Case No: A3/2017/3200

Neutral Citation Number: [2018] EWCA Civ 434
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
COMMERCIAL COURT
MR JUSTICE TEARE
[2017] EWHC 2753 (Comm)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/03/2018

Before:

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION
(Sir Brian Leveson)
LORD JUSTICE UNDERHILL
and
LORD JUSTICE LEGGATT

- -

Between:

(1) ALLIANZ INSURANCE PLC (FORMERLY CORNHILL INSURANCE PLC) **(2) SIRIUS INTERNATIONAL INSURANCE CORPORATION (PUBL) (LONDON BRANCH)**	**Appellants**
- and -	
TONICSTAR LIMITED (ON ITS OWN BEHALF AND BEHALF OF THE OTHER CORPORATE MEMBERS OF LLOYD'S SYNDICATES 62, 1861 AND 2255)	**Respondent**

- -

Mr Stephen Hofmeyr QC (instructed by **Weightmans LLP**) for the **Appellants**
Mr Andrew Burns QC (instructed by **DLA Piper UK LLP**) for the **Respondent**

Hearing date: 1 March 2018

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Judgment

LORD JUSTICE LEGGATT:

1. The Excess Loss Clauses promulgated by the Joint Excess Loss Committee (the "JELC Clauses") are a standard set of clauses in common use in the London market for excess of loss reinsurance. They contain at clause 15 of the version dated 1 January 1997 an arbitration clause which provides for disputes concerning the contract between the parties to be the subject of arbitration in London. Clause 15.5 states:

> "Unless the parties otherwise agree the arbitration tribunal shall consist of persons with not less than ten years' experience of insurance or reinsurance."

The question raised on this appeal is whether a Queen's Counsel who has practised as a barrister specialising in the field of insurance and reinsurance for more than 10 years satisfies this requirement.

Background

2. The respondent is reinsured by the appellants under a contract of excess of loss reinsurance evidenced by a broker's cover note dated 12 February 2001. The contract incorporates the JELC Clauses dated 1 January 1997. The business ultimately reinsured by the contract, in respect of losses occurring during the 2001 year, includes certain layers of excess liability insurance of the Port of New York. In 2011 the Port of New York reached a substantial settlement of claims made by around 10,000 firefighters and others involved in rescue and recovery operations following the attack on the World Trade Center on 9/11. Those plaintiffs had claimed damages for personal injury allegedly caused by (amongst other things) negligent failure to provide them with adequate protective equipment such as respirators or adequate training. The settlement resulted in a claim by the Port of New York under its liability insurance which has in turn led to a claim under the present reinsurance contract. That claim is disputed and the respondent has commenced arbitration proceedings.

3. The respondent appointed as its arbitrator Mr Tony Berry, a former underwriter. The appellants appointed Mr Alistair Schaff QC. The respondent objected to Mr Schaff's appointment and applied to the court under section 24(1)(b) of the Arbitration Act 1996 to remove Mr Schaff as an arbitrator on the ground that he does not possess the qualifications required by the arbitration agreement. The application was heard by Teare J who made the order sought by the respondent for reasons given in a judgment dated 6 November 2017.

4. Teare J said that, uninhibited by authority, he might well have decided that Mr Schaff – who, as is common ground, has considerably more than 10 years' experience of acting as counsel in insurance and reinsurance cases – satisfies the qualification requirement in clause 15.5 of the JELC Clauses. However, the judge felt bound to follow an earlier decision of the Commercial Court in *Company X v Company Y* (17 July 2000) where, on materially identical facts, Morison J held that a Queen's Counsel who had more than 10 years' experience of acting in insurance and reinsurance disputes did not qualify for appointment under the clause. That decision is not reported, but it is referred to in *Butler & Merkin's Reinsurance Law* and

Professor Merkin's textbook on *Arbitration Law*. In circumstances where the decision has stood for 17 years, Teare J was not persuaded that there were sufficiently powerful reasons for departing from it to justify him in doing so as another first instance judge. Recognising, however, that the Court of Appeal would not be constrained in the same way, he granted permission to appeal.

Company X v Company Y

5. In *Company X v Company Y* Morison J construed clause 15.5 of the JELC Clauses as requiring persons appointed as arbitrators to have not less than 10 years' experience of working within the insurance or reinsurance industry – a condition which "Mr Z QC" did not fulfil. The essential reason given for this interpretation was that, "having regard to the context in which this clause appears, it seems reasonably clear to me that the common intention of the parties who adopt the committee rules is that there should be what is called a trade arbitration" (para 10). Although the term "trade arbitration" is not a term of art, I understand Morison J to have meant by it an arbitration which is to be decided by members of a particular trade and not by anyone who does not belong to that trade.

6. The factors from which the judge inferred this intention appear to have been: (i) that the clause in question is part of a set of clauses drafted by a trade body; (ii) that clause 15.6 gives the arbitration tribunal a discretion to act upon evidence which would not be admissible in a court of law; and (iii) that the arbitration clause also provided that, if the respondent to the arbitration failed to appoint an arbitrator or if the two arbitrators appointed by the parties failed to appoint a third arbitrator, an application could be made to the Chairman of the Lloyd's Underwriters Association and the Chairman of the International Underwriting Association of London to nominate an arbitrator. Morison J accepted an argument that those Chairmen would know of suitable people within the market to appoint but were unlikely to be able to identify suitable barristers or solicitors to appoint as arbitrators. He also considered that, if clause 15.5 was not construed as confining the arbitrators to people working within the industry, the clause would be apt to include not only solicitors, barristers and accountants but also "ship owners and other people who were insureds who devoted a considerable amount of their time to insurance matters" – which the judge thought could not have been intended. He added that, in those instances in which parties intend lawyers to be capable of being appointed, he would expect express words to be used, as for example in the ARIAS standard wording which requires the arbitrators to be persons "with not less than ten years' experience of insurance or reinsurance within the industry <u>or as lawyers or other professional advisors serving the industry</u>" (my emphasis).

7. As Mr Stephen Hofmeyr QC for the appellants pointed out, the short reasons given by Morison J in his *ex tempore* judgment in *Company X v Company Y* do not at any point address the actual language of clause 15.5. The words of the clause do not say that a person appointed as an arbitrator must have been employed in the insurance or reinsurance industry for at least 10 years. The clause says only that the persons appointed must have "not less than 10 years' experience of insurance or reinsurance". It does not impose any restriction on the way in which that experience has been acquired. In particular, the clause does not say that the relevant experience must have been gained from working in the industry or that the relevant experience cannot have

been gained from providing legal or other professional services to insurers or others in the industry.

8. Nor does the context in which clause 15.5 appears justify reading any such limitation into the clause. Even if the words had been ambiguous – which in my view they are not – none of the matters referred to in the judgment tends to suggest that the parties who adopted the clause intended a "trade arbitration" in the sense in which I understand Morison J to have used that term. Thus, the fact that the JELC Clauses are drafted by a trade body cannot be taken to mean that only members of the trade are considered suitable to arbitrate disputes between parties who incorporate the clauses in their contract. As Mr Hofmeyr observed, there are many examples of standard terms drafted by trade associations which provide for arbitration of disputes but do not require persons appointed as arbitrators to be members of the trade or prevent lawyers who have never been engaged in the trade from being appointed.

9. Nor does the fact that a default power of appointment is conferred on the Chairmen of the Lloyd's Underwriters' Association and the International Underwriting Association of London signify that only persons who have worked within the industry are qualified for appointment. The assumption made in *Company X v Company Y* that those Chairmen are unlikely to be able to identify any lawyers who are suitable to be appointed as arbitrators is unsupported and I agree with Mr Hofmeyr that it is not credible. Mr Burns QC suggested that although the two Chairmen, if called on to appoint an arbitrator, would no doubt be able to identify a suitable lawyer if they wished, they could in practice be expected to nominate someone who is a member of one of their associations. I see no reason to make this assumption without evidence. But even if it be right that, in default of party choice, a market professional and not a self-employed QC would in practice be appointed, this does not demonstrate an intention to prevent the parties from appointing an experienced QC as an arbitrator if they choose to do so.

10. Finally, the fact that clause 15.6 gives the tribunal a discretion whether or not to apply strict rules of evidence does not in any way suggest an intention to disqualify lawyers from appointment, not least since an arbitration tribunal would have that discretion anyway pursuant to section 34 of the Arbitration Act 1996. A much more powerful contrary indication that lawyers are not intended to be disqualified from appointment is provided by clause 15.9, which requires the arbitration tribunal to apply the laws of England (unless the parties have chosen otherwise in the schedule to the contract). Given that the arbitrator's task is to decide the dispute by applying the law, I can see no reason to expect express words to be used if the appointment of lawyers is to be permitted. It seems to me that the opposite is the case and that, if it were intended to exclude persons with expertise in insurance and reinsurance law from appointment – either altogether or unless they have been employed within the industry – the parties could be expected to say so expressly.

11. The further point made by Morison J that the parties could not reasonably have intended that, for example, a ship owner should be capable of appointment as an arbitrator does not advance the argument. Clause 15.5 does not specify the kind or depth of experience of insurance or reinsurance which the arbitrators are required to have but it is implicit in the function of the clause that the experience must be of sufficient quality to equip the appointee to perform the role of arbitrator in an insurance or reinsurance dispute. The fact that a person owns ships for which they

have purchased insurance cover would not reasonably be regarded as satisfying the requirement. However, there is no reason to attribute to the parties an intention to prevent someone who is a ship owner from being appointed if that person does in fact have the requisite experience.

12. Accordingly, none of the matters relied on in the judgment in *Company X v Company Y* in my view provides any legitimate basis for inferring that parties who incorporate the 1997 version of the JELC Clauses in their contract intend an arbitration held pursuant to clause 15 to be a "trade arbitration", if that phrase is taken to mean that only persons who have worked in the trade may be chosen as arbitrators. In my view, the words of clause 15.5 are not capable of being read as imposing any such restriction.

The respondent's case

13. In his pithy submissions on behalf of the respondent, Mr Andrew Burns QC did not seek to support the interpretation of clause 15.5 adopted in *Company X v Company Y*. He accepted that the clause does not restrict the persons eligible for appointment as arbitrators to those who have acquired 10 years' experience of insurance or reinsurance from working within the industry and that the clause does not preclude the appointment of a lawyer who has not worked within the industry. In my view, Mr Burns was realistic and right not to attempt to defend the interpretation adopted in *Company X v Company Y* which, for the reasons I have indicated, is not defensible.

14. The interpretation urged by Mr Burns was a different one. He emphasised that clause 15.5 refers to experience of insurance or reinsurance and not to experience of insurance or reinsurance law. He accepted, as the respondent has accepted from the outset, that Mr Schaff QC has considerably more than 10 years' experience of insurance and reinsurance law. But Mr Burns submitted that the appellants have adduced no evidence to show that Mr Schaff has any experience of insurance or reinsurance "itself". He pointed out that someone who has long experience of insurance law may have little or no experience of how an underwriter sets premium, assesses risk or estimates the profitability of an insurance policy or of how an underwriter decides on the scope of cover, what endorsements to the policy wording are appropriate or what reinsurance cover to buy.

15. In support of this argument, Mr Burns took as an example a sports arbitration and submitted that a requirement that an arbitrator should have not less than 10 years' experience of sports would not be satisfied by showing that he or she had more than 10 years' experience of sports law. Similarly, a requirement to have not less than 10 years' experience of engineering or telecommunications would not be satisfied by showing that the arbitrator had 10 years' experience of advising and acting in disputes involving engineering or telecommunications. In the same way, Mr Burns submitted, experience of insurance and reinsurance law is not the same as experience of insurance and reinsurance.

16. Attractively as this short point was put by Mr Burns, I cannot accept it. Unlike sports, engineering and telecommunications, which are clearly distinct from the law regulating those activities, no similar distinction can be drawn between insurance and reinsurance law and insurance and reinsurance "itself". Insurance contracts create legal rights and obligations and those whose business it is to negotiate and draft

insurance contracts, whether as underwriters or brokers, need to have some understanding of insurance law. They need, for example, to understand the duty of an insured to disclose facts which are material to the risk to the insurer before the contract is concluded and the scope of that duty. To take another example illustrated by the facts of the present case, a competent insurer or reinsurer of liability risks needs to have sufficient legal knowledge to appreciate how, even when a policy is written on a "losses occurring" basis, claims under the policy may arise many years after the period of cover has expired. Many more examples of the relevance of legal knowledge to the contractual process could be given. Furthermore, the business of insurance and reinsurance on any view encompasses not only the placing and underwriting of risks but the handling of insurance claims. Whether or not a claims manager is legally qualified, he or she cannot in many cases properly assess whether a claim is payable without having some knowledge of the applicable law.

17. Conversely, barristers and solicitors who practise in the field of insurance and reinsurance need to understand practical aspects of the business. It is a safe inference that a lawyer who has specialised in insurance and reinsurance cases for at least 10 years will have acquired considerable practical knowledge of how insurance and reinsurance business is conducted from meeting and taking instructions from clients, having discussions with and reading reports written by expert witnesses, and from reviewing many insurance contracts and many documents generated in the placing and underwriting of insurance contracts and in the handling of claims made under such contracts. Such practical knowledge will inform and assist their legal analysis and their ability to give effective representation and advice.

18. It is precisely because the practical and legal aspects of insurance and reinsurance are so intertwined that both market professionals and lawyers who have specialised in the field for many years are commonly appointed as arbitrators in insurance and reinsurance disputes. It may well be true that, as Mr Burns submitted, many such lawyers would not know, for example, how to set an underwriting rate for a risk. But I see no reason to assume that an experienced claims manager would have that expertise either. Equally, an experienced underwriter or broker cannot be assumed to have expertise in analysing case law or in how to conduct arbitration proceedings. Both lawyers and market professionals have potentially relevant skills which make them suitable for appointment.

19. The conclusions that I would draw are, first, that there is no such thing as insurance or reinsurance "itself" which is separate and distinct from the law of insurance and reinsurance and, second, that, unless the parties have some special reason for wishing to exclude lawyers from the pool of candidates eligible for appointment, a person who has practised as a barrister specialising in the field of insurance and reinsurance for more than 10 years would naturally be regarded as qualified for appointment as an arbitrator. In these circumstances I consider that reasonable parties who incorporate the JELC Clauses into their contract of excess of loss reinsurance would understand such a barrister to have the requisite experience of "insurance or reinsurance" within the natural meaning of those words. I also consider that, if the intention were to restrict the parties' freedom of choice by excluding such a person from eligibility, a clear expression of that intention would be needed, which on any view the clause in question does not contain. I would therefore reject the respondent's argument.

Overturning a settled meaning?

20. I mentioned earlier that Teare J did not think that there were sufficiently powerful reasons to justify him in departing from the decision in *Company X v Company Y*. Factors which dissuaded him from doing so were: (i) that the wording of clause 15.5 was not altered when the Joint Excess Loss Committee produced a new edition of the JELC Clauses in 2003; (ii) that he thought the decision must be fairly well known in the reinsurance market; and (iii) that the decision has stood unchallenged for 17 years.

21. This court is not under the same constraint as a judge of first instance who should generally follow an earlier decision of a court of coordinate jurisdiction unless there is a powerful reason for not doing so: see *Willers v Joyce* [2016] UKSC 44, para 9. Nevertheless, where the meaning of a clause in a standard form of agreement has been interpreted by a court, later courts may think it right to adhere to the interpretation previously adopted even if, had they been deciding the question for the first time, they would have taken a different view. There are two reasons for this. One is that the earlier decision may form part of the relevant background against which the parties have contracted. As Clarke LJ said in *Sunport Shipping Ltd v Tryg Baltica International (UK) Ltd (The Kleovoulos of Rhodes)* [2003] EWCA Civ 12; [2003] 1 Lloyd's Rep 138, para 38:

> "Where a contract has been professionally drawn, as in the case of the Institute Clauses, the draftsman is certain to have in mind decisions of the courts on earlier editions of the clause. Such decisions are part of the context or background circumstances against which the particular contract falls to be construed. If the draftsman chooses to adopt the same words as previously construed by the courts, it seems to me to be likely that, other things being equal, he intends that the words should continue to have the same meaning."

A second, related reason for adhering to an established interpretation is the value of certainty in commercial law. Lord Denning MR made this point in *The Annefield* [1971] P 168 at 183, when he said:

> "Once a court has put a construction on commercial documents in standard form, commercial men act upon it. It should be followed in all subsequent cases. If the business community is not satisfied with the decision, they should alter the form."

In *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema) (No 2)* [1982] AC 724 at 737, Lord Diplock said:

> "It is only if parties to commercial contracts can rely upon a uniform construction being given to standard terms that they can prudently incorporate them in their contracts without the need for detailed negotiation or discussion."

Other judicial statements to similar effect are collected in Sir Kim Lewison's book on *The Interpretation of Contracts* (6th Edn, 2015) at para 4.08.

22. The fact, however, that *Company X v Company Y* has stood for 17 years should not, in my opinion, dissuade this court from holding that it was wrongly decided for either of these reasons. In the first place, as Teare J himself recognised in para 10 of his judgment, the particular contract which the court has to construe in this case was made in February 2001, only some seven months after *Company X v Company Y* was decided. In English law contracts are interpreted on the basis that their meaning is to be ascertained as at the date when the contract was made and does not subsequently change. The fact that the wording of clause 15.5 was not altered when a new edition of the JELC Clauses was issued in 2003 is therefore irrelevant in deciding what the words of the clause as used in this contract mean. Nor do I think it realistic, in circumstances where the case was not reported and there is no evidence that it had been mentioned in any textbook or other publication by February 2001, to regard the decision in *Company X v Company Y* as forming part of the background reasonably available to the parties at the time of contracting.

23. Even if the contract had been made much more recently, my conclusion would have been the same. Consideration of the background, including the legal background, against which the parties have contracted may inform what the words of the contract would reasonably be understood to mean and help to resolve ambiguity. But context must not be used to impose on the text a meaning which it cannot reasonably bear. In any case the assumption that court decisions have been taken into account when drafting or updating standard clauses should not be carried too far. Such an assumption deserves greater weight where a decision has been widely published than in a case such as this where the decision in question has never been reported and has merely been cited in two of the many books which comment on the relevant area of the law.

24. I also do not consider that the desirability of promoting certainty provides a good reason to uphold Morison J's decision. One aspect of legal certainty is consistency, but certainty is also enhanced if contractual language is interpreted in accordance with its natural meaning. If the meaning of a clause appears tolerably clear – as clause 15.5 of the JELC Clauses in my view does – a commercial party should be able to rely on that meaning without having to scour legal textbooks in order to find out whether the clause has been given a different and unnatural meaning by a court.

25. In any case, while certainty is an important value in commerce, so too is the ability of the legal system to correct error, and contracting parties may be taken to know that a decision of a court of first instance is not immutable and is capable of being overruled. The value of certainty is greatest where the members of a trade can be expected to rely on the determination of a point which is otherwise unclear. Such cases epitomise Lord Mansfield's famous *dictum* that "it is of more consequence that a rule should be certain than whether the rule be established one way or the other; because speculators in trade then know which ground to go upon": *Vallejo v Wheeler* (1774) 1 Cowp 143, 153. But if a decision is not one on which significant reliance is likely to be placed or if the consequences of such reliance are unlikely to be significant, the importance of certainty is diminished. And if a decision is untenable, it should not in any case be allowed to stand.

26. I am sceptical whether many parties who have incorporated the JELC Clauses into their contracts since *Company X v Company Y* have been aware of the decision and have contracted on the understanding that, unless agreed otherwise, the choice of

arbitrators would be limited to people within the industry. Moreover, in so far as any did, I find it hard to see that such parties can be said to have suffered any significant detriment if the range of persons eligible for appointment turns out to be wider than they expected and includes an experienced QC. This is not therefore a type of case in which overruling a long-standing decision is calculated to cause injustice to parties who have acted in reliance on it. Even if it were, a decision of a lower court ought not to be upheld by an appellate court if the appeal court is satisfied that the decision is plainly wrong. In *Re Spectrum Plus Ltd* [2005] UKHL 41, [2005] 2 AC 680, the House of Lords overruled a decision which had for many years been relied on by banks and other commercial lenders when formulating and using standard forms of charges on book debts. Lord Hope said (at para 64):

> "This is not one of those cases where there are respectable arguments either way. With regret, the conclusion has to be that it is not possible to defend the decision on any rational basis. It is not enough to say that it has stood for more than 25 years."

In the same way, in my view, the decision in *Company X v Company Y* cannot be defended and should now be overruled.

27. Although it does not affect the proper interpretation of the contract between these parties, it is worth noting that the JELC Clauses have recently been revised with effect from 1 January 2018. What is now clause 27.4 states:

> "The Arbitrators shall be persons (including those who have retired) with not less than 10 years' experience of insurance or reinsurance within the industry or as lawyers or other professional advisors serving the industry."

This makes explicit what, as I interpret it, was already the effect of the previous wording.

Conclusion

28. For these reasons, I would allow the appeal.

LORD JUSTICE UNDERHILL:

29. I agree.

THE PRESIDENT OF THE QUEEN'S BENCH DIVISION:

30. I also agree.