suffer if it had to pay swing premiums on other identified contracts including contracts in the first two groups of contracts. With regard to these “burning cost” contracts there were two options in relation to the calculation of the premium. Option A was in similar terms to the adjustment clause in the other contracts; option B was a straight percentage of the Syndicate’s net premium income without regard to any question of the amount of the claims. The brokerage clause was “15% on minimum and deposit premiums”, but if option B was exercised, as in fact happened, there would be no minimum premium and the brokerage would, therefore, have to be calculated by reference to the fixed rate of premium agreed in Option B. Miss Sabben-Clare contended that even here brokerage should be paid both on the deposit premium and the premium due as a whole. She recognised that this was not a particularly likely construction but said that it should follow the construction of the earlier contracts. She also suggested, somewhat faintly, that even if the court was against her in relation to the burning cost contracts they could be regarded separately and be construed as the reinsured Syndicate contended, without impairing her arguments in relation to the other contracts.

16. Since I have rejected her arguments in relation to the other contracts, there is now no separate point about the burning cost contracts. They must be construed so as to entitle the brokers to 15% of the actual premium, including the deposit part of the premium.

17. I would, therefore, answer the preliminary issue in the same way as the judge answered it in paragraph 45 of his judgment and would dismiss this appeal.

Lord Justice Jacob:

18. I agree with both judgments. The proposition that by the words used – particularly the “and” – the parties intended that both the deposit premium and the adjusted premium should be payable is so unrealistic that one is driven, reading the words in context, to the rational answer provided by the Judge.

Lord Justice May:

19. I agree that this appeal should be dismissed for the reasons given by Longmore LJ. I express my central reason for reaching the same conclusion in my own words quite shortly.

20. I simply do not accept Miss Sabben-Clare's submission as to the natural and ordinary meaning of the words in these brokerage clauses. The words are: "15% applicable to deposit premium and minimum rate". The small word "and" does not always have the same meaning or shade of meaning. It is, no doubt, always a conjunction in whatever way fits the context. But it is not always cumulative. Its natural and ordinary meaning here is not cumulative. 15% is "applicable" to both the deposit premium and the minimum rate, but not so as to add together 15% of each of them. This is because

the first 15% is 15% of the deposit premium. A deposit is a part payment, usually in advance, of what is expected eventually to be a greater amount. When the greater amount becomes payable, the deposit coalesces with the greater amount. The deposit is not paid twice - as here with the deposit premium itself. So here also with the 15% brokerage on the deposit premium. Absent her natural and ordinary meaning, which I reject, Miss Sabben-Clare's submissions about commercial sense take her submission nowhere.