Case No: FOLIO 2011 1089

Neutral Citation Number: [2011] EWHC 2487 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/10/2011

Before :

MR. JUSTICE TEARE

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Between :

A LLOYD'S SYNDICATE	**Claimant**
- and -	
X	**Defendant**

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- -

Andrew Hunter (instructed by **Clyde & Co.**) for the **Claimant**
Michael Holmes (instructed by **Hogan Lovells**) for the **Defendant**

Hearing dates: 30 September 2011

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Judgment

Mr. Justice Teare :

1. This is an application by the Claimant, a Lloyd's insurance syndicate acting on its own behalf and on behalf of other Lloyd's syndicates, for an injunction restraining the Defendant from giving expert evidence in an arbitration (between the Claimant and a Reinsurer) due to commence on 10 October 2011. The application was issued on 16 September and was heard on 30 September. In view of the proximity of the arbitration hearing the decision of the Court was required urgently.

2. This unusual, but not unprecedented, application has come about in the following way.

3. In July 2007, Clyde & Co., acting on behalf of the Claimant, instructed the Defendant (who had spent 35 years in the aviation reinsurance market) to act as an expert for the Claimant in relation to a reinsurance claim against another reinsurer ("the Other Reinsurer"). The claim concerned losses arising from the events of 9/11 which the Claimant claimed under an OLW reinsurance issued by a reinsurance pool, whose members included both Reinsurers. The Defendant's instruction is recorded in letters from Clyde & Co dated 26 July 2007 and 7 September 2007. His opinion was sought on a number of issues but they did not include what is known as the "Interlocking Clause". The Other Reinsurer had not, at that stage, relied upon that clause.

4. At the time the Defendant was acting as a consultant to the Reinsurer on unrelated matters. The Claimant and the Reinsurer were in dispute (the very dispute which is to be arbitrated in October 2011) and so on 20 September 2007 Clyde & Co emailed the Defendant and told him that the Claimant had a separate dispute with The Reinsurer and was "especially anxious that nothing about the [*Other Reinsurer*] claim leaks through to [t*he Reinsurer*] ie totally confidentiality".

5. The Other Reinsurer arbitration was not progressed in 2007 and the Defendant closed his file in November 2007. However by January 2009 the matter had become live again and Clyde & Co wrote to the Defendant asking him to resume his role. At this stage the issues in the Other Reinsurer arbitration still did not include the Interlocking Clause.

6. However, by February 2009 the Reinsurer had rejected the separate claims made against it on the reinsurance on grounds which included the contention that the Interlocking Clause applied to reduce the claim. The Claimant believed that the Reinsurer and the Other Reinsurer might cooperate and on the 4th March 2009 the Reinsurer told the Claimant that they and the Other Reinsurer had met to discuss their defences. It was feared that the Other Reinsurer might seek to raise the Interlocking Clause issue through expert evidence in its arbitration. That is exactly what happened. The Other Reinsurer served an expert report from a Mr Z on 13 March 2009 which raised the Interlocking Clause issue.

7. On 16 March 2009 the Defendant was provided by Clyde & Co. with a copy of Mr. Z's report. Up until this time he had been unaware of any reliance being placed on the Interlocking Clause. The next day he had a discussion with Mr. B of Clyde & Co. and spent about half an hour reading the report. Paragraphs 45 and 46 of the report dealt with the Interlocking Clause.

8. It is necessary to set out the Interlocking Clause:

> "In the event of a loss occurring hereunder for any sum in excess of the Priority of this Contract involving two or more policies accepted by the Reinsured attaching to different periods of reinsurance, then such Priority shall be reduced to that percentage thereof which the Reinsured's settled loss(es) on such policy(ies) attaching to the period of this Contract bears to the total of the Reinsured's settled losses arising out of all such policies contributing to the loss. The Indemnity shall likewise be computed in the same manner."

9. The issue which has arisen with respect to this clause may, for the purposes of this application, be expressed shortly. It is whether the clause operates so as to apportion losses between different periods of reinsurance, irrespective of whether the insured had reinsurance for the periods in question.

10. Mr Z's view for the Other Reinsurer was that the Interlocking Clause applied irrespective of whether the insured had reinsurance for the periods in question.

11. When reading Mr. Z's opinion on the Interlocking Clause the Defendant wrote "agree" next to it and underlined the words "different periods of reinsurance" in the quoted Interlocking Clause. The Defendant has said that he disagreed with Mr. Z's use of the term "underwriting year" in his explanation of his opinion because the clause used the phrase "periods of reinsurance". Counsel for the Claimant cast doubt on this evidence but it is consistent with the Defendant's underlining of the phrase "periods of reinsurance." I do not consider that I can reject the Defendant's evidence.

12. Thereafter there were discussions between the Claimant, Clyde & Co. and the Defendant. Two of these are of significance; a telephone call lasting about an hour on 25 March 2009 between Mr. B of Clyde & Co. and the Defendant and a meeting on 7 April 2009 between Mr. B, representatives of the Claimant and the Defendant.

13. There is no note of the telephone call on 25 March 2009. Mr. B has a recollection of it, though it is common ground that his recollection was at fault in that he thought the conversation took place at a meeting. The Defendant's recollection of the call is that the

Interlocking Clause was discussed and that he said that he generally agreed with Mr. Z's analysis of it. Mr. B's recollection of the meeting is more detailed. He recalls that Mr. Z's opinion was discussed and that they had a more general discussion about the Interlocking Clause and the steps that a placing broker would take when placing an RAD ("risks attaching during") reinsurance. There was also a discussion about making claims on such a policy. Mr. B put hypothetical scenarios to the Defendant. The Defendant remained of the view that Mr. Z's opinion was correct. After the discussion Mr. B thought that it would be necessary to "work through some examples with [*the Defendant*] to test his understanding, conclusions and thinking on the issue of interlocking." Accordingly a meeting was arranged which would be attended by representatives of the Claimant and the Defendant.

14. That meeting took place on 7 April 2009. An attendance note was kept of that meeting by Ms. K of Clyde & Co. The note commences by saying that the purpose of the meeting was to hear the Claimant's views on how the Interlocking Clause operated and to try to understand the differences between the Claimant's and the Defendant's interpretation of the clause. The Claimant's contention was that the clause did not apply to reinsurance periods in respect of which the Claimant did not have a policy of reinsurance. It is clear from that note that the Defendant maintained his opinion and relied in particular on the phrase "different periods".

> "[The Defendant] said that LSW304A is a standard clause, and the wording does not say what [the Claimant] contends. The clause talks about "different periods", not just from 1 November 2000 onwards. If [the Defendant] were the broker and the intention was not to interlock backwards, he would have put specific wording to that effect. The fact that there is no prior policy does not matter; [the Defendant] would still expect a clause saying that the Interlocking Clause should not apply backwards."

15. It is also clear that Mr. B, having put forward the Claimant's interpretation of "periods of reinsurance", then put questions to the Defendant which were designed to persuade him that the Claimant's view of the clause was correct. The Defendant is recorded as saying that "he is now grappling with the idea of whether he would be happy to argue [the Claimant's] interpretation, now that he has been advised of the specifics of the case." There followed a discussion about the origin and purpose of the clause and how the members of the arbitration panel might decide the issue.

16. After that meeting, perhaps later that day, the Defendant informed Mr. B that he did not share the Claimant's view as to the interpretation of the Interlocking Clause. In due course in May 2009 the Defendant gave evidence in the Other Reinsurer arbitration on issues other than the Interlocking Clause.

17. In May 2010 the Claimant, in a separate arbitration, pleaded its case against the Reinsurer. At paragraph 24(d) it set out its allegations as to the proper construction of the Interlocking Clause.

18. In June 2010 the Reinsurer pleaded its case against the Claimant. Paragraph 24(d) of the claim was denied.

19. In October 2010 the Defendant accepted instructions to provide expert evidence for the Reinsurer in relation to the Interlocking Clause. He accepts that this is the same clause and same issue which arose in the Other Reinsurer arbitration. Prior to this time he had been unaware that the Reinsurer had raised any issue with the Claimant about the operation of the Interlocking Clause. He disclosed to the Reinsurer that he had acted as an expert witness for the Claimant in the Other Reinsurer arbitration but that he had not discussed the Interlocking Clause in his expert report in that case. He considered carefully whether there might be a conflict but concluded that there was not because, although he had discussed the meaning of the clause with the Claimant and disagreed with the Claimant's view, he had not provided any evidence in the Other Reinsurer arbitration concerning the Interlocking Clause.

20. The Defendant provided his report to the Reinsurer in May 2011 (though it was later signed and dated on 9 September 2011).

21. The Claimant was informed that the Defendant was acting for the Reinsurer on 12 May 2011. On 27 May 2011, having retrieved the relevant documents from storage, Clyde & Co wrote to the Reinsurer's solicitors objecting to the Defendant acting as expert on the basis that he had received privileged information on the same issue while acting for the Claimant. By a letter dated 1 June 2011 the Reinsurer's solicitors declined to disinstruct him. They contended that (based on their discussions with the Defendant) he was not in possession of any privileged information. They also stated that he would be giving evidence of "market practice" and would not be called upon to reveal anything about discussions he may have had about the Claimant's interpretation of the Interlocking Clause.

22. There was further correspondence on this issue in June 2011. On 22 June 2011 the Defendant signed a letter confirming that he had not disclosed any privileged or confidential information to the Reinsurer's solicitors and would not do so.

23. On 24 June 2011 Clyde & Co wrote to the Reinsurer's solicitors and provided further detail of the prior engagement of the Defendant by the Claimant. They took the position that the Defendant's undertaking was insufficient in circumstances where he did not accept that he was in possession of privileged information. The Claimant asked the tribunal to direct that the Defendant should not give evidence for the Reinsurer but

reserved the right to bring the matter before the Court. The tribunal were not told what views the Defendant had expressed to the Claimant and were not provided with the note of the meeting on 7 April 2009 but were informed that the Defendant had acted as the Claimant's "consulting expert to assist in developing our client's litigation strategy and tactics". Reference was made to the Claimant's right to protect confidential and privileged information as explained in *Prince Jeffri Bolkiah v KPMG* [1999] AC 222.

24. The Reinsurer maintained its position. On 8 July 2011 it made a formal application for permission to call expert evidence relating to the Interlocking Clause (which had not previously been granted). There was further correspondence in July and early August 2011. During this time a ruling was awaited from the arbitral panel as to whether expert evidence would be permitted.

25. In view of the passage of time, even though there was still no ruling from the tribunal, on 26 August 2011, Clyde & Co wrote a Letter before Action to the Defendant setting out its concerns in full detail. The Defendant declined to withdraw. It was however agreed that no legal action would be taken until the arbitral panel ruled on whether expert evidence should be permitted.

26. By an email dated 14 September 2011 the tribunal issued its ruling. The tribunal decided that expert evidence on a "quite specialised area of insurance" would assist and that they saw "no impediment in [the Defendant] providing such evidence." The Claimant accordingly issued this application on 15 September 2011.

27. On 16 September 2011 Clyde & Co. were provided with a copy of the Defendant's expert report dated 9 September 2011. Paragraphs 28 and 29 are as follows:

> "28. Lastly, we have the type of situation under consideration, where there is a new specific RAD reinsurance contract inuring to the benefit of existing programmes. In such cases, the standard Interlocking Clause LSW304A operates both forwards and backwards in the standard way provided for by the clause without exception."
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> "29. As stated in the clause, "in the event of a loss occurring hereunder for any sum in excess of the priority of this Contract involving two or more policies accepted by the Reinsured attaching to different periods of reinsurance…" The clause refers to "different periods of reinsurance" and not, for example, "different reinsurance contracts". From my experience in the market, the Interlocking Clause was understood to operate so as to interlock backwards in all circumstances. There was therefore never any question that interlocking would not operate backwards

just because of an absence of reinsurance cover in the prior period of reinsurance."

The parties' submissions

28. Mr. Hunter, on behalf of the Claimant, submitted that the Defendant had been engaged by the Claimant to assist in the formulation of the Claimant's case as to the interpretation of the Interlocking Clause in the course of which he was given confidential and privileged information, namely, the Claimant's case and arguments for and against that case formulated by the Claimant. It was as if the Defendant had been provided in advance with the Claimant's Skeleton Argument and counsel's notes for cross-examination. In those circumstances the test set out in *Prince Jeffri Bolkiah v KPMG* [1999] AC 222 at p.237 applied, namely, that an injunction should be granted restraining the Defendant from misusing that confidential and privileged information unless he could prove that there was no risk of misuse. The Defendant could not discharge that burden of proof because his report showed that he had already misused the confidential and privileged information and there was a further risk that, knowing of the Claimant's argument against the Defendant's opinion, he would develop answers to meet those points. An injunction should therefore be granted restraining the Defendant from giving evidence for the Reinsurer. Such evidence would give the Reinsurer an unfair advantage.

29. In circumstances where the grant of the injunction, albeit an interim injunction, will in effect provide the Claimant with the whole relief which it seeks in the claim, the Court should only grant the injunction if, as explained in *Zockoll v Mercury* [1998] FSR 354 at pp.364-366, it is likely that the Claimant will succeed at trial. It was however accepted that the court had a discretion whether or not to issue the injunction based on where the balance of justice lay.

30. Mr. Holmes, on behalf of the Defendant, submitted that the facts of the present case were not similar to those of *Prince Jeffri Bolkiah v KPMG* [1999] AC 222 but are similar to the facts of *Meat Corporation of Namibia Limited v Dawn Meats (UK) Limited* [2011] EWHC 474 (Ch) and that the appropriate test therefore was that an injunction should only be granted if the Claimant could establish that it was inevitable that the Defendant would misuse confidential and privileged information. In this case no confidential or privileged information was provided. Rather, there was a lively discussion about the meaning of the Interlocking Clause and the impact of the rival meanings. In any event, the Claimant's view as to the meaning of the clause is no longer privileged because it has been pleaded in the Reinsurer arbitration. Whilst the fact of what passed between the Claimant and the Defendant in March and April 2009 cannot be divulged the Defendant cannot be restrained from expressing his own opinion of the Interlocking Clause. The Defendant's view had always been that the clause did not require the existence of a prior policy and that view has been repeated in his expert report for the Reinsurer. There was nothing in that report which suggested that the Defendant had misused confidential or privileged information provided to the Defendant in March and April 2009. There is no property in a

witness (see *Harmony Shipping v Saudi Europe Line* [1979] 1 WLR 1380) and the Defendant should therefore be permitted to give evidence in the arbitration against the Claimant.

31. In any event, the Court should bear in mind that an experienced arbitration tribunal has expressed the view that there is no impediment to the Defendant giving evidence and the Court should be slow to interfere with the tribunal's conduct of the arbitration. This injunction has been sought at a very late stage and if granted may have a serious impact on the Reinsurer's conduct of its own case.

Discussion

32. This is a case where the Defendant was, in the context of an arbitration dispute between the Claimant and the Other Reinsurer, engaged to provide his view upon the Interlocking Clause and other matters. Having expressed his view he was informed of the Claimant's different view upon that clause and his view was tested by questions posed by the Claimant and its solicitor based upon actual or hypothetical claims scenarios. Whilst a solicitor may also give his view to a client of the meaning of a clause the service provided by the Defendant to the Claimant was not of the same scope, breadth or depth as the services typically provided by a solicitor. I do not therefore consider the facts of the case to be analogous to the facts of *Prince Jeffri Bolkiah v KPMG* [1999] AC 222 where KPMG carried out very extensive litigation support services; see p.229 C-E of the report. It is appropriate that in such a case, having regard to the scope of such litigation support services, the burden should be on the solicitor (or other provider of extensive litigation support services) to show that there is no risk of confidential or privileged information being misused. It does not follow that where an expert is engaged to provide his view of the meaning of a clause that the same stringent test should apply. Of course, to the extent to which the Defendant has been given confidential or privileged information he cannot divulge such information; see *Harmony Shipping v Saudi Europe Line* [1979] 1 WLR 1380 at p.1385 D-E per Lord Denning MR. But the question is whether the burden of proof should be on the Defendant to show that there is no risk that he will misuse confidential or privileged information as it is with solicitors or those who provide like services. I am not persuaded that such a burden should be placed on the Defendant. Like Mann J. in *Meat Corporation of Namibia Limited v Dawn Meats (UK) Limited* [2011] EWHC 474 (Ch) at paras. 38 and 41 I consider that the approach of the Court of Appeal to expert witnesses in *Harmony Shipping v Saudi Europe Line* suggests that a less stringent test is appropriate. Mann J., having considered other authorities concerned with expert witnesses, said at para.39 of his judgment that they demonstrated that an expert should not permitted to act where it was likely that the expert would be unable to avoid having resort to privileged material. Mann J. also said that the court will intervene where the use of privileged material was inevitable but I do not consider that he was saying that inevitability was the test. Rather, he was giving an example of where the court would intervene, those having been the facts of at least one of the other cases to which he had referred.

33. I do not consider that the terms of the Defendant's report show that he has already misused confidential or privileged information provided to him. Paragraphs 28 and 29 merely state his view of the Interlocking Clause, which view he had expressed to the Claimant in 2009. In his report he relies on the phrase "different periods of reinsurance". But that was the very phrase he had underlined, and therefore had in mind, when noting that he agreed with Mr. Z's opinion before talking to Mr. B on 25 March 2009.

34. The question therefore is whether it is likely that the Defendant might misuse confidential or privileged information in the future. The risk is said to be that, having already been cross-examined on 25 March and 7 April 2009, he will be able to develop answers to the cross-examination which will take place in the arbitration and so be prepared for it.

35. I accept that to the extent that factual and hypothetical scenarios or other arguments were put to the Defendant in 2009 they amount to privileged "information" given to him in confidence. However, the Defendant has no detailed recollection of the telephone conversation of 25 March 2009 and does not appear to have any detailed recollection of any scenarios or other arguments put to him on 7 April 2009. Given that the conversations took place over 2 years ago that seems likely to be true. I would be surprised if he had a detailed recollection of the scenarios or arguments points put to him to test his view in two conversations over 2 years ago. He has no note of the meeting and has purposely refrained from reading Clyde & Co.'s note of that meeting. He does recall being told that the Claimant's brokers felt that they may not have properly considered the operation of the Interlocking Clause. However, he says that that did not have any impact on his own view and that he has not divulged that piece of information. I consider it improbable that the Defendant will sit down between now and the arbitration and construct answers to points which might be put to him in cross-examination based upon the scenarios and arguments put to him in March and April 2009 in circumstances where it does not appear that he has any detailed recollection of those matters. I am therefore not persuaded that it is likely that the Defendant will misuse privileged and confidential information given him in 2009. For this reason the injunction, which would effectively give the Claimant all the relief it is seeking in the action, should not be granted.

36. If I am wrong, and it is likely that the Defendant will misuse privileged and confidential information given him in 2009 by developing answers to questions which he thinks will be put to him based upon what was put to him in 2009, I do not consider that it is appropriate to grant the injunction which has been sought. The arbitration tribunal has itself considered whether there is any impediment to the Defendant giving evidence and has concluded that there is not. It is true that the tribunal has not seen the evidence of Mr. B and, in particular, the note of the meeting on 7 April 2009 but the tribunal has considered the Claimant's objection in principle. In effect this court is being asked to interfere with the arbitration process and the management of it by the parties' chosen arbitrators. That is not something which this court does, especially where the arbitration hearing is to commence in a week's time. I am not persuaded that justice, considered objectively, requires it. Mr. Hunter accepted that all the Claimant's arguments and points

will be deployed in the arbitration. They will therefore no longer be privileged or confidential. The Claimant's complaint is thus not that there are matters which it wishes to keep confidential but which may be divulged by the Defendant but that it will lose the forensic advantage of being able to cross-examine the Reinsurer's expert without having given that expert advance notice of the questions to be put. But a considered response by the expert will surely be of greater assistance to the tribunal than one given "on the hoof". Put another way, I am not persuaded that the loss of such a forensic advantage amounts to damage which justifies the grant of an injunction which would interfere with the tribunal's management of the arbitration.

Conclusion

37. For the reasons I have endeavoured to give, in the short time available to me, the application must be dismissed.