Neutral Citation Number: [2007] EWHC 155 (Comm)

Case No: 2005 FOLIO 80

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

Royal Courts of Justice
Strand, London, WC2A 2LL

6th February 2007

Before :

MR JUSTICE DAVID STEEL

- -

Between :

1)DORNOCH LTD on its own behalf and on behalf of underwriting members of Syndicate 1209 **2) AEGIS INTERNATIONAL INSURANCE LTD** **3) WURTTEMBERGISCHE VERSICHERUNGS AG** **4) CATLIN SYNDICATE LTD (formerly known as Catlin Westgen Ltd) on its own behalf and on behalf of underwriting members of Syndicate 1003** **5) ATRIUM UNDERWRITERS LTD on behalf of underwriting members of Syndicate 609**	**Claimants**
- and -	
1) THE MAURITIUS UNION ASSURANCE COMPANY LTD **2) THE MAURITIUS COMMERCIAL BANK** (No. 2)	**Defendants**

- -
- -

Michael Swainston QC and Alan Maclean (instructed by **Clyde & Co**) for the **Claimants**
Mark Humphries of Linklaters for the **First Defendants**

- -

Judgment

Mr Justice David Steel:

Introduction

1. The Claimants are reinsurers writing business on the London market. Four of the five Claimants are English companies representing Lloyd's Syndicates. The other, the Third Claimant, is a German insurance and reinsurance company.

2. The First Defendant ("MUA") describes itself as "a public limited liability Mauritian company which conducts both life and general insurance business. Its head office and four branch offices are all located in Mauritius."

3. The Second Defendant ("MCB") is a Mauritian bank. It is the original assured under three elements of an insurance programme underwritten by MUA for the 12 month period from 30 June 2002 covering infidelity of employees (Clause 1), Premises (Clause 2) and Transit (Clause 3). Before the insurance was written, primary reinsurance was obtained in London from the Bankers' Blanket Bond market in respect of Clause 1, 2 and 3, and by way of excess top up for Mauritian Rupees (MRS) 25m in respect of Clause 1. A larger MRS 50m excess top up was purchased from the Specie market in respect of physical losses to Premises and in Transit under Clauses 2 and 3.

4. MCB made a claim in Mauritius against MUA in relation to losses flowing from a large number of allegedly unauthorised transactions over 11 years. These are said to have been orchestrated by one employee, a Mr Lesage, and to have involved many cheques drawn on various different accounts in favour of different counterparties on various dates during that period.

5. MCB pursues its claim in respect of these alleged frauds under Clause 2 of the underlying cover (Premises), rather than Clause 1 (Infidelity of Employees). One possible reason for it having done so is the lower limit applicable to Clause 1 by reason of the decision to buy only limited excess cover in respect of Clause 1. MUA in turn has brought an equivalent claim against the Claimant Reinsurers in Mauritius.

6. In these English proceedings, the Claimant Reinsurers on the Excess Physical Loss or Damage cover seek declarations that they are not liable under that policy in respect of the subject losses. They do so on three grounds reflected in the preliminary issues that the Court is called upon to decide:

   (1) The losses were not of their nature within the physical loss or damage cover provided by the Excess Physical Loss or Damage reinsurance;
   (2) They were not discovered within the 72 hour discovery period applicable to losses which are covered by the Excess Physical Loss or Damage reinsurance.
   (3) The various financial defaults over 11 years do not (save in one case and marginally) exceed the deductible (of MRS 50m x/s MRS 500,000) applicable to each loss under the Excess Physical Loss or Damage reinsurance.

7. MCB was not represented at this trial notwithstanding confirmation by the Court of Appeal that it is properly subject to English jurisdiction. It may be that MCB had hoped to obtain a prior resolution of the scope of the reinsurance within its proceedings in Mauritius to which reinsurers have been joined (although they are contesting jurisdiction). It may also be that MCB considers that, if it does not file a further acknowledgment of service, it can argue in Mauritius that the scope of the reinsurance is different from what it is determined to be in these proceedings.

Procedural history

8. MCB submitted a letter of claim to MUA dated 30 June 2003. This stated:

> "On behalf of [MCB] we wish to confirm its claim in respect of [NPF/Lesage claim], notified to you on February 17, 2003, hereby being made under your Policies BI 10/00/4 and BI 10/00/3 for an indemnity amounting to Rs 737,000,000 – less policy excess applicable under Insuring Clause 2 – Premises."

9. On 19 January 2005 the Claimants avoided the Excess Reinsurance on the grounds of material non-disclosure and/or misrepresentation. On the same day they applied to the Commercial Court for permission to serve a Claim Form and Particulars of Claim upon MUA and MCB out of the jurisdiction. Mr Justice Aikens granted the Claimants' application on 1 February 2005. The Claim Form and Particulars of Claim were duly issued and were served on the Defendants in Mauritius on 17 February 2005.

10. Both Defendants applied to the Court to set aside service of the proceedings on them on the basis that the English Court had no jurisdiction. Those applications were heard over 4 days in June and July 2005 and dismissed by Aikens J., whose judgment is reported at [2006] Lloyd's Rep IR 127. Aikens J. gave both Defendants permission to appeal against his Order dismissing their challenge to the Court's jurisdiction. The Defendants pursued those appeals.

11. The Court of Appeal dismissed the appeals, following a hearing on 15 and 16 March 2006: [2006] EWCA Civ 389; [2006] 2 Lloyd's Rep 475. The Court of Appeal rejected MUA's case on jurisdiction and choice of law. Although the Court of Appeal only had to decide whether the Claimants had a good arguable case that the Excess Reinsurance did not contain a Mauritius jurisdiction clause, it follows from the Court of Appeal's judgment that the Excess Reinsurance is governed by English law, pursuant to article 3 and/or 4 of the Rome Convention. That is common ground between the Claimants and MUA.

12. In the Mauritian Proceedings against MUA, MCB makes the following allegations:

    (1) The removal of funds from accounts at the bank was orchestrated by Mr Robert Lesage, a former senior manager.

    (2) Though he was due to retire in June 2001, Mr Lesage continued to work at MCB. MCB's claim against MUA goes on to state:

    > "Following his retirement, Mr R Lesage stayed on to put in order certain specific credit files. However, Mr R Lesage overstepped his mandate and continued, without the knowledge of [MCB], to deal with [national pensions ("NPF") and savings ("NSF")] fixed deposits."

    (3) Mr Lesage's fraud involved, over many years, drawing down client funds from their accounts at MCB without the clients' knowledge and making illegal loans of those funds to other companies. MCB says that the fraud was characterised by the following recognised money laundering techniques:

i) “layering, that is to say, separating the siphoned off and fraudulently misappropriated funds from their source by creating complex layers of financial transactions designed to disguise the audit trail and to make it appear anonymous and/or normal.”

ii) “splitting, that is to say, dividing the proceeds of the siphoned off and fraudulently misappropriated funds into various amounts so as to disguise the source and audit trail of the funds.”

iii) “integrating, that is to say, providing apparent legitimacy to siphoned off and fraudulently misappropriated funds in such a way that they re-enter the bank’s systems appearing as normal business funds.”

(4) In 1991, Mr Lesage started endorsing bills and promissory notes which were discounted with other financial institutions;

(5) From 1993, Mr Lesage started to make unauthorised advances;

(6) Between December 1994 and March 1995 “the account of one of [MCB’s] clients was used by [Mr Lesage] to effect unlawful and unauthorised transfers which amounted to MRS 167 million”;

(7) Further unlawful transfers were effected by Mr Lesage in 1996;

(8) “As from August 1996 Mr [Lesage] started using the NPF and NSF fixed deposit accounts to effect the siphoning off and fraudulent misappropriation of [MCB’s] funds” to the benefit of various recipients;

(9) “The NPF and NSF fixed deposit accounts were also used to cover up other clients’ fixed deposit accounts which [Mr Lesage] had previously used to siphon off and fraudulently misappropriate [MCB’s] funds and to pay interest thereon”;

(10) It had reimbursed NPF and NSF a total of MRS 881,557,257.22;

(11) The fraud occurred without any knowledge on MCB’s part. According to paragraph 18 of its claim against MUA:

> "The siphoning off and fraudulent misappropriation of funds belonging to the Plaintiff and complained of were committed over a span of some 11 years between 1991 and 2002 and were finally discovered by the Plaintiff on February 14, 2003."

(12) The fraud was perpetrated by a Mr Lesage, who acted alone, and who:

> ".. over the years concealed from his fellow colleagues, his superiors at [MCB] and/or the Executive Committee of [MCB] the various unlawful and illegal transactions in connection with the accounts of Sea Rock Paradise Ltd, Angel Beach Resorts Ltd, Handsome

Investment Ltd, Quartet Development Co. Ltd, Magarian Cie Ltee, Mr Donald Ha Yeung, Advance Engineering Ltd, the late Kistnasamy Veerabadren, Mauri Beach Travel and Tours Ltd, NPF and NSF."

The allegations go on to say that he:

> ".. tampered with the fixed deposit accounts of various clients, including those of the NPF and NSF, and issued to the latter letters outside the knowledge of [MCB], which did not set out the true position of the said accounts".

(13) MCB also alleges that the NPF fraud "was effected through the use of various and separate intermediary accounts of [MCB] and office cheques, thereby giving the impression of being banking transactions in the normal course of [MCB's] business and also enabling the covering up of the paper trail in connection with the illegal transactions of Mr R Lesage".

13. The individual cheques which account for the sums allegedly stolen are set out in parallel proceedings which MCB has also instituted against Mr Lesage and the alleged recipients of the money abstracted, namely the Mauritian fraud proceedings. As appears from the various lists, the individual transactions occurred on various dates back to 1994. Only one of the defaults (that on 19 December 1994 of an amount of MRS 55,000,000) exceeds the MRS 50,500,000 deductible on the Excess Reinsurance.

14. It would appear that MUA has not yet served a defence in the Mauritian Proceedings. MUA has however attempted to join the Claimants in to the Mauritian proceedings. The Claimants have disputed jurisdiction in Mauritius but this jurisdictional challenge has not yet been determined. The proceedings are ongoing. In its Plaint with Summons in the third party proceedings in Mauritius, MUA makes clear that it denies that it is liable to MCB under the underlying insurance.

Summary of the insurance and reinsurance cover

15. In the course of his judgment in the Court of Appeal, Tuckey LJ summarised the underlying insurance position thus:

> "MCB is a commercial bank and MUA an insurance company in Mauritius. From June 1999 MUA provided bankers' blanket insurance for MCB which it renewed for 12 months from 30 June 2002 to 30 June 2003. The renewal was not completed until MUA's reinsurances were in place. MCB's cover consisted of a primary bankers blanket policy on the broker's BRS 98 form covering a variety of risks including employees infidelity, premises and transit and two excess policies. The excess policies provided increased cover for infidelity and premises and transit respectively. Each of these policies was expressly subject to Mauritius law and jurisdiction. Their other terms do not matter except that they covered losses occurring or discovered during the policy period."

16. So far as the Excess Reinsurance was concerned, Tuckey LJ explained:

> "The [Excess Reinsurance] was reinsured by the respondents (Reinsurers) in the specie (articles of high value) market. That is because premises cover of this kind is not for buildings and ordinary contents but for loss of or damage to high value contents held by banks and similar institutions. …. It was ..written on a slip policy. The cover was excess 50m. Mauritian Rupees any one loss. The relevant conditions set out in the slip are:
>
>> Conditions: To follow all terms and conditions of the primary policy together with riders and amendments applicable thereto covering the identical subject matter and risk ...
>>
>> Coverage extended to include infidelity - 72 hour discovery period.
>>
>> Terrorism Exclusion NMA 2921.
>>
>> LSW 3000 - 90 days
>>
>> Jurisdiction Clause
>
> The primary policy referred to is the primary reinsurance. The evidence before the judge was that the extension to the infidelity cover was a London market wording designed to provide cover if for example an employee facilitated entry by thieves to secure premises over a weekend. The 72 hour limit was to exclude cover in respect of systemic infidelity going back over a long period. A similar clause was added to the underlying premises and transit excess insurance but not to the primary insurance or Reinsurance."

17. So far as the underlying insurance position is concerned, MUA issued 3 policies of insurance to MCB, each of which was based upon the BRS 98 Bankers' Blanket Insurance policy form. These were:
    (1) A primary policy containing three distinct elements:
        i) Clause 1 (Infidelity)
        ii) Clause 2 (Premises)
        iii) Clause 3 (Transit)

        The policy limit was MRS 25,000,000, save for clauses 2 and 3 in respect of which the limit was MRS 50,000,000.
    (2) An excess policy which covered various risks including Clause 1 (Infidelity), but excluding Clauses 2 (Premises) and 3 (Transit).
    (3) An excess all risks of physical loss or damage policy covering only Clauses 2 (Premises) and 3 (Transit), for loss in excess of MRS 50,000,000 any one loss, itself excess of a further MRS 500,000 deductible.

18. Each of these policies was reinsured 100% in the London market by separate London reinsurance policies.
    (1) The Primary Reinsurance covered a range of risks including Clauses 1 (Infidelity), 2 (Premises) and 3 (Transit). It was placed in the Bankers' Blanket Bond market and was led by Munich Re and provided cover for MRS 25,000,000 any one loss/claim and in the annual aggregate, increasing to MRS 50,000,000 for clauses 2 and 3, all subject to an excess of (for clauses 2 and 3) MRS 500,000.

(2) The Excess Crime Reinsurance covered various risks including Clause 1 (Infidelity), but excluding Clauses 2 (Premises) and 3 (Transit). It too was placed in the Bankers' Blanket Bond market and was led by Munich Re.

(3) The Excess Reinsurance – which is in issue in these preliminary issues – which only covered Premises and Transit. It was obtained from the distinct Specie market, and was led by XL. It was excess to the coverage provided by the Primary Reinsurance, in respect of clauses 2 and 3 only. MUA has correctly confirmed that clause 3, transit, is of no relevance to the present case. In respect of clause 2, the cover provided was:

> "Maur Rup 687,000,000 any one loss and lesser limits as per schedule……EXCESS OF THE PRIMARY POLICY FOR Maur Rup 50,000,000 any one loss…which in turn excess of amounts as defined in the Primary Policy."

19. The Excess Reinsurance, by general words of incorporation and by the terms defining the scope of cover, swept up the terms and conditions of the Primary Reinsurance: "Conditions: To follow all terms and conditions of the primary policy together with riders and amendments applicable thereto covering the identical subject matter and risk". It did so, however, only in relation to Clauses 2 and 3 – the Premises and Transit cover – because the Excess Reinsurance did not carry any general infidelity cover under Clause 1.

Back to back cover

20. As already indicated, it was intended that the primary insurance programme would be 100% reinsured in London with the outcome that MUA had no retention. To this end, for instance, the entire premium was remitted directly to reinsurers, with MUA merely retaining a commission for fronting the programme. However, as the Court of Appeal confirmed, the general words of incorporation in the Excess Reinsurance slip quoted above did not incorporate the Mauritius jurisdiction clause from the primary reinsurance. The result was a disparity between the Excess Reinsurance (which accordingly has no such jurisdiction clause and is governed by English law) and the underlying excess policy (which is subject to such a jurisdiction clause and, probably, Mauritian law). This in turn threatened to give rise to a difference of approach to the construction of the 72 hour clause as a matter of Mauritian law as compared with English law, a difference reflecting reliance by the former on French case law and text-book writers (and the rule that in the event of ambiguity matters of construction will be resolved against the underwriter).

21. In the face of this potential disparity, it remained part of the First Defendant's case that the 72 hour discovery clause in the Excess Reinsurance (as construed by English law) should be given the same meaning as the 72 hour clause in the excess insurance (as construed by Mauritian law) by analogy with ***Vesta v. Butcher*** [1989] AC 852. However the matter is not quite as straightforward as all that. As Tuckey LJ noted:

> "In this case I accept that the contracts are closely connected. But they are not a complete match. The reinsurance followed the primary reinsurance in the sense that it provided an extra layer of cover above that provided by the primary. But the primary did not cover all the risks covered by the underlying

> primary insurance and the reinsurance only covered premises and transit risks. Moreover the primary reinsurance does not contain the 72-hour infidelity clause contained in the reinsurance."

Thus the analogy with ***Vesta*** is not entirely sound.

22. However, that said, the principles of construction of Mauritian law are similar to those of English law: see Articles 1156 to 1164 of the Civil Code. In particular, clear and precise terms will be given their plain meaning. As will emerge I do not consider that there is any ambiguity in the terms of the cover with which the preliminary issues are concerned. Accordingly it is likely that the ambition of arranging that the cover was back to back and that the reinsurers bore all such risk as existed has been achieved by way of what in effect was replicated cover.

The specie market

23. That said, it is legitimate as a matter of English law to have regard to the relevant factual matrix in construing a contract. In this context, the Claimants served a statement of Mr Blair, an underwriter and consultant with substantial experience of Lloyd's and, in particular, of the Specie market, where the excess reinsurance was placed. It was his evidence that the business of the Specie market includes all risk of physical loss or damage insurance of cash or valuable tangible property. In the result, the market is divided into four specie books: General Specie (which includes vault risks for storage of cash and documents of title), Fine Art, Cash in Transit (the armoured car industry) and Jeweller's Block insurance.

24. As Mr Blair also explains, the Specie market provides very limited cover for infidelity in the context of physical losses which occur through employee complicity in theft. Further, such limited extension is usually limited (as here) by a 72 hour Discovery Period which requires that the loss must have been discovered within 72 hours of its occurrence. The object is to cover physical losses occurring over an interval of 72 hours, but to exclude long term stealing which goes unnoticed for longer.

The preliminary issues

<u>Issue 1 - Are the alleged losses within the "Premises" or "Transit" cover provided by the Excess All Risks of Physical Loss or Damage Reinsurance?</u>

25. In my judgment, it is clear that the facts and matters pleaded in the Mauritian Proceedings fall outside the scope of cover provided by the Excess Reinsurance. The Excess Reinsurance provided cover only for insuring clauses 2 ("Premises") and 3 ("Transit") of the BRS 98 form. Insuring clause 1 of the BRS 98 form (which the Excess Reinsurance <u>did not</u> cover) is headed "Infidelity of Employees" and provided cover for losses discovered during the Period of Insurance:

> "By reason of and solely and directly by any dishonest or fraudulent act of any of the Employees of the Insured, as defined, wherever committed and whether committed directly or in collusion with others, including loss of Property through any such act of any of the Employees, provided that it is committed

with the intent to cause the insured to sustain such loss or with the intent of making improper personal gain for themselves or for any other person and/or organisation…"

26. Insuring Clause 2, headed "Premises", provided cover, subject to the respective terms, exclusions, conditions and limitations for all such losses as might during the policy period be discovered or sustained:

> "A) By reason of any Property being lost through theft, burglary, robbery, false pretences, or mysterious unexplained disappearance, or being damaged destroyed or misplaced, howsoever or by whomsoever caused including by fire, whilst such Property is in or upon any premises wherever situated including caravans, mobiles and/or similar premises used temporarily by the Insured for the conduct of their business or lost through theft, burglary or robbery whilst within an automatic teller machine, however cover shall not apply to loss of Property whilst in the mail or with a carrier for hire, other than a security company used for the purpose of transportation."

27. Insuring Clause 3, headed "Transit" was also concerned with loss of Property, as defined, whilst in transit, and there has been no suggestion that it is engaged here.

28. Put shortly, the point as regards the reinsurance of underlying cover in relation to Clauses 2 and 3 is that defalcations of funds in bank accounts by deception are not in the nature of the physical loss or damage covered:-

    (1) They do not constitute physical loss or damage at all.

    (2) They may in principle fall within Clause 1 of the BRS 98 form (Infidelity of employees) but that is academic for present purposes, because the Excess Physical Loss or Damage reinsurance did not extend to Clause 1 cover.

29. Insofar as any reliance might be placed on the endorsement of the reinsurance "Coverage extended to include infidelity – 72 Hour Discovery Period" , it is important to note the following:

    (1) This was an extension of the physical loss or damage cover to include losses with employee complicity. It does not derogate from the elemental requirement of physical loss or damage.
    (2) If it were intended that there should be broader cover in relation to employee infidelity unrelated to physical loss or damage, it makes no sense that Clause 1 cover should have been left out of the Excess Physical Loss or Damage reinsurance.
    (3) If cover had been intended to extend to fraud, unrelated to physical loss or damage, the proposal form would cover relevant security and policing systems (see below).
    (4) In any event, as Mr Blair explains, this is the only degree to which the specie market extends cover to embrace employee dishonesty.

30. The Proposal Form was completed by MCB, dated 3 May 2002 and signed by each of MCB's General Manager, its Chief Accountant and its Chief Internal Auditor. In

question 15 on the Proposal Form, MCB was asked to confirm that infidelity cover was in place. MCB replied in the affirmative, referring to insuring clause 1, thereby confirming that infidelity *per se* had been covered in other insurance. As to the substance of the proposal, the Proposal Form made disclosure in respect of MCB's physical exposure on premises by setting out specific value limits for each of MCB's premises

<u>Issue 2 - To what extent are the losses asserted by MCB capable of giving rise to a potential claim by MUA for an indemnity under the Excess Physical Loss or Damage Reinsurance, having regard to the applicable deductible of Maur Rup 50,000,000 any one loss?</u>

31. The Excess Reinsurance provides cover, in respect of Premises and Transit risks, excess of the primary policy, for:

> "Maur Rup 50,000,000 any one loss….in turn excess of amounts as defined in the Primary Policy"

The relevant amount in the primary policy, for premises and transit, was Maur Rup 500,000 each and every loss. Thus, the Excess Reinsurance only comes into play in respect of losses greater than Maur Rup 50,500,000.

32. Thus even if there were any scope for recovery under the Excess Reinsurance in respect of the subject losses, it is quite clear that any such claim is largely eliminated by application of the deductible of MRS 50,500,000. Only one loss marginally exceeds that threshold, according to the details of individual defalcations set out by MCB in the Mauritian Fraud Proceedings. That is the transfer which occurred on 19 December 1994, which exceeds the deductible by MRS 4,500,000 – about £ 68,577.71 at current exchange rates. .

33. If it were to be suggested that some or all of the various defalcations are to be regarded as a single loss, in my judgment, this is unarguable:

    (1) Each transfer or procurement of a transfer was a separate conscious act by those involved, separated by days or months or years and perpetrated against one or other of a range of different accounts in favour of a range of different counterparties.

    (2) Each transfer undoubtedly represented an individual loss which could have been the subject of a separate claim (on a policy providing cover for losses of this nature).

34. This approach is well established on the authorities: see the helpful analysis of Moore-Bick J in *Glencore International v. Alpina Insurance Co Ltd* [2004] I Lloyd's Rep. 111 at paras 288 to 304. For example, in *Philadelphia National Bank v Price* (1938) 60 Ll L Rep 257 (CA), a policy insuring the bank against loss sustained by reason of making advances against forged or invalid documents was subject to an excess of $25,000 "each and every loss and occurrence". Credit facilities were granted to a trader on the security of invoices assigned to the bank. Each day, the trader assigned a bundle of invoices and the bank advanced a sum corresponding to the total of the invoices. The invoices turned out to be false and the bank was unable to recover advances of over

$400,000 in the aggregate, although no single daily loss amounted to more than $25,000. The Court of Appeal held that a separate loss had occurred in respect of each day's advance:

> "…applying the language of this policy to that state of facts, what really happened was that the bank was making a series of advances against documents, and the next question is: Did it sustain any loss by reason of its having done so? If an advance so made proved to be irrecoverable, as the advances did in this case, quite clearly a loss was sustained in respect of that advance; and it seems to me that once one has answered the question: Was there one advance or were there many advances?-one also answers the question: Was there one loss by reason of those advances, or were there many losses by reason of those advances having been made? Directly you have answered the question of what advances were made, you have answered the other question; and the argument that was addressed to us on behalf of the appellants, if I may venture to criticise it, began at the wrong end, because instead of examining the advances and answering that question, it started at the end of the losses and said, and said attractively at first sight, "The bank has suffered a loss; a customer to whom it lent 400,000 dols., or whatever is the figure, is insolvent, and the loss is the debit balance standing to the debit of that customer's account." At first sight that looks attractive and businesslike, but it is approaching the matter, in my humble judgment, from the wrong end, because the first thing to analyse is the nature of the operations in order to see whether the bank made advances; and once that question is examined it seems to me quite impossible to hold that the bank made only one advance. It made a number of advances, and in each case the advance was made against the documents produced and in response to a separate request": per Sir Wilfrid Greene MR at p.265

Issue 3: Whether the alleged losses claimed by MCB in its proceedings in Mauritius are capable of giving rise to a claim by MUA for an indemnity under the Excess Physical Loss or Damage Reinsurance pursuant to the condition thereof which provides: "Coverage extended to include infidelity – 72 Hour Discovery Period"?

35. Again, in my judgment, it is clear that the answer to this issue is "No". On MCB's own case in the Mauritian Proceedings, no misappropriations took place after the end of 2002. According to MCB, the fraud was discovered in February 2003. All that MCB alleges occurred shortly before 14 February 2003 was an unsuccessful alleged attempt at a cover up by Mr Lesage on 11 February 2003. None of the many losses alleged in the Mauritian Proceedings was discovered within 72 hours of its occurrence.

36. The 72 Hour Condition was considered by the Court of Appeal:

> "The evidence before the judge was that the extension to the infidelity cover was a London market wording designed to provide cover if for example an employee facilitated entry by thieves to secure premises over a weekend. The 72 hour limit was to exclude cover in respect of systemic infidelity going back over a long period. A similar clause was added to the underlying premises and transit excess insurance but not to the primary insurance or Reinsurance: per Tuckey LJ at para 5."

37. In fact, the purpose of the clause is in my judgment obvious. In any event, as already recorded, the commercial background includes the material supplied by Mr Blair. It was his evidence that the 72 Hour Condition is typically used in the Specie market in conjunction with the limited extension to include infidelity related to property losses which that market occasionally provides. It originates from armoured car coverage, where it is often the case that losses are the product of collusion between an employee of a bank and/or of the armoured car operator.

38. The purpose of the 72 Hour Condition is thus to focus the insured's attention on their security procedures by ensuring that cover is not provided in respect of cumulative losses caused by the failure of an insured's controls to identify a deceitful employee stealing property or assisting in its theft over a long period of time. Indeed, the purpose of the 72 Hour Condition is precisely to exclude cover in respect of any systemic infidelity involving a series of losses which go undiscovered for a lengthy period, such as those which form the basis of the Mauritian Proceedings and the Mauritius Fraud Claim.

39. As a further indication, no additional premium was paid in respect of the 72 Hour Condition. The premium charged was low, reflecting the fact that the Excess Reinsurance was low-cost catastrophe coverage consisting of substantial excess limits which only apply excess of a significant amount each loss. The premium (Maur Rup 1,333,3000) was the equivalent of 9.4 pence per £100 of cover. In short, the risk would have to have been renewed for 1063 years to fund one total loss.

40. The only interpretation which has been ventured inconsistent with the above analysis is the suggestion that the 72 Hour Condition is a notice requirement, so that any losses, however longstanding, would be covered if notified within 72 hours of discovery. However, this is not only inconsistent with the frequent usage identified above but such a requirement would typically be addressed via a clause dealing in terms with notice of claims

41. The only other context in which "discovery periods" are used in the London market is in the context of construction risks, where typically, cover under a contractor's policy is extended to embrace defects which emerge during a discovery period after closure of the primary period of cover. But it would make no business sense in the present context to have a discovery period of only 3 days at the end of a year. Rather, the 72 Hour Condition comes in conjunction with the infidelity extension to property cover, and the natural interpretation of it is a qualification to that infidelity extension, which itself does not derogate from the fundamental requirement of property loss or damage.

Conclusion

42. For all the reasons set out above, and without prejudice to the Claimants' claim in respect of non-disclosure and misrepresentations, the Claimants have no liability to MUA pursuant to the Excess Reinsurance on account of any of the facts and matters relied on in the Mauritian Proceedings or the Mauritian Fraud Proceedings because any loss which MCB may prove it has suffered falls outside the scope of cover of that Excess Reinsurance.