Neutral Citation Number: [2007] EWCA Civ 1066

Case No: A3/2007/2033

**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)**
**Mr Justice David Steel**
**2007 Folio 19**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30 October 2007

**Before :**

**LORD JUSTICE BUXTON**
**LORD JUSTICE JACOB**
and
**LORD JUSTICE MOORE-BICK**

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**Between :**

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| **KOREA NATIONAL INSURANCE CORPORATION** | **Claimant/ Respondent** |
| **- and -** | |
| **ALLIANZ GLOBAL CORPORATE & SPECIALITY AG** **(on its own behalf and on behalf of the reinsurers subscribing to policy No. AJFM157 for the 2004 year of account)** | **Defendant/ Appellant** |

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**Mr. Gordon Pollock Q.C., Mr. David Scorey and Mr. Damien Walker** (instructed by **Clyde & Co LLP**) for the **appellant**
**Mr. Bernard Eder Q.C.** (instructed by **Elborne Mitchell**) for the **respondent**

Hearing dates : 18th October 2007

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# Judgment

**Lord Justice Moore-Bick :**

1. This is an appeal against an order made by David Steel J. on 24th July 2007 giving judgment for the claimant, Korea National Insurance Corporation ("KNIC"), under CPR Part 24 on certain issues arising in the action and in consequence striking out parts of the defence and counterclaim served by the defendant, Allianz Global Corporate & Specialty AG ("Allianz"). The description which follows of the circumstances giving rise to this appeal is derived largely from the judgment below, passages from which I have gratefully adopted.

2. KNIC is an insurance company incorporated in the Democratic People's Republic of Korea ("DPRK"). By a contract of insurance covering the period 1st November 2004 to 31st October 2005 KNIC insured Air Koryo (a North Korean airline based in Pyongyang) under an aviation hull and liability policy ("the insurance contract") in respect of third party liability claims. The limit of indemnity was €45 million (or 7.2 billion North Korean won) each accident with a nil deductible. Cover also included crew and non-revenue passengers for accidental bodily injury, including death, for up to €20,000 (NKW3.2 million) each person.

3. Allianz and the various reinsurers represented by it in this action reinsured KNIC in respect of its liability to Air Koryo in the same period under an aircraft third party liability reinsurance policy which contained the following provisions:

   (i) a limit of liability in respect of claims involving legal liability to third parties for bodily injury or property damage of €75 million each accident, except for claims involving Mi-8 helicopters for which the limit was €45 million each accident;

   (ii) a currency conversion clause under which claims in local currency were to be paid in euros at an exchange rate of NKW 160 = €1;

   (iii) a DPRK law and jurisdiction clause; and

   (iv) a schedule of aircraft covered which included, amongst others, Mi-8 helicopter registration No. 313.

4. KNIC alleged that at approximately 11 p.m. on 9th July 2005, during an internal flight from Jamae Island to Pyongyang International Airport, MI-8 helicopter registration No. 313 belonging to Air Koryo crashed into a warehouse situated at Chonam-Ri in Pyongyang owned by the Relief Material Reserve & Supply Centre. The aircraft was destroyed and the three crew members and three passengers were killed. The crash also caused substantial damage to the warehouse and its contents.

5. The Relief Centre made a claim against Air Koryo for NKW50 million for the rebuilding of the warehouse and NKW7.6 billion for the contents. KNIC invited the reinsurers to exercise their right under the reinsurance contract to take control of the claim, but they did not respond to that invitation.

6. Following the institution of proceedings in September 2005, on 9th December 2005 the Relief Centre obtained judgment in Korea against Air Koryo in the sum of NKW7,634,006,244 together with court expenses. On 23rd January 2006 Air Koryo

wrote to KNIC advising that it had paid the Relief Centre and requesting reimbursement, the claims now having been adjusted to NKW7,200,000,000 for third party property damage, NKW9,600,000 in respect of the deceased crew and NKW144,000,000 in respect of costs, making a total of NKW 7,353,600,000. KNIC once more notified the reinsurers of the claim and invited them to take control, but once again they failed to take up the invitation.

7. On or about 6th March 2006 Air Koryo commenced arbitration proceedings pursuant to the insurance contract and on or about 20th July 2006 the tribunal made an award in favour of Air Koryo in the total sum of NKW7,301,932,137, which KNIC paid on or about 26th July. When the reinsurers refused to indemnify KNIC, it started proceedings in Korea in accordance with the jurisdiction clause in the policy against Allianz, both on its own behalf and on behalf of the other reinsurers. Its claim, now converted at the rate provided in the reinsurance contract, amounted to €45,637,076. The trial took place on 11th December 2006. Although the reinsurers had been notified of the proceedings, they chose not to take part in them or to attend the trial. In due course the court gave judgment for KNIC in the sum of €43,454,383 and costs. The reinsurers declined to honour the judgment and KNIC therefore began proceedings in this country to enforce it.

8. In due course Allianz served a defence and counterclaim putting forward five grounds of defence. This document runs to 257 paragraphs and 112 pages, including two appendices. I regret to say that it is as good an example of how not to draft a statement of case as one might hope to find, being excessively long, complex and, most importantly, full of unnecessary and irrelevant allegations. The judge described it as "grossly prolix, part pleading, part citation from witness statements and part argument, without any summary" and expressed the view that, if it were to survive the application, it would be necessary to take steps at the case management conference to make it comply with the requirements of the Admiralty and Commercial Court Guide. (The Guide provides, among other things, for statements of case to be as brief and concise as possible.) I entirely endorse his comments.

9. In the event this appeal is concerned with only one of the five grounds of defence, namely, that the judgment in Korea was obtained by fraud inasmuch as KNIC failed to inform the court that its rights against the reinsurers had been discharged under a compromise agreement entered into in the course of discussions between the parties' representatives in London in December 2005. The judge gave summary judgment for KNIC on this issue and struck out that part of the defence and counterclaim which deals with it. It is against that order that Allianz now appeals.

10. Although 178 paragraphs of the defence are devoted to this limb of the case, the essential elements can be summarised quite shortly. Allianz says

    (i) that at a meeting held in London on 23rd December 2005 to discuss the claim the parties entered into a binding agreement to compromise the claim on terms that Allianz would pay KNIC the limit of indemnity provided for by the reinsurance contract in won (rather than euros), provided it could obtain the means to do so; and

(ii) that by 8th March 2006 Allianz had made the necessary arrangements to enable it to transfer a sufficient number of won to KNIC so that all rights and obligations under the contract of reinsurance were thereupon discharged.

Those who were present at the meeting at which this agreement is said to have been made included two representatives of Allianz's solicitors, Clyde & Co, and Allianz's aviation claims manager as well as various representatives of KNIC and their London broker, Mr. Clarabut.

11. One feature of this case is that Allianz has filed no evidence in opposition to KNIC's application, preferring to rely instead on the verification of the defence and counterclaim by Mr. Michael Payton of Clyde & Co who signed the statement of truth on its behalf. For the purposes of the application, therefore, the judge was bound to accept at face value (as are we) such statements of fact as are set out in the defence, but he was not bound to accept as correct the many inferences, assertions of law and matters of comment which it also contains. More importantly, perhaps, the course which Allianz has chosen to adopt means that the court does not have the benefit of a general account of the critical meeting from any of those present which might have enabled it to understand more clearly the nature of exchanges and the context in which they occurred.

12. The judge reached the conclusion that there was no real prospect of Allianz's establishing either limb of this ground of defence at trial. He did so for three main reasons. First, he regarded it as wholly improbable, if not inconceivable, that KNIC and the reinsurers would have settled a claim of that kind without a written note of some kind to record the terms agreed. It is common ground, however, that no note or record of the alleged agreement was made, not even by Allianz's claims manager or solicitors for their own purposes. Second, he considered that it was impossible to reconcile the existence of a binding agreement with the correspondence passing between the parties during the following weeks and months. Third, he appears to have doubted whether the terms of the agreement as set out in the defence were capable of giving rise to a legally binding agreement in any event. He did not specifically address in addition the question whether Allianz had a real prospect of showing that KNIC knew that the claim had been settled at the time when it obtained judgment in Korea, although it is an essential element of the defence.

13. In seeking to overturn the judge's decision Mr. Pollock Q.C. for Allianz has drawn our attention to some of the many cases in which this court and others have warned against the dangers of disposing summarily of arguments that appear at first sight to be implausible or depend on establishing facts which, at the time of the application, seem very unlikely to have occurred. These warnings must be taken seriously because experience tells one that the picture that emerges at trial, when all the evidence has been examined, often differs markedly from that which presents itself at an earlier stage. For that reason the court on an application for summary judgment will normally accept the parties' evidence at face value, as the judge did in this case, and will refuse to be drawn into an attempt to resolve factual disputes of any kind. However, a party cannot complain if, accepting his evidence at face value, the court adopts a rigorous approach when considering what, if anything, that evidence amounts to.

14. In the present case Allianz criticised the judge for having failed to make allowance in its favour for the likelihood that additional evidence relating to various aspects of this

defence would be available at trial to cast a more benevolent light on events, but in my view that criticism is unfounded. It is incumbent on a party responding to an application for summary judgment to put forward sufficient evidence to satisfy the court that it has a real prospect of succeeding at trial. If it wishes to rely on the likelihood that further evidence will be available at that stage, it must substantiate that assertion by describing, at least in general terms, the nature of the evidence, its source and its relevance to the issues before the court. The court may then be able to see that there is some substance in the point and that the party in question is not simply playing for time in the hope that something will turn up. It is not sufficient, therefore, for a party simply to say that further evidence will or may be available, especially when that evidence is, or can be expected to be, already within its possession, as is the case here. Allianz was quite entitled, if it so chose, to confine its evidence to the factual allegations in the defence, but having done so, and having failed to give any indication of what other evidence can be expected to be available at trial, it cannot complain that the court has not speculated about whether there might be any such evidence, and if so what its nature might be.

15. Since Allianz has chosen to base it arguments on the facts alleged in the defence and counterclaim, it is convenient to begin by identifying what those facts are and then to consider whether, in the light of the other evidence before the court, they show that Allianz has a real prospect of establishing the existence of a binding agreement to compromise the dispute. The critical element in the dispute (though not the only one) was the rate of exchange stipulated in the contract for settling in euros claims incurred in won. That rate, although agreed to by the reinsurers, was one which they considered would give KNIC a windfall profit at great expense to themselves and had been the subject of discussions on more than one previous occasion. However, since the agreement on which this limb of the defence turns is said to have been made in the course of the meeting on 23rd December it is possible to limit the enquiry to paragraphs 73 and 85 to 93 of the defence, some of which contain important background facts, but most of which are directly concerned with the meeting on that date. They contain the following allegations:

(i) that at a meeting on 1st December 2005 to discuss the claim Mr. Clarabut and senior representatives of KNIC said that KNIC was prepared to ignore the exchange rate provision, but did not think that the reinsurers would be able to obtain the necessary won to enable them to settle the claim in that currency [§73.1(a)];

(ii) that at the same meeting Mr. Clarabut and the representatives of KNIC also said that KNIC was prepared to work with the reinsurers and Air Koryo to enable them to settle the underlying claim in won [§73.1(b)];

(iii) that on 16th December 2005 the reinsurers received a copy of a report from Burgoynes Consultants ("Burgoynes") [§85] which described a number of suspicious features about the fire at the warehouse which was said to have been caused by the crash [§86];

(iv) that on 19th December 2005 KNIC informed the reinsurers through Mr. Clarabut that it would consider taking the matter to court unless they made a payment on account by 23rd December 2005 [§87];

(v) that at a meeting on 23rd December reinsurers gave KNIC a copy of the Burgoynes report and summarised its conclusions [§90.1];

(vi) that in the course of the meeting Mr. Payton asked whether, if the reinsurers' agents could arrange for a sufficient sum in won to be made available, "everyone would be happy", to which Mr. Clarabut answered "Yes" [§90.2];

(vii) that the parties then went to separate meeting rooms for private discussions [§91]; Mr. Clarabut joined the representatives of Allianz and there was a discussion about rates of exchange in which Mr. Payton referred to a rate published in the Financial Times of NKW1,000 = €1 [§93.3];

(viii) that Mr. Clarabut then said that if the reinsurers could obtain the necessary amount in won reinsurers had a deal [§93.5];

(ix) that discussions then turned to the question of a payment on account and a debate ensued as to the appropriate rate of exchange to be used for calculating the amount to be credited against the policy limit if the payment were made in euros [§93.6(a)];

(x) that later Mr. Clarabut encouraged reinsurers to seek to obtain the sum required to settle the claim in won [§95.1];

(xi) that at a later stage, when the parties had rejoined each other in the main meeting room, one of KNIC's representatives reiterated that if the reinsurers could obtain the necessary amount in won "they had a deal" [§97.1].

16. Mr. Pollock submitted, and I agree, that those facts support the conclusion that over the preceding weeks the parties had been inching their way towards a compromise, despite their mutual suspicion. The reinsurers had declined to accept KNIC's claim and had indicated that they considered the underlying claim by Air Koryo to be fraudulent, or at any rate exaggerated. KNIC was anxious to persuade them to accept the claim and to make an immediate payment on account. The exchanges which took place during the meeting on 23rd December have to be viewed against that background. Mr. Pollock submitted that there would be nothing surprising in the parties' reaching agreement to compromise KNIC's claim on the basis of a payment at the limit of indemnity expressed in won, since that would provide KNIC with sufficient funds to cover its liability to Air Koryo and would remove from the reinsurers the risk of having to pay a very large sum in hard currency. He therefore submitted that the facts set out in the defence and counterclaim were sufficient to give a real prospect of establishing at trial, not only that the parties had reached agreement, but that they had entered into a legally binding agreement to compromise all rights and obligations arising under the contract of reinsurance.

17. If the issue were simply whether the parties had reached agreement, there would be much to be said for Mr. Pollock's submission, but it is not. The issue is whether they entered into a legally binding agreement to compromise KNIC's claim and that depends to a large extent on the words used and the context in which they were spoken. Mr. Pollock submitted that there would inevitably be more evidence about that at trial, if only because those who attended the meeting on behalf of Allianz could

be expected to give evidence. So, he submitted, the case should go to trial on that ground alone.

18. For the reasons I have already given, I do not think that that is a satisfactory approach to an application of this kind. It is the reinsurers' case that the claim was compromised at the meeting of 23rd December and it was therefore incumbent on them to put before the court such evidence of the background to and course of the meeting as would, if standing alone, demonstrate that the case had a real prospect of success. On the face of it that could easily have been done because Mr. Payton and another partner of Clyde & Co, Mr. Lewis, had been present at the meeting (not to mention Allianz's aviation claims manager, Mr. Smith) and had been closely involved in the events which had preceded it. It was not necessary to put forward compelling evidence, simply enough evidence to raise a real prospect of being able to persuade the court that in the circumstances the words spoken at the meeting were intended to give rise to a binding agreement. As it is, they have chosen to stand on the defence and counterclaim on the grounds that it contains all that is necessary for their purpose.

19. In those circumstances I think the court must proceed on the basis that nothing else is likely to emerge at trial that will affect the construction to be placed on what was said at the meeting. Mr. Pollock explained the reinsurers' decision by saying that it reflected an understanding that the modern approach to applications for summary judgment does not require parties to adduce evidence of that kind, which is liable to draw the court into a mini-trial of issues that cannot properly be resolved at an interlocutory stage. I entirely agree that on an application of this kind the court should avoid becoming involved in factual disputes, but that is a different matter altogether. Once it becomes clear that the facts are in dispute, neither the parties nor the court should succumb to the temptation to investigate them in depth, since the dispute can normally only be resolved at trial; but that position will not be reached at all until the parties have set out their competing positions and the evidence on which they are based.

20. I return then to the facts alleged in the defence and counterclaim. Standing alone, the exchanges that took place between the parties at the meeting on 23rd December 2005 do not, in my view, point at all strongly to there having been a compromise of the claim. Had that been the parties' intention one would have expected there to have been some discussion of the period within which payment was to be received, if nothing else. However, there is no suggestion that anything at all was said about that, despite KNIC's obvious desire to have its claim paid as soon as possible. In view of the importance to KNIC of a prompt payment on account, one would also have thought that something would have been agreed about that as part of any compromise, although I would accept that it is possible for it to have been treated entirely separately.

21. However, the evidence is not entirely confined to the facts set out in the reinsurers' statement of case. Two pieces of evidence which particularly impressed the judge were also relied on by KNIC on the appeal: the absence of any written record of an agreement and the tone and content of certain correspondence passing between the solicitors acting for the parties during the weeks and months immediately following the meeting on 23rd December. For their part the reinsurers relied on certain admissions which they said had been made by various representatives of KNIC during the same period.

22. It is convenient to deal with the admissions first. They are referred to in paragraphs 159, 161-162, 182, 201 and 206 of the defence and counterclaim. In some cases they consist in a failure on the part of representatives of KNIC to challenge an assertion that they had agreed that the claim should be settled in won (paragraphs 159, 161 and 162); in others they take the form of a positive acknowledgment by Mr. Clarabut that KNIC had agreed to accept payment in won (paragraphs 182, 201 and 206). I agree with Mr. Pollock that they tend to support the conclusion that at the meeting on 23rd December KNIC agreed to accept payment in won, but they do not shed any light on whether the parties intended to enter into a binding agreement to compromise the claim.

23. The absence of any written note or record of a compromise is in my view of some significance. The judge said in paragraph 34 i) of his judgment

> "Given the size of the claim and the significance of the currency exchange clause, it is wholly improbable if not inconceivable that the Claimant and reinsurers would reach (or be viewed as intending to reach) a settlement without a written record of the agreement, or at least a minute of the meeting in which the compromise was achieved. It is not just that the financial implications of the currency conversion clause were so great. The exchanges referred to in the Defence and Counterclaim were couched in fairly casual language. Yet the parties were highly suspicious of each other: indeed the underlying claim was said by the Defendant to be fraudulent in whole or in part."

24. In my view that neatly encapsulates the point. Even if KNIC had been willing to settle the claim without obtaining the reinsurers' agreement to a payment on account, it is difficult to imagine that it would have been willing to enter into a binding agreement to settle the claim without a record of some kind and, despite Mr. Pollock's dark comments about the nature of the Korean state and its institutions, nothing has been put in evidence to support the conclusion that KNIC wanted to avoid anything being put into writing. The point does not end there, however, because there has been no suggestion that a written note of any kind recording an agreement was made for public or private use by any of those representing the reinsurers. That seems to me extraordinary given the significance to the reinsurers of an agreement that would potentially limit their liability to less than a quarter of the policy limit in euros. Mr. Pollock was quite right, of course, in saying that a binding agreement to settle a claim can be made without the need for anything in writing, but, if there had been an agreement of the kind suggested by the reinsurers, it would be very surprising if neither of the solicitors present nor the claims manager of the leading reinsurer had made any note of the fact, either at the meeting or afterwards.

25. Finally there is the correspondence. In an e-mail sent to KNIC on 23rd December after the meeting had concluded Mr. Clarabut set out his understanding of the offer put forward by the reinsurers for a payment on account in order to confirm the position that had been reached. The fact that he made no mention of any settlement agreement is not conclusive, but does seem surprising if such an agreement had been made.

26. Towards the end of January 2006 Elborne Mitchell were instructed to act on behalf of KNIC in this matter. On 25th January they wrote to Clyde & Co expressing their client's concern at the reinsurers' delay in accepting liability and asked whether they disputed the claim, and if so on what grounds. At the same time they referred to the proper law and jurisdiction clause in the contract and asked for the name of a person who would accept service of proceedings in Korea on behalf of the reinsurers in the event of a dispute.

27. If Clyde & Co had thought that the claim had been compromised, even conditionally, one would have expected their reply to contain some reference to that fact, but it contained none. Instead, in a letter dated 26th January they simply stated that the reasons for the reinsurers' rejection of liability had been set out in earlier exchanges of correspondence with KNIC's brokers. They expressed mild surprise at the suggestion that KNIC was proposing to start proceedings in Korea.

28. The following correspondence is very much in the same vein. On 13th February Elborne Mitchell wrote again to Clyde & Co. asking for a summary of the grounds on which reinsurers were rejecting the claim and reminding them that Air Koryo was demanding payment by 28th February. They invited reinsurers to take over the handling of that claim pursuant to the terms of the claims control clause. In their reply sent on 15th February Clyde & Co. said that if KNIC chose to pay Air Koryo they did so at their own risk and that the reinsurers' position remained fully reserved.

29. One can find several more examples of exchanges which cried out for a reference of some kind to be made to the existence of a settlement agreement, if there had been one, but which are entirely silent on the point. I do not think that anything is to be gained by referring to them individually, although it is worth noting that in a letter dated 13th March 2006, five days after the reinsurers now say the settlement had become binding, Clyde & Co reiterated that the reinsurers fully reserved their position. There followed many other letters in which they maintained that position. However, one letter in particular does deserve mention. On 28th June 2006 Clyde & Co wrote to Elborne Mitchell a letter which contained the following passages:

> "As your Clients will recollect, in early meetings with Mr. Ko, particularly that which took place on 23rd December, it was agreed it would be in order for Reinsurers to try to obtain North Korean Won to enable the Third Party/original Insureds' claim to be met, and so negate the (now apparent) swingeing windfall effect of the "exchange rate" stipulated in the Reinsurance Contract.
>
> As your Clients will also know, pursuant thereto, Reinsurers have arranged for the payment of the North Korean Won necessary to meet that claim. We are advised that both the Central Bank of North Korea and the China Central Bank (the Won being sourced through China) have each agreed to the transfer of the Won to KFIC [sic, passim], subject only to KFIC reconfirming their earlier agreement to receive such payment. However, it appears that a faction within KFIC is (for whatever reason) bitterly opposed to this being achieved, and is doing all that it can to prevent it happening. Your clients must

> understand that *this payment of North Korean Won represents the only opportunity they have for settlement of this matter* with Reinsurers. Your Clients should be under no illusions – *there is no other way forward than the acceptance of the agreed payment*.
>
> If the opposition of the faction referred to effectively prevents this, then *Reinsurers will challenge any and all liability asserted against them* by your Clients. . . . . .
>
> . . . . . Moreover, if your Clients do not in the very near future confirm *the previously acceptable arrangement* of payment in North Korean Won, these discussions and *any efforts to settle the matter will be terminated*." (Emphasis added.)

30. The judge expressed the view that it was impossible to reconcile the existence of a binding agreement to compromise the claim with the correspondence to which I have referred and in my view that is plainly correct. In particular, Clyde & Co's letter of 28th June 2006 is clearly an attempt to put pressure on KNIC to adhere to an "arrangement" that was not understood to be legally binding or itself to have accomplished a settlement of the claim, but would do so if KNIC accepted the money then on offer. I can see no other explanation for the reference to "the only opportunity [KNIC] have for settlement of this matter" or for the threats "to challenge any and all liability asserted against [the reinsurers]" and that failing acquiescence "efforts to settle the matter will be terminated". In other words, in common with the rest of the correspondence, it reflects an understanding that the agreement reached on 23rd December was nothing more than an "arrangement" or a non-binding expression of intent that could be expected to lead to a settlement if the reinsurers could obtain the necessary currency.

31. Mr. Pollock was inclined to accept that as it stood the correspondence was not entirely consistent with his clients' case, but he submitted that it was in fact relevant only to the question whether Mr. Payton *believed* that the parties had entered into a binding agreement on 23rd December and that on that point the court had his statement of truth verifying the defence and counterclaim. That, he submitted, amounted to a statement by Mr. Payton that he personally believed that the parties had entered into a binding agreement and was a statement which the court should accept as correct, at least at this stage of the proceedings. Mr. Pollock accepted that whether the parties had entered into a binding agreement was a matter to be judged objectively and not by reference to what they thought at the time or subsequently, but insofar as Mr. Payton's state of mind was capable of casting any light on what had occurred at the crucial meeting, the evidence of that, taken as a whole, was inconclusive. The court therefore had to accept, at any rate for the purposes of the application, that Mr. Payton did believe that a binding agreement had been made.

32. I have to say that I find this line of argument unsatisfactory. It is necessary to bear in mind that Mr. Payton was present at the meeting and was therefore as well placed as anyone to describe what had occurred and in what context. Moreover, he could easily have made a statement describing his understanding of the outcome and explaining, if necessary, why the correspondence took the form it did. The suggestion that the court should assume that such an explanation will be given at trial and may prove sufficient

to explain the apparent inconsistency of the correspondence with the existence of a binding agreement is one which I cannot accept for the reasons given earlier. If that was the reinsurers' case they should have put forward the evidence in the course of the application. No doubt the court would have been bound to accept it at face value, but in its absence there are no grounds for thinking that such evidence is available.

33. It is also wrong, in my view, to treat the statement of truth as if it were a statement by Mr. Payton personally verifying everything contained in the defence and counterclaim and thus amounting to confirmation by him that he believes the claim to have been settled. The material parts of CPR 22.1(4) provide that

> "a statement of truth is a statement that the party putting forward the document believes the facts stated in the document are true."

Two things must be noted about that rule: first, the statement must be made by or on behalf of the party putting forward the document, in this case Allianz; second, it relates only to the facts stated in the document. Indeed, the statement of truth in this case said as much. Furthermore, Mr. Payton signed the statement of truth on behalf of Allianz, not on his own behalf. It is not, therefore, equivalent to a witness statement made by him in a personal capacity, although I can understand why it might be regarded as coming close to the same thing. Quite apart from all that, however, it is inherently unsatisfactory, as Buxton L.J. observed in the course of argument, for the reinsurers to rely on the statement of truth made by Mr. Payton on their behalf as containing his evidence when he could have provided a witness statement in his own right.

34. As can be seen from rule 22.1(4), the scope of a statement of truth does not extend to propositions of law set out in the document in question and whether the parties in this case entered into a legally binding agreement is ultimately a conclusion of law based on certain facts. Moreover, whatever else may be said about the defence and counterclaim, it quite properly does not contain any allegation that Mr. Payton personally believed that KNIC and the reinsurers had entered into a legally binding agreement. For that reason, and also for the reasons set out in para 33 above, the statement of truth is not a statement by Mr Payton at all, much less a statement about his belief as to the existence of a binding agreement.

35. However, Mr Pollock sought to persuade us that the application had been argued below on a common assumption that the statement of truth was indeed a statement by Mr Payton as to his belief in the existence of a binding agreement. Such an assumption is so far from the meaning and implication in law of the documents themselves, and so obviously relates to a statement that Mr Payton could have made for himself, had he chosen to do so, that it would be necessary for it to be clearly established that it was common ground below before the court could act on it. It is true that in his submissions to the judge Mr. Pollock sought to treat the statement of truth as evidence given by Mr. Payton in his personal capacity that he believed that a binding agreement had been made. It is also true that Mr. Eder Q.C. accepted that the contents of the statement of truth (which he also seems to have treated as having been made by Mr. Payton in a personal capacity) had to be accepted as correct. However, little time was spent discussing its content, which by its own terms was limited to the facts stated in the document, and Mr. Eder does not appear to have accepted that the

statement of truth had the character that Mr. Pollock sought to ascribe to it. On the contrary, he appears to have limited himself to accepting that he could not contradict Mr. Payton's account of what was said at the meeting, as indeed he could not. However, to the extent that any argument was addressed to the issue of Mr Payton's belief, Mr Eder simply submitted that it was in law irrelevant, without pausing to debate whether that belief had been established in the first place, a view of the matter which commended itself to the judge as one can see from paragraph 36 of the judgment. I do not think it can be said, therefore, that the whole of the argument below proceeded on a common assumption that the statement of truth amounted to evidence of Mr. Payton's belief in the existence of a binding settlement agreement.

36. There is therefore no foundation for Mr Pollock's argument that the implications of the correspondence are neutralised by the statement of truth attached to the defence and once that contention is seen to fail the correspondence stands as evidence that points strongly to the conclusion that no legally binding agreement was reached between the parties at the meeting on 23rd December 2005. It does so, not because the parties' understanding of the position is directly relevant to the formation of an agreement, which, as the judge held and the parties agreed, is a matter to be judged objectively, but because it tends to suggest that whatever was said on 23rd December was said in a manner and in a context which it made it apparent that it was not intended to give rise to legal rights and obligations.

37. That leaves one further point for consideration, but an important one, namely, whether there is any real prospect of the reinsurers' showing at trial that KNIC pursued a claim before the Korean court to enforce rights which it knew had been discharged by reason of a legally binding settlement of its claim. This is an essential element of this ground of defence which depends on proof of fraud. It is not enough, of course, that there should as a matter of law have been a settlement; what the reinsurers must establish is that KNIC knew that.

38. Once again, the main difficulty facing the reinsurers is the correspondence. The position must be judged as of December 2006 when judgment was obtained, since until that point was reached there remained an opportunity for KNIC to explain the true position to the court. By that time the reinsurers had made it clear through Clyde & Co in correspondence that they did not consider themselves to be under a legal liability of any kind to KNIC, either under the original contract of reinsurance or under an agreement by which the claim had been compromised. In the light of that evidence I find it difficult to see how the reinsurers could hope to persuade a court that KNIC was aware that the claim had been compromised and that it had a right to receive from them a payment of NKW7.3 billion, but no more. This alone is fatal to the position of the reinsurers.

39. Having regard to all these matters, I think the judge was right to hold that the reinsurers have no real prospect of succeeding on this ground of defence. Accordingly he was right in my view to strike out the relevant parts of the defence and counterclaim. I would dismiss the appeal.

**Lord Justice Jacob:**

40. I agree.

**Lord Justice Buxton:**

41. I also agree.