Case No: CL-2016-000062

Neutral Citation Number: [2016] EWHC 2515 (Comm)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14th October 2016

Before:

Sir Jeremy Cooke
Sitting as a Judge of the High Court

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Between:

MIC SIMMONDS (on his own behalf and on behalf of all Members participating in Lloyd's Syndicate 994 for the 2001 year of account)	Claimants
- and -	
AJ GAMMELL (on his own behalf and on behalf of all Members participating in Lloyd's Syndicate 102 for the 2001 year of account)	Defendants

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Aidan Christie QC and James Purchas (instructed by Berwin Leighton Paisner) for the Claimants
Andrew Burns QC (instructed by DLA Piper UK LLP) for the Defendants

Hearing dates: 10th October 2016

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Judgment

Sir Jeremy Cooke:

Introduction

1. This is an appeal against an Arbitration Award dated 21 December 2015 made by two arbitrators experienced in the world of insurance and reinsurance, Messrs Tony Berry and Richard Youell. There was a dissenting opinion from Mr Jeremy Fall. Permission to appeal was given by Walker J on 17 March 2016. It is highly regrettable that this appeal has not been heard earlier.

2. By paragraph 4 of its Claim Form the Appellants (the Reinsurers) appeal on the following question of law, on which it is said that the majority Arbitrators erred:

> "What is the proper construction of the phrase "arising from one event" in the phrase "Loss" under this Contract means loss, damage, liability or expense or a series thereof arising from one event" in clause 3.1 of the Joint Excess Loss Committee Clauses in an Excess of Loss Reinsurance Policy, and, in particular:
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> Is a single event disassociated from the negligence which gave rise to the underlying liability claims capable of being 'a single event' for the purpose of the aggregation clause;
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> Where the insured's liability arises as a result of a continuing state of affairs (the failure to provide a safe system of work and equipment to multiple workers, working in disparate places over an extended period) is this to be treated as 'a single event' of negligence or does the relevant event only arise when the harm giving rise to the insured's liability occurs?"

3. As appears hereafter, the particularised sub-questions set out above are framed in such a way as to beg the major question formulated with the intention of prescribing the answer in the light of the decided authorities. It is the contention of the Reinsurers that the majority Arbitrators failed to understand and/or apply the test set out in the authorities for determining whether the losses or liabilities in issue in the arbitration did arise from one event, and that the error of law is plain on the face of their reasons; or that it can be inferred from the conclusion they reached; or that the conclusion was one which no reasonable arbitrators properly applying themselves to the question could properly reach.

4. It is the Respondent's position that no question or error of law arises as the majority Arbitrators referred to the relevant test in the authorities, applied it and reached a conclusion which was plainly correct or alternatively was well within the range of decisions that arbitrators, exercising their judgment as finders of fact or assessors of mixed questions of law and fact, could properly reach.

The Dispute

5. The Reinsurers described the dispute thus in their arguments on appeal.

6. The Respondent, Syndicate 102 ('the Reinsured'), participated in various layers of an excess liability insurance programme ('the Liability Programme') insuring the Port of New York (PONY) for the period 27 October 1998 to 27 October 2001, during which the events of 9/11 occurred. The dispute centred on whether or not claims made against PONY following the attacks on the World Trade Centre (WTC) were to be aggregated as losses or liabilities arising from that event.

7. In the hours, days, weeks, months and possibly years following the WTC attacks, there was a massive clear-up operation by PONY as the owner of the land on which the WTC had stood.

8. PONY has been the subject of multiple claims from employees following the WTC attacks. These fall into two categories:

   i) Workers' Compensation Claims: these were claims by workers (or their estates) of PONY who were at the WTC site at the time of the WTC attacks and were either struck by or became trapped under the debris ('the WCA Claims').

   ii) The Respiratory Claims: these were claims for damages for negligence by about 10,000 firemen, policemen, clean-up and construction workers and volunteers engaged in the rescue and recovery operations, debris removal and evidence gathering both at the WTC site itself and elsewhere, including the Fresh Kills landfill sites on Staten Island, in the period following the WTC attacks. The evidence before the Tribunal as to the nature of these claims was limited, but it was clear that the claimants had alleged that PONY had negligently exposed them to personal injury, inter alia by reason of its failure to provide adequate protective equipment such as respirators or to provide adequate training.

9. PONY made claims against the Reinsured pursuant to the Liability Programme and the Reinsured accepted them.

10. The Reinsurers participated in one of the reinsurance contracts which the Reinsured had taken out in respect of its liability under the Liability Programme which incorporated the JELC wording ('the Reinsurance Contract'). That contract provided:

    i) Reinsurers would provide an indemnity for all "losses howsoever and wheresoever arising in respect of business allocated by [Syndicate 102] to their … Energy and Liability Accounts".

    ii) The Limit and Excess were, respectively, US$1.5 million and US$1 million "each and every loss as defined in clause 3.1".

iii) The relevant aggregation clause at Clause 3.1 of the JELC wording provides: "'Loss' under this Contract means loss, damage, liability or expense or a series thereof arising from one event.'

11. It was accepted by the Reinsurers that, at the arbitration hearing, where the parties were represented by their solicitors, the Reinsured had submitted that on its proper construction, Clause 3.1 of the JELC Wording required the Tribunal to "examine whether there is a significant causal connection between" the Respiratory Claims and the WTC attacks and had submitted that there was a sufficiently significant link between each of the Respiratory Claims and the WTC attacks to say they "arose from one event" within the proper meaning of that phrase for the purposes of JELC Clause 3.1 and so could be aggregated together.

12. The Reinsurers submitted that on its proper construction Clause 3.1 of the JELC Wording did not permit such a broad approach to the causative requirement of the phrase "arising from one event" in the aggregation clause. Specifically, they argued that:

i) it was necessary to identify a relevant "event";

ii) PONY's failure properly to provide adequate protective equipment to around 10,000 rescue workers over the course of the clean-up operation did not constitute an "event";

iii) the Respiratory Claims arose from a continuing failure on the part of PONY to make available the relevant protection and there were as many events as there were persons who were not given adequate protection by PONY;

iv) for the purposes of the aggregation clause the WTC attacks were too remote to constitute an "event".

13. Thus, it was submitted that the individual Respiratory Claims were not capable of being aggregated together; nor could they be aggregated with the WCA Claims. The Arbitrators concluded that they could all be aggregated together as losses or liabilities arising from one event, namely the attacks on the WTC which caused the destruction of the Twin Towers.

The Award

14. At paragraphs 5-10 of the Award, the majority Arbitrators set out the issues, correctly stating that the burden of proof lay with the Reinsured to show that both the Respiratory Claims and the WCA Claims could be aggregated under the Reinsurance Contract and that the Reinsurers were bound to indemnify them in respect of the loss settlements which they had made in accordance with the Loss Settlements Clause which provided that:

> "All loss settlements by the Reinsured, including compromise settlements and the establishment of Funds for the settlement of losses shall be binding upon the Reinsurers, providing such

> settlements are within the terms and conditions of the original policies and/or contracts … and within the terms and conditions of this Contract …"

15. Under paragraphs 11-15 of the Award, the parties' respective cases were set out. The Reinsurers' case was summarised in the following way:

> "13. The Respondent denies that it is obliged to indemnify the reinsured, on various grounds. It suggests that the Respiratory claims arise not as a result of 'an event' but of a "continuing state of affairs" which followed the WTC attacks, particularly during the rescue and the ensuing clean up operations, which continued for many months and years. It further asserts that the claims arise from "the pervading alleged negligence" of PONY, including that of failing to provide adequate safety equipment.
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> 14. Secondly, the Respondent maintains that the 9/11 WTC attacks "did not have any causative effect on the Respiratory Claims (let alone being a significant cause of those claims)", and draws attention to the extended period of time and the extensive location of the clean up operations.
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> 15. Finally, the Respondent raises doubts as to whether the Claimant was in fact liable for these claims under the original PONY policies on the grounds that there were "strong defences available to the Respiratory claims". There were in the order of 10,000 claimants in this category, including firemen, policemen, construction workers and volunteers, and it is not disputed that they were potentially exposed to harmful and toxic substances. While the Respondent does not directly challenge the aggregation of the claims under the PONY policies, which were subject to New York law, they argue that in respect of the reinsurance policy there were in fact 'thousands of "events" from which the Respiratory Claims arise.' …"

16. The Arbitrators were therefore fully aware of the Reinsurers' case as set out in paragraph 12 above.

Proper settlement of claims by the Reinsured

17. Paragraph 16-20 of the Award related to the Reinsurers' submission that the claims had not been properly settled under the underlying PONY liability policies issued by the Reinsured. Reliance was placed upon advices given by lawyers representing the Reinsured to the effect that there were "strong defences" available to PONY in respect of the Respiratory Claims. It was submitted that this advice, along with an advice handed to the judge at the time of the settlement, which referred to PONY's belief that it had compelling defences to the claims called the propriety of the PONY settlement into question. The Award stated the Arbitrators' view, on this point unanimous, that the settlement was made for good practical reasons, that it made sound

commercial sense on its merits and that there was no evidence to indicate that it was made for any other unconnected business reason and so the claims were capable of falling within the terms of the underlying policies. The Arbitrators saw no good reason to question the aggregation of the claims under the original policies where the Reinsureds' lawyers had recorded that:

> "The (Respiratory) claims all arguably result from a similar time period during the clean up process, in a generally similar, centralized geographic location, with arguably no intervening agent that would clearly separate different phrases or locations of the clean up process."

18. Although not much was made of this in argument by counsel it seems to me that there is some significance in the fact that the Reinsurers were contending that there was no real liability on PONY in respect of the Respiratory Claims. The reality, as the Arbitrators and the parties would have been aware, was that, faced with some 10,000 claimants, the realities of mass tort litigation in the United States of America and the general approach adopted by the courts towards E&O Insurers, a compromise settlement where liability was highly questionable made very good sense, as well as falling within the ambit of the insurance and reinsurance contracts.

19. Whether or not that feature was significant in the context of the argument about aggregation of losses or liabilities arising from one event is not stated on the face of the Award but it is a factor which the court is entitled to take into account in looking at the Arbitrators' reasoning.

Aggregation

20. The majority Arbitrators dealt with the issue succinctly between paragraphs 23 and 30 of the Award. At paragraphs 24-26, they referred to the Court of Appeal decision in *Caudle v Sharp* [1995] LRLR 433 to the "Unities Guidelines" set out by Rix J (as he then was) in *KAC v KIC* [1996] 1 Lloyd's Rep 664 before going on in paragraphs 28 to 30 to refer to the test set out in *Scott v Copenhagen Reinsurance Co UK Ltd* [2003] Lloyd's Rep 696. Since it is common ground that these are the essential relevant authorities on the point of aggregation for a "loss arising from one event", this does not represent fertile ground for an appeal on a point of law where it is accepted, as it is here by the Reinsurers, that paragraph 28 of the Award sets out the essential test formulated by Rix LJ by reference to the prior authority and an arbitration award of Michael Kerr QC (as he then was) which had been cited in such authorities with approval.

Discussion

21. In *Axa v Field* [1996] 1 WLR 1027, Lord Mustill at paragraph 35 stated "… an event is something which happens at a particular time, at a particular place, in a particular way". It was common ground that this, in the light of the authorities, could not be constituted by a state of affairs or by a series of different negligent acts. The event in question here however was identified as

the attack on the WTC so the only issue was whether losses or liabilities arose from it.

22. I need not dwell on the earlier authorities because of the comprehensive nature of the judgment of Rix LJ in *Scott* (*ibid.*) where he recited their effect. In referring to the Court of Appeal decision in *Caudle* (*ibid.*) he set out Evans LJ's three requirements of a relevant "event" when construing a "series of losses and/or occurrences arising out of one event". Those three requirements were that there should be a common factor which could properly be described as an event, that such event satisfied the test of causation and that it was not too remote for the purposes of the insurance. He referred also to Nourse LJ's judgment in that case where he said that an event must be something out of which a loss or series of losses arise, which meant that Mr Outhwaite's state of mind and his failure to instruct himself when writing 32 run-off reinsurance contracts could not be said to constitute such an event. The losses arose out of his negligent writing of the policies and there was no event before the first of them was written.

23. In *KAC v KIC* (*ibid.*) Rix J stated that an *occurrence* (which was not materially different from an event or happening in the ordinary way), was not the same as a loss because one occurrence could embrace a plurality of losses.

> "Nevertheless, the losses' circumstances must be scrutinised to see whether they involve such a degree of unity as to justify their being described as, or as arising out of, one occurrence. The matter must be scrutinised from the point of view of an informed observer placed in the position of the insured."

Moreover, he said that when analysing this issue, the scrutiny had to be performed on the basis of the true facts. In assessing the degree of unity required, regard could be had to such factors as cause, locality and time and the intentions of the human agents. In considering the viewpoint or focus of the scrutineer in the position of the insured, regard might properly be had to the context of the perils insured against. (See page 686).

24. In giving his leading judgment in *Scott* (*ibid.*) Rix LJ emphasised that, for a loss to be said to arise out of one event, with its causative emphasis, there were four analytical elements, namely:

i) Something that could be called an event;

ii) The function of that event as being prior to the aggregated losses;

iii) A causative link between losses and event, undefined other than being looser than proximate cause; and

iv) The absence of remoteness.

To this could be added the underlying concept of aggregation itself, that of a single unifying event. In consequence, aggregation could occur if the

suggested unifying factor was something which could properly be called an event.

25. As for causation and remoteness, Rix LJ at paragraphs 63-68 of his judgment referred to *Caudle* (*ibid*.) and stated that:

> "Even though the causative link is looser than that of proximate cause, the courts will look for a nearer and more relevant cause than for a more distant one. Another way of saying this is that the causative link has to be a significant rather than a weak one."

Furthermore, at paragraph 67 he said that:

> "It seems to me ultimately to be inherent in the concept of aggregation (arising out of one event) that a significant causal link is required."

He went on to say that in the present context, the purpose and scope of the rule had to be found in the concept of aggregation inherent in the wording.

> "A plurality of losses is to be regarded as a single aggregated loss if they can be sufficiently linked to a single unifying event by being causally connected with it. The aggregating function of such a clause is antagonistic to a weak or loose causal relationship between losses and the required unifying single event. This is the more easily seen by acknowledging that once a merely weak causal connection is required, there is in principle no limit to the theoretical possibility of tracing back to the causes of causes. The question therefore in my judgment becomes: Is there one event which should be regarded as the cause of these losses so as to make it appropriate to regard these losses as constituting for the purposes of aggregation under this policy one loss?"

26. At paragraph 28 of the Award, the majority Arbitrators cited key parts of paragraph 63 and 68 of Rix LJ's judgment in the following way:

> "28. Both the Claimant and Respondent refer to Scott v Copenhagen Re (2003). LJ Rix said this in his judgment
>
> *"the causative link is looser than that of proximate cause, the Courts will look for a nearer and more relevant cause than for a more distant one. Another way of saying this is that the causative link has to be a significant rather than a weak one.*
>
> and
>
> *"A plurality of losses is to be regarded as a single aggregated loss if they can be sufficiently linked to a single unifying event by being causally connected with it."*

…"

27. In my judgment it is clear that the Arbitrators fully understood the test that they had to apply in deciding on the question of aggregation in relation to the wording at issue, namely "loss, damage, liability or expense or a series thereof arising from one event". It is clear from paragraphs 29 and 30 that they considered what guidance could be obtained from the cases to which they had been referred and the different factual circumstances in each, which, in their view, made it impossible to draw clear parallels with the matter with which they were concerned. They stated that they were influenced by their commercial experience and by common sense, perhaps what the Reinsured referred to as "intuition and impression". Under the arbitration clause each arbitrator had to be someone with more than 10 years' experience of insurance and reinsurance. At paragraph 30 they said:

> "We consider the Respondents' assertion that the attacks of 11 September 2001 did not have any causative effect on the Respiratory Claims (let alone being a significant cause of those claims) to be mistaken. While the attacks may not qualify as the proximate cause of the Respiratory Claims, the causal link between them and the attacks is clear and obvious and thus the Claims fall within the ambit of clause 3.1 of the reinsurance policy as losses arising from one event."

It is clear that the majority Arbitrators looked for and found that, regardless of any question of negligence on the part of PONY, the attack on WTC and the destruction of the Twin Towers was a significant cause of the claims.

28. Once this is recognised, as it plainly must be from the terms of the Award, all the Reinsurers' arguments fall away. The true nature of their complaint is that the Arbitrators found that there was a sufficiently significant causal connection between the attacks on the WTC and the losses when the Reinsurers argued that the connection was too weak, if it existed at all. The determination of the strength of the causal link fell into the category of assessment/decision making that arbitrators, exercising their judgment, are required to make and involves no error of law where the correct test is applied.

29. To complain that, in referring to *Caudle*, the majority Arbitrators stated that the underlying facts were of paramount importance and that they did not believe that the facts mirrored those in *Caudle* in any way is nothing to the point. To complain that, when referring to the Unities Guidelines, regard was had only to unities of time and place and not to the intention of the human agent or the context of the perils insured against, when considering causation takes the matter no further when it is seen that the majority Arbitrators applied the relevant causational test. The "unities" are merely an aid in determining whether the circumstances of the losses involve such a degree of unity as to justify their being described as "arising out of one occurrence". To complain that PONY's negligence did not constitute one event, but a series of negligent acts or omission, is of no help to the Reinsurers, nor that the approach of PONY constituted a state of affairs.

30. Once an event had been identified which is not simply a "state of affairs" such as the attack on the WTC, the only issue which mattered was the question of sufficient causal connection with the losses in question. Furthermore, any criticism of the "but for" test in the Award fails to allow for the fact that the Arbitrators were not looking for proximate cause, but for a significant cause. Whilst the majority Arbitrators stated that, without the attack on the WTC and the destruction of the Twin Towers, there would have been no survivors to be rescued and no debris to be cleared up, they found a clear and obvious causal link between the attacks and the claims for inhalation of harmful or toxic dust, even if the negligence of PONY was sufficiently causative for liability to be established. For the purpose of the Reinsurance Contract, there was a significant causal connection with the attack on the WTC which justified aggregation. To ask the question as to what would have happened if there had been no negligence is to stray into the field of fact finding which is the province of the Arbitrators.

31. In paragraph 26 of the majority Award and paragraph 10 of the dissenting opinion, it is clear that some of the Respiratory Claims emanated from those who worked or volunteered as rescuers on 11 September 2001 itself, as well as during the following days or months. The majority Arbitrators stated that they were in possession only of limited information as to the nature of the actual underlying claims and did not have extensive information as to the alleged negligence of PONY beyond suggestions about the provision of inadequate safety equipment. The result was that they could not identify any new and different phase in the rescue and clean- up operations. (See also the opinion of the Reinsureds' lawyers referred to in paragraph 17 above).

32. As was submitted by Mr Andrew Burns QC for the Reinsured, when the majority Arbitrators stated in paragraph 26 that they were satisfied that:

> "On a broad and common sense view the unities were present to a sufficient degree to satisfy the test and believed that an informed observed would reach the same conclusion in viewing the rescue and clean up operation as part and parcel of the destruction of the Twin Towers following the terrorist attack …"

that was well within the province of arbitrators in making findings of fact or forming judgments in relation to mixed questions of law and fact.

33. I was directed to the well-known decision of Mustill J (as he then was) in *The Chrysalis* [1983] 1 Lloyd's Rep 503 and the three stage process of arbitrators which he set out at page 507. There he set forth the three stages as ascertaining the facts, ascertaining the law and thirdly in the light of the facts and the law so ascertained, reaching a decision. He stated that in some cases the third stage would be purely mechanical once the law had been correctly obtained, but in other instances, that stage involved an element of judgment on the part of the arbitrator where there was no uniquely right answer to be derived from marrying the facts and the law. It was the second stage which was the proper subject matter of an appeal from arbitration and where an error of law could be demonstrated by studying the way in which an arbitrator had

set out the law in the reasons, such an appeal could properly be pursued. It was however also possible to infer an error of law in cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator had arrived at another, even if the arbitrator had stated the law in the reasons in a manner which appeared to be correct. A court could be driven to assume that he did not properly understand the principles which he had stated.

34. Mustill J did not decide whether the third stage could ever properly be the subject of an appeal under the 1979 Act which then applied. It was common ground between the parties however, that in the light of *The Baleares* [1993] 1 Lloyd's Rep 215 at 228, if it was clear that the Arbitrators had applied the wrong test in law or had reached a conclusion that no reasonable Arbitrator could properly reach by applying the right test, there was a point of law upon which an appeal could lie.

35. Here, however, as Mr Burns pointed out, it was obvious that the dust which was inhaled by the Respiratory Claimants resulted from the attack and destruction of the WTC. The majority Arbitrators referred to the fact that it was undisputed that the underlying claimants were potentially exposed to harmful and toxic substances. These resulted from the destruction of the Twin Towers in the attacks. The clean up operation followed from that attack and destruction. Whether or not the proximate cause of the injuries suffered was the negligence of PONY does not assist in determining whether or not the attacks also had a significant causal connection to the claims made and losses suffered. As Rix LJ stated in *Scott* at paragraph 81:

> "Are the losses to be aggregated as all arising from one event? That question can only be answered by finding and considering all the relevant facts carefully and then conducting an exercise of judgment. That exercise can be assisted by considering those facts not only globally and intuitively and by reference to the purpose of the clause, but also more analytically or rather by reference to the various constituent elements of what makes up one single unifying event. It remains an exercise of judgment, not a reformulation of the clause to be construed and applied."

36. The majority Arbitrators were therefore involved in an exercise of judgment as to whether or not there was a sufficiently significant causal connection and they found the causal link between the Respiratory Claims and the attacks to be clear and obvious. Whether that is seen as a finding of fact or a mixed conclusion of law and fact matters not since this is well within the ambit of an exercise of judgment with which this court will not interfere. This is plain not only from *Scott* (*ibid.*) but also from *The Nema* [1982] AC 724, *The Aegean Dolphin* [1992] 2 Lloyd's Rep 178 at 184 and *The Sylvia* [2010] 2 Lloyd's Rep 81 at 87.

37. It can readily be said that from the perspective of PONY, the claims against it all arose as a result of the attack on the WTC and the destruction of the Twin Towers with resultant debris and the exposure of people at the site at the time,

and following the event, to harmful and toxic substances, whether or not there was any failure on their part to protect those who came to rescue or clear up the site. Without any clear dividing line as to time (see above), the majority Arbitrators could properly reach the conclusion that they did. In no sense can the majority Arbitrators decision here be described as perverse or one which no reasonable arbitrator, properly directing himself, could reach. They applied the correct test and came to a sensible conclusion. There is no basis for a challenge to it in this court.

38. In these circumstances, it is not possible for the Reinsurers to establish that there was any error of law on the part of the Arbitrators, whether by reference to the wording used to express the test applied, whether by reference to the application of the test and the conclusion reached or by asserting that the conclusion is one which no reasonable arbitrator, properly directed, could reach. Whichever way the case is put, it is doomed to fail.

39. Whilst Mr Fall published a dissenting opinion in which he referred also the judgment of Rix LJ in *Scott*, and stated that he was not persuaded that all the claims could be said to arise out of the same event, this merely illustrates the point that judgment is involved in applying the test set out in *Scott* to the facts of any particular case. That, however, will not avail the Reinsurers.

The order to be made

40. Consequently, the appeal must be dismissed and it is inevitable that costs must follow the event.