Neutral Citation Number: [2011] EWHC 1658 (Comm)

Case No: 2007 FOLIO 351

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 30/06/2011

Before :

MR JUSTICE DAVID STEEL

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Between :

GARD MARINE & ENERGY LIMITED (a company incorporated in Bermuda)	**Claimant**
- and -	
LLOYD TUNNICLIFFE (sued on his behalf and on behalf of all other members of Lloyd's Syndicate 780 for the 2005 year)	**First Defendant**
-and-	
GLACIER REINSURANCE AG (a company incorporated in Switzerland)	**Second Defendant**
-and-	
AGNEW HIGGINS PICKERING & COMPANY LIMITED	**Third Defendant**

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MR GUY PHILIPPS QC AND MR ANDREW HUNTER
(instructed by **CLYDE & CO**) for the **Claimant**

MR DOMINIC KENDRICK QC AND MR MICHAEL HOLMES
(instructed by **EDWARDS ANGELL PALMER & DODGE**) for the **First Defendant**
MR TOM WEITZMAN QC AND MR ADAM KRAMER
(instructed by **CMS CAMERON McKENNA)** for the **Third Defendant**

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Judgment

MR JUSTICE DAVID STEEL :

Introduction

1. The primary issue in this case is a short point of construction and can be summarised as: "What does the notation "(100%)" mean in the context of an excess or limit in an energy facultative reinsurance policy". More precisely perhaps: "100% of what?"

2. The claimant ("Gard") is a Bermudian insurance company carrying on business in Norway. The first defendant ("Advent") is a Lloyd's Syndicate. The third defendant ("AHP") is an insurance broker based in London. The claim against the second defendant ("Glacier Re") was settled.

3. Devon Energy Corporation ("Devon") was a large independent oil exploration and production company with an interest of varying percentages in a number of wells and platforms in the Gulf of Mexico. It was insured under an Energy Package Insurance for the period 1 July 2003 to 1 September 2005 ("the Original Policy"). The Original Policy was extended by endorsement in August 2005 to 1 September 2006. Gard subscribed to a 12.5% share under the Original Policy.

4. For the 2005 year, the Original Policy contained various sections including, but not limited to, coverage of all risks of physical loss or damage to offshore and onshore property and business interruption. Section 1A and Section 2 exposures under the Original Policy were subject, inter alia, to a combined single limit of "*US$400,000,000 (for interest) any one accident or occurrence*" arising out of a Named Windstorm in the Gulf of Mexico.

5. In the summer of 2005 Gard instructed AHP to effect renewal of its reinsurance of its exposure on the Original Policy for the 2005/2006 period. AHP placed facultative reinsurance of Gard's 12.5% line as follows: Gard reinsured 7.5% of its 12.5% line with various Lloyd's syndicates including Advent (who were allocated 26.6667% of the 7.5%). Gard reinsured the remaining 5% of the 12.5% line with Glacier Re.

6. The "*Sum Insured*" clause in Gard's reinsurance policy with Advent was expressed as follows:

   > "*To pay up to Original Package Policy limits/amounts/sums insured excess of USD250 million (100%) any one occurrence of losses to the original placement*".

   The substantive dispute centres on the correct construction of "*(100%)*" in the reinsurance policies and the consequences this has for the presentation of losses to reinsurers arising out of losses sustained on the Original Policy in September 2005 as a result of damage caused by Hurricane Rita in the Gulf of Mexico.

7. The insurers under the Original Policy, including Gard, adjusted and settled Devon's Hurricane Rita claim in the sum of US$365 million, in excess of Devon's retention of

US$16 million, and taking account of a negotiated discount of US$35 million. Gard's share of the payment was its 12.5% proportion, i.e. US$45,625,000.

8. Gard's and AHP's case is that the excess point in the Sum Insured clause in the reinsurance policy is based on the total insured value of the original lost asset and not Devon's interest in that original lost asset. Thus Gard and AHP contend that each indemnity paid by Gard to Devon has to be grossed up to establish the full value of each asset lost. On this basis, Gard and AHP contend that the indemnity due from Advent is US$5,020,737.

9. It is Advent's case that the Sum Insured clause is to be construed as referring to losses of US$250 million to the full market of insurers on the Original Policy, as opposed to Gard's 12.5% participation. Advent has paid US$2,300,000 which sum reflects that construction of the Sum Insured clause. Advent contends that this is the correct construction of the Sum Insured clause and that by making such payment it has discharged the full extent of its liability.

10. Advent also claims that, at the time of placement, AHP made certain representations on behalf of Gard as to the correct construction and operation of the Contract of Reinsurance and that, if Advent was wrong as to the correct construction of the Sum Insured clause, it followed that those representations were inaccurate and misleading. It followed that the Contract of Reinsurance was void as a result and that the US$2,300,000 it paid was repayable, less premium it received in respect of the reinsurance policy.

11. Gard has accordingly an alternative claim that if by reason of the misrepresentations Advent are not liable to pay Gard's claim in full then AHP are in breach of their duties and must pay Gard the sums claimed from Advent to the extent that they are not recovered from those reinsurers. Further, if Advent's construction were to be accepted, Gard also has a contingent claim against AHP for failing to use the proper wording to achieve an outcome where the excess or limit scaled

Witnesses

12. The parties served a number of witness statements. Those that were called to give oral factual evidence were as follows:

    i) Gard - Mr Gunnar Aasberg – he was Gard's energy underwriter who dealt with Gard's participation in the Original Policy (and its predecessors) and the purchase of the reinsurance.

    ii) Advent –

        a) Mr Kevin Regan – Advent's energy underwriter. He explained Advent's participation in the reinsurance (and other previous relevant participations in the same programme). He also described the manner in which the reinsurance had been placed by AHP.

        b) Mr Sam Hui – Mr Regan's assistant.

c) Mr Steven Abbot – Advent's claims handler. He explained the circumstances of Advent's non-payment of the claim and the basis for its part payment.

iii) AHP –

a) Mr Dominick Hoare – an underwriter at the Watkins Syndicate. He had also purchased the OPL reinsurance.

b) Mr Mark Jones - a broker at AHP. He prepared the original OPL reinsurance slip both in 2003 and thereafter.

c) Mr Sam Martyn - a broker and senior technician at AHP. He assisted Mr Smith in placing the Original Policy with Gard in 2004 and 2005.

d) Mr Jonathan Smith - a director of AHP. He was the Devon Account Executive. He explained AHP's placing of Devon's insurance programme and associated reinsurance and dealt with specific details of the placing of Gard's 12.5% participation in the Original Policy in 2005.

e) Mr Mark Jenner. He was an executive of AHP who had peripheral involvement with the presentation to Advent.

f) Mr Matthew Hilsum – a broker at AHP. He was the placing broker as regards Advent (Mr Smith having approached the lead insurers) and duly explained AHP's placing of the facultative reinsurance with Mr Regan of Advent in 2004 and 2005.

g) Mr Graeme Herrington - He was a claims broker at AHP. He explained how AHP calculated and dealt with the reinsurance claim.

13. I am satisfied that all these witnesses did their best to assist the court bearing in mind that they were seeking to recall events from some 5 or more years ago. Where there were disparities of recollection I have inevitably placed particular reliance on the contemporary documentation.

14. As regards expert evidence, the following were called:

i) Mr Richard Outhwaite who gave underwriting evidence for Gard.

ii) Mr David Hope who gave underwriting evidence for AHP.

iii) Mr Stephen Adams who gave underwriting evidence for Advent.

iv) Mr Michael Van Der Gucht who gave broking evidence for AHP.

It is sensible to set out my views of the relative value of the experts' evidence at a later stage in this judgment.

General background

15. From about 1999, AHP placed an insurance programme comprising a primary Package Policy and an excess Package Policy on behalf of Devon. Gard participated on the primary Package Policy for several years before 2003 with a line of 12.5%. The primary Package Policy which is the immediate predecessor of the Original Policy in this case was placed by AHP in about June 2003 for the period 1 July 2003 to 1 September 2005. Gard participated with a reduced line of 10% although that was increased back to 12.5% in 2004. This primary Policy has 8 Sections with limits and deductibles variously expressed in the full wording as *"(for Assured's interest)"* and *"(100% interest)"*. In the slip wording (which was provided to Advent as information attached to the reinsurance slip), the same limits and deductibles are expressed as *"(Assured's interest)"* and *"(100%)"*.

16. AHP also renewed the excess Package Policy in June 2003. Advent, through its underwriter, Mr Kevin Regan, took a 3% line. The excess Package Policy had three sections: excess business interruption, excess OEE and excess liability. The limits and excess points are expressed variously as *"[FIGURE] (Assured's Interest)"*, *"[FIGURE] (100%)"* or simply *"[FIGURE]"*. It was common ground that limits and deductibles expressed as *"[FIGURE] (100%)"* which appeared in Section 2 (OEE) scaled for interest. The 2003-2005 primary Package Policy was renewed in August/September 2005. The mechanism for the renewal was that AHP procured underwriters (including Gard) to participate on an endorsement extending the period of the expiring Policy to 1 September 2006.

17. In order to encourage underwriters to participate in the Package Policy, AHP developed and offered various facultative reinsurance programmes which it could offer participants. These included the reinsurance contract which is the subject of the present case. At the 2003 renewal, Gard purchased two such facultative reinsurances through AHP. These were: full reinsurance for its line on Sections 3 (liability) and 4 (P&I); and a specific facultative reinsurance for onshore property which was expressed as *"US$200 million (for interest) excess of US$50 million (for interest) excess US$500,000 (100%)"*. At the same time (June 2003), Gard was offered, but did not at this stage purchase, the predecessor of the OPL facultative reinsurance cover which is the subject of this case.

18. In 2004, Gard renewed its two existing facultative reinsurances (liability and on-shore property). In addition, AHP again offered Gard the OPL facultative reinsurance and this time Gard did purchase that cover, in conjunction with increasing its line in the Package Policy back to 12.5%. Indeed Gard's agreement to increase its line was subject to AHP placing OPL facultative reinsurance for at least a third of its 2004 line and AHP duly did so. As for Advent, in 2004 it decided not to renew its participation on the excess Package Policy. However, instead of this, on 17 August 2004, Advent participated in the 2004 OPL facultative reinsurance with a 4.25% line.

19. It may be of some significance that in September 2004, AXA Re agreed to participate on the facultative excess reinsurance for a 1% line. When presented with the slip to sign, the underwriter (Mr Vivares) deleted the "(100%)". There ensued a telephone conversation between Mr Vivares and Mr Jones of AHP in which Mr Jones explained that the effect was to scale the excess and such had been the basis on which the reinsurance had been sold. AXA was concerned as to how such an arrangement would work and did not in the event renew. It was Mr Jones' and Mr Hilsum's

evidence that the latter happened to listen in to this conversation, something which was vigorously challenged by Advent.

20. On 7 July 2005, Mr Smith of AHP met Mr Aasberg of Gard, and told Mr Aasberg that the leader (Wellington) had agreed to renew the primary Package Policy. Mr Smith invited Gard to do the same. There were some changes to the terms from the previous year, most notably, the introduction of a Combined Single Limit of US$400 million for losses arising out of a Named Windstorm in the Gulf of Mexico. Gard indicated that it was willing in principle to renew, whilst making clear that it wished to have reinsurance for its full line. On 8 July 2005, Mr Aasberg annotated the renewal endorsement: *"Gard 12.5% to sign in full. NB! DO NOT CONFIRM THIS UNTIL AHP HAS CONFIRMED X/L R/i FOR OUR FULL LINE"*.

21. AHP then started building support for the 2005 OPL facultative reinsurance. On 14 and 19 July 2005 it received quotes from the leading Lloyd's syndicate, Talbot. Mr Hilsum then broked the OPL facultative reinsurance to Mr Regan of Advent at several visits to his box between about 14 July 2005 and 17 August 2005, when Mr Regan confirmed Advent's participation. The exact details of what was done and said during this placement exercise are matters of dispute between Advent and AHP.

22. In the meantime, on 3 August 2005, Gard emailed Mr Smith asking him to *"advise status regarding r/i in respect of our 12.5%"*. Mr Smith replied that he was waiting for an answer from a "*substantial block of capacity*". On 11 August 2005, Mr Jones emailed Aasberg and asked for confirmation that Gard was *"looking to buy the OPL excess USD250m (100%) reinsurance for your full signed line"*. Mr Jones also stated he had placed 5% of the line with Glacier and asked for confirmation that this was acceptable to Gard.

23. On 12 August 2005, there was a phone call between Gard (Aasberg and Larsen) and AHP (Martyn and Smith) in which Mr Aasberg and Ms Larsen asked AHP to give specific confirmation that the OPL reinsurance was placed on the basis that the excess point would scale for interest. Mr Martyn of AHP confirmed this position orally and indeed asserted that he went through a worked example.

24. The oral confirmation was confirmed in writing by an email sent the next day, 12 August 2005, by Mr Martyn of AHP to Gard. In this email, Mr Martyn stated:

> *"To confirm our earlier conversation we can advise as follows regarding the internal insurance to the package layer.*
> *The placement (which is as expiry) is for Original Policy Limits (to the package policy) xs USD 250,000,000 (100%). Therefore the excess is on the original lost asset and not necessarily for Devon's interest/losses to the original policy (unless Devon has 100% interest in the lost facility).*
> *Cover does not apply to the liability section.*"

25. On 17 August 2005, Mr Smith spoke to Mr Aasberg by phone and stated that he had placed 11 to 11.5 of the 12.5% line and would allocate any further capacity to complete the line. On that basis Gard confirmed its 12.5% participation by email on 18 August 2005. On 23 August 2005, AHP sent Gard a formal confirmation of cover and attached the Lloyd's reinsurance slip scratched by Advent and three others.

26. On 23 September 2005, Hurricane Rita hit the Gulf of Mexico. Devon suffered substantial losses which were settled by the leader of the direct insurance policy (Syndicate 457 at Lloyd's). The settlement agreed the insured loss at the Original Policy limit of US$400 million (there being a US$400 million CSL for Named Windstorm). However, the amount paid was US$365 million to reflect a discount for immediate payment of the US$400 million loss. Gard paid its share (US$45.625 million) in accordance with the settlement.

27. Following settlement of the underlying claim, Gard made claims against its reinsurers. It calculated the reinsurance claim on the basis that the US$250 million excess point was referable to 100% values of the property and other subject matter comprising Devon's claim, and so given that Devon had less than a 100% interest, the excess point had to be "*scaled*" to reflect the lower interest.

28. The effect of this scaling was put forward as follows. The gross loss from the ground up was about $912.5 million. Devon's interest in that gross loss was $416 million or about 45.6%. On that basis, if the deductible scales to that percentage of $250 million, it becomes $114 million. Thus the claim against reinsurers becomes $251 million, being the payment of $365 million less the scaled deductible. In contrast absent scaling the claim on reinsurers would be the payment of $365 million less $250 million deductible, thus $115 million.

29. Talbot and a number of other reinsurers reserved their position when first notified of a possible claim on 29 December 2005 although it was not asserted that the excess did not scale. Indeed on 10 January 2006 Mr MacDonald, who was underwriter of Talbot, the lead Lloyd's Syndicate on the OPL Reinsurance agreed that the excess was for 100% and accordingly scaled.

30. In June 2006, the underlying claim was agreed between Devon and the direct insurers. This resulted in Mr Jones and Mr Herrington preparing a calculation of the claim under the OPL Reinsurance on a scaling basis which was submitted to Talbot on 14 July 2006. On 27 July 2006 Talbot changed its position. Its claims manager, Mr Deardon, sent an email to AHP referring to a market meeting that morning and asserting that the unanimous position of underwriters was that "we can not identify any wording in the policy to support the claim and the application of the retention as presented by Agnew Higgins". This was a somewhat surprising contention given that Mr MacDonald had previously agreed that the excess was for "*(100%)*" and scaled. Indeed Mr Hoare was upset about the stance adopted by reinsurers (because it so obviously conflicted with the market meaning of "*(100%)*").

31. On 1 August 2006 Mr Herrington met with Mr Deardon and Mr MacDonald of Talbot. The explanation that Talbot gave of its change of heart was that it had received legal advice that the "*(100%)*" referred to 100% of the reassured's interest. On 21 August 2006, Mr Herrington met with Mr Hayward of Axis, and Mr Hayward agreed that the excess scaled. This was then confirmed by Mr Hayward in an email the next day.

32. On 23 August 2006, Mr Herrington received a telephone call from Mr Deardon. Mr Deardon had spoken to Mr Hayward and his position had as a result "softened" in that Talbot was now willing to make an interim payment and to request a further claims adjustment before formalising its position. On 30 August 2006, Mr Herrington spoke

to Mr Deardon, who confirmed that Talbot now accepted that the excess scaled. On 15 September 2006, Talbot confirmed its agreement that the excess scaled in writing.

33. Thereafter, all the subscribing reinsurers apart from Advent and Glacier Re accepted that the excess scaled and paid the claim on this basis.

Construction

34. Various points can be made by way of introduction to the issue of construction:

i) First, the correct approach to construction of a written contract is that one is seeking to "*ascertain the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract*".

ii) Second in the context of a reinsurance contract, and in particular one expressed to be *"subject to all terms, clauses, and conditions as Original and to follow the Original in every respect ..."* the factual matrix includes the terms of and circumstances surrounding the underlying policy.

iii) Third the factual matrix will also include evidence about relevant market practices, which are widespread but not universal, if the existence of such practices is part of the background known to each party. In this regard there was even some assertion of a market custom. But I think such was in due course not pressed. The focus was on an assertion that there was a specialised and established meaning to "(100%)" when expressed in regard to a limit or excess in the energy market.

Gard's submissions

35. The submissions made on behalf of Gard (which were adopted by AHP) can be briefly summarised as follows:

i) The starting point was the Original Policy. This was because its terms are (to the extent appropriate) incorporated into the reinsurance by the *"subject to all terms, clauses, and conditions as Original and to follow the Original in every respects ..."* wording, but also because the Sum Insured clause itself manifestly requires reference to the Original Policy in order to understand its meaning: it refers to *"Original Package Policy limits/amounts/sums insured"*.

ii) The *"Original Policy limits/amounts/sums insured"* are stated by reference to the notations *"[FIGURE] (for Assured's interest)"* (Section I and IV) or *"[FIGURE] (100% interest)"* (Sections II, V, VI, VII, and VIII). It is not in dispute what the notation *"(100%)"* or *"(100% interest)"* means in the Original Policy. Indeed it is spelled out in terms in the Partial Interest Clause in Section II of the Original Policy (OEE) which provides as follows:

"The Combined Single Limit of Liability over all sections hereof, the Assured's Retention(s), any separate limit of liability set forth in any endorsement hereto and the rates expressed herein are for a 100% interest. In

the event that the interest of the Assured in any one well insured hereunder does not amount to 100% then said Combined Single Limit of Liability over all sections hereof, the Assured's Retention(s), any separate limit of liability set forth in any endorsement hereto and the rate(s) applicable to that well, shall be reduced proportionately and shall apply in the same proportion as the total interest of the Assured in said well hereunder bears to 100%..."

iii) It is equally common ground that the notation *"(Assured's interest)"* or *"(for Assured's interest)"* in the Original Policy denotes the opposite to *"(100%)"* or *"(100% interest)"* i.e. that the limit or deductible does not scale. It follows, therefore, that the notation *"(100% interest)",* sometimes abbreviated to *"(100%)"*, is used throughout the Original Policy to mean that the limit or deductible which it qualifies scales for interest. Accordingly it is a significant part of the factual matrix that this was a reinsurance contract on "as original terms" which covered an Original Policy in which the parties used the notation *"(100% interest)"* or *"(100%)"* to denote that a limit or deductible scales for interest.

iv) Against this background, the parties to the reinsurance contract must have intended the notation *"(100%)"* to bear the same meaning which it has in the Original Policy.

v) As regards market practice, the relevant market is the market for insurance of offshore energy risks, irrespective of the contractual form of participation in that market. The evidence overwhelmingly supports the conclusion that the notations *"(100%)"* or *"(100% for interest)"* have a specialised and recognised meaning in the energy market when they are used to qualify limits or deductibles: they denote that the limit or deductible scales for interest.

vi) Although the clause makes reference to "*losses to the original placement*" that merely makes explicit that the subject matter of the reinsurance is losses to the original policy and not from the ground up.

vii) The construction advanced by Advent would result in the surprising outcome that "*(100%)*" has no significance. Since Advent say that the deductible reflects the position where Devon's own losses exceed $250 million, the only outcome would be to treat "*(100%)*" as being to the same effect as "*(for Assured's Interest)*". Yet it is common ground that, generally speaking the notations are regarded as alternatives.

36. AHP adopted and supported the construction argument advanced by Gard.

Advent's construction case.

37. Again, in very summary form, Advent's submissions were as follows:

a) The natural meaning of the words used lead to the conclusion that the "*losses*" are those of the original assured (Devon) which the reassured (Gard) has had to pay under the direct insurance. This is made explicit by the words "*losses to the original placement*".

b) Gard's construction gives rise to the surprising outcome that the excess point depends on losses to a range of third party interests which are not by definition suffered by the original insured and thus not losses to be paid under the original placement.

c) Gard's construction also gives rise to great difficulty in calculating the claim on reinsurers. If as suggested the excess point scales but, as is accepted the limit does not, the variable interest of Devon in the physical assets leads to the outcome that the reinsurer's exposure becomes a matter of chance whether the excess point is reached by reference to losses to third parties or otherwise. Furthermore, the calculation also gives rise to the artificial scaling (upwards) of retentions in the original policy.

d) The initial reaction to the claim (and the suggestion that the excess point scaled) demonstrates that there was no "*market practice*" in regard to the use of 100%.

Discussion

38. AHP and Gard relied on ***Myers v. Saarl (1860) 3 El & El 306*** in support of the proposition that the court should approach the question of construction on the assumption that the parties intended to use words which have a special or peculiar meaning in a trade that way:

> "*…if the parties have used terms which bear not only an ordinary meaning and acceptation, but also one peculiar to the department of trade or business to which the contract relates, it is obvious that due effect would not be given to the intentions if the terms were interpreted according to their ordinary and not according to their peculiar signification*": per Cockburn CJ at p.315

39. I accept this approach which has been recently confirmed in ***Thomas Crema v. Cenkos Securities PLC*** [2010] EWCA Civ 1444 at para 43. Of course, the express terms of the contract will prevail if they are inconsistent with any such meaning. In this regard, as already noted, Advent relied on the words: "*losses to the original placement*". But in my judgment the evidence is overwhelming that the notation of "*(100%)*" in regard to an excess or limit has a recognised and established meaning in the market writing direct insurance of offshore energy risks and facultative reinsurance. It means that the limit or excess scales to reflect the assured's interest in the relevant assets.

40. A convenient starting point for this is the evidence of Mr. Hoare, the underwriter of the Watkins Syndicate. He was called by AHP. In his witness statement dated 30 March 2011 (which constituted his evidence in chief) he stated:

> "*5. In my experience the phrase "(100%)" is used in the Energy Market to indicate that an excess/deductible/limit scales for interest. I have seen "(100%)" in many slips and come across it regularly when underwriting energy risks. I*

> *would expect fellow underwriters active within the Energy Market to understand the meaning of this term.*"

41. During his cross examination by counsel for Advent, his attention was drawn to a note of an interview or conversation in February 2011 with solicitors acting for Advent. That note which Mr. Hoare accepted was reasonably accurate (albeit he only saw it when in the witness box) contained entries which were, in my view, entirely consistent with his witness statements. In particular, paragraph 7 read:

> "*100% should have been obvious to any u/w in the market that it scaled.*"

As he explained in cross-examination (and I accept), this applied to both direct insurance and facultative reinsurance because "*it is all in the same market and same applies to both*". In the result, as he explained, he was annoyed when the lead reinsurers, Talbot, initially refused to treat the excess as subject to scaling.

42. As regards the expert evidence, Gard called Mr. Outhwaite. Although he had been out of the market for some years, his evidence was brief but clear to the effect that the market meaning or practice associated with "*(100%)*" was longstanding. He was firmly of the view that, in accord with market practice "*100% referred to 100% of values and that it scaled*".

43. Mr. Hope was called by AHP. He was of the same view, speaking from the perspective of more recent underwriting experience of both direct energy risks and facultative reinsurance of those risks. His report summarised his view as follows:

> "*In my experience the term "(100%)" has exactly the same meaning when used to described a limit or excess in a facultative insurance as it has when used in a direct insurance. In each case it means that the limit or excess scales to reflect the assured's interest in the underlying asset. This is well-established and recognised by market participants. It reflects the fact that both types of risk are written by the same market. As explained above my experience includes both purchasing and underwriting facultative reinsurances. Such reinsurances frequently contained a "100%" limit excess. This indicated that the limit or excess scaled to reflect the assured's interest in the underlying assets.*"

Although Mr. Hope was reluctant in cross examination to contemplate the impact of expressly contradictory wording, I did not derive any assistance from that challenge. His approach was entirely straightforward, namely that the presence of contradictory language would necessitate the underwriter clearing the matter up with the broker.

44. The views of these experts were consistent with much of the lay evidence, in particular Mr. Aasberg, Mr. Smith, Mr. Jones, Mr. Martyn, Mr. Hilsum and Mr. Herrington. Albeit not independent experts, they were experienced underwriters or brokers in the energy field. I confess that in listening to their evidence I was not for a moment left with the impression that they were *parti-pris* on this issue.

45. Moving on to the evidence relied upon by Advent, I must start with their expert Mr. Adams. He was somewhat at a disadvantage since he was a treaty underwriter who had never written a direct energy policy or even a facultative reinsurance of such. More importantly I agree with the criticism that his evidence to the effect that it may or may not have a specialized meaning in a particular context left matters uncomfortably uncertain.

46. The thrust of his evidence emerged as being to the effect that, where "(*100%*)" was in a deductible or limit clause tendered to a direct underwriter or reinsurer in a slip, the underwriter had to ask the broker in each case whether it was to have its "*specialised*" meaning or its "*non-specialised*" meaning.

> "*Q. In a normal facultative reinsurance, would you accept that that "100 per cent" had a special market meaning and indicated that the limit scaled?*
>
> *A. As I said to you before, a facultative reinsurance is specific to a specific contract so it would depend upon what is in that contract and in that sum insured clause.*
>
> *Q. I see. So "100 per cent" has no specific special market meaning in a facultative reinsurance; you need to look at --*
>
> *A. Not in every case, no.*
>
> *Q. Assume that you have a limit, X, 100 per cent, any one occurrence. Does it have a special market meaning in those circumstances?*
>
> *A. If there is -- if there are no other words with it, I would say it may well mean scaling. I would always want to know. Remember, being facultative reinsurance, it needs to be specific.*
>
> *Q. You would always want to ask; is that right?.*
>
> *A. I think I would ask all the time, yes."*

47. I did not have confidence in that view which did not form part of his report and which appeared to be based more on advocacy than established practice. In particular I reject his evidence that Mr. Hoare was "*absolutely wrong*" in suggesting that "*(100%)*" has an established market meaning in both the direct and reinsurance energy market.

48. Mr. Regan's approach suffered from a similar level of uncertainty or at least inconsistency despite his experience in the field. He variously accepted that "*(100%)"* after numerical excess means that it scales for interest but that such was only applicable to direct insurance or in any event that such did not apply when associated with the words "*any one occurrence of losses to the original placement*".

49. A good example was during cross-examination on Day 2:

"*Q. If you look at the last sentence of that paragraph you say:*

"In the context of a facultative reinsurance I considered that $250 million, 100 per cent, meant that the excess applied to 100 per cent of the slip which Gard subscribed to, ie the direct insurance of Devon."

Do you see that?

A. I see that.

Q. I had read that as indicating that that view on your part was based on the fact that the reference to the excess and the 100 per cent appeared in a facultative reinsurance?

A. Well, yes, as it starts out it is in the context of a facultative reinsurance.

Q. But, as I understand it, your evidence is that you accept that you can have a scaling excess in a facultative reinsurance?

A. I'm unclear about that, because I'm not sure myself whether you can.

Q. I see. Your position is that you cannot have a scaling excess in a facultative reinsurance?

A. Well, I'm not saying one way or the other. This particular contract states, it is $250 million, my Lord, 100 per cent to the original policy. I'm not sure, I'm not sure, without those words, what it actually does mean.

Q. I see. You accept that in a direct policy 100 per cent indicates scaling?

A. I do.

Q. And that "for assured's interest" indicates that the excess or limit doesn't scale?

A. Correct.

Q. And that the two terms are the opposite of the other?

A. They are certainly different.

Q. If one sees the term for "assured's interest" in a facultative reinsurance policy, that would indicate, wouldn't it, that what was being reinsured was only the insured's interest in the relevant asset?

A. The assured's interest, that is what I've taken that to mean.

> *Q. And we see you writing FAI in your assessment of exposure in relation to Nansen, don't we?*
>
> *A. For assured's interest, yes.*
>
> *Q. And in the context of a facultative reinsurance, 100 per cent has the same meaning as in a direct insurance, doesn't it?*
>
> *A. I'm not sure whether it does, because in a direct insurance, as I've made a point in my witness statement, you have a specific part of it which is an OEE risk and one of the reasons why we have partial interest clause is so that the limit scales in the same proportions to the excess point. That is what I understand. So I'm not sure how that is actually termed in the facultative reinsurance but as I will repeat, this actually says, in this contract, it is 100 per cent to the original policy. That is what I took the fact that this excess is for that particular original policy being Devon".*

50. I am afraid I cannot accept that last sentence. Taken as a whole I repeat that the evidence establishes that the notation of "*(100%)*" in regard to an excess or limit has a recognised and established meaning in the market writing direct insurance of offshore energy risks and facultative reinsurance to the effect that the limit or excess scales to reflect the assured's interest in the relevant assets.

51. This conclusion receives further support from the exchanges with AXA in 2004. Mr Vivares' reaction was only consistent with the view that the excess would scale if *"(100%)*" was left in place. In contrast some reliance was placed by Advent on the exchanges with Mr Aasberg in 2005 when an assurance was sought that the excess did indeed scale. I confess that I was not entirely convinced by the explanation tendered by Mr Aasberg that he merely wanted something on the file. Nonetheless I conclude that he had approached the wording on the basis that it scaled and simply wanted to be assured that his conventional view was shared.

52. Advent also made much of the reaction to the claim. Undoubtedly the reactions were varied but I accept that the reluctance to treat the point as beyond argument reflected a combination of the impact of a very large claim and the input of legal advice. The point then and now was whether the reference to losses to the original placement had the effect of counteracting the usual meaning and effect of *"(100%)*". Whilst arguable, in my judgment it does not achieve any such thing. At most it was mere surplusage: the better view is that it established that the exposure was not ground up.

53. In the result I accept Gard's and AHP's case that the excess point in the Sum Insured clause in the reinsurance policy is based on the total insured value of the original lost asset and not Devon's interest in that original lost asset: in short it scales for interest

Avoidance

54. On the basis that *"(100%)"* means that the deductible scales for interest, I must now turn to consider the issue of avoidance. This arises from alleged misrepresentations made by Mr. Hilsum to Mr. Regan during the placement in 2005. I have already

mentioned the difficulties that can arise when witnesses are asked to recall oral communications after a long passage of time. The present dispute is a paradigm case for applying the observations of Lord Goff in ***Grace Shipping v. Sharp & Co*** [1987] 1 Lloyds Rep. 207 at p. 215 as regards the need to have particular regard to the contemporary documentation, the probabilities and the motives of those concerned.

55. The pleaded case on misrepresentation is set out in paragraph 37 of the Defence and Counterclaim and focuses on the period between 15 and 17 August 2005. In particular, it is contended that that period culminated as follows:

> "*On 17 August, Mr Hilsum visited Syndicate 780's box again to finalise the syndicate's participation. At that time he asked Mr. Regan to write a 5.5% line. Mr Regan's initial reply to that suggestion was negative, as he believed such a participation would exceed his authorised underwriting limit. Mr Hilsum replied with words to the effect that "reinsurers had CSL of US$400 million, were excess of US$250 million and also had the benefit of US$15 million deductible on the Energy Package"; there by indicating that the syndicate was excess of US$265 million from a ground up loss with a maximum exposure of US$135 million. Mr. Regan replied that at 5.5% the syndicate's maximum exposure was US$7,425,000, from which Mr. Hilsum did not dissent.*
>
> *If, as Gard contends, the excess level on the reinsurance differs depending on Devon's interest in the assets protected by the Original Insurance for which a claim in made, then Mr. Hilsum's representations as to the maximum liability under the excess insurance were false.* "

56. The pleaded case underwent something of a metamorphosis both in the run up to and during the course of the trial. In the event Advent's case became that Mr. Hilsum, in placing the cover, made two misrepresentations to Mr. Regan during the placement:

    a) That AHP intended to operate the OPL reinsurance by way of adjusting claims with a fixed $250 million excess level.

    b) That the excess point referred to $250 million of losses under the original policy.

    These allegations against Mr Hilsum are made against the background of an acceptance that Mr. Jones who drafted the OPL reinsurance slip in 2003 appreciated that the excess was intended to scale. In contrast Mr. Hilsum, it is submitted by Advent, did not. In the result he sought to market the risk expressly on the basis that it did not scale.

57. In support of this conclusion, Advent submitted as follows:

    a) Mr. Hilsum's evidence that he had listened in to Mr. Jones's telephone conversation with Axa Re in 2004 during which Mr. Jones explained that the OPL did scale was untrue, or at least wholly unreliable.

b) Mr. Hilsum had probably become aware of Mr. Regan's maximum line of $7.5 million when he placed the Devon Direct Excess Cover in 2003 and again when Mr. Regan wrote a 4.25% line on the facultative reinsurance in 2004. Indeed Mr. Regan had made a presentation at AHP's offices in October 2004 during which Mr. Regan claims that he disclosed his levels of authority.

c) Following the destructive impact of Hurricane Ivan in 2004, renewal focused on the $400 million CSL for named windstorms. Nonetheless, there was pressure on capacity with the withdrawal of some security. With Gard wanting a full 12.5%, it was obvious that Mr. Hilsum would want Advent to increase its subscription from 4.25%. Indeed a contemporary note of Gard suggests an expectation of a 5% line for Advent (to match that of the leader, Talbot) following discussions between Mr. Martyn and Mr. Aasberg.

d) The evidence of Mr. Regan to the following effect was reliable:

   i) On 15 August 2005, Mr Hilsum discussed the slip quotation scratched by Talbot with particular reference to the $400 million CSL.

   ii) On 16 August, Mr. Hilsum returned and explained that, with the $250 million excess level, the exposure on the reinsurance for a named windstorm in the Gulf of Mexico was $150 million. Accordingly he stated that Mr Regan could write a 5% line equating to his limit of $7.5 million.

   iii) On 17 August, Mr. Hilsum came back to seek more capacity. Mr. Regan's evidence was that Mr. Hilsum drew his attention to the original policy deductible of $15 million. Mr. Regan asserts that he worked on a calculation (with Mr. Hilsum standing over him) that this would allow him to go to 5.5 per cent. Such was only explicable if thereby it would maintain his $7.5 million limit on the basis that the total exposure was $150 million less $15 million.

e) In contrast, Mr. Hilsum's evidence, to the effect that, far from seeking to persuade Mr. Regan to take a line of 5% (let alone increase it by reference to calculations based on Mr. Regan's limit) he adopted a passive approach, offering the opportunity to Mr. Regan to sign whatever line he thought appropriate, was unreliable.

Discussion

58. I confess that I found some difficulty in accepting that Mr. Hilsum's broking manner was quite as understated as he claimed. I have little doubt that he hoped that Mr. Regan would increase his line to 5% and then to 5.5%. Indeed, it is far from clear that there was ready capacity elsewhere in the market if Mr. Regan refused. I also regard it as likely that he had some understanding of Mr. Regan's limits and may even have wondered whether Mr. Regan, having appreciated the potential impact of the line he

was writing (which in other respects was in fact well in excess of his claimed limit), had obtained special authorisation.

59. Nonetheless I have come to the firm conclusion that the allegation of misrepresentation is not made out:

a) It is highly significant that Mr. Regan even on his own account was exceeding his authorised limit in respect of fire and explosion and on-shore risks.

b) As regards exposure to named windstorms, Advent's case on the content of the alleged misrepresentations and the manner and terms into which they were expressed underwent significant variation throughout from the Defence via Mr. Regan's witness statement and oral evidence to the case put to Mr. Hilsum. AHP were in my opinion justified in their submission that this sequence bore the hallmarks of a reconstruction. Absent corroborative material, it was as likely to constitute an attempt to justify a poor underwriting decision as opposed to a genuine recollection of an underwriting decision induced by misstatements.

c) It is difficult to accept that Mr. Hilsum was the only one amongst his colleagues who thought that the excess did not scale. Not only, as I have found, does the use of "*(100%)*" have a well recognised meaning in the market but I accept Mr. Hilsum's evidence that he overheard Mr. Jones say as much to AXA in 2004.

d) Indeed the whole concept of a case in which Mr. Hilsum is alleged to have asserted (or perhaps merely implied) that the notation "*(100%)*" did not have its usual meaning is somewhat bizarre. The almost inevitable response of Mr. Regan, who fully understood the potential implications of such a notation, would be to challenge the suggestion and even to invite Mr. Hilsum to strike it out (as had AXA in 2004 and as became the situation in the succeeding year).

e) In the "*Underwriting Notes Form*" dated 9 September 2005, there is no reference to the maximum exposure being $150 million (or $135 million) or any reference to the fact that the 5.5% line represents an exposure of $7.425 million. This is all the more striking where the form for the previous year records those very statistics. Furthermore, the form was completed by Mr. Hui and then reviewed and approved by Mr. Regan. Yet Mr. Hui has no recollection of Mr. Regan saying anything about representations made to him by Mr. Hilsum.

f) AHP are also justified in placing considerable reliance on the fact that the first allegation of any misrepresentation was set out in the Defence in September 2007, although AHP's stance that the excess scaled had been made clear since December 2005. It had not even been raised with Mr. Smith at a meeting in August 2006. Indeed Mr. Regan's complaint at that stage was that the nature of the excess had, as he understood it, been discussed with other underwriters but <u>not</u> with him.

60. In summary I reject the case that Mr Hilsum made the alleged or any misrepresentations during the placement. This conclusion makes it unnecessary to grapple with the issues of materiality and inducement. Indeed absent clarity as to what representations were in fact made, such issues are not susceptible to determination. By the same token this makes it unnecessary to deal with the various issues that would have arisen in relation to Gard's alternative claim over against AHP.