Neutral Citation Number: [2007] EWHC 1785 (Comm)

Case No: 2007/449

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2007

Before :

THE HONOURABLE MR JUSTICE LANGLEY

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Between :

EUROP ASSISTANCE INSURANCE LIMITED	**Claimant**
- and -	
TEMPLE LEGAL PROTECTION LIMITED	**Defendant**

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- -

Mr David Railton QC and Mr Paul Sinclair (instructed by **LeBoeuf Lamb Greene and MacRae**) for the **Claimant**
Mr Timothy Saloman QC and Mr Gavin Geary (instructed by **Bond Pearce LLP**) for the **Defendant**

Hearing dates: 4, 5 and 6 July 2007

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Judgment

The Hon. Mr Justice Langley :

Introduction

1. This judgment relates to the Claimant (EA)'s application for interim injunctions and declarations against the Defendant (Temple) the substance of which is to restrain Temple from continuing to conduct the run-off of after the event insurance which Temple wrote with EA as carrier under the authority granted by a Binding Authority Agreement effective from 1 January 2003, which, as is not disputed, was terminated as regards the issue of new policies on 31 December 2005 and to which I will refer as the BAA. At the end of the hearing I said I had concluded that I would not grant EA the relief claimed but would seek or impose certain obligations on Temple in relation to the run-off and would give my reasons in writing when I could. Those reasons follow. It was rightly accepted that if the court did not grant the injunctions the claims for interim declaratory relief must also fail.

Background

2. EA is a wholly-owned subsidiary of the well-known and substantial Italian insurance company, Assurazioni Generali SpA. Temple is an underwriting agency which works exclusively in the field of legal expense insurance and has done so since 1999.

3. Under the BAA, EA granted Temple very wide powers to underwrite legal expense insurance. Temple was authorised to bind insurances, process and settle claims, calculate and collect premiums (to be paid into a separate account) and authorised to delegate its authority to others, which Temple did, largely to firms of solicitors ("coverholders") who were acting for claimants in personal injury litigation.

4. EA became the capacity provider in place of various Lloyds' syndicates. Temple was entitled to 35% commission on the net premium. Temple entered into coverholder agreements with those to whom it delegated authority to bind EA and the coverholders issued policies to individual claimants (insureds). It is, for the purposes of the present issues, accepted that EA were aware of the terms of the coverholder agreements and the entry into them on those terms was within the authority granted to Temple under the BAA. EA were not parties to the coverholder agreements and Temple did not enter into them as agent for EA, but as principal.

5. The coverholder agreements required the submission of monthly bordereaux and claims information to Temple as well as payments of premium to Temple. They also provided that:

> "Temple will administer all claims matters arising from declarations under this Agreement. Any payments due to the Insured shall be made by Temple and the Coverholder must not set off such claims payments against Premiums due to Underwriters."

6. The policies, subject to their terms, provided cover for insured claimants both for opponents' costs and their own costs in the litigation. Premiums were adjusted according to the stages when a claim was disposed of (the later, the higher) and were generally payable only upon disposal of the claim.

7. Termination of the BAA with effect on 31 December 2005 did not affect accrued rights and liabilities and Temple remained obliged and entitled to conduct the run-off of existing insurances at that date under section 7 of the BAA. The business written is currently profitable for EA. Temple is confident that the run-off will also prove to be profitable; EA is not so sure. There remain some 7000 policies in force.

The Dispute

8. EA's original claim in these proceedings alleges that Temple was in breach of the BAA, negligent and in breach of fiduciary duty in a number of serious respects including claiming "hundreds of thousands of pounds of commission to which it was not entitled", failing to account for premiums received, and failing to collect premiums from coverholders. Whilst these are serious allegations there are also serious defences to them. It is not suggested (rightly) that on the present application the court could or should attempt to assess the merits. EA's submissions have stressed that they have lost all trust and confidence in Temple to administer and monitor the policies. That may well be true; but insofar as it derives from these issues (as it largely does) it therefore may or may not be justified.

9. It was these matters, the subject of the original claim, which led EA, by a letter dated 13 April 2007, to write purporting to revoke Temple's authority to act in any way as

EA's agent. EA also wrote to coverholders on the same day to advise them that Temple was no longer authorised to act for EA and requiring them in effect to provide to EA the information which they were obliged under the coverholders' agreements to provide to Temple, and to account to EA not to Temple for premium, again contrary to their obligations in the coverholders' agreements.

10. Temple's response was to assert that EA had no right to terminate its authority, to assert, by letter dated 20 April, that EA had repudiated the BAA and to accept that repudiation as bringing an end to the BAA. Temple also wrote to the coverholders setting out its contentions and asking them to continue to honour the coverholder agreements. Thus both parties have asserted that the BAA is at an end. That, submits Mr Railton QC for EA, is effectively that, whoever is right about repudiation. There is no agency left, no right for Temple to conduct the run-off, and EA must be allowed to administer the covers for which it is the risk carrier. Not so, submits Mr Saloman, for Temple. He submits the agency is irrevocable and the existing arrangements whereby insured claimants deal with the coverholders (usually their solicitors for the claims) and the coverholders deal with Temple and Temple deals with EA, are all the subject of legal obligations expressly authorised by EA at the time they were entered into and which run until the covers have expired and/or the claims are finally disposed of. Mr Saloman referred to Section 12.4 of the BAA which provided that in the event the BAA was cancelled or terminated each insurance bound or coverholders agreement granted by Temple "shall run to its contractual expiry date" unless cancelled in accordance with its individual cancellation provisions. These are also issues which this is not the occasion to resolve.

11. On the evidence before the court the great majority of coverholders have continued to honour their agreements with Temple.

12. It is Temple's conduct in continuing to seek to operate the coverholders agreements and collect premiums and pay claims which is said to give rise to the causes of action (pleaded by amendment) on which the present applications for interlocutory injunctive and declaratory relief are founded.

The causes of action

13. The causes of action said to justify the relief are: causing loss by unlawful means, unlawful interference, and breach of trust in failing to pay over monies in the bank account used by Temple to hold premiums and pay claims. The unlawful means relied upon are, in my judgment, inventive but thin. They seem to come to little, if anything, more than a re-assertion of EA's alleged right to step into Temple's shoes and so of Temple's "unlawful" conduct in contending the contrary to the coverholders. The allegation, necessary to found the first two causes of action, of an intention to cause loss to EA is, I think, even thinner. The reality, as the evidence stands, seems to me to be that the parties have a genuine commercial dispute in which EA first sought to involve and make demands upon the coverholders and Temple, unsurprisingly to my mind, refused to lie down and asserted what Temple contends remain binding obligations to be found in the coverholder agreements.

14. The allegation of breach of trust is, again on the present evidence, also not compelling. On 11 May 2007 EA's solicitors demanded payment forthwith of all monies in the account. Temple refused. Temple asserted a right to use the funds to

pay claims and its own commission and acknowledged (and says it has discharged) the obligation to account to EA for the balance. That was the way the account was operated under the BAA which entitled Temple to a "float" of £50,000 to be held in the account to meet claims but otherwise was to be paid out 65% to EA and 35% to Temple. EA's claim simply asserts that Temple, as trustee, was bound to pay the whole contents of the account to EA on demand and, again reprising the underlying dispute, that Temple is no longer authorised to pay claims and EA would be under no obligation to reimburse Temple if it did so.

Discretion

15. There is, unsurprisingly, no dispute both that the determination of the application is a matter of discretion nor that the exercise of that discretion turns on the adequacy of damages as a remedy, the balance of convenience more generally, and, at least where those considerations produce an even balance, conservation of the status quo.

Damages

16. The relevant damage to EA would be such loss as it might suffer from the unlawful conduct (or breach of trust) upon which the claims for interim relief depend. Yet in general terms (that is apart from genuine disputes about claims by Temple to commission) historically Temple has discharged its duties under the BAA without criticism of claims handling or failing to account properly for monies in the bank account. If, which I think is improbable, and can be at least partially managed by the requirements referred to below, Temple were to cause and be liable for losses of that type they would be quantifiable and recoverable. There is no evidence of any loss since April 2005 and it is in Temple's interest to conduct the business efficiently to achieve its profit commission and to maintain its commercial reputation with coverholders. EA has no continuing interest in the business. Temple is not a large company, but it is a profitable one, and has significant reserves.

17. On the other hand, and in contrast, the "business" is Temple's business. The commercial and goodwill relationship with solicitors is Temple's relationship. Temple created and implemented the scheme. EA has had no personal relationship with and indeed only knows who the coverholders are from access to Temple's records. If Temple is unable to continue the scheme, or participating coverholders are compelled to work with EA, there is a real risk of damage to Temple's business which will be difficult both to prove and to quantify. The loss of cash flow could also be damaging to the business in ways difficult to prove and quantify.

18. Although there were suggestions that EA would not be able to meet a claim for damages or to satisfy a claim on a cross-undertaking I am satisfied on the evidence that it would.

Other Factors

19. There are, I think, a number of other factors which militate against the grant of relief to EA. They are:

    (1) If EA were to be granted the relief it seeks, without qualifications, the consequence would be that Temple would be deprived of all knowledge of the

progress of claims and payment of premiums on the business written. It would be wholly dependent on EA accounting to it for commission. No doubt recognising the unfairness of such an outcome, EA, in the course of submissions, offered various undertakings to provide information and make payments to Temple, albeit contending for a set-off and that any payments should be held in an escrow account. Nonetheless, the offer demonstrates that EA's essential submission that it should not be compelled to work with an "agent" it no longer trusts must be subject to some qualification.

(2) If the relief were granted, Temple would be placed in breach of the coverholder agreements which EA authorised Temple to conclude and which require Temple to provide claims services to the coverholders and to pay claims. So, too, coverholders would be in breach of the agreements in failing to provide bordereaux, other information and claims notifications to Temple.

(3) Very arguably, in my judgment, policyholders also would have claims against Temple and would also be placed in an invidious position. The certificate of insurance requires notification of claims to Temple. Temple's name and logo appear on each page of the certificate and policy wording. The definition of "Insurer" in the wording is "Temple…are specialist underwriters with authority to underwrite and manage (my emphasis) this insurance on behalf of [EA]." The wording contains nothing which expressly requires the insured or anyone else to report to EA.

20. On the other hand, EA's concerns are, I think, capable of being addressed pending a trial:

(1) Under the BAA, Section 22, Temple was obliged to provide monthly bordereaux to EA as set out there. There is no reason why that should not continue and, as raised during the hearing, and in prior correspondence, be supplemented by Temple providing to EA the claims files, the bordereaux and other information it receives from coverholders within a reasonable period following receipt. That should enable EA to monitor claims perhaps more closely than the existing arrangements permit.

(2) The obligation of Temple under Section 28 of the BAA, to maintain a separate bank account for premiums and claims, and upon EA to provide funds in advance to meet claims as well as to maintain the £50,000 float can continue, including the 65/35 distribution from the account. Relevant bank statements should be provided to EA on a regular basis.

(3) Under Section 30 of the BAA, now to be found in Endorsement 3, EA has extensive unrestricted rights to inspect and audit Temple's records of and to receive information about the insurances bound under it. Those rights have been exercised and can be retained pending a trial.

21. In summary, in my judgment, the effect of the relief sought would be to place third parties and Temple in a state of confusion and probably breach of contract. EA would have to seek new rights of reporting from insureds and/or coverholders. Policy terms would probably require variation. It may well be factors of this kind which explain why so few coverholders have been willing to respond positively to EA's demands

upon them. In contrast, if substantially the present arrangements continue, third parties will be protected and, with the safeguards to which I have referred, I think EA will also be protected in a context which, it must be remembered, EA itself expressly authorised Temple to create.

Status Quo

22. This is, in my judgment, a case where the status quo has perhaps more than its usual significance because of the concerns and rights of third parties, insureds and coverholders. That factor also, I think, points in favour of not granting the relief sought.

Timing

23. At the end of the hearing there was discussion about directions for the trial. In the event the trial is to take place in February 2008. It is, of course, in the period between now and then that this judgment will be effective.

Hand-down

24. The precise terms of the order to be made and any other ancillary matters which cannot be agreed should be addressed when this judgment is formally handed down. It was supplied to the parties in draft on 23 July 2007. In particular the parties were to discuss and seek to agree the terms which should apply in the interim to which I have referred in paragraph 20.