Neutral Citation Number: [2018] EWHC 3609 (Comm)

Case No: CL-2018-000292

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21 December 2018

Before :

MR JUSTICE ROBIN KNOWLES CBE

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Between :

(1) CATLIN SYNDICATE LIMITED (underwriting as XL CATLIN SYNDICATE 2003) **(2) XL INSURANCE COMPANY SE**	**Claimant**
- and - **WEYERHAEUSER COMPANY** **(a company incorporated in Washington State)**	**Defendant**

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Colin Edelman QC and Richard Harrison (instructed by **Kennedys Law LLP**) for the **Claimants**
Huw Davies QC and Jeremy Brier (instructed by **Addleshaw Goddard**) for the **Defendants**

Hearing dates: 28 November 2018

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Approved Judgment

I direct that pursuant to CPR PD39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version may be treated as authentic

MR JUSTICE ROBIN KNOWLES CBE

Mr Justice Robin Knowles:

Introduction

1. The First Claimant ("Catlin") and the Defendant ("Weyerhaeuser") are parties to an excess insurance policy ("the Layer 4 Policy").

2. This is the hearing of the claim of Catlin for a final order restraining Weyerhaeuser from pursuing proceedings under the policy before the District Court in the State of Washington. The basis advanced by Catlin for that order is that the parties had agreed to refer the relevant disputes for resolution by arbitration in London.

The Layer 4 Policy and the Lead Underlying Policy

3. The Layer 4 Policy provides alongside the side heading "Choice of Law and Jurisdiction":

> "NMA 1998 Service of Suit Clause (USA) (amended), as attached.
>
> As per Lead Underlying Policy."

4. Under an "Insuring Agreements" clause of the Layer 4 Policy it is provided ("the Follow Clause"):

> "[Catlin] agrees that, except as may otherwise be endorsed to this Policy, this Policy will follow:
>
> 1. The same terms, definitions, exclusions and conditions as are, at inception hereof, contained in the Lead Underlying Policy …"

5. The NMA 1998 "Service of Suit Clause" is in these terms:

> "It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Insured (or Reinsured), will submit to the jurisdiction of a Court of competent jurisdiction in the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States
>
> It is further agreed … that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal …"

6. The Lead Underlying Policy contained the following endorsements:

    a. As Endorsement 7, an endorsement providing for "any dispute, controversy or claim arising out of or relating to" the policy to be determined in London under the Arbitration Act 1996.

b. As Endorsement 8, an endorsement providing for the construction and interpretation of the policy to be governed by the laws of the State of Washington.

c. As Endorsement 9:

> "Solely for the purpose of effectuating arbitration, in the event of the failure of the Company to pay any amount claimed to be due hereunder, the Company, at the request of the Insured, will submit to the jurisdiction of any court of competent jurisdiction within the United States."

English law

7. Weyerhaeuser accept that the central issue is one of construction. It correctly submits that the task of construction involves looking at the Layer 4 Policy as a whole. That does not take away from the point that it is the parties' agreement (if any) as to dispute resolution that is the particular focus.

8. In my judgment, the analysis that results from the language used by the parties, and in the relevant context, is as follows:

   (1) The "Choice of … Jurisdiction" under the Layer 4 Policy was "As per Lead Underlying Policy" and in turn Endorsement 7 of that policy, and that was for any dispute arising out of or relating to the Layer 4 Policy to be determined in London under the Arbitration Act 1996.

   (2) In addition Catlin submitted to the jurisdiction of any court of competent jurisdiction within the United States "in the event of the failure of [Catlin] to pay any amount claimed to be due" under the Layer 4 Policy, but this was "solely for the purpose of effectuating arbitration": Service of Suit Clause attached to the Layer 4 Policy read with Endorsement 9 of the Lead Underlying Policy.

   (3) Further, Catlin had "rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States": Service of Suit Clause attached to the Layer 4 Policy.

   (4) Given (1) above, the circumstances contemplated at (2) and (3) concerned enforcing an award resulting from arbitration (or obtaining jurisdiction in the event that the parties agreed after entering into the Layer 4 Policy to dispense with arbitration).

9. The analysis recognises that there is no conflict in the drafting. A conclusion that there was a conflict would not be one that could or should lightly be attributed to commercial parties.

10. Very importantly, as highlighted in the argument of Mr Colin Edelman QC and Mr Richard Harrison for Catlin, the analysis works commercially. As I develop further below I do not consider that can be said of the alternative.

11. Mr Huw Davies QC and Mr Jeremy Brier accepted that under the alternative that Weyerhaeuser advanced, arbitration still survived as a dispute resolution mechanism, only not for money due. Mr Davies QC accepted that the words "As per Lead Underlying Policy" incorporate Endorsement 7, but "only with respect to disputes other than claims for [Catlin's] failure to pay under the Layer 4 Policy and/or if [Weyerhaeuser] elects not to rely upon the Service of Suit Clause."

12. I do not consider Mr Edelman QC overstates things in his submission that this alternative would be potentially chaotic. The alternative would see, for example, the parties arbitrating where declaratory relief was sought (as with a claim to avoid the Layer 4 Policy, made before the indemnity level was reached), but then litigating where a claim to indemnity arose.

13. Where (as here) the Layer 4 Policy sits within a number of layers (with Layers 3 and 5 at least containing, albeit by different documentation and terms, arbitration agreements providing for mandatory arbitration in London), the unlikelihood of the parties having intended this complexity increases further still.

14. I regard Mr Davies QC's alternative as reading in appreciable limits that do not find expression in the wording used, and I struggle to see why commercial parties would want to provide for those limits; it would certainly be unusual. Mr Davies QC goes on to argue that "another way of interpreting this provision" is "simply to read in the word "otherwise" before the words "[A]s per Lead Underwriting Policy" in the "Choice of Law and Jurisdiction" Clause. I do not regard reading in the word "otherwise" as a simple thing. I appreciate it is said to be consistent with the Follow Clause. But it is not found in the "Choice of Law and Jurisdiction" Clause.

15. Mr Davies QC argues that there are critical distinctions between the Lead Underlying Policy and the Layer 4 Policy. These include:

    a. The Service of Suit Clause in the Layer 4 Policy does not contain the words "Solely for the purpose of effectuating arbitration" found in Endorsement 9.

    b. The reference in the Service of Suit Clause to "failure of the Underwriters hereon to pay any amount claimed" is "unlike in the case of Endorsement 9 … not linked to the enforcement of an arbitration award".

    c. "The Layer 4 Policy does not contain an endorsement providing for arbitration in London, unlike the Lead Underlying Policy which does via Endorsement 7."

16. I do not, with respect, see these as critical distinctions. The first is as capable of being read consistently. The second is no real distinction: Endorsement 9 contains the same wording "failure … to pay any amount claimed" and if that is "linked to the enforcement of an arbitration award" in Endorsement 9 it can be taken to be so linked in the Service of Suit Clause. The third begs the question whether because of the "Choice of Law and Jurisdiction Clause" (and perhaps the Follow Clause too) the Layer 4 Policy also contains "an endorsement providing for arbitration in London … via Endorsement 7".

17. In oral argument Mr Davies QC urged that the reading of Endorsement 7 was affected by the fact that it and the Service of Suit Clause were in contradiction and the fact that the Service of Suit Clause was to have primacy. I do not consider these two facts are sound. As to the first, it is possible to read the two provisions without one being in contradiction with the other. As to the second the "Choice of Law and Jurisdiction" Clause does not assert primacy to the Service of Suit Clause. It simply refers to two things: the Service of Suit Clause and the Lead Underlying Policy. The fact that it refers to the Service of Suit Clause first is, realistically, neither here nor there without an indication that the order of reference should have any significance at all.

18. Mr Edelman QC accepted in his submissions in reply that the Service of Suit Clause was capable of operating across all areas of dispute if it was used alone. But the point was that in the present case it was not used alone but with Endorsement 7 which referred to arbitration. Where that was the case the Court should endeavour to see whether and if so how the two provisions worked together. I agree.

Washington State law

19. The conclusion reached above is one I reach applying English law, on familiar principles that were not in issue between the parties and that I do not need to rehearse. As Weyerhaeuser argued, the starting point under English law for any issue of construction or interpretation is to ascertain the objective meaning of the language which the parties have used to express their agreement.

20. However the parties differed as to the law that I should apply to construe the Layer 4 Policy, although each contended that whichever law I did apply the answer would be the same.

21. As Mr Davies QC pointed out there was much common ground as to the applicable principles of construction under Washington State law. I should record that this was largely on the basis of expert evidence before the Court and solely for the purpose of these proceedings and without prejudice to any contention the parties may subsequently seek to advance in Washington proceedings.

22. In particular it is agreed between the parties that:

    a. insurance policies are interpreted as they would be understood by the average person purchasing insurance;

    b. ambiguity in an insurance policy is resolved in favour of the insured, having regard to whether alternative or more precise language was available;

    c. a provision overriding or modifying Washington law as expressed in a. and b. above would not be enforced by a Washington Court;

    d. insurance policies are to be construed in accordance with the parties' intent as objectively manifested rather than their unexpressed subjective intent.

23. It was also agreed that subject to the effect of the New York Convention 1958 and/or the United States Federal Arbitration Act, section 48.18.200 of the Revised Code of Washington law prohibits mandatory arbitration agreements in insurance policies delivered or issued for delivery in Washington State. However and materially Weyerhaeuser does not contend in these proceedings that an arbitration agreement is unenforceable by reason of 48.18.200.

24. In result I have reached the view that Washington State law does not lead to any different conclusion to English law. I have considered the available expert reports filed by the parties, but in the end the heart of the matter is that the analysis at paragraph 8 above (taken with the paragraphs that follow) is fully supported if one applies the principles at paragraph 22 above. As to the second of those principles, this is not a case where it is necessary to accept that there is any true ambiguity.

25. Even if (as Mr Mark Parris, an expert contributing at the request of Weyerhaeuser, opines) there is a policy of Washington State law that is adverse to arbitration, that does not affect the conclusion on the question of what the parties agreed. And as I have set out above even Weyerhaeuser accepts that some matters would be arbitrated under that agreement. Moreover the point that the argument advanced by Weyerhaeuser does not work commercially would further weigh strongly against a policy of the nature described altering the conclusion as to what the parties agreed towards the conclusion advanced by Weyerhaeuser.

Conclusion

26. The parties both cited a number of authorities by way of analogy or illustration. But each had differing wording and facts, and sometimes context. I prefer to decide this case on its particular wording, fact and context. And it is Weyerhaeuser's express contention by reference to Washington State law that "[a]s under English law, it appears that each case will depend on its own wording in the context of its own particular facts".

27. I am quite clear, to the standard required on a final hearing that Catlin's construction succeeds.

28. I see every reason for Catlin having the benefit of a final order restraining Weyerhaeuser from pursuing proceedings before the District Court in the State of Washington, and I will make an order to that effect.

29. In the normal way the order will be directed to Catlin to enforce what it has agreed. The order is not in any way directed to the District Court in the State of Washington.