Claim No: CL-2022-000102

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 09/05/2024

NCN: [2024] EWHC 1078 (Comm)

Before :

NIGEL COOPER KC sitting as a High Court Judge

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Between :

(1) PREMIA REINSURANCE LIMITED **(2) ARCH REINSURANCE LIMITED**	**Claimants**
- and -	
AMTRUST INTERNATIONAL INSURANCE LIMITED	**Defendant**

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David Edwards KC and Christopher Foster (instructed by **Holman Fenwick Willan LLP**) for the **Claimants**
James Cutress KC and Max Kasriel (instructed by **DWF Law LLP**) for the **Defendant**

Hearing dates: 01 and 02 November 2023

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JUDGMENT

Nigel Cooper KC:

Introduction

1. The Claimants (individually "Premia" and "Arch") and the Defendant are all Bermudian companies involved in insurance and reinsurance. AmTrust is a part of a group of companies ("the AmTrust Group").

2. This action concerns the proper construction of clause 3.22 of a Reinsurance Framework Agreement ("the RFA") entered into by the parties on 31 December 2019. The RFA was the last of a series of transactions by which the AmTrust Group disposed of its non-life syndicates at Lloyd's.

3. Clause 3.22 of the RFA dealt with expenses, specifically with the expenses which the Claimants were obliged to pay under section 13 of four Quota Share Reinsurance Agreements ("QS Agreements") to which the Claimants became party by novation on 31 December 2019 in place of the Defendant as part of the same transaction.

4. Clause 3.22 of the RFA provided:

   "From Completion, the Reinsurers [the Claimants] shall pay the expenses set out under section 13 of the QS Agreements and in the event that:

   (a) the actual expenses to be paid by the Reinsurers under section 13 of the QS Agreements are less than £1,000,000 per calendar year, the Reinsurers shall pay AmTrust the difference between the amount of the actual expenses and £1,000,000 and such payment shall be made on the commutation of the QS Agreements on the occurrence of the 2018 YOA RITC or termination of the QS Agreements in the event that the 2018 YOA RITC does not occur; or

   (b) the actual expenses to be paid by the Reinsurers under the QS Agreements exceed £1,000,000 per calendar year AmTrust shall pay the Reinsurers the amount of expenses that exceed £1,000,000 (per calendar year) and, such payment(s) shall be made by AmTrust to the Reinsurers through the deductions set out in Clause 13.14(e)."

5. The Defendant originally concluded the QS Agreements on 02 October 2019 but the agreements were effective as at 00:01 on 01 January 2019 and remained so when the Claimants became parties to them by novation. It is common ground that the Claimants were liable under section 13 of the QS Agreements to pay expenses incurred back to that effective date and therefore over a significant period prior to completion under the RFA.

6. It is also common ground that the effect of the words "and in the event of" and the language of sub-paragraphs (a) and (b) of clause 3.22 of the RFA is to impose a £1 million threshold on responsibility for payment of relevant expenses. In the event that the actual expenses to be paid by the Claimants under section 13 of the QS Agreements are less than £1 million, the Claimants have to pay the difference to the Defendant. In the event that the expenses are more than £1 million, the Defendant has to pay the excess to the Claimants.

7. The issue of construction between the parties is to what expenses does the threshold apply? Is there a temporal restriction?

   i) The Claimants' case is that the threshold applies to all the actual expenses which they are obliged to pay under section 13 of the QS Agreements and under the promise made to the Defendant in the first two lines of clause 3.22. In other words, the threshold applies to expenses which were incurred before as well as after conclusion of the RFA on 31 December 2019.

   ii) The Defendant's case is that the threshold applies only to those expenses that fall due or are paid under section 13 of the QS Agreements after conclusion of the Framework Agreement on 31 December 2019. More specifically, the Defendant says that the threshold does not apply to expenses that became due and payable or were paid in or are referable to Q2 – Q4 2019.

8. The quantum of expenses covered by clause 3.22 of the RFA was agreed between the parties. After deduction of the £1 million threshold figure, the expenses were:

   i) For the 2019 calendar year: US$15,429,261.00; and

   ii) For the 2020 calendar year: US$2,915,525.00.

9. Each of the parties seeks declaratory relief as to the proper construction of clause 3.22 and as to the sums payable to that party by the other as a consequence of that construction together with an order for payment of the resulting sums.

Evidence

10. I had before me a core bundle with copies of the relevant agreements together with hearing bundles containing the witness statements and relevant disclosure.

11. So far as witness evidence was concerned, the Claimants adduced evidence from two witnesses:

    i) David Atkins, the COO of Premia Managing Agency Limited. His witness statement went solely to the quantum of expenses. As quantum was agreed, AmTrust indicated that it did not wish to cross-examine Mr. Atkins and he was not called. His evidence was formally admitted.

    ii) William O'Farrell, the CEO of Premia Holdings Ltd, who provided two witness statements going to background matters concerning the placing of adverse development cover by AmTrust Group with Premia. Mr. O'Farrell was called to give evidence and was briefly cross-examined.

12. AmTrust also adduced evidence from two witnesses.

    i) Peter Dewey, now head of the International Division at AmTrust Financial Services Inc ("AMFSI"), AmTrust's Parent and prior to January 2019 CEO of AmTrust at Lloyd's. Mr. Dewey provided two statements. Premia and Arch challenged certain of the evidence of Mr. Dewey as providing inadmissible evidence of negotiation and subjective intent although they were content for me

to look at the evidence *de bene esse*. Mr. Dewey's evidence was admitted without him being called subject to the challenge already mentioned.

ii) Adam Karkowsky, president of AMFSI, who also provided two witness statements. Again, the Claimants challenged certain of the evidence of Mr. Karkowsky as providing inadmissible evidence of negotiation and subjective intent although they were content for me to look at the evidence *de bene esse*. Mr. Karkowsky was called and was briefly cross-examined.

13. Mr. O'Farrell and Mr. Karkowsky each gave brief oral evidence. I am satisfied that each of them was truthful and doing their best to assist the court. Their statements and oral evidence were of assistance in providing evidence of the commercial context to the RFA. Subject to the Claimants' challenge to the admissibility of evidence going to the parties' intentions and to the negotiation of the RFA, there was little, if any, dispute between the witnesses. In the end, it was not necessary for me to reach any conclusions on the admissibility of evidence from Mr. Dewey or Mr. Karkowsky going to the parties' negotiations or subjective intent because that evidence was not relied on by the Defendant.

Factual Background

14. The factual background was largely a matter of common ground.

15. Prior to January 2019, the AmTrust Group (via AmTrust International Limited ("AIL) had interests in the Lloyd's insurance business carried on by Lloyd's Syndicates 1206, 1861 and 5820 ("the Syndicates"). The Syndicates' sole corporate member was AmTrust Corporate Member Limited ("AMCML"), and they were managed by AmTrust Syndicates Limited ("AMSL") until 02 October 2019. Syndicates 1206 and 5820 ceased underwriting from the end of the 2017 Year of Account.

16. In or before January 2019, AIL decided that it wished to dispose of its interests in the insurance business of the Syndicates. It did this by a series of transactions described below.

17. In February 2019, the 2016 Year of Account of the Syndicates was reinsured to close by the Enstar Group Syndicate (2008).

18. In or around June 2019, Premia expressed an interest in purchasing the 2017 and 2018 Years of Account. Premia issued an initial letter of intent dated 02 July 2019. Following further discussions between the parties, Premia subsequently issued (a) an Offer Document for the purchase of the reinsured 2017 and 2018 Years of Account dated 24 August 2019 and (b) a new letter, described by the Defendant as a letter of intent, dated 17 September 2019 ("the September Letter"). The September Letter contained a provision for dealing with the payment of certain expenses.

19. On 02 October 2019, pursuant to a framework agreement dated 18 April 2019, ("the Canopius FA"), AMCML, which was renamed Flectat, was sold by AIL to Fortuna Holdings Limited ("Fortuna"), a Canopius group company, and the obligations of AMSL as managing agent of the Syndicates were novated to Canopius Managing Agents Limited ("CMAL"). Further Fortuna acquired the 2019 Year of Account of Syndicate 1861.

20. On the same date, in order to carve out the underwriting results of the Syndicates' 2017 and 2018 Years of Account and in accordance with the terms of the Canopius FA, AIL entered into four 100% QS Agreements with Flectat, one for each of the 2017 Years of Account of the relevant Syndicates and one for the 2018 Year of Account for Syndicate 1861. Pursuant to the Canopius FA, AIL also agreed to pay Fortuna £10 million on closing, which was for, inter alia, CMAL's management of Syndicate 1861 for the 2017 and 2018 Years of Account for the period from 02 October 2019 (when CMAL became managing agent) until the anticipated reinsurance to close of those Years of Account (in other words until early to mid 2020 and 2021 respectively). Fortuna agreed that after closing no further expenses would be allocated to it by Syndicate 1861 for the 2017 and 2018 Years of Account.

21. On 31 December 2019, the Claimants and the Defendant entered into the RFA pursuant to which the Defendant agreed to transfer the economic interest in the 2017 and 2018 Years of Account and the rights and obligations of the Defendant (or relevant AmTrust Group company) under the QS Agreements to the Claimants. This was achieved in accordance with the terms of the RFA and (pursuant to clauses 2.4 and 2.5 of the RFA) by four Deeds of Novation and Restatement dated 31 December 2019 between (among others) the Claimants and the Defendant. Under the four Deeds, the four QS Agreements were novated to the Claimants on the terms set out in the Deeds and in the QS Agreements.

22. Also on 31 December 2019, the Claimants and two entities within the AmTrust Group entered into an Amended and Restated Aggregate Reinsurance Agreement ("the Restated ADC").

The RFA

23. I deal in more detail with the provisions of the RFA when I come to consider the parties' arguments on the construction of the RFA. It is, however, helpful to set out a brief summary by way of background here.

24. Recital B to the RFA provides that the Defendant agreed to transfer and the Claimants agreed to assume the economic interest in the Years of Account and to take over the rights and obligations of the Defendant under the QS Agreements. In other words, the starting point for the purposes of construing the RFA is that, from Completion, the Claimants had agreed to assume all the rights and obligations of the Defendant under the QS Agreements. This was, of course, subject to the terms of the RFA, various of which (including clause 3.22) had the effect of writing back certain specific rights and obligations.

25. Clause 2.1 provides that the Claimants shall assume the economic interests in the Years of Account on the terms set out in the Agreement with Premia taking an 87.5% share (clause 2.2) and Arch taking a 12.5% share (clause 2.3).

26. By clause 2.4, the Claimants agree to enter the relevant Transaction Documents (which included the QS Agreements) on Completion, and from that time, to discharge and perform when due the obligations and liabilities thereunder.

27. Clause 3.1 provides that in consideration for the Claimants' assumption of obligations and entry into the documents described in clause 2 (including the QS Agreements) and

for the performance of their other obligations under the RFA, the Defendant shall transfer the benefit of the Transaction Premium calculated as at 31 March 2019 (net assets of US$600 million as set out in row 40 of Schedule 1 to the RFA) to operate on a funds withheld basis and to be settled at Completion by the transfer of the Defendant's interests in the assets remaining in the premium trust fund from the Defendant's participation in the QS Agreements.

28. Clauses 3.3 to 3.5 provide for a "roll-forward" mechanism. Pursuant to this mechanism the Transaction Premium was to be adjusted to take account of movements in certain types of income and expenditure between 31 March and 31 December 2019. The relevant expenditure did not include Expenses (being the expenses for which the Reinsurers are liable under clause 13 of the QS Agreement).

29. The Transaction Premium was calculated net of the Q1 2019 profit. Accordingly, clause 3.14 provides for the Claimants to pay to the Defendant the Q1 profit of US$19,659,361 less US$6,430,354 in respect of the GRAFT Residual Value less the Initial Enstar TSA amount of $1,064,477. This resulted in an adjusted Q1 2019 profit figure of US$12,410,477. Certain other amounts including any expenses payable by the Defendant under clause 3.22(b) were to be deducted from that figure.

30. Lloyd's related expenses accruing between 01 January and 31 March 2019 but which only became payable after Completion were to be solely for the Defendant's account under clause 3.23. Any such expenses were to be paid through deductions in clause 3.14(g).

31. It is common ground between the parties that the background facts known or reasonably available to the parties in entering the RFA include:

    i) Expenses incurred in Q2 and Q3 2019 alone were US$12,734,600 (£10,063,730) which was more than the adjusted Q1 profit of US$12,410,704.

    ii) Expenses incurred in Q1 to Q3 2019 were US$17,686,794 (£13,838,829).

    iii) Expenses for Q2 to Q4 2019 would be broadly consistent with the expenses for Q1 to Q3 2019 (save that Q4 2019 would include some CMAL managing fees which the Defendant had warranted that it had prepaid).

    iv) Expenses for the calendar year 2020 would be significantly lower than those for 2019 due to:

        a) There only being expenses for one Syndicate in 2020 as compared to expenses for three Syndicates in 2019; and

        b) The fact that the remaining open Year of Account (2018 YOA for Syndicate 1861) would be in its third and final year (with the result that the level of activity would be lower).

    v) A further reason why the Expenses for the calendar year 2020 would be expected to be significantly lower than those for 2019 is that the Defendant warranted that it had pre-paid CMAL's managing fees and expenses for the calendar year 2020. Although the Defendant also warranted that it had paid CMAL's managing

agent fees and expenses for the calendar year 2019, CMAL had only become managing agent on 02 October 2019 with the result that managing agent fees and expenses were only warranted to be paid for Q4 2019.

The QS Agreements

32. Each QS Agreement became effective on 01 January 2019. The Claimant became party to the QS Agreements in place of the Defendant (by novation) on 31 December 2019.

33. Section 11 of the QS Agreements provides that the premium payable to the Reinsurers in respect of the open years under the agreements shall comprise the relevant percentage of the original gross net premium relating to the reinsured business plus or less, as applicable, (i) investment income or losses and investment expenses relating to the reinsured business less (ii) the Expenses payable by the Reinsurers as detailed in section 13 (expenses). The Agreements were to operate on a funds withheld basis with no payment being made to Reinsurers other than in accordance with sections 9 (Underwriting FAL) and 14 (Settlement).

34. Under section 12 of the QS Agreements, the Reinsurers (the Defendant and then by novation the Claimants) have a beneficial interest in the Reinsurers' Premium and the right to manage the assets and investments relating thereto.

35. Section 13 of the QS Agreements defines the expenses payable by the Reinsurer as they relate to the reinsured year as being the relevant percentage of the Reinsured's share of (i) the operating expenses relating to the reinsured business, (ii) certain Lloyd's expenses and management agent fees as deducted by the Reinsured's managing agent in respect of the reinsured business and (iii) the distribution expenses of the Lloyd's Market Services Administration charges and Overseas Taxation less Reinsured's distribution interest.

36. Section 14 of the QS Agreements provides that premium and other income of the reinsured business shall be retained within the Premium Trust Funds and other trust funds of the member of the Syndicate for the Reinsured Year until closure of the Reinsured Year. The retained premium and income was to be utilised in accordance with the terms of the applicable trust deeds and for the settlement of claims and other underwriting liabilities of the Reinsured Business.

37. The effect of the above provisions was, therefore, that Expenses which became due and payable by Flectat would be paid from the premium trust funds on an ongoing basis, from 2019 to the anticipated reinsurance to close in early 2021. On Settlement, the Claimant would then become obliged to pay such Expenses by way of a deduction from the premium payable to the Claimants calculated as set out in the QS Agreements.

38. The overall net effect of the QS Agreements was that ultimately the Claimants would receive all the premium and income from the Reinsured Business (and would have the right to manage the investments) but would have to pay all the claims liabilities and the Expenses.

The Restated ADC

39. The Defendant and other companies in the AmTrust Group and Premia had entered into an Adverse Development Cover dated 30 June 2017 ("the ADC") pursuant to which Premia agreed to provide an indemnity of up to an aggregate level of US$1.025bn in excess of a retention of approximately US$5.962bn. Arch was not a party to the ADC.

40. The US$ 1.025bn limit under the ADC was calculated to include sums already reserved plus US$400 million of potential adverse development. As a result of adverse development on business underwritten in excess of US$400 million being reported not long after inception, the Defendant expected the US$1.025 bn limit under the ADC to be fully utilised. However, following the disposal of certain businesses, the AmTrust Group wished to amend the ADC to cover only US business produced by the US Carriers.

41. Under the proposed amendments, the Defendant would be removed as a party to the ADC and the retention would be reduced from US$5.962 bn to US$1.475bn. The limit would remain the same and the premium would also remain the same. In consideration for the amendments, cumulative quarterly limits were agreed to the amounts payable by Premia with payments in excess of such limits being deferred.

42. Premia and the Defendant entered into the Restated ADC on 31 December 2019. It is the Claimants' case that the Restated ADC and the Defendant's desire to obtain amendments to the ADC is part of the commercial matrix against which one has to test the rival constructions of clause 3.22. The Defendant says that the ADC and amendments to it are irrelevant to the process of construction.

Principles applicable to the issue of construction

43. The relevant principles are well-known and were a matter of common ground between the parties.

44. They were explained by Lord Neuberger in Arnold v Britton [2015] AC 1619 at [15]:

"When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean" to quote Lord Hoffmann in Chartbrook Ltd v Persimmon Homes Ltd [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

45. In relation to the relevance of facts known to the parties, Lord Neuberger went on at [21]:

"When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time that the contract was made, and which were known or reasonably available to both parties. Given that a contract is a bilateral, or synallagmatic, arrangement involving both parties, it cannot be right, when interpreting a contractual provision, to take into account a fact or circumstance known only to one of the parties."

46. The Defendant also pointed to the principle that if there are two possible constructions, the court is entitled to prefer the construction which is consistent with business common sense and to reject the other; Rainy Sky SA v Kookmin Bank [2011] 1 WLR 2900 at [21] per Lord Clarke. This pre-supposes of course, that one can identify objectively what makes business common sense in the particular case and also that one of the possible interpretations is inconsistent with that business common sense; something which Christopher Clarke LJ addressed in the decision of the Court of Appeal in Wood v Capita [2015] EWCA Civ 839 at [29] to [31]:

"29. Care must, however, be taken in using "business common sense" as a determinant of construction. What is business common sense may depend on the standpoint from which you ask the question. Further the court will not be aware of the negotiations between the parties. What may appear, at least from one side's point of view, as lacking in business common sense may be the product of a compromise which was the only means of reaching agreement. ...

30. Businessmen sometimes make bad or poor bargains for a number of different reasons such as a weak negotiating position, poor negotiating or drafting skills, inadequate advice or inadvertence. If they do so, it is not the function of the court to improve their bargain or make it more reasonable by a process of interpretation which amounts to rewriting it. Thus:

31. In effect a balance has to be struck between the indications given by the language and the implications of rival constructions. The clearer the language the less appropriate it may be to construe or confine it so as to avoid a result which could be characterised as unbusinesslike. The more unbusinesslike or unreasonable the result of any given interpretation the more the court may favour a possible interpretation which does not produce such a result and the clearer the words must be to lead to that result. Thus, if what is prima facie the natural reading produces a wholly unbusinesslike result, the court may favour another, even if less obvious, reading. ..."

47. Similar sentiments were expressed by the Court of Appeal in the Merthyr Tydfil case discussed below at [49] and following.

48. In the Supreme Court in Wood [2017] AC 1173 at [10] – [12], Lord Hodge drew together the various principles governing contractual construction:

"10. The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. ...

11. Lord Clarke of Stoney-cum- Ebony JSC elegantly summarised the approach to construction in the Rainy Sky case [2011] 1 WLR 2900, para 21f. In the Arnold case [2015] AC 1619 all of the judgments confirmed the approach in the Rainy Sky case: Lord Neuberger of Abbotsbury JSC, paras 13 -14, Lord Hodge JSC, para 76 and Lord Carnworth JSC, para 108. Interpretation is, as Lord Clarke JSC stated in the Rainy Sky case (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (the Rainy Sky case, para 26, citing Mance LJ in Gen Insurance Co Ltd v. Tai Ping Insurance Co Ltd (No. 2) [2001] 2 All ER (comm) 299, paras 13, 16) and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: the Arnold case, paras 20, 77. Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.

12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: the Arnold case, para 77 citing in In re Sigma Finance Corpn [2010] 1 All ER 571, para 12 per Lord Mance JSC. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

49. Both parties relied on the decision of the Court of Appeal in Merthyr (South Wales) Limited v Merthyr Tydfil County Borough Council [2019] EWCA Civ 526 for the principles governing when information or documents relating to the negotiations leading to the making of a contract may be admissible evidence.

50. Having reviewed the relevant authorities, Leggatt LJ. set out the relevant principles:

"51. In my view, the relevant principles of law are clear in the light of the decision of the House of Lords in the Chartbrook case and can be summarised as follows.

52. It is established law that, as stated by Lord Wilberforce in Prenn v Simmonds [1971] 1 WLR 1381, 1384-5 , previous documents may be looked at to show the surrounding circumstances and, by that means, to explain the commercial or business object of a contract. No doubt was cast on that principle in the Chartbrook case and the passage from the judgment of Lord Wilberforce which includes this proposition was cited with approval in Arnold v Britton [2015] UKSC 36; [2015] AC 1619 , para 15, and Wood v Capita Insurance Services Ltd [2017] UKSC 24; [2017] AC 1173 , para 10. It is an approach which, as Lord Wilberforce noted, can be traced back at least to Lord Blackburn's judgment in River Wear Commissioners v Adamson (1877) 2 App Cas 743, 763 , which emphasised the importance in construing written instruments of "seeing what the circumstances were with reference to which the words were used, and what was the object, appearing from those circumstances, which the person using them had in view ..."

53. The phrase "genesis and aim of the transaction" is a composite phrase taken by Lord Wilberforce from the judgment of Cardozo J in Utica City National Bank v Gunn, 222 NY 204 (1918) , a decision of the New York Court of Appeals, which Lord Wilberforce described as following "precisely the English line" and as a judgment which "combines classicism with intelligent realism": see Prenn v Simmonds [1971] 1 WLR 1381, 1384F . The approach followed by Cardozo J was, by considering the circumstances which led to the execution of the contract, to identify the purpose of the transaction and to construe the language used in the light of that purpose. Cardozo J concluded (at 208):

> *"To take the primary or strict meaning is to make the whole transaction futile. To take the secondary or loose meaning, is to give it efficacy and purpose. In such a situation, the genesis and aim of the transaction may rightly guide our choice."*

54. Lord Wilberforce clearly saw no conflict between this approach and the rule, reaffirmed in Prenn v Simmonds , that evidence of negotiations, or of the parties' intentions, ought not to be received. (It is equally clear that Lord Blackburn had seen no such conflict, as Lord Hope observed in the Chartbrook case at para 4.) What is not permissible, as the decision of the House of Lords in the Chartbrook case confirms, is to seek to rely on evidence of what was said during the course of pre-contractual negotiations for the purpose of drawing inferences about what the contract should be understood to mean. It is also clear from the Chartbrook case that it is not only statements reflecting one party's intentions or aspirations which are excluded for this purpose but also communications which are capable of showing that the parties reached a consensus on a particular point or used words in an agreed sense. The exclusion of such evidence was justified in the Chartbrook case, not on the ground that it will always or necessarily be irrelevant, but because of the costs and other practical disadvantages that would result from relaxing the rule and because the "safety devices" of rectification and estoppel will generally prevent the exclusionary rule from causing injustice.

55. I would accept that there may be borderline cases in which the line between referring to previous communications to identify the "genesis and aim of the transaction" and relying on such evidence to show what the parties intended a particular provision in a contract to mean may be hard to draw. The present case, however, is not one of them. In my view, it very well illustrates this distinction."

51. Finally, the Court of Appeal in Merthyr Tydfil revisited the relevance of surplusage and said the following at [39], confirming the limited relevance of arguments based on redundancy:

"39. It is, however, by no means uncommon, including in professionally drafted contracts, to find provisions which are unnecessary and could, without disadvantage to either party, have been omitted. For this reason, arguments from redundancy seldom carry great weight. Many judicial observations to that effect are collected in Sir Kim Lewison's book on The Interpretation of Contracts (6th edition, 2015) at para 7.03. For example, in Arbuthnott v Fagan [1995] CLC 1396 at 1404, Hoffmann LJ, discussing a Lloyds' agency agreement, said that "little weight should be given to an argument based on redundancy", as it is "a common consequence of a determination to make sure that one has obliterated the conceptual target." More generally, in Total Transport Corp v

Arcadia Petroleum Ltd [1998] 1 Lloyds Rep 351 at 357, Staughton LJ, citing two judgments of Devlin J to similar effect, said:

> *"It is well-established law that the presumption against surplusage is of little value in the interpretation of commercial contracts."*

Sir Kim Lewison summarises the relevant principle, in terms that I would adopt, as being that "an argument based on surplusage cannot justify the attribution of a meaning that the contract, interpreted as a whole, cannot bear."

The proper construction of clause 3.22 of the RFA

The Claimants' case

52. The Claimants' case overall is that the cap and collar found in clause 3.22 applies to all the actual expenses which they are obliged to pay under section 13 of the QS Agreements including those that were incurred before as well as after the Completion of the RFA on 31 December 2019.

53. The Claimants say that both the language of the RFA and clause 3.22 in particular as well as logic support the Claimants' case rather than the Defendant's. Both suggest a congruence between the expenses which the Claimants are liable to pay under the QS Agreements and the cap and collar in clause 3.22.

54. So far as the language of the RFA is concerned, the Claimants point first to Recital (B) which they say makes clear that the Claimants were becoming parties to the QS Agreements not unconditionally but only on the terms of and subject to the conditions set out in the RFA.

55. They also point to clauses 2 and 3 of the RFA. Clause 2 obligated Premia and Arch to enter into the Deeds of Novation and Restatement and to become parties (by novation) to the QS Agreements. Clause 3 sets out the consideration which the Claimants were to be paid for agreeing to perform these obligations.

56. Clause 3 is divided by sub-headings into a number of parts. The bargain reflected in the clause operated in broadly the following way and provided for the consideration payable to the Claimants.

    i) Clause 3.1 provides that as consideration for the Claimants' assumptions of the obligations under and their entry into the documents required by the RFA, the Claimants were to have transferred to them the Transaction Premium, being net assets of $600,000,000 as set out in row 40 of Part A of Schedule 1.

    ii) Part A of Schedule 1 identified the net assets of the relevant Syndicate YOAs as at 31 March 2019 (end of Q1 2019). The net asset figure before accounting for Q1 profit was $612,410,704. Deduction of the Q1 profit gave the figure of $600,000,000.

    iii) Secondly, Clauses 3.3 to 3.6 provide what has been described as a roll-forward mechanism. The general aim of that mechanism was to account for positive and negative movements in income for the period from 01 April 2019 until 31

December 2019 (clause 3.2). Clause 3.3 sets out the adjustments that were to be made and the scheme which was to be followed.

"The Transaction Premium amount shall be rolled forward from the Start Date by subtracting [1] the returned premium, [2] loss payments and [3] allocated adjustment expenses paid from the Start Date (in accordance with the balance sheet set out in Part A of Schedule 1) to 31 December 2019 and adding to the Transaction Premium all [4] additional premiums received [5] recoveries and salvages from third parties, [6] amounts received and recovered in respect of external reinsurance and [7] the Investment Returns from the Start Date in accordance with the balance sheet set out in Part A of Schedule 1) to 31 December 2019 ("the Roll-Forward Calculation")."

iv) Accordingly, starting from the figure of $600 million as at 31 March 2019, a number of items were to be added or subtracted to reach the roll-forward amount of the Transaction Premium as at 31 December 2019. However, although the Syndicates 2017 and 2018 YOAs would have to be managed during the period from 01 April 2019 to 31 December 2019, and, although expenses would be incurred for the purposes of that management, clause 3.3 makes no provision for a deduction to be made for these expenses as part of the roll-forward mechanism.

57. The Claimants say that this last point is significant. While additional premiums and Investment Returns from 01 April 2019 were to be taken into account in the roll-forward exercise from 31 March to 31 December 2019 and while the Claimants were to benefit from them, no provision was made for the deduction, and for the Claimants to bear the burden, of Syndicate operating expenses during the roll-forward period. This was the bargain the parties made and it would seriously undermine that bargain, the Claimants say, if *sub silentio,* all expenses incurred during Q2 to Q4 2019 were wholly for the Claimants' account and fell to be set off against the premiums received and investment income earned by the Claimants during that period.

58. Thirdly, the Claimants point to clauses 3.18 and 3.21 which provide for a process of post-Completion Adjustment and involve re-assessing the Transaction Premium at three successive anniversary dates of 31 December 2022, 31 December 2023 and 31 December 2024 by reference to movements in premiums and claims since 31 March 2019. There was a profit or loss sharing mechanism such that depending on the outcome:

i) The Defendant might be liable to pay an Adjustment Premium of up to $32 million (clause 3.20); and

ii) The Claimants might be liable to pay a Premium Refund of up to $30 million (clause 3.21).

59. Clauses 3.18 and 3.19 of the RFA provide that this process of post-Completion Adjustment is to be conducted by an evaluation of the Agreed Technical Results Amount.

60. The Claimants say that what is notable about this process is that while they take into account movements in written premium between 31 March 2019 and the valuation date

as well as movements in paid and unpaid claims during the same period, just like the roll-forward mechanism they take no account of expenses in managing the Syndicate YOAs during this period. This is because, the Claimants say, expenses were dealt with separately and were subject to their own regimen in clause 3.22. They were not linked to premium or investment returns.

61. Clause 5 of the RFA sets out the arrangements by which the relevant Syndicate YOAs were to be reinsured to close. Each of the Defendant and the Claimants was to use their reasonable endeavours to exercise their rights under the agreements to which they were each party to achieve that end. The intention, and what ultimately happened was that the 2017 YOA of Syndicates 1206, 1861 and 5820 was to be closed in to the 2018 YOA of Syndicate 1861 (by February 2020) and the 2018 YOA of Syndicate 1861 was to be closed into a Premia Syndicate (by February 2021).

62. Pursuant to clause 7.1 and the warranty given by the Defendant as set out in paragraph 15 of Part A of Schedule 2, the Defendant warrants that:

"AmTrust has paid CMAL's managing agent fees and expenses for calendar years 2019 and 2020 with respect to the fees and expenses attributable to the Years of Account and, so far as AmTrust is aware, no further amounts in respect of such fees and expenses will be charged by CMAL."

63. The Claimants say that what is of note about this warranty is that it embraced both the 2019 and 2020 calendar years including the period before the Completion of the RFA. The Claimants did not know at the time of concluding the RFA what amounts had been paid and when by way of fees and expenses.

64. By way of context, the Claimants also refer to the permissible deductions which could be made from the Q1 profit. As set out in clause 3.2, the intention was that the Claimants should receive the Assets of the Syndicates YOAs rolled forward to 31 December 2019. The roll-forward exercise, as described above, involved taking into account premiums received and losses paid between 31 March and 31 December 2019 such that the Claimants assumed the economic risk of underwriting performance over that period.

65. The Claimants did not, however, assume any risk of underwriting performance for Q1 2019 itself. In other words, to the extent that the Assets of the Syndicate as at 31 March 2019 included an amount referable to the Q1 profit, that amount was to be paid over to the Defendant pursuant to clauses 3.12 and 3.14 but subject to certain deductions. The first permissible deduction concerned an item relating to capitalised information technology expenditure, the second, third and fourth deductions were referable to the Enstar transaction, the sixth permissible deduction is not relevant. The fifth and seventh permitted deductions were (i) any expenses payable by the Defendant under Clause 3.22(b) and (ii) any Lloyd's related expenses under clause 3.23.

66. The procedure for payment of the Q1 profit less permissible deductions was set out in clauses 3.15 to 3.17, namely (i) a calculation was to be prepared by the Claimants and notified to the Defendant by 14 February 2022, (ii) the Defendant had 60 days to raise any queries or any dispute in relation to the calculation; and (iii) the balancing payment was to be made by the relevant party within 15 days of the later of the Defendant's receipt of the calculation or the resolution of any dispute.

67. Turning to clause 3.22 itself, the Claimants point to the fact that although clause 3.22 consists of 13 lines, there is a single sentence divided by a colon with two sub-paragraphs separated by a semi-colon and the word 'or'.

68. As to the content of the clause, the Claimants point to the three positive obligations imposed on the parties. The first is an unconditional obligation on the Claimants and the second and third are conditional obligations which are on their face dependent on the consequences of performance of the first.

69. So far as the unconditional obligation on the Claimants is concerned, it is, from Completion, to pay the expenses set out under section 13 of the QS Agreements. The Claimants say that the words 'From Completion' followed by a comma can only naturally be interpreted as a reference to the point in time the Claimants' obligation to pay those expenses bites, namely on 31 December 2019. The words do not reference or qualify the content of the Claimants' contractual obligation. In this regard, the Claimants point to the fact that at the time when the RFA was concluded, all parties knew that the Claimants' obligation under section 13 of the QS Agreements would stretch back to 01 January 2019.

70. The second and third conditional obligations are introduced by the words "and in the event that" and are each concerned with the amount of actual expenses to be paid by the Reinsurers under section 13 of the QS Agreements. Depending on whether the amount in question was greater or lesser than £1 million per calendar year, one or other party had to make a payment.

71. The Claimants make the following points.

72. First, the language and structure of the clause strongly suggest that the subject matter of the first part of the clause and that of the two sub-paragraphs is intended to be the same. The clause consists of a single sentence and it should be construed as a consistent whole. Further, the use of the prepositional phrase "and in the event that" obviously suggests a relationship between what has gone before and that which follows. Reference is made both before and after the phrase "in the event that" to the expenses payable or paid by the Claimants under section 13 of the QS Agreements. It is natural, the Claimants say, to regard the repeated wording in the two parts of the clause as referring to the same thing.

73. In other words, if the Claimants' obligation under the first part of the clause was to pay all the expenses set out in s.13 of the QS Agreements, including expenses incurred prior to completion on 31 December 2019, then the cap and collar should be interpreted to apply to the same set of expenses.

74. Second, the reference in the two sub-paragraphs to the 'actual' expenses paid by Reinsurers under section 13 of the QS Agreements. The cap and collar were thus concerned with that which the Claimants actually paid under section 13 of the QS Agreements, which was all the expenses covered by that clause.

75. Third, there is no qualifying language in the two sub-paragraphs which suggests that the cap and collar are intended to apply only to a temporally-limited sub-set of what the Claimants are liable to pay. In other words, there is no language in either sub-paragraph

which expressly limits their application to only those expenses paid or payable by the Claimants under section 13 of the QS Agreements after 31 December 2019.

76. In short, the Claimants say that the natural interpretation of clause 3.22 is that the cap and collar apply to the whole. This result is unsurprising and there is nothing uncommercial about it. In this regard, the Claimants point to the roll-forward mechanism which deals with the period between 31 March 2019 and 31 December 2019 and note that it did not allow for the Assets to be reduced by the expenses incurred in managing the Syndicates during that period. If expenses incurred during this period had been intended to be wholly for the Claimants' account, then the omission of any deduction for expenses incurred in Q2 to Q4 2019 in the roll-forward procedure would be difficult to explain. Expenses in managing the Syndicate YOA were also not included in the process of post-completion adjustment (but are borne by the Defendant).

77. The consequence is that save for the £1 million per calendar year contribution which the Claimants agreed to make towards expenses in clause 3.22, the Claimants agreed to assume liability for the run-off of the Syndicate YOAs for a price based on the Assets as at 31 March 2019 and on movements in premium and claims since that date, leaving expenses above the £1 million figure for the Defendant.

78. The Claimants say that this cannot be said to be contrary to commercial commonsense. It simply represents the price that the Claimants have agreed to charge and is no different to a deal in which the Claimants agreed that deductions should be made for expenses incurred prior to 31 December 2019 but an additional amount is added to Transaction Premium to take account of the fact that they would have to shoulder expenses. Why should the Claimants not be able to agree a fixed contribution to expenses for each calendar year including 2019 and agree that any expenses above this are for the Defendant?

79. In response to the Defendant's arguments, the Claimants say that linguistically the language of clause 3.22 does not support an interpretation that the mechanism in the clause only applies to expenses arising after Completion.

80. Further, they say that the Defendant's construction of the clause re-locates the words "from Completion" from the beginning of the clause, where it is naturally interpreted as identifying the point in time when the Claimants' obligations bite, to the end of sub-paragraph (b) so as to qualify the expenses to which the cap and collar applies. In other words, it is re-writing the clause.

81. They also say that there is no basis for interpreting the phrase "per calendar year" to mean that the only relevant calendar years are those following Completion. There is no such express restriction in the clause.

82. In this regard, the Claimants also point to the warranty given by the Defendant in paragraph 15 of Part A of Schedule 2 to the RFA, pursuant to which the Defendant expressly warrants that it has paid CMAL's managing agent fees and expenses for calendar years 2019 and 2020; expressly identifying 2019 as a relevant calendar year for expenses for the purposes of the RFA.

83. The Claimants also say that the Defendant's reliance on clause 3.23 in support of their position is misplaced. Properly understood, the clause addresses a particular issue

which arises in relation to Lloyd's expenses, namely that they could emerge late or at unexpected times. The purpose of clause 3.23 was to ensure that Lloyd's expenses which ought to have been included in the calculation of the Q1 2019 profit payable to the Defendant under clause 3.14 of the RFA would be for the account of the Defendant even if they came in late.

84. The Claimants say that their construction of clauses 3.22 and 3.23 leaves no gap and is consistent with the remainder of the parties' bargain.

    i) Expenses in Q1 2019 are solely for the Defendant's account reflecting the fact that the Claimants assume no risk at all in this period.

    ii) Any expenses for Q2 2019 onwards that the Claimants are required to pay under section 13 of the QS Agreements are subject to the allocation of liability in clause 3.22.

85. In contrast, the Defendant's arguments lead to a position where there is an unstated gap. Clause 3.22 only applies to expenses from Completion and from 31 December 2019 onwards whereas clause 3.23 applies only to expenses in Q1 2019. Expenses in the period Q2 to Q4 are not specifically dealt with at all.

86. Finally, in relation to commercial commonsense, the Claimants make two points.

87. The Defendant contends that it would be contrary to commercial commonsense for the Defendant to agree to pay expenses due and payable in the calendar year 2019 in excess of £1 million in circumstances where they already knew that the expenses would be well in excess of £1 million. But it is common ground that the Claimants also knew that the expenses would be well in excess of £1 million and there is no reason why the Claimants would agree to bear those expenses in full.

88. Second the Claimants point to the payment of £10 million to manage the Syndicates YOAs for Q4 2019 and for 2020 and following years. In other words, the Defendant took through its payment to Canopius a significant part of the expenses of managing the Syndicate YOAs in these periods. This, it is said, undermines the Defendant's argument that the Claimants should not benefit by receiving premium and investment income without bearing the burden of expenses.

89. The Claimants ask this further question. If the Defendant was prepared in order to dispose of the Syndicates' 2017 and 2018 YOAs to pay Canopius' expenses in managing the Syndicates from 02 October 2019 onwards notwithstanding that any additional premium and investment income during this period would go to the Claimants, what is commercially odd or different about a conclusion that to the same end the Defendant would agree that the Claimants would only have to make a minimal contribution to the costs that the Defendant's own group managing agent had incurred whilst managing the Syndicates prior to 02 October 2019 for which period the Claimants would also receive premium and investment income?

The Defendant's case

90. The Defendant offered five reasons why their construction of clause 3.22 is to be preferred.

91. First , the Defendant's construction gives effect to what they say is the ordinary and natural meaning of the words used, and in particular, to the words "From Completion" as they appear at the start of clause 3.22. Those words qualify all that follows and make clear that the clause is of a forward-looking nature. In contrast, on the Claimants' construction, the words "From Completion" are mere surplusage because the Claimants' obligation to pay expenses under section 13 of the QS Agreements arises under clauses 2.4 and 8.1 in any event. Accordingly, the Claimants' contention that the words "From Completion" were solely intended to identify the point in time at which the Claimants' obligation to the Defendant under clause 3.22 arose makes little linguistic or commercial sense.

92. Further:

    i) The Claimants' construction requires the Court to read the words "per calendar year" awkwardly because on the Claimant's own case sub-clauses 3.22(a) and (b) only apply in respect of Q2 – Q4 2019 (and not the entire year).

    ii) The Defendant's construction is harmonious with clause 3.23 as it also provides that expenses accruing during Q1 2019 but only becoming due and payable after Completion shall be solely for the Defendant's account. Clause 3.23 is, in other words, an exception to what would otherwise be the position under clause 3.22.

    iii) The Defendant's construction does not lead to a gap for Q2 – Q4 2019 because under clause 2.4 of the RFA and under the QS Agreements, the Claimants are to bear the 2019 Expenses with clauses 3.22 and 3.23 adjusting the position for Expenses which become due and payable in Q2 to Q4.

93. Second, there is no reason why the parties should have chosen to say that the Claimants' obligation under clause 3.22 arose from Completion but not to have said that the same thing applies for any other provision in the RFA despite the fact that all of the Claimants' obligations under the RFA arose on Completion.

94. Third, the Claimants' construction is inconsistent with or does not sit happily with other provisions of the RFA in light of the background facts which were known or reasonably available to the parties at the time of the RFA.

    i) Expenses incurred in Q2 and Q3 2019 alone were US$12,732,460 (£10,063,730) which was more than the adjusted Q1 profit of US$12,410,704.

    ii) Expenses incurred in Q1 to Q3 2019 were US$17,686,794 (£13,838,829) and the expenses for Q2 to Q4 2019 would be broadly consistent.

    iii) Mr. O'Farrell candidly admits that he was aware at the time of the negotiations that the Expenses for 2019 would considerably exceed £1 million.

    iv) Expenses for the calendar year 2020 would be significantly lower than those for 2019 due to (i) there only being expenses for one syndicate in 2020 as compared to expenses for three Syndicates in 2019, (ii) the fact that the remaining open YOA (2018 YOA for Syndicate 1861) would be in its third and final year (with a lower level of activity) and (iii) the Defendant having warranted that it had

pre-paid CMAL's managing agent fees and expenses for 2020 but only for Q4 2019.

95. In light of the above facts, the Defendant says that the words "in the event that" in clause 3.22 are inapt for the calendar year 2019 because it was already known that the Event (expenses exceeding £1 million) had either already occurred or would inevitably occur for calendar year 2019. In contrast, an obligation to pay Expenses exceeding £1 million makes much more sense in respect of the calendar year 2020 (and 2021) because it was not known at the time of the RFA whether the 2020 Expenses would exceed £1 million.

96. Further, the Claimants' construction would render clause 3.16 of the RFA nugatory for the following reasons:

   i) As set out in paragraph 29 above, clause 3.14 provides for the Claimant to pay the Defendant an adjusted Q1 profit figure of US$12,410,704 as set out in row 38 of Schedule 1. From that figure was to be deducted certain other amounts including under clause 3.14(e) any expenses payable by the Defendant under clause 3.22(b). The net resulting amount was to be paid in accordance with clause 3.16.

   ii) Clause 3.16 provides *"To the extent that the calculation in Clause 3.14 results in a positive amount, the Reinsurers shall pay to Amtrust the absolute value of such positive amount [...]"*.

   iii) If the Claimants are correct that the expenses payable by the Defendant under clause 3.22(b) includes Expenses in respect of 2019, the effect would be that the calculation in clause 3.14 would inevitably result in a negative amount.

   iv) It follows that clause 3.16 could never have applied and there was no reason for the parties to have included it in the RFA. Nor would it have made sense to describe the calculation in clause 3.14 as a sum which 'Reinsurers shall pay to AmTrust' given that the calculations would result in a sum which the Defendant would pay to the Claimants.

97. Fourth, the Claimants' construction is contrary to commercial common sense given:

   i) It would be contrary to commercial common sense for the Defendant to agree to pay Expenses which are due and payable for calendar year 2019 in excess of £1million in circumstances where the parties knew that this would inevitably result in a substantial payment of over US$12.7 million to the Claimants.

   ii) Similarly, it would be contrary to commercial common sense for the Defendant to have transferred to the Claimants the benefit of the premium in relation to the QS YOAs without the Claimants having to bear the burden of any of the substantial Expenses that had become due and payable in 2019 save for those under £1 million and with the Defendant bearing the burden of such Expenses.

98. To the extent that the Claimants rely on their agreement to enter the Restated ADC as part of the commercial background against which clause 3.22 falls to be construed, the

Defendant disputes that the Restated ADC is of any relevance or assistance in construing clause 3.22 of the RFA. They also say:

i) That the Claimants' case that entry into the RFA generally was something of a condition of amending the ADC is inconsistent with the Claimants' pleaded case that each transaction has to stand on its own merits.

ii) Reliance on the ADC was an afterthought.

iii) The Second Claimant is not a party to the ADC.

iv) The Defendant's view was that the limits under the ADC were expected to be fully utilised in any event such that Premia's agreement to reduce the retention under the ADC did not carry any additional risk for Premia so the Defendant would not have any reason to make an uncommercial concession in relation to the 2019 Expenses as a quid pro quo for renegotiating the ADC.

v) Further the Restated ADC contained its own consideration for the amendments.

vi) It is unlikely that the parties would have intended to provide Premia with consideration for entering into the Restated ADC by the circuitous and hidden method of agreeing an uncommercial expenses provision within the RFA.

99. Fifth it is clear from the September Letter, which sets out the genesis and aims of the transaction (and the genesis of the obligation to pay expenses in clause 3.22) that the aim of the £1 million cap was to address Expenses incurred after Completion only. The Defendant relies on this passage from the letter:

"One key focus post transaction will be to maintain operational continuity and further build our Lloyd's platform. Per our discussion with Canopius and AmTrust in London, we would be prepared to have Canopius continue to management [sic] the runoff with a small Premia team overseeing the subject years until RiTC of the YoA 2018 in 2021. During this interim period, Premia would be prepared to pay Canopius £1 million annually (with any partial year pro rated) for the runoff of this portfolio. In the event AmTrust has already paid Canopius for this service, we would be prepared to pay this amount to AmTrust instead of Canopius."

100. The Defendant says it is thus clear that one of the aims of the transaction was that the expenses provision in clause 3.22 was only prospectively to address Expenses incurred after Completion. The Claimants' interpretation subverts this aim by construing clause 3.22 as requiring the Defendant to pay to the Claimants' known expenses of over US$10m prior to Completion.

Evidence of the genesis and aim of the transaction

101. The Claimants challenged the Defendant's reliance on the September Letter on the grounds that (i) it was inadmissible as being evidence of the parties' intentions and negotiations, (ii) that if the September Letter was an element of the factual matrix, it was not pleaded and (iii) that in any event, the Letter may have reflected the parties' intentions in September 2019 but there is no sufficient evidence to justify the conclusion

that the parties' intentions remained the same at the time when the RFA was concluded three months later.

102. Logically, the first question is whether the Defendant is entitled to rely on the September Letter in circumstances where it is accepted that the September Letter was not an element of the factual matrix identified in the Defendant's pleadings. The ordinary rule in the Commercial Court is that where proceedings involve issues of construction of a document in relation to which a party wishes to contend that there is a relevant factual matrix that party should set out in its statement of case each feature of the matrix which is alleged to be of relevance; Commercial Court Guide, 11th edition at Section C1.3(h). Further in TKC London Ltd v. Allianz Insurance plc [2020] Lloyds Rep. I.R. 631 at [90], Mr. Richard Salter KC sitting as a High Court Judge summarised the position as follows:

"... If particular facts are relied on by a party as being relevant to the interpretation of a document, those facts must be pleaded. That is so that they can be specifically responded to, whether by admission or denial and can (where necessary) be established and/or challenged by evidence. It is also so that the court can know with certainty what each party relies on as the relevant elements of the "background" knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract."

103. Nevertheless, the Defendant submitted that in circumstances where the Claimants had known since the service of witness statements in June 2023, that the Defendant intended to rely on the September Letter and had set out the basis of its reliance in the witness statement of Mr. Dewey, I should nevertheless exercise my discretion and allow the Defendant to rely on the September Letter notwithstanding that it did not form part of the Defendant's pleaded case.

104. I find, however, that in circumstances where the September Letter was not pleaded as an element of the factual matrix relied on by the Defendant for the purposes of its case on the construction of the RFA and clause 3.22, the Defendant is not entitled to rely on the September Letter in support of its case. I consider that there is no reason to depart from the ordinary position as set out in Section C.13(h) of the Commercial Court Guide and in the TKC London Ltd case. While it may be that the Claimants were aware that the Defendant had relied on the September Letter in its witness evidence, the Claimants and the Court were entitled to know with certainty the basis on which the Defendant intended to rely on the September Letter. This is particularly the case where on the face of it, the September Letter was evidence of the parties' negotiations and intentions such that it would ordinarily be inadmissible. The Claimants were entitled to know with certainty the Defendant's case that the September Letter was admissible evidence of factual matrix. Further, given that the Defendant knew in June 2023 of its intention to rely on the September Letter, there would seem to be no reason why an application to amend the Defence could not have been made in June 2023 or shortly thereafter.

105. However, even if I had been minded to permit the Defendant to rely on the September Letter notwithstanding that this reliance had not been pleaded, I agree with the Claimants that it is in any event evidence of the parties' negotiations and subjective intentions. As such, the Letter would ordinarily be inadmissible under the rule in Prenn v Simmonds. The Defendant sought to argue that the Letter was nevertheless admissible evidence because it was evidence of the genesis and aims of the transaction, namely the

RFA, and of the particular clause in that contract, namely clause 3.22. As such, the Defendant says, the Letter falls within the exception to the ordinary rule recognised in the Merthyr Tydfil case and other authorities discussed above.

106. However, I do not accept the Defendant's characterisation of the September Letter as a communication, which sets out the "genesis and aim" of clause 3.22 let alone the "RFA" more generally. On the face of it the Letter sets out the terms on which in September 2019 the Claimants would be prepared to contract with the Defendant to enable the Defendant to achieve an exit from the Lloyd's market. One element of those terms was the basis on which the Claimants were prepared to pay Canopius to manage the runoff so as to maintain operational continuity. It seems to me that the passage relied on by the Defendant in the Letter and the terms of the September Letter more generally do not go so far as to shed light on the commercial purpose of the RFA, which are in any event largely a matter of common ground. Rather, the September Letter sets out the Claimants' negotiating position at a particular time in the negotiations between the parties. As such, I do not consider that it falls within the exception to the ordinary rule in Prenn v Simmonds. Further, as was the position in the Merthyr Tydfil case, this is not a borderline case. Accordingly, the September Letter is inadmissible in evidence in any event.

107. Finally, even if I had concluded that the September Letter was admissible evidence, I do not consider that it would have assisted me in deciding how to construe the RFA and clause 3.22 in particular. The September Letter sets out the Claimants' position as at September 2019 and deals only with the basis on which the Claimants were prepared to contribute to Canopius' fees to manage the run-off. As such, I do not consider that the Letter provides any material assistance to the task of construing clause 3.22. Of far more assistance, are the agreed common ground between the parties and the terms of the RFA generally, including its recitals.

Construction of Clause 3.22 - Discussion

108. It was common ground that, in accordance with the principles of contractual construction set out above, I have to consider both the text of the RFA and the admissible factual matrix (including any issues of commercial common sense). Provided I consider both, it does not matter which I address first.

109. I find helpful in this case to consider the text of the RFA and in particular clause 3.22 first.

Textual analysis

110. Turning to the language of clause 3.22, it is common ground that the use of the words "From Completion" qualify all that follows including the content of clauses 3.22(a) and (b) and make clear that the clause is of a forward-looking nature. In other words, the Claimants are correct when they say that the words "From Completion" apply equally to the Claimants' obligation to pay the expenses set out under section 13 of the QS Agreements as well as to the operation of the mechanism for dealing with expenses set out in sub-paragraphs (a) and (b). As such, I accept the Claimants' submissions that the location of the words "From Completion" is a pointer to the fact that the words are dealing with when the Claimants' obligations arise and are not intended to define the

content of the Claimants' obligations in the sense of limiting their liability for Expenses to only those Expenses becoming due and payable after 31 December 2019.

111. The Defendant submits that if the Claimants' interpretation of clause 3.22 is correct then the words "From Completion" are mere surplusage because clause 2.4 imposes a general obligation on the Claimants to comply with their obligations under the RFA from Completion anyway. For the reasons outlined by Leggatt LJ at [39] in the Merthyr Tydfil case, I do not consider that arguments based on surplusage assist in resolving the questions of construction in this case. It does not seem to me surprising that the parties would repeat the date on which the Claimants' obligation arose in a clause dealing with the payment of expenses and in particular expenses, which (i) the parties knew to be significant and (ii) would include expenses pre-dating the date of Completion. Further clause 3.22 is not the only example of the parties using the words "From Completion" in a clause where arguably they are unnecessary. I accept the Claimants' submission that clause 8.3 is another example of such a clause.

112. Of more import for the purposes of construction is the fact that all parties to this transaction are experienced and sophisticated businesses advised by experienced legal advisers. If the parties' intentions were to exclude the 2019 calendar year from the mechanism found in sub-clauses (a) and (b) of clause 3.22 then I would have expected the parties to spell out that exclusion expressly and in clear terms, which they have not done.

113. The Defendant also submits that the Claimants' construction requires the Court to read the words "per calendar year" awkwardly because on the Claimants' own case clause 3.22(a) and (b) only apply in respect of Q2 – Q4 2019 (and not the entire year). However, as Mr. Edwards KC pointed out in oral submissions, clause 3.22 as a whole applies in principle to all the expenses that the Claimants were obliged to pay under section 13 of the QS Agreements including Q1 2019 but the parties had already accounted for and settled the Q1 expenses in the Q1 profit payment. I accept Mr. Edwards' submissions in this regard.

114. The Defendant also submitted that if the 2019 expenses are brought within clause 3.22, then the parties would not have used the words "in the event that" in the opening lines of clause 3.22 because the parties already knew that the expenses for calendar year 2019 exceeded £1 million. However, as was common ground, clause 3.22 was dealing not only with calendar year 2019 but also other calendar years, including 2020, where it was not clear at the time the RFA was concluded that the expenses would be more or less than £1 million. Given that clause 3.22 was intended to apply to all these calendar years, I do not accept that the use of the words "in the event that" supports the Defendant's interpretation of clause 3.22 or is inconsistent with the Claimants' interpretation.

115. Accordingly, as a matter of language, I prefer the Claimants' submissions as to the effect of the words "From Completion" in clause 3.22.

116. I next turn to consider which construction of clause 3.22 is consistent with the other provisions of the RFA. The Defendant refers in particular to clause 3.23 and to the roll-over mechanism in clauses 3.14 and 3.16.

117. Clause 3.23 provides that any expenses accruing during the period from 01 January 2019 to 31 March 2019, which only become due and payable after Completion will be solely for the Defendant's account. The Defendant submits that its construction of clause 3.22 is harmonious with clause 3.23 because clause 3.23 operates as an exception to how such expenses fall to be allocated as they would otherwise be addressed under the mechanism in clause 3.22(a) and (b) and therefore subject to the £1 million cap in that mechanism. In other words, the Defendant submits it is only where expenses become due and payable after Completion that they are caught by clauses 3.22 and 3.23.

118. I do not accept the Defendant's submissions. On the contrary, I find that the provisions of clause 3.23 are a further indicator that expenses under section 13 of the QS Agreements for the calendar year 2019 are generally covered by the provisions of clause 3 of the RFA Agreement.

    i) Expenses for Q1 2019 becoming due and payable before the date of Completion have been settled in the Q1 profit payment payable in accordance with clause 3.14. Expenses for Q1 2019 which become due and payable after Completion remain for the Defendant's account and are solely for the Defendant's account.

    ii) Expenses for Q2 to Q4 2019 fall within the provisions in clause 3.22 and are subject to the mechanism in clause 3.22(a) and (b).

119. I accept the Claimants' submission that if the Defendant were correct as to the relationship between clause 3.22 and 3.23, it would effectively leave a gap in relation to the expenses for Q2 to Q4 2019. The Defendant says that this is not the case because its construction of clauses 3.22 and 3.23 simply reflects a commercial bargain whereby Expenses in Q2 – Q4 2019 were to remain wholly for the Claimants' account pursuant to clauses 2.4 and 3.1 of the RFA read together with clause 14 of the QS Agreement (Settlement). However, I find that the Claimants are correct to say that there is a gap in relation to Expenses for Q2 – Q4 2019. In this regard, it is important to keep in mind that the consideration for the Claimants entering into the RFA and taking over the QS Agreements by novation is the Transaction Premium initially calculated at 31 March 2019 and then adjusted under the roll-forward mechanism in clauses 3.14 to 3.17. The Transaction Premium takes no account of Expenses. Q1 2019 expenses are addressed in the profit calculation provided for in clause 3.14 and by clause 3.23. Expenses for calendar years after 2020 are covered by the mechanism in clause 3.22 and are subject to the £1 million cap in that clause. On the Defendant's case, Q2 to Q4 2019 Expenses would then fall entirely to the Claimants and thereby effectively reduce the Transaction Premium payable to them. If this was the parties' intention, then there is a gap in the RFA which I would have expected the parties to address expressly rather than leave to a matter of extrapolation from the provisions of the RFA and the QS Agreements read together.

120. So far as the adjustment mechanism in clauses 3.14 to 3.17 is concerned, the Defendant submits that if the Q2 to Q4 2019 Expenses are taken into account, then the provisions in clause 3.16 would be nugatory because those expenses would always outstrip the Q1 profit. However, in this regard, I accept the Claimants' submissions that the Defendant's argument fails to takes account of (i) the £1 million (or US$1.3 million) contribution which the Claimants were required to pay towards the expenses for Q2 to Q3 2019 and (ii) the warranty by the Defendant that it had paid Canopius' managing agent fees and expenses for Q4 of 2019 and the expectation that there would be no

further amounts payable in respect of such fees and expenses. In other words, it wasn't inevitable at the time the RFA was concluded that the Q2 to Q4 Expenses would outstrip the Q1 profit. I also accept the Claimants' submission that in any event the parties expressly accepted that the consequences of taking the Expenses into account in the adjustment mechanism found in clauses 3.14 to 3.17 is that there might not be any sum to be paid to the Defendant. In other words, clause 3.16 has to be read together with clause 3.17 which expressly contemplates that once the calculation in 3.14 has been done, there might not be any sum to be paid to the Defendant. On the contrary, the Defendant might be required to make a payment to the Claimants. The provisions in clause 3.14 to clause 3.17 are another example of the agreement making general provision for the outcome of the calculations made pursuant to clause 3.14; something which is unsurprising even the parties were already aware of the likely amount of the expenses for Q2 and Q3 2019.

121. I have dealt above with the principal arguments by which the Defendant challenges the Claimants' construction of clause 3.22. I find that those arguments fail. The Claimants' submissions as to the proper interpretation of clause 3.22 are to be preferred both in relation to the language of the clause itself and also its inter-relationship with the other provisions of the RFA.

Factual Matrix/Commercial Common Sense

122. This is a case to which the warnings given by Christopher Clarke LJ in <u>Wood v Capita</u> about business common sense are apposite (see paragraph 46 above); in particular the warning that business common sense may depend on the standpoint from which you ask the question. Further, the relevance of business common sense may depend on how unreasonable or how unbusinesslike the result of any given interpretation may be.

123. In the present case, the Defendant says it would be contrary to commercial common sense for the Defendant to have agreed:

i) To pay Expenses that become due and payable in the calendar year 2019 in excess of £1 million, where this would result in a substantial payment of over US$12.7 million to the Claimants.

ii) To agree to pay the Claimants the benefit of the premium for the QS YOAs without the Claimants having to bear the burden of any of the substantial Expenses that had become due and payable in 2019 save for those under £1 million.

124. However:

i) While it can be said that it would be contrary to commercial common sense for the Defendant to take on the burden of the Q2 to Q4 2019 Expenses subject only to the £1 million contribution from the Claimants, it might equally be said that it would be contrary to commercial common sense for the Claimant to take on the burden of those same expenses in circumstances where they would operate to effectively reduce the Transaction Premium payable to the Claimant and were known to be a significant sum.

ii) As Mr. Karkowsky acknowledged in his second witness statement and in cross-examination, the AmTrust Group wished to exit the Lloyd's market and wished to protect itself against a possible worsening of the reserve pool.

iii) Mr. Karkowsky was also clear that he would not take on an uncommercial bargain under the RFA for the purposes of enabling the conclusion of the ADC. I accept his evidence in this respect and also accept the Defendant's argument that concluding the RFA was not a pre-condition to Premia agreeing to the amendments to the ADC. Yet, Mr. Karkowsky also recognised that there was a commercial link between the ADC and Project Anchor in that by negotiating the Project Anchor deal with Premia rather than a third party, the Defendant would gain a stronger commercial basis and leverage for renegotiating some of the terms of the ADC.

125. Overall, I find that it cannot be said that commercial common sense inevitably requires the Court to prefer the Defendant's construction of clause 3.22 over that of the Claimants. Each party had their own commercial reasons for concluding the RFA and it cannot be concluded that the Claimants' construction of clause 3.22 leads to a result which is so unbusinesslike or imprudent that the court should reject that construction in favour of the Defendant's construction.

126. It follows from the above that I do not consider that commercial common sense justifies the court in preferring the Defendant's construction of clause 3.22 over that of the Claimants.

Conclusion

127. Accordingly, I find that the Claimants are correct in their construction of clause 3.22. The words "From Completion" have the effect of defining when the Claimants' obligations arise under the RFA and do not define the content of the Claimants' obligations. In other words, the expenses that the Claimants are required to pay under clause 13 of the QS Agreements referrable to the period Q2 to Q4 2019 do fall within clause 3.22 of the RFA and are subject to the £1 million cap found contained in that clause.

128. I understand that the calculations found in Appendix 1 of the Particulars of Claim are now agreed such that the result of the calculation carried out pursuant to clause 3.14 of the RFA is that there is an overall sum payable to the Claimants of US$6,523,015.00. It would further seem in light of my findings above that the Claimants are entitled to the declaratory relief that they seek although I will hear further from the parties if there is any dispute over the particular wording of any declarations to be made.

129. However, I would be grateful for the assistance of the parties in finalising the orders to be made as a consequence of this judgment. If the parties cannot agree the form of order to be made, then I will hear the parties further on the terms of those orders.