Neutral Citation Number: [2008] EWCA Civ 1455

Case No: A3/2008/1565

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEENS BENCH DIVISION, COMMERCIAL COURT
HIS HONOUR JUDGE CHAMBERS QC
[2008] EWHC 1127 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2008

Before :

LORD JUSTICE LAWS
LORD JUSTICE RIX
and
LORD JUSTICE MOSES

- -

Between :

ALLIANZ INSURANCE COMPANY – EGYPT (A COMPANY INCORPORATED UNDER THE LAWS OF EGYPT)	**Claimant / Respondent**
- and -	
AIGAION INSURANCE COMPANY S.A. (A COMPANY INCORPORATED UNDER THE LAWS OF GREECE)	**Defendant / Appellant**

- -

(Transcript of the Handed Down Judgment of
WordWave International Limited
A Merrill Communications Company
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Official Shorthand Writers to the Court)

- -

Mr Howard QC & Mr Guy Blackwood (instructed by **Messrs Holman Fennwick & William**) for the **Claimant / Respondent**
Mr Duncan Matthews QC (instructed by **Messrs Clyde & Co**) for the **Defendant / Appellant**

Hearing dates : Friday 14th November 2008

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Judgement

Lord Justice Rix :

1. Towards the end of negotiations for a contract of marine reinsurance, conducted entirely by email via a broker between offices in different countries, the reinsurer asks the reinsured's broker to "forward slip soonest for our agreement". The broker does so, but unfortunately omits from the slip a vital clause, a class warranty, which had previously been stipulated by the reinsurer and agreed between the parties. The reinsurer, presumably failing to note the omission, responds "Cover is bound with effect from 31.03.05 as we had quoted, ie 1.33% H&M and 0.4% IV for our 30% line". Those rates had already been agreed and were set out in the slip itself. The line of 30% had also been already agreed. The question has arisen, however, following a casualty, as to whether the reinsurer's final message was agreeing to cover with or without the class warranty clause. The reinsured says that it does not matter, and that either way there is a contract: but also that its primary case is that the contract included the missing clause. The reinsurer, however, submits that these exchanges did not result in a contract: because the offer was on the basis that the clause was not there, and the would-be (but unsuccessful) acceptance was on the basis previously quoted which had of course included the clause in question.

   Was there a contract or not? That is the question.

The parties

2. The reinsured (or would-be reinsured) is Allianz Insurance Company Egypt, which is claimant and in this court respondent ("Allianz"). The reinsurer (or putative reinsurer) is Aigaion Insurance Co SA, which is defendant and here appellant ("Aigaion"). Allianz is based in Egypt, Aigaion in Greece. The broker, Chedid & Associates Ltd, is based in Cyprus, but the transaction was routed through its Beirut office ("Chedid"). The people involved were Wael Wasfi, then marine underwriting manager at Allianz; his broker, Nassib Barbir, then account executive with Chedid; and Nicholas Tzimas, senior marine underwriter at Aigaion.

The emails

3. On 27 December 2004 Mr Barbir at Chedid emailed Mr Tzimas at Aigaion as follows:

> "We are pleased to offer you a share on the above account, details as per attached slips…"

The slip attached referred to the insurance type as Marine Hull & Machinery, to a MAR (91) form, to the original assured as Ocean Marine Services, to the vessels and sum assureds as per an attached schedule, to various conditions beginning with a version of the Institute Time Clauses, to a period of 12 months from 31 March 2005, to Hull & Machinery (H&M) and Increased Value (IV) rates of 1% and 0.4% respectively, and to the relevant loss record. The attached schedule named 8 tugs built between 1975 and 1988 and classed variously with ABS or BV, both members of the International Association of Classification Societies (IACS). One of the tugs was the *Ocean Dirk* which was subsequently to suffer the casualty concerned.

4. Mr Tzimas of Aigaion replied on 27 January 2005 as follows:

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

5. On 10 March 2005, Mr Barbir responded to Mr Tzimas of Aigaion, referring to his email of 27 January, reporting that the information concerning the loss record had moved favourably due to a decline in losses reserved, and requesting –

> "In view of this reduction in the loss amount, the cedant is requesting a slight improvement in rate and deductible to secure firm order."

On 15 March 2005 Mr Tzimas of Aigaion replied:

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

6. On 24 March 2005 Mr Barbir of Chedid came back with a request for a revised quotation on an alternative basis:

> "Further to your e-mail dated 15.03.2005 in respect of the above account, kindly note that the Cedant is look for alternation [sic] quotation excluding the additional 1/4th Collision Liability, Fixed and Floating objects.
>
> Your urgent advice is highly appreciate [sic] and thank you for your cooperation."

On 28 March 2005 Mr Tzimas of Aigaion replied:

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

On 30 March 2005 Mr Barbir of Chedid replied as follows:

> "Thank you for your e-mail dated 28.03.2005 in respect of the above account, kindly note that the cedant have secured a firm order and accordingly we are pleased to bind your participation with a share of 30% for 12 months as from 31.03.2005.
>
> Kindly note that this decrease in share was due to the fact that this risk was Co-insurance.
>
> Our cover note will follow."

7. It will be recalled that the original proposal was for a 50% share. At trial, Allianz submitted that this e-mail closed the deal ("we are pleased to bind your participation"), but the judge, HH Judge Chambers QC, thought that it did not. There is no respondent's notice from that decision.

8. On the next day, 31 March 2005, which it will be recalled was the day from which the proposed cover was to start, Mr Tzimas of Aigaion replied:

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

9. The reference to "the below" was to the incoming email which in common form was printed below its reply.

10. At that stage the parties had appeared to have agreed on terms, but there was no slip in existence which recorded the parties' agreement. Aigaion's latest message was calling for such a slip so that it could finalise its agreement by reference to it: "for our agreement".

11. In response, later that day Mr Barbir of Chedid replied by a new email message as follows:

> "Further to your e-mail dated 31.03.2005, kindly find attached the slip for the above account as requested
>
> Awaiting your urgent confirmation and thank you for your cooperation"

12. That message attached a slip, which was in the same form as the earlier slip which Chedid had proposed on 27 December 2004, amended to take account of the negotiations in the meantime. Thus the rates had been revised from the original 1% (for H&M) and 0.4% (for IV) to the negotiated rates of 1.33% and 0.4%. The change from "4/4th Collision Liability and fixed and floating objects" to "3/4th Collision Liability and excluding fixed and floating objects" was incorporated. The "Claim Cooperation Clause" which Aigaion had stipulated early on was incorporated. Unfortunately, there was no reference to the IACS warranty which Aigaion had stipulated at the same time. As the judge found:

> "By an oversight it contained no reference to class at all. In all other respects it reflected the exchanges that had taken place between Chedid and Aigaion."

13. That email from Chedid with its attached slip was sent on Thursday afternoon in Beirut. There was in fact no reply until Saturday evening, 2 April 2005, when Mr Tzimas replied on an email message which, as before, printed the incoming message (ie Mr Barbir's message of 31 March attaching the slip "as

requested") underneath the reply. The reply, which is ultimately the focus of this appeal, stated:

> "Cover is bound with effect from 31.03.05 as we had quoted, ie 1.33% H&M and 0.4% IV for our 30% line.
>
> Our documents to follow."

The subsequent history

14. On 15 April 2005 Aigaion sent its policy documents to Chedid in Beirut. The policy requested its assured to examine it carefully and to advise Aigaion immediately in writing if it did not comply with instructions.

15. The policy differed in at least two respects from the slip. First, it contained reference to the IACS warranty. Secondly, it contained a "Payment Terms" clause which warranted the payment of the premium at the due quarter days. It also referred to a condition called "Deffered Premium Clause" (DPC, sic), which had been part of the slip conditions. The judge held that the DPC was a reference to a "Deferred Premiums" condition in the original insurance. Apart from matters of timing, the essential difference between the Aigaion policy's Payment Terms and the DPC/Deferred Premiums was that under the former failure to pay the premium on time was a breach of warranty and thus could bring the insurance to an end then and there, whereas under the latter the insurer/reinsurer would have to give a notice of cancellation the effect of which was to give the insured/reinsured a further 15 days of grace for payment. Aigaion also sent a debit note with its policy.

16. Chedid did not respond to the policy or debit note. The debit note was passed on to its accounting office in Cyprus, where it was stamped as received on 26 April 2005. The policy was not stamped received, and may have stayed in Beirut unread. Allianz made two payments, one in April and another in late June, but they were directed to Chedid's office in Cyprus and were not paid on to Aigaion.

17. On 23 July 2005 the *Ocean Dirk*, one of the tugs scheduled to the slip, suffered a casualty and became a constructive total loss. Aigaion was notified of the claim on 27 July 2005 and immediately replied repudiating liability on the ground that its "policy automatically lapsed on 31 May 2005 due to non-payment of premium as per payment warranty".

18. In the circumstances, one can have sympathy with both parties who, largely because of the errors of Chedid, have been drawn into litigation with one another.

19. At trial Aigaion submitted that no contract of insurance had been entered into at any time, but that if any contract had been formed it had been made on the terms of its policy, which in any event had superseded the slip. On any view there was no liability. On appeal, it took its stand solely on the absence of any contract on 2 April 2005: Allianz's offer (on the slip) and Aigaion's acceptance (by its email) had passed one another in the night. The slip offered a contract which did not include the IACS warranty, but Aigaion's email could only have been understood ("as we had quoted") on the basis that the IACS warranty was included.

20. Although the argument on formation of contract centred around the presence or absence of the IACS warranty in offer or acceptance, that warranty played no part in the subsequent history of events. If there was a contract, no issue arose out of the warranty's presence or absence. It could of course have been otherwise. There might in theory have been a breach of the warranty before the occurrence of the casualty.

The judgment

21. The judge gave Aigaion's argument short shrift. He said:

> "32…I have no doubt that the e-mail sent by Mr Tzimas on 2 April 2005 was intended to close the deal and that, unless the exchanges were in some way flawed, that is what it did…
>
> 33. It is submitted on behalf of Aigaion that the absence of a reference to the IACS condition in the slip sent to Aigaion on 31 March 2005 meant that the communication constituted a request for cover without the condition and that Aigaion's e-mail containing the words "*as we had quoted*" negatived an acceptance of that request. It seems to me that the submission is self-evidently wrong. Relying as it does purely on the wording of the exchange, that wording does not support it. The use of the letters *i.e.* is unambiguous. They indicate that that which follows is what is meant by the words "*as we had quoted*" and that which follows contains

no reference to the IACS clause. This is because the quotation that is being referred to is exclusively monetary.

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

Submissions

22. On behalf of Aigaion Mr Duncan Matthews QC submitted that the judge had erred first in reading Mr Tzimas's email so narrowly as to be referring solely to monetary matters and secondly in begging the question in his para 34. The issue of whether there was a contract or not could not be resolved without deciding whether the offer and acceptance were directed to the same terms, whether in other words the parties were *ad idem*. Unless they were, there was no contract. It made no sense simply to say that there was a contract whether or not it included the IACS warranty. First, therefore, one had to ask whether the proffered slip contained the IACS warranty. Answer: it did not. Then one had to ask whether the email in response stipulated for the IACS warranty or not. Answer: yes it did, because "as we had quoted", even if the "*ie*" was a reference simply to the rate, could not be so narrowed: a quote at a particular rate involved all the terms upon which that rate depended. The acceptance was limited therefore to the terms stipulated, and the parties were not *ad idem*. They may, through error, have thought that they were, but that happens not infrequently. What matters is not what they thought, but what they said.

23. On behalf of Allianz on the other hand Mr Mark Howard QC said the judge was right. He took his primary stand on the basis that the contract contained the IACS warranty. Against the background of the negotiations, it was impossible to read the proffered slip as though the IACS warranty had been omitted from it. Such an error was one which rectification would if necessary remedy. But before one got to rectification, and despite the warranty's omission, any reasonable person would have read the slip as though the IACS warranty was in fact included. Therefore, there was no lack of symmetry between Allianz's offer and Aigaion's acceptance. Alternatively, if, contrary to that submission, the slip did not contain the IACS warranty as part of the offer, then neither did the email response involve any reference to it: the judge was right to read the response narrowly. Then the (mistaken) contract would have been made without the IACS warranty and the true contract would have to be arrived at by rectification.

Permission to appeal

24. The difficulties of the point are perhaps clarified by reference to the permission to appeal proceedings. On paper, Stanley Burnton LJ had said this:

> "The email exchange culminating in the email exchange of 2 April 2005 is conclusive. The email of that date unequivocally accepted risk on terms previously quoted. The unexpressed intention of either or both parties to include the IACS condition is irrelevant: it was not included. Alternatively, if they had expressed and agreed its inclusion, the agreement arrived at included it. Either way, there was a contract."

25. On renewal of Aigaion's application, however, Thomas LJ, who gave permission to appeal on terms that the judgment sum should be brought into court, which it was, accepted the problem raised by the basic facts and Mr Matthews' submission about them. He said:

> "It is therefore the submission…that what the defendant was accepting was not what had been offered. Then he says, looking at the commercial importance of the class-maintained warranty, and the judge's view, unexplained, that it would somehow be incorporated, how could that be achieved jurisprudentially? The judgment is silent. He therefore says the parties were not *ad idem* on an important term…
>
> Unfortunately the judgment contains no answer to the question…"

The forensic shifts

26. The difficulties are also illustrated by Allianz's forensic shifts. In its Reply it pleaded that if a contract had not been made on 30 March 2005, then it had been made on 2 April 2005 "on the terms set out in the slip policy" sent to Aigaion on 31 March. That would presumably be without an IACS warranty.

27. Before the judge, however, it was submitted (Allianz's opening written submissions, para 41) that, if no contract had been made on 30 March 2005, then it had been concluded "on the terms of the slip policy sent to Mr Tzimas on 31st March, 2005 plus the IACS warranty which had been omitted in error".

However, no explanation was given as to how the omission was to be made good.

28. At the permission to appeal stage Allianz put in a respondent's skeleton argument. It drew attention to its case at trial (referred to in my previous paragraph) and to evidence that the IACS warranty had been omitted in error. It sought to support the judge's view that he did not ultimately have to decide whether the IACS warranty was included or not, or if it was, how it was. It also sought to support his reason for refusing permission to appeal, which was "Clear decision on clear evidence". It was not explained how matters presumably of the construction of the parties' documentary exchanges became matters of fact.

29. At the appeal stage, Allianz's skeleton argument maintained the submission that the answer was contained in the judgment below: but that, if the jurisprudential mechanism for inclusion of the IACS mechanism had to be identified, then that could be done by reference to the doctrine of rectification. That would perhaps presuppose that the contract had originally been concluded without the inclusion of the IACS warranty, but no such submission (which would have reverted to Allianz's original Reply) was made.

30. At the appeal hearing, however, Mr Howard's submissions explained for the first time how the IACS warranty was included as a matter of contract: it was to be read into the slip offer as though it had not been omitted. That was, he said, the case made below, and it was the first way (he eschewed the word "primary") he put his alternative cases.

Discussion

31. Short as the point is, it is not easy. On the one hand, there is much in the circumstances of the exchanges ending on 2 April 2005 to suggest that the parties had concluded their agreement. It is not merely that they thought they had, but that is what they were saying to one another. If that was so, then it would seem that they could only have done so on the basis of the slip put before Aigaion. That, however, was not Allianz's primary case, which was that the IACS warranty had to be read into the slip. Could that really be so?

32. On the other hand, Mr Tzimas's reply did not refer expressly to the slip, but rather reverted to his previous quote. He did not have to refer to his previous quote in order to emphasise the rates of 1.33% and 0.4% because they were in the slip. There is force in Mr Matthews' submission that whether one considers the rates or the quote as a whole, all had been done on the basis of the IACS warranty. The cogency of Aigaion's case is in effect recognised by many of Allianz's submissions, including Mr Howard's primary submission that the slip offer and the concluded contract included the IACS warranty.

33. In my judgment, it is impossible to read the IACS warranty into the slip offer. Mr Howard did not rely on *Mannai Investment Co Ltd v. Eagle Star Life Insurance Co Ltd* [1997] AC 749 to support his submission that the slip offer would have been read by a reasonable offeree as including the IACS warranty. It seems to me that in any event it could not be so read. The slip was intended to be the definitive reference point, at any rate pending the issue of any policy document, of the terms of the parties' contract. If Aigaion by its reply agreed to those terms by its email response, it was as if it had appended its signature to it (which is how a slip is normally dealt with. Here of course the parties were in separate countries and could not act by face to face presentation and signature – or initialling or stamp – of the slip). If Aigaion had simply signed or initialled the slip, it could not argue, without a plea of rectification, that the contract included the IACS warranty. The judge did not say that the contract was made on that basis. In his para 33, he left the point open. Stanley Burnton LJ, on the other hand, said, contrary to Allianz's present primary submission, that the IACS warranty was not included because it had not been expressed in the slip. I agree.

34. The question then comes down to how Aigaion's reply email is to be interpreted. I have finally concluded that, despite such cogency as there is in Mr Matthews' submissions, the mutual indicia of finality about the email exchange are so strong that it would be wrong to interpret them as ending in a mere offer and counter-offer. The reasonable reader of these exchanges would conclude that Aigaion was agreeing to the terms set out in the slip, on the basis that that was what Aigaion had itself quoted.

35. I would seek to put the matter in the following way. In his email of 30 March Mr Barbir had indicated that the parties had reached agreement on terms ("we are pleased to bind your participation…Our cover note will follow"), albeit Aigaion's participation had reduced from that originally contemplated to 30%. In its reply of 31 March, Aigaion had agreed that the parties had come to terms and asked for a slip to be forwarded soonest "for our agreement". On the same day, Mr Barbir replied, attaching the slip "as requested. Awaiting your urgent confirmation". That slip was, for then present purposes, the definitive (albeit mistaken) restatement of the agreed terms. On 2 April, Aigaion replied,

agreeing that "Cover is bound from 31.3.05". It is true that Mr Tzimas added, "as we had quoted, ie 1.33% H&M" etc. It is that and only that which has set up a question-mark as to whether this email is in truth to be interpreted as a counter-offer rather than an acceptance. As to that, I agree with Mr Matthews that the quote of 1.33% etc was in fact on the basis of the various terms previously stipulated and agreed including the IACS warranty. However, in circumstances where a gap had opened up between what had been previously quoted (and agreed) and what had been defined on the slip as the determinative contract, a straightforward choice has to be taken between construing Mr Tzimas's email response as a counter-offer (which gives priority to previous stipulations) or an acceptance (which gives priority to agreement on the slip).

36. In my judgment, once the issue is so expressed, the correct answer is to say that it is to be construed as an acceptance. Although the email did not refer expressly to the slip, it was clearly speaking by reference to it. The email was sent on the same document as contained the incoming email from Mr Tzimas with reference to the attached slip. There is nothing to indicate the possibility that any attention is being given to the absence of the IACS warranty. No doubt it had gone undetected. There is nothing to indicate that the appearance of finality and agreement is subject to a stipulation that the slip had correctly restated the basis of Aigaion's agreement. The only emphasis is on the rate, which is the one matter stated. It was in fact unnecessary to emphasise that, since the slip correctly set out the rate agreed: therefore there was nothing about the emphasis on that rate to suggest that there was any prevarication with agreement on the slip's terms. On the contrary, the email began "Cover is bound with effect from 31.3.05". It was impossible for cover to be so bound if Aigaion were in fact making a counter-offer. In my judgment therefore, upon a true construction of Mr Tzimas's email of 2 April 2005, Aigaion was agreeing with the terms set out on the proffered slip, and in ignorance of the fact that the slip represented any difference from the terms quoted and previously agreed. It follows that there was a contract, but one which did not include the IACS warranty.

37. If, thereafter, and before the matter could have been sorted out, there had been a breach of the IACS warranty before a casualty had occurred, there would perhaps have been an unfortunate dispute. It may be that the reinsured, Allianz, would have accepted that the IACS warranty had been agreed and mistakenly omitted from the contract, that the contract could be rectified, and would have gone forward on that basis. As likely, there would have been an unseemly wrangle. Aigaion would, if necessary, have said that either there was no contract (its present position) or that any contract made would need to be rectified. We were not concerned on this appeal with the question whether a plea of rectification would have been successful, but I would not as presently advised accept Mr Matthews' bare submission that rectification could not assist: he said because the law could not rectify an offer, only a contract. The

question would have been whether the contract could be rectified, and I do not know why it could not have been. At any rate in this litigation, for understandable reasons Allianz were perfectly willing to acknowledge that it could have been.

38. Aigaion has not submitted, no doubt for good reasons, that the mutual mistake of the parties as to the inclusion of the IACS warranty rendered their apparent contract void.

Conclusion

39. In sum, I would dismiss this appeal. Aigaion are bound as reinsurers to answer subject to the slip terms for the loss of the *Ocean Dirk*.

Lord Justice Moses :

40. I agree. The reasonable reader would, in seeking to understand the final exchanges between Mr Barbir and Aigaion on 31 March and 2 April, assume that these exchanges were conducted in an honest and straightforward manner. It would have been disingenuous for Aigaion to ask for a slip to be forwarded " for our agreement" and, on receipt, to announce that "cover is bound", if in fact it was, on 2 April, making a counter-offer.

Lord Justice Laws :

41. I also agree.