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Case No: 2003 Folio 413

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29 January 2007

**Before** :

**MRS JUSTICE GLOSTER, DBE**

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**Between :**

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| **R+V Versicherung AG** | **Claimant** |
| **- and -** | |
| **(1) Risk Insurance and Reinsurance Solutions SA** | **Defendants** |
| **(2) Reass France SARL** | |
| **(3) Reass SARL** | |
| **(3) Risk Insurance and Reinsurance Solutions Ltd** | |

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**Colin Edelman Esq, QC & Charles Dougherty Esq**
(instructed by **LeBœuf Lamb Greene & Macrae**) for the **Claimant**
**Hugo Page Esq, QC** (instructed by **Penningtons**) for the **2nd & 3rd Defendants**

REASONS FOR RULING MADE ON 12.01.07

Hearing dates: 12 January 2007 (further written submissions 15 January 2007)

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# Judgment

**Mrs Justice Gloster, DBE:**

## Introduction

1. These are the reasons for the order which I made on 12 January 2007, dismissing the second and third defendants' application dated 8 February 2006 ("the Application"). The application was made pursuant to (a) CPR 3.1(7) and (b) the slip rule, namely CPR 40.12.

## Procedural Background

2. The full background to this matter is set out in the judgment of Moore-Bick J (as he then was), which was handed down on 18 November 2004 ("the Judgment"). A brief procedural chronology suffices for present purposes. The claimant R+V Versicherung AG ("R+V") is a major German insurance and reinsurance company. All four defendants are members of a group of companies that operate under the name of "Risk", and carry on business in various jurisdictions as insurance intermediaries.

The day-to-day operations of the group are or were under the control of Jean-Claude Chalhoub. The main claim principally concerned the operation of two binders which were negotiated and signed on 28 September 2001 by Mr. Gebauer, the then chief underwriter of R+V (Non-Life), on behalf of R+V, namely:

i) the "SHTTL" binder which allowed Risk France (the first defendant) to bind short tail property and contingency risks on behalf of R+V, subject to the terms of the binders;

ii) the "UNL" binder which allowed Risk France to bind personal accident risks on behalf of R+V, subject to the terms of the binders.

3. On the same day, Mr. Gebauer signed addenda to the two binding authorities. These addenda provided amongst other things that Risk France was entitled to levy an additional 40% ("the 40% addenda") on the first 12 months gross premium in return for providing R+V with a 30% shareholding in Risk UK (the fourth defendant).

4. In the Judgment, Moore-Bick J found that:

i) Mr. Gebauer had no authority to enter into the 40% addenda and this was known by the defendants (through Mr. Chalhoub); and that the 40% addenda were entered into as part of a dishonest conspiracy between the defendants and Mr. Gebauer to defraud R+V.

ii) Mr. Gebauer conspired with the defendants to route business which did not otherwise fall to be accounted for under the UNL and SHTTL binders through those binders, so that a 40% deduction was levied on these premiums which would not otherwise have been payable.

5. The judge found that R+V was entitled to terminate all its binders with the defendants and could claim damages for conspiracy (paragraphs 255 and 256 of the Judgment). The judge dismissed Risk France's counterclaim for damages for wrongful termination of the binders.

6. The Judgment did not deal with quantum or remedies. The post-judgment order dated 16 December 2004 provided that there be judgment for R+V against all the defendants for (a) all sums due under the UNL and SHTTL binders, and a further binder (referred to as the ING binder), such sums to be assessed, and (b) damages for conspiracy. An order for an interim payment of £5m was made against all defendants on 16 December 2004.

7. By the order dated 16 December 2004, and a further order dated 18 February 2005, the defendants were ordered to pay a total of £1m on account of costs. By the order dated 18 February 2005, the defendants were ordered to pay R+V's costs of the claim (other than costs in relation to remedies) on an indemnity basis. To date, the defendants have not paid any sum in relation to costs.

8. Certain issues of principle in relation to remedies were determined by me on 27th January 2006. Shortly before I handed down my judgment, Mr. Hugo Page QC, on behalf of the defendants, objected to the draft order produced by junior counsel for R+V, on the grounds that it should not apply to the second and third defendants. He

informed the claimants for the first time that an application would be made to set aside Moore-Bick J's order dated 16 December 2004.

9. Paragraph 4 of my order dated 27 January 2006 made it clear that my order was without prejudice to any application which the second and/or third defendants might make to set aside the orders made against them by Moore-Bick J. This was because the point in relation to the second and third defendants had been raised by Mr. Page at the post-judgment hearing in front of me. At that hearing, I commented that there was a threshold issue as to whether a first instance judge could deal with any application to set aside the orders made by Moore-Bick J as against the second and third defendants, awarding judgment against them.

10. On 7 February 2006, Moore-Bick LJ made an order fixing the date for written submissions from the parties as to permission to appeal against the Judgment. On 8 February 2006 the second and third defendants issued the current application to set aside Moore-Bick J's orders against them. On 14 March 2006, Moore-Bick LJ refused, amongst other things, the second and third defendants' application for permission to appeal against the judgments against them, as reflected in his orders. Permission to appeal had been sought on the grounds that there was no factual or legal basis for any finding against them. In giving his written reasons for that refusal Moore-Bick LJ said:

> "It was accepted at trial that the first to fourth defendants inclusive were all parties to any conspiracy that may have existed. In those circumstances, I do not consider it appropriate to give the second and third defendants permission to appeal merely on the assertion that they were not."

11. On 21 March 2006, there was a six-day quantum hearing before Tomlinson J. Although it had previously been agreed between the parties that the current application by the second and third defendants to set aside the orders of Moore-Bick J would be heard on that occasion, there was, in the event, no time to deal with the matter. Accordingly, the parties agreed that it would be determined at a further quantum hearing.

12. On 10 July 2006 Tomlinson J handed down his judgment in relation to quantum and remedies. Those issues were substantially resolved in favour of R+V. Tomlinson J ruled that the monies in a particular London account belonged beneficially to R+V (or ING) and not to Risk. He further assessed R+V's damages for contractors' costs and management/staff time at £2,298,867. This left for further determination the question of what was owed by each party under the terms of the binders; in other words, the taking of the account under the terms of the binders, having regard to the fact that, as I held in my judgment, no deduction was to be made in respect of the 40% commission; alternatively that R+V was entitled to damages for conspiracy in respect of the 40% deduction.

13. On 21 April 2006, the second and third defendants issued their notice of appeal against Moore-Bick J's order of 16 December 2004. On 14 November 2006, Longmore LJ determined the matter as a paper application and refused the second and third defendants' application for permission to appeal However, the second and third

defendants are apparently making a renewed oral application for permission to appeal, and that application is to be heard on 31 January 2007.

14. On 22 April 2005, Moore-Bick LJ appointed an accountant from Robson Rhodes ("the JQE") to draw up an account of what was owed by each party. This report was originally to have been completed by 10 November 2005, with the account being heard at the remedies hearing listed on 20 March 2006. In the event, the JQE informed the parties at the end of January that he would be unable to complete the exercise in time and would need until 8 May 2006 to finish his report. The 20 March 2006 hearing in front of Tomlinson J was instead used to determine all issues other than the taking of the account. A final remedies hearing was listed for June 2006. The JQE provided an interim report dated 16 May 2006. Unfortunately, it became clear that the JQE would not be ready for the June hearing which was accordingly vacated by Mr. Justice Andrew Smith on 26 May 2006.

15. Risk failed, contrary to the order of Moore-Bick LJ dated 22 April 2005, to pay its share of the costs of the JQE – each party having been ordered to pay 50% of the costs. By November 2006 some £114,579.22 in fees were outstanding from Risk to the JQE. R+V therefore applied for an order that Risk's Defence be struck out for non-payment of these fees. The application was heard by David Steel J on 2 November 2006. He ordered that, unless Risk paid the sum of £114,579.33 in respect of fees to the JQE by 4pm on 16 November 2006 the Defence to the Points of Claim in relation to Quantum would be struck out. David Steel J refused permission to appeal. Risk has, however, sought permission to appeal the order of David Steel J from the Court of Appeal. The application for permission has not yet been determined. No stay of David Steel J's order has been granted. No monies were paid by Risk to the JQE by that date or at all. Risk's Defence was therefore struck out.

16. Once Risk's Defence was struck out, R+V applied for judgment in default of defence by application dated 23 November 2006, and I heard that application on 12 January 2007. On that date, having dismissed the second and third defendants' application dated 8 February 2006, I gave judgment in favour of R+V against the first to fourth defendants in the sum of £14,032,622.82 plus interest, and granted the ancillary relief set out in my order of that date.

## The grounds of the second and third defendants' Application

17. The basis of the second and third defendants' application to have Moore-Bick J's judgment and the orders against them set aside is as follows. Mr. Page contends that there was never any case against the second and third defendants, and neither the judge, nor counsel on either side, appeared to have given any consideration to whether any order should have been made against them. In particular, complaint is made that the second and third defendants have been ordered to account under contracts (the binders) to which it is not suggested they were a party. Mr. Page submitted that it appeared from the pleadings that the second and third defendants were joined because R+V was unsure which company or companies in the Risk group was a party to the binders. He referred to the fact that the Particulars of Claim, at paragraphs 8 and 12, alleged that the party to the binders was the fourth defendant, alternatively the second or third defendant as agent for the fourth defendant; and to the fact that the Defence, at paragraph 19, admitted R+V's primary case, viz that the party to the binders was the fourth defendant. Thus, submitted Mr. Page, it was in effect common ground that

the second and third defendants were not party to the binders either as principal or as agent. Mr. Page submitted further that, in front of Moore-Bick J, the whole case against the second and third defendants was contained in one paragraph of R+V's written submissions, as follows:

> "The key Defendants are clearly Risk France and Risk UK. Nevertheless, there is also a good claim against Reass France and Reass SARL. Mr. Chalhoub was the guiding spirit behind all the Defendants and the Risk Group Companies. The UNL and SHTTL binders and 40% addenda were counter signed by 'Reass' (denoting either Reass France or Reass SARL). The binders and the 40% addenda were taken over to Wiesbaden by Mr. Tannous, the business manager of Reass France, for Mr. Gebauer to sign. Accordingly, if R+V is correct in saying that Risk France and/or Risk UK conspired with Mr. Gebauer in entering into the 40% addenda, Reass France and Reass SARL were part of the same conspiracy and helped carry it out."

18. Mr. Page further submitted that there was no case (and no finding) as to which of the second or third defendants signed the binders; and that, on the Pleadings, neither of them did, since the only party was the fourth defendant. Apart from that, he submitted, the only case against the second and third defendants was that Mr. Tannous was a "gerant" of Reass France, and had carried the drafts to Wiesbaden for signature; and that no reason had been suggested why he should have been acting for Reass France in doing so, given that it was not a party and had no interest in them.

19. Mr. Page further relied on the fact that, in paragraph 1 of the Judgment, Moore-Bick J said that he would refer to the defendants collectively as "Risk", save insofar as it was necessary to deal with them individually. Mr. Page submitted that it was indeed necessary to deal with the defendants individually when deciding what orders should be made against them, but the judge never did so. He submitted that Moore-Bick J made no actual findings against the second and third defendants, but simply failed to consider their respective separate positions, and that this situation continued when the orders were made. The defendants had just appointed new counsel, to replace trial counsel, who informed Moore-Bick J that they had only just been instructed, did not understand the details of the case, and asked for an adjournment which was refused. In the circumstances, Mr. Page submitted, it would be unjust to treat problems with the order as being due to the failure of defendants' counsel to raise the matter. Accordingly, submitted Mr. Page, the order as presently made was clearly wrong insofar as it makes these defendants liable to account under the binders when it was common ground that they were not parties to them; nor was it suggested that they received any monies under them, nor that they should have a liability to account. In addition, Mr. Page submitted that there was no basis for holding the second and third defendants liable for the tort of conspiracy.

20. In my judgment, however, the picture painted by Mr. Page is not complete. It is clear from the skeleton arguments produced at trial that at the liability hearing in front of Moore-Bick J, R+V advanced a case against both the second and third defendants in its opening and closing submissions. Moreover, the Risk defendants never sought to differentiate between the separate corporate personalities of the second and third

defendants and the other defendants at trial, or in their submissions on the question of conspiracy; that is clear, for example, from the Risk defendants' closing submissions. That approach was no doubt taken on realistic and pragmatic grounds, given that all four companies were part of the Risk Group controlled by Mr. Chalhoub, and that they, or their employees, were used by Mr. Chalhoub in the carrying out of the conspiracy found by the judge. Moreover, as was clear from paragraph 1 and paragraphs 251 to 255 of the Judgment, Moore-Bick J clearly found that the second and third defendants were party to the conspiracy. That was emphasised by the judge in the passage quoted above from the reasons given by him for refusing permission to appeal.

21. In addition, the four Risk companies, through their counsel, agreed the form of the orders made on 16 December 2004 and 18 February 2005. As Mr. Colin Edelman QC for R+V submitted, at the time Risk and its then legal advisors were clearly content that the form of the order reflected the decision made by the judge in the Judgment.

**Application under the slip rule: CPR 40.12**

22. The first basis for Mr. Page's application was CPR 40.12. This provides:

> "The court may at any time correct an accidental slip or omission in a judgment or order."

23. It is clear from the note to the rule contained in the White Book that, essentially, the rule is there to do no more than correct typographical errors or matters that are clearly genuine slips or mistakes. It is well-established that the slip rule cannot be used to correct errors of substance, nor in an attempt to add to or detract from the original order made by the judge. In my judgment, in the circumstances of this case, and in particular the way in which the matter was argued at trial, there is no basis for any application under the slip rule here. There is no basis for characterising the relevant provisions of Moore-Bick J's orders as an "accidental slip" or "omission". The reality is that the proposed alterations to the orders of Moore-Bick J which are sought, are matters of substance which challenge his judgment.

**Application under CPR 3.1(7)**

24. CPR 3.1(7) is in the following terms:

> "A power of the court under these rules to make an order includes a power to vary or revoke the order."

25. It is relevant to note that Part 3.1 deals with the court's general powers of management, and part 3.1(2) sets out a number of powers that the court has in the exercise of its general powers of management, such as, for example, to "dismiss or give judgment on a claim after a decision on a preliminary issue"; see sub-paragraph (l). However, the notes to the rule emphasise that, in terms, rule 3.1(7) is not restricted to procedural orders and that the question whether, as a matter of law, an order may be varied or revoked, and whether it should be varied or revoked, are matters that must be determined in the context in which they arise.

26. I am satisfied that in the circumstances of this case there is no power under CPR 3.1(7) to vary or revoke the order made by Moore-Bick J, as against the second and third defendants. Those orders reflect the judgment which he gave and the views which he (rightly or wrongly) reached on the substantive merits of the case. In my judgment CPR 3.1(7) – at least in this context - can have no application to a final judgment at trial on the substantive merits of an issue. The circumstances where it may be possible to invoke the rule, may be difficult to define, although I respectfully adopt the approach articulated by Patten J in *Lloyds Investment (Scandinavia) Ltd v Christen Ager-Hanssen* [2003] EWHC 1740 (Ch). In that case, the claimant had entered judgment against the defendant after he had failed to comply with conditions imposed on him by an order setting aside an earlier judgment obtained in default of defence. The defendant applied to vary the terms of the order setting aside the first judgment. In dismissing the application, pursuant to CPR 3.1(7), the judge said as follows:

> "Although this is not intended to be an exhaustive definition of the circumstances in which the power under CPR Part 3.1(7) is exercisable, it seems to me that, for the High Court to revisit one of its earlier orders, the Applicant must either show some material change of circumstances or that the judge who made the earlier order was misled in some way, whether innocently or otherwise, as to the correct factual position before him. The latter type of case would include, for example, a case of material non-disclosure on an application for an injunction. If all that is sought is a reconsideration of the order on the basis of the same material, then that can only be done, in my judgment, in the context of an appeal. Similarly it is not, I think, open to a party to the earlier application to seek in effect to re-argue that application by relying on submissions and evidence which were available to him at the time of the earlier hearing, but which, for whatever reason, he or his legal representatives chose not to employ. It is therefore clear that I am not entitled to entertain this application on the basis of the Defendant's first main submission, that Mr. Berry's order was in any event disproportionate and wrong in principle, although I am bound to say that I have some reservations as to whether he was right to impose a condition of this kind without in terms enquiring whether the Defendant had any realistic prospects of being able to comply with the condition."

27. Likewise, in *Collier v Williams* [2006] EWCA (Civ) 20, 25 January 2006, the Court of Appeal stated that the power conferred by CPR 3.1(7) cannot be used simply as an equivalent to an appeal against an order with which the applicant is dissatisfied. The Court of Appeal there endorsed the approach adopted in *Ager-Hanssen* (*supra*). Accordingly, in my judgment, it is not open to me as a judge exercising a parallel jurisdiction, in the same division of the High Court as Moore-Bick J was exercising his jurisdiction, to entertain what, in effect, is an appeal from the Judgment and the orders which he made reflecting, or purporting to reflect, the judgment which he had given. Any order varying or revoking the orders made by Moore-Bick J must, in my judgment, be sought and obtained on an appeal to the Court of Appeal.

28. Even if (contrary to my view) I did have power to set aside the orders, I would not, as a matter of discretion, have exercised it in circumstances where Moore-Bick J had specifically refused the second and third defendants permission to appeal against his judgment, and had given specific reasons for so doing. In my judgment, on the facts of this case, Moore-Bick J had clearly found that the second and third defendants were guilty of a conspiracy for which they were liable to pay damages. The order that they should pay damages reflects his finding that they were conspirators. If he were wrong on that point, then the matter is one which falls to be rectified by the Court of Appeal.

29. Although it might appear that the second and third defendants were not parties contractually to the binders, and thus contractually had no obligation to account in respect of monies due thereunder, Moore-Bick J's order, no doubt intentionally, provided that judgment should be awarded against them for all sums due under the binders. Furthermore, although Mr. Page argued that the second and third defendants were not parties to the binders, and therefore could have no obligation whatsoever to account in respect of the monies payable thereunder, that could be regarded as too simplistic a description of the actual position. As Mr. Edelman submitted, the liability of the second and third defendants in conspiracy would also include an obligation to repay the purported 40% commission wrongly deducted or withheld as damages for conspiracy. This was the point that I made in paragraph 40(ii) of my judgment dated 27 January 2006. As I pointed out in paragraph 41, whether the correct analysis was that the Risk defendants had to repay the 40% deduction that they had received to date, and were not entitled to charge it in the account going forward, or whether the 40% deduction was *prima facie* payable contractually, but all defendants were liable to repay the 40% deducted by way of damages for conspiracy, was not a relevant issue at trial. This was because it had effectively been conceded by Mr. Schaff QC, leading counsel for the Risk defendants at trial, as an issue which it was not necessary to decide in the event of a finding of dishonesty.

30. Moreover, as Mr. Edelman further submitted, apart from the 40% deduction point, there are further grounds that would provide a juridical basis for Moore-Bick J's judgment that the second and third defendants were liable in respect of all sums due under the binders. Sums that were due under the binders have not been properly accounted for to R+V, but had been paid away to other Risk companies as a result of the conspiracy. This also, submitted Mr Edelman, would justify an order against the second and third defendants as co-conspirators, by way of damages for the conspiracy that had resulted in the misappropriation of these monies.

31. He also submitted that, in the Particulars of Claim, relief had been sought against the second and third defendants in terms that they should account to R+V for such sums as the court thought fit as constructive trustees, on the grounds of knowing assistance, and that this also justified Moore-Bick J's order that they should pay all sums due under the binders. Mr. Page, on the other hand, submitted that, in the absence of a causal connection between the second and third defendants' alleged dishonesty and the missing monies, there could be no liability to account as a constructive trustee on a knowing assistance basis.

32. In my judgment, whether, and, if so, which of such contentions might be well-founded in the light of the way the case was argued at trial, are not matters which I, as a first-instance judge, should resolve under CPR 3.1(7), even if I had power to do so.

Such matters, if they do indeed raise any realistic grounds for challenging Moore-Bick J's judgment (as to which I say nothing) would clearly be matters to be argued on an appeal, if and when permission to appeal were granted on the defendants' renewed application, due to take place on 31 January 2007.

33. Accordingly, for the reasons set out above, I dismissed the second and third defendants' application.