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Case No: CL-2023-000219

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: 12/06/2024

Before :

THE HONOURABLE MR JUSTICE CALVER

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Between :

HAMILTON CORPORATE MEMBER LTD AND THE OTHER CLAIMANTS LISTED IN SCHEDULE 1 TO THE CLAIM FORM (As Amended)	**Claimants**
- and –	
(1) AFGHAN GLOBAL INSURANCE LIMITED (a company incorporated under the laws of Afghanistan) (2) ANHAM USA INC (a company incorporated under the laws of Virginia, USA) (3) ANHAM FZCO (a company incorporated under the laws of the Dubai Airport Free Zone, United Arab Emirates)	**Defendants**

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Peter MacDonald Eggers KC, Michael Ryan (instructed by **Mills & Reeve LLP**) for the **Claimants**
Rebecca Sabben-Clare KC (instructed by **Herbert Smith Freehills LLP**) for the **Second and Third Defendants**

Hearing dates: 22 May 2024

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JUDGMENT

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10:00 on Wednesday 12 June 2024.

Mr Justice Calver:

Introduction

1. The Claimants ("**Reinsurers**") apply for summary judgment on their claim for a declaration of non-liability under two policies of reinsurance (market references B0572PV201437 and B0572PV201700 – together "**the Reinsurances**") and summary dismissal of the Second and Third Defendants' counterclaim for a declaration that Reinsurers are liable thereunder.

2. The Reinsurances were in respect of a warehouse located in Afghanistan (used to distribute foodstuffs for the US military) ("the warehouse") which the parties agree, for the purposes of this hearing, can be taken to have been owned and operated by the Second and Third Defendants, who are collectively referred to as "**Anham**" for convenience. Anham claims to be the original insured under a policy allegedly issued by the First Defendant, Afghan Global Insurance Ltd ("**AGI**").

3. During 2021, US forces were withdrawing from Afghanistan and the Taliban was taking over. The warehouse was lost in August 2021 as a result of its seizure by the Taliban. By reason of the seizure, Anham lost possession and control of the warehouse.

4. Anham seeks to recover an indemnity in respect of its loss of the warehouse under the AGI policy. Its claim is for the full extent of the cover, namely US$41m.

5. Reinsurers deny that they are liable in respect of such loss under the terms of the Reinsurances. Reinsurers maintain that the loss of the warehouse in respect of which Anham seeks an indemnity falls outside the scope of cover under the Reinsurances on their true construction.

6. Reinsurers rely upon two grounds upon which they maintain that summary judgment should be entered in their favour now, although they accept that these two grounds simply amount to different strands of one argument of theirs, namely that the loss caused by the seizure of the warehouse falls within the scope of (exclusion) clause 4.2 on its true construction. The two grounds are:

6.1. **Ground 1:** the meaning of clause 4.2 of the Reinsurances is clear. Under clause 4.2, any loss directly or indirectly caused by seizure is excluded from cover and it is common ground that the loss of the warehouse was caused by its seizure by the Taliban. Reinsurers therefore maintain that there is no cover for this loss.

Anham's answer to this is, in short, that for the exclusion to operate, the seizure under clause 4.2 must be by a "*governing authority*", which does not extend to the Taliban.

6.2. **Ground 2:** under the Reinsurances there is only cover for property damage, not for a deprivation loss consequent upon the seizure (which this is).

Anham disputes this, arguing that on the true construction of the Reinsurances there is cover for a deprivation loss. The warehouse was lost: it is akin to a theft of property.

7. If Reinsurers are correct and there is no cover for the claimed loss, then they are entitled to a declaration of non-liability, and Anham's counterclaims for declarations that Reinsurers are liable to indemnify AGI under the Reinsurances fall to be dismissed[1].

8. Ms Sabben-Clare KC, leading counsel for Anham, submits in particular that summary judgment ought not to be granted in favour of Reinsurers because the meaning of clause 4.2 is not clear and the court should await relevant factual matrix evidence before determining the proper construction of the clause, not least because this is an important issue to the Political Violence ("PV") and Political Risk ("PR") insurance markets, concerning as it does the AFB Political Violence Wording which is widely in circulation in that market. She relied upon

[1] As regards ground 1, Reinsurers have pleaded an alternative case that, if the word "seizure" in clause 4.2 is conditioned by the words "*by law, order, decree or regulation of any governing authority*" (contrary to Reinsurers' primary case) then the Taliban was in any event the *de facto* governing authority of Afghanistan such that the seizure was within the scope of the exclusion. However, Reinsurers accept that this alternative case is not amenable to summary judgment and rely solely upon their primary case on ground 1.

Toomey v Eagle Star [1994] 1 Lloyds Rep at 516 at 519 RHC-520 LHC, where the court heard factual and expert evidence about the circumstances surrounding the making of the contract and the practices of the London insurance market.

The terms of the Reinsurances

9. The Reinsurances were written in two layers: a primary layer covering the first US$20,000,000 (after a deductible of US$1,000,000); and an excess layer covering US$21,000,000 excess of US$20,000,000 and the US$1,000,000 deductible. The policy periods were 7 November 2020 to 7 November 2021. For the purposes of this application the parties agree that there is no material difference between the primary and excess policy.

10. The Reinsurances consist first of a reinsurance slip setting out the terms of the Reinsurance ("the slip"). The slip includes the following provisions in particular:

    10.1. The Type of policy is described as: "*Riots, strikes, civil commotion, malicious damage, war, terrorism and political violence (including terrorism and sabotage) reinsurance*".

    10.2. The Interest reinsured is described as being: "*In respect of Property Damage only as a result of Direct physical loss of or damage to the interest insured caused by or arising from Riots and/or Strikes and/or Civil Commotions including fire damage and loss by looting following Riots and/or Strikes and/or Civil Commotions and/or Malicious Damage, Insurrection, Revolution, Rebellion, Mutiny and/or Coup d'Etat, War and/or Civil War (including Terrorism and Sabotage) to the Insured's Physical Assets as declared to Underwriters and held on file with Tysers*[2]."

    10.3. The first Reinsurance Condition reads as follows: "*Underwriters hereon will only reinsure the Reinsured in accordance with claims admissible*

[2] The placing brokers

under the attached wording as if such wording had been issued by Underwriters to the Insured…

All terms and conditions as per AFB Political Violence Wording as attached and agreed by Underwriters… "

10.4. A condition precedent that security at the site remained in place for the duration of the policy period, which included 220 armed guards at the site, 24 hours a day and 4-5 metre walls to protect against rocket attack.

11. The AFB Political Violence wording, headed "*Political Violence Insurance / Property Damage Wording*", is attached to the slip behind a page which states "*Deemed to be original wording*" ("**the Wording**"). It is common ground that as a result of the first Reinsurance Condition, Reinsurers are only liable for losses which would fall within the scope of the Wording.

12. The Wording is headed "*Political Violence Insurance – Property Damage Wording*" and includes the following terms in particular:

"2. INSURING CLAUSE

"In consideration of the premium paid and subject to the exclusions limits and conditions contained herein, this Policy indemnifies the Insured for its ascertained Net Loss for any one Occurrence up to but not exceeding the Policy Limit against:

2.1 Physical loss or physical damage to the Buildings and Contents which belong to the Insured or for which the insured is legally responsible, directly caused by one or more of the following perils occurring during the Policy Period and in respect of which the insured has purchased cover as specified in item 4 of schedule 1:

1. Act of Terrorism;

2. Sabotage;

3. Riots, Strikes and/or Civil Commotion;

4. Malicious Damage;

5. Insurrection, Revolution or Rebellion;

6. Mutiny and/or Coup d'Etat;

7. War and/or Civil War.

3. DEFINITIONS

…

*"**Actual Cash Value**" means the cost to repair or replace the Buildings or Contents with a proper deduction for obsolescence, wear and tear…*

*"**Net Loss**" shall, in respect of Buildings, mean the reasonable cost of repairing, replacing or reinstating (whichever is the least) on the same site, or nearest available site (whichever incurs the least cost) to a condition substantially the same as but not better than the condition of the Buildings immediately prior to the loss, subject to the repairing, replacing or reinstating being carried out and subject to the following provisions:*

…

2. If the Buildings are not repaired, replaced or reinstated within a reasonable period of time the underwriters shall only pay the Actual Cash Value…

*"**Occurrence**" shall mean any one loss and or series of losses arising out of and directly occasioned by one act or series of acts for the same purpose or cause. The duration and extent of any one Occurrence shall be limited to all losses sustained by the insured in respect of Buildings and Contents insured herein during any period of 72 consecutive hours arising out of the same purpose or cause. However no such period of 72 consecutive hours may extend beyond the expiration of this Policy unless the insured shall first sustain direct physical damage prior to expiration and within said period of 72 consecutive hours…"*

4. EXCLUSIONS

*This Policy **DOES NOT INDEMNIFY AGAINST:***

1. Loss or damage arising directly or indirectly from nuclear detonation, nuclear reaction, nuclear radiation or radioactive contamination, however such nuclear detonation, nuclear reaction, nuclear radiation or nuclear contamination may have been caused nor from any loss or damage directly or indirectly caused by or contributed to from any nuclear waste or the radioactive, toxic, explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof.

2. Loss or damage directly or indirectly caused by seizure, confiscation, nationalisation, requisition, expropriation, detention, legal or illegal occupation of any property insured hereunder, embargo, condemnation, nor loss or damage to the Buildings and/or Contents by law, order, decree or regulation of any governing authority, nor for loss or damage arising from acts of contraband or illegal transportation or illegal trade."

Seizure of the Warehouse

13. Anham's loss of the warehouse was first notified to Reinsurers by a letter from Anham dated 17 August 2021 which was provided to Reinsurers by Anham's broker, Tysers, on 19 August 2021. That letter stated that on or about 15 August 2021, the warehouse was seized by armed individuals thought to be part of the Taliban.

14. In subsequent correspondence, Reinsurers were told that Anham had lost possession and control of the warehouse as a result of seizure by the Taliban.

15. The formal proof of loss submitted by Anham dated 13 December 2021 confirmed that there had been a seizure of the warehouse by the Taliban, who were said to have taken control of the warehouse "*by force of arms*" and who "*had taken armed possession of the Warehouse*".

16. It is accordingly common ground that the loss of the warehouse was caused by way of armed seizure by the Taliban.

Summary judgment: legal principles

17. The Court's power of summary judgment is set out in CPR 24.3. The Court may grant summary judgment on a claim, defence or issue if it considers that the relevant party has no real prospect of succeeding on the claim, defence or issue and there is no other compelling reason for a trial.

18. The principles applicable to summary judgment applications were summarised by Lewison J (as he then was) in *Easyair Ltd v Opal Telecom Ltd* [2009] EWHC 339 (Ch) at [15] and approved by the Court of Appeal in *AC Ward & Sons Ltd v Catlin (Five) Ltd* [2009] EWCA Civ 1098; [2010] Lloyd's Rep IR 301, [24].

19. In particular, in *Easyair Limited v Opal Telecom Limited* [2009] EWHC 339 (Ch) at [15] Lewison J explained as follows:

> *"…the court must be careful before giving summary judgment on a claim. The correct approach on applications by defendants is, in my judgment, as follows:*

i) *The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;*

ii) *A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]*

iii) *In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman*

iv) *This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]*

v) *However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;*

vi) *Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;*

vii) *On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because*

> *something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725."*

20. Points vi) and vii) are of particular relevance here, as I discuss below.

Interpretation of insurance policies: legal principles

21. The general principles of contractual interpretation applicable to reinsurance contracts were recently restated by the Divisional Court in *FCA v Arch* [2020] EWHC 2448 (Comm) at [62]-[79] per Flaux LJ and Butcher J as follows:

> *"62. The general principles of construction were not in dispute. The court must ascertain what a reasonable person, that is, a person who has all 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, would have understood the contracting parties to have meant by the language used: Rainy Sky SA v Kookmin Bank [2011] UKSC 50, [2011] 1 WLR 2900 at [14]. This means disregarding evidence about the subjective intentions of the parties …*
>
> *63. In Wood v Capita Insurance Services Ltd [2017] UKSC 24, [2017] AC 1173, Lord Hodge set out the applicable principles … as follows:*
>
> > *"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 that 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. In Prenn v Simmonds [1971] 1 WLR 1381 … Lord Wilberforce affirmed the potential relevance to the task of interpreting the parties' contract of the factual background known to the parties at or before the date of the contract, excluding evidence of the prior negotiations.*
> >
> > *11. Lord Clarke of Stone-cum-Ebony JSC elegantly summarised the approach to construction in the Rainy Sky case [2011] 1 WLR 2900, para 21f. … Interpretation is … 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; 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… 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… 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.*
>
> *13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement. There may often therefore be provisions in a detailed professionally drawn contract which lack clarity and the lawyer or judge in interpreting such provisions may be particularly helped by considering the factual matrix and the purpose of similar provisions in contracts of the same type…."*

64. The unitary exercise of interpreting the contract requires the court to consider the commercial consequences of competing constructions, but … commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party. Where the parties have used unambiguous language, the court should apply it ….

65. There may be certain cases, however, where the background and context drive a court to the conclusion that "something must have gone wrong with the language": Chartbrook v Persimmon Homes Ltd [2009] 1 AC 1101 at [14] … A "strong case" is required because courts do not easily accept that people have made linguistic mistakes in formal documents (Chartbrook at [15]). But if it is clear that something has gone wrong with the language, the court can interpret the agreement in context to "get as close as possible" to the meaning which the parties intended. This is part of the construction exercise, as opposed to a separate process of correcting mistakes, or a summary version of rectification… Nonetheless, there are certain limits to the

> *exercise. First, there must be a clear mistake in the language or syntax in the contract, as distinct from the bargain itself … Second, the court can only adopt this approach if it is clear what correction should be made…*
>
> *…*
>
> *67. In respect of certain policies, reference was made by the parties to the maxims or canons of construction ejusdem generis (of the same kind) and noscitur a sociis (known by its associates). These are specific applications of the primary principle, which is to read the words of a particular provision in context…*
>
> *68. For instance, if a clause in an insurance policy covers, or excludes, the risk of damage to a number of items, it is likely that the words used denote things of the same genus (ejusdem generis), and each word can take its meaning from the words with which it is linked or surrounded (noscitur a sociis)…*
>
> *70. The principle of noscitur a sociis is, however, one which only operates if there can be said to be a common characteristic of the surrounding words, and it is a principle which must in any event give way if the particular words, or other features of the contract so dictate."*

22. Furthermore, in a case such as this which concerns a commercial insured acting by and through a specialist broker, the insured is taken

> "*to be familiar with the basic principles of insurance law and the meaning which has been put on phrases used in insurance contracts by consistent judicial authority. Many policies of insurance in many fields contain terms of art which have acquired their meaning by consistent use and judicial interpretation, which it is the duty of brokers to understand and, if necessary, advise on*":
>
> See Brian Leighton (Garages) Ltd v Allianz Insurance Plc [2023] EWCA Civ 8 per Popplewell LJ at [40].

This has particular relevance to the use of the word "seizure" in clause 4.2 of the Wording, as I discuss in paragraphs 34ff below.

23. Last, an exclusion in a reinsurance policy (such as clause 4.2 in this case) is part of the definition of the scope of the cover, not an exemption from liability for cover which would otherwise have existed: *Impact Funding Solutions v Barrington Services Ltd* [2016] UKSC 57 at [6]-[7] per Lord Hodge and *Brian Leighton (Garages) Ltd* at [26] (ibid). There is, therefore, no room in this case

for any presumption that the exclusion in clause 4.2 is to be narrowly construed or construed against Reinsurers.

Is the loss caused by the excluded cause of seizure?

(i) The ordinary and natural meaning of the words used in clause 4.2

24. As a matter of grammar and syntax, the wording of clause 4.2 may be broken down into 3 separate parts as follows:

> *"This Policy DOES NOT INDEMNIFY AGAINST: [1] Loss or damage directly or indirectly caused by seizure, confiscation, nationalisation, requisition, expropriation, detention, legal or illegal occupation of any property insured hereunder, embargo, condemnation, [2] nor loss or damage to the Buildings and/or Contents by law, order, decree or regulation of any governing authority, [3] nor for loss or damage arising from acts of contraband or illegal transportation or illegal trade.*"

25. The argument of Mr. MacDonald-Eggers KC on the first of his two grounds for summary judgment is simple. Anham's loss of the warehouse was caused by its seizure by the Taliban. Clause 4.2 of the Wording is unambiguous: it excludes any loss which is directly or indirectly caused by seizure. Consequently, there is no cover under the Reinsurances by virtue of the first Reinsurance Condition.

26. Ms Sabben-Clare KC takes issue with this analysis. She submits that the meaning of clause 4.2 is not clear and obvious. She argues that the wording "*by law, order, decree, or regulation of any governing authority*" must be taken to qualify all of the wording which precedes it. Alternatively, she submits that the word "seizure" takes its meaning from where it appears in the clause, namely next to the words "confiscation, nationalisation" etc which typically concern the acts of a governing authority, and so this makes clear that the exclusion only applies to seizure by a governing authority.

27. There are, however, significant difficulties with Ms Sabben-Clare KC's construction. First and most obviously, the extent of the exclusion in Part [1] is

not limited by the words which appear in Part 2, namely "*by law, order, decree or regulation of any governing authority*". It would have been a simple matter for the drafter of the clause to have included those words at the end of Part [1], or to have omitted the word "nor" at the start of Part [2]. Instead, Parts 1, 2 and 3 are separated from each other both by the use of the word "nor" as well as a comma.

28. In addition, the causal language of each of the parentheses is different. Part [1] concerns loss or damage "*directly or indirectly caused by*" seizure etc. Part [2] concerns loss or damage caused "*by*" law, order etc. Part [3] concerns loss or damage "*arising from*" acts of contraband etc. Ms Sabben-Clare KC suggested that "directly or indirectly" should be read into Part [2] of the clause, and that "directly or indirectly" should be treated as interchangeable with "arising" in Part [3] of the clause. But why should the reader do that when the clause works perfectly well as it is drafted? This also disregards the fact that the drafter of the clause has, it appears, purposefully used different language in each of the three parts of the clause, which again suggests that it is dealing with three separate situations. Moreover, as the wording of clause 4.1 demonstrates, where the drafter wishes to use the same causal link ("directly or indirectly"), they are fully capable of doing so.

29. Moreover, reading Part [1] and Part [2] together, so that both parts only apply to actions of a governing authority renders Part [1] otiose. If Anham were right, it would only be necessary to have Part [2], namely an exclusion in respect of loss or damage to the Buildings and/or Contents by law, order, decree or regulation of any governing authority. Obviously the court should seek to give meaning to all parts of the clause rather than adopting a construction which renders a large part of the clause otiose. Reinsurers' construction gives meaning to both parts of the clause: Part [1] of the clause deals with loss or damage by reason of acts of dispossession by anyone[3] and Part [2] deals with loss or damage by reason of acts of a governing authority.

[3] I address this further below.

30. Accordingly, I do not consider that the wording "*by law, order, decree, or regulation of any governing authority*" is capable of qualifying all of the wording which precedes it without doing violence to the natural language of the clause.

31. Whilst the wording of the respective clauses in each case is of course different, it is interesting to note that Cooke J adopted a similar syntactical analysis to the foregoing in respect of the word "seizure" in an off-hire provision of a charterparty in *The Captain Stefanos* [2012] EWHC 571 (Comm); [2012] 2 Lloyd's Rep 46 at [17]-[25]. In that case the vessel was hijacked by pirates off the coast of Somalia. The relevant part of an off-hire clause applied to "*capture/seizure, or detention or threatened detention by any authority including arrest*." Having noted that "seizure" covered forcible possession of the ship and was apt to include hijacking by pirates unless the words were qualified by the further words "by any authority" which appear later in the clause, Cooke J rejected an argument that the words "*capture/seizure*" must be read subject to the words "*by any authority*". "*Capture/seizure*" were free-standing words and constituted a separate head of hire quite apart from "*detention or threatened detention by any authority including arrest*". The Judge stated in particular at [20]:

> "*Thus, as a matter of syntax, the words "by any authority" qualify only the words "detention or threatened detention" and not the words "capture/seizure". If the parties had wished "capture/seizure" to be qualified by the words "by any authority" it is, in my judgment, inconceivable that they would have written the clause in the way it appears. The most obvious way in which this could have been achieved, with limited alteration, would have been, not simply by omitting the comma, but also deleting the "or", which follows "capture/seizure"*."

32. In the light of the ordinary and natural meaning of the language used in clause 4.2 in the present case, and putting aside for present purposes Anham's argument on factual matrix/commercial purpose (to which I shall turn below), the word "seizure" in this clause should be given its ordinary and natural meaning. It follows that the next question is what is the natural and ordinary meaning of the word "seizure"?

33. That question is answered by settled authority. It covers all acts of taking forcible possession either by a lawful authority or by overpowering force. As a matter of ordinary language therefore, "seizure" is not limited to acts of a legitimate government or a sovereign power. This was the approach adopted by Cooke J in the *Captain Stefanos*.

34. In *Kuwait Airways Corporation v Kuwait Insurance Co* [1999] 1 Lloyds Rep 803 (HL), Lord Hobhouse stated at 812 RHC; 814 RHC and 815 LHC:

> "*The ordinary meaning of the word "seizure" is the act of "taking forcible possession either by a lawful authority or by overpowering force" and this is its ordinary meaning in an insurance policy. (Cory v. Burr 8 App. Cas. 393) … It includes both belligerent and non-belligerent forceable dispossession. That is its ordinary meaning…. The ordinary meaning of the word is any forceable seizure.*"

35. Accordingly, "seizure" is not confined to acts of state. A seizure may, for example, be perpetrated by pirates,[4] passengers on board a vessel who eject the master and crew[5], and by locals whose object is to plunder a vessel[6]: see *Arnould's Law of Marine Insurance and Average* (20th ed., 2021) at [24-23].

36. It follows that I accept Mr. MacDonald-Eggers KC's submission that seizure has an ordinary meaning in the insurance context which has been the subject of settled judicial decisions for many years at the highest level, and a sophisticated insured such as Anham, acting in this case by and with the advice of specialist brokers, should be taken to have understood the ordinary and settled meaning of that term as confirmed by the authorities[7].

37. Ms Sabben-Clare KC's alternative argument on the wording of clause 4.2 is that the word "seizure" takes its meaning from where it appears in the clause, namely next to the words "confiscation, nationalisation" etc., which typically concern

[4] *Dean v Hornby* (1854) 3 E&B 180

[5] *Kleinwort v Shepard* (1859) 1 E&E 447; 28 LJQB 147.

[6] *Johnston & Co v Hogg* (1883) 10 QBD 432.

[7] *Brian Leighton (Garages) Ltd v Allianz Insurance Plc* [2023] EWCA Civ 8 per Popplewell LJ at [40].

the acts of a governing authority, and that this makes clear that the exclusion only applies to seizure *by a governing authority*. This is a "*noscitur a sociis"* argument, as discussed in paragraph 68 and 70 of FCA v Arch (*supra*), namely that the word "seizure" should derive its meaning from its context in clause 4.2.

38. I do not accept this argument.

39. As was stated in FCA v Arch at [70]: *"[t]he principle of noscitur a sociis is, however, one which only operates if there can be said to be a common characteristic of the surrounding words, and it is a principle which must in any event give way if the particular words, or other features of the contract so dictate."* Here, there is no common characteristic and in any event this principle must give way to the clear wording of the clause.

40. As for there being no common characteristic, Part [1] of clause 4.2 contains:

(1) some actions which are likely to be carried out by a governing authority (confiscation, nationalisation, expropriation and condemnation);

(2) some actions which might or might not be carried out by a governing authority (seizure, detention, requisition, embargo, legal occupation). For example, "*detention*" may extend to situations where property is the subject of a siege or blockade,[8] which need not be perpetrated by the local legitimate power[9]; and

(3) an action which would be very unlikely to be carried out by a governing authority (illegal occupation).

41. Moreover, Part [3] of clause 4.2 goes on to include acts of contraband or illegal transportation or illegal trade (e.g. smuggling in breach of the law), which are again to be contrasted with the actions of a legitimate government. Ms Sabben-Clare KC argued that Part [3] only applies if there is loss caused by government

[8] *Miller v The Law Accident Insurance Company* [1903] 1 KB 712, 719 per Williams LJ.

[9] Sieges and blockades and the like may be imposed by hostile actors external to the relevant state. In such cases "*it does not matter whether it is the act of the State in which the goods are, or the act of the enemy*": *Millers Marine War Risks* at [13.4].

intervention consequential upon an act of contraband or the illegal transportation/trade. But the clause is not so narrowly worded and the reference to the actions of a governing authority does not come at the end of the clause but rather at the end of Part [2], and so it is difficult to see how it can apply to Part [3].

42. Indeed, even in the case of those actions which are likely to be carried out by a governing authority (confiscation, nationalisation, expropriation and condemnation), as Mr. MacDonald-Eggers KC points out, they could also be carried out by the Taliban as a military power, rather than a (legitimate) governing authority.

43. It follows that the location of the word "seizure" within the clause does not support the submission that it is only concerned with seizure by a governing authority, contrary to its ordinary meaning. It *could* cover such a seizure; but it could equally cover seizure by a non-governing authority.

44. Standing back and considering Ms Sabben-Clare KC's argument in the round, a similar argument to hers was rejected by the House of Lords in the *Kuwait Airways* case (*supra*). In that case the relevant part of the clause (e) in question referred to "*Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil military or de facto) or public or local authority*." The underwriters sought to argue that the forcible taking of Kuwait Airways' aircraft by the invading Iraqi forces (who were not a lawful authority of Kuwait in any sense) was not a "seizure" within the meaning of clause (e), notwithstanding the ordinary meaning of the word, since the clause only applied to acts of authorities lawfully done *within their own territories*. The underwriters so submitted by reason of the fact, in particular, that the seizure peril appeared alongside the other political risk perils including nationalisation etc.

45. That submission was rejected by Lord Hobhouse (the majority concurring) at 812-815. Whilst it is true to say that in that case the issue was different to the issue in the present case, being whether clause (e) perils were limited to the acts

of governments within their own territories (Kuwait) or not (Iraq), Lord Hobhouse stated, relevantly, as follows at p.815 LHC:

> "*Were the ordinary meaning of the word seizure confined to peaceful seizures*[10]*, it could certainly be said that the context was not clear enough to widen that meaning so as to refer also to all forcible seizures. But where, as here, the ordinary meaning of the word is any forcible seizure, the context does not suffice to show that the word must have been used in some special or restricted sense. At the best from the point of view of the underwriters, the context […] is neutral and does not suffice for their purpose. However, in my judgment, it is not neutral but supports the ordinary use of the word and the case of the airline.*" (emphasis added)

46. Thus, the forcible taking of Kuwait Airways' aircraft by the invading Iraqi forces (who were not a lawful authority of Kuwait in any sense) was a "seizure" within clause (e), "seizure" being any forcible seizure, whether by the state or otherwise.

47. I adopt the same approach to clause 4.2 in this case. Seizure must be given its ordinary meaning and there is no common characteristic of the surrounding words in clause 4.2 to justify restricting the ordinary meaning of the word "seizure" (so as to cover only a seizure by a governing authority). The *noscitur a sociis* principle must in any event give way where, as here, the particular words of the contract so dictate.[11]

(ii) Factual matrix / commercial purpose

(a) Factual matrix

48. Ms Sabben-Clare KC further submits that (despite the clear wording of the clause), viewed in its relevant factual matrix (which she argues includes both what was factually known to the parties and the relevant insurance market background) and taking account of the commercial purpose of the Reinsurance

[10] As contended for by underwriters

[11] *FCA v Arch* at [70]

cover, clause 4.2 of the Wording only excludes seizure *by a governing authority*. In other words, although the ordinary meaning of the word "seizure" in an insurance context refers to the taking forcible possession either by a lawful authority or by overpowering force, in this case clause 4.2, read in the context of the Policy as a whole and its commercial purpose, is so drafted as to only cover the seizure by a governing authority. Ms Sabben-Clare KC submitted that, to put it another way, whilst it is common ground that the warehouse was seized, it is Anham's case that the wrong people did the seizing for the exclusion in clause 4.2 to apply.

49. So far as this factual matrix argument is concerned, one clear day before the hearing of this application, Anham served a draft Amended Defence and Counterclaim in which it included a new paragraph 46e. In that paragraph it relies upon four separate matters by way of allegedly relevant factual matrix/ "commercial sense" as follows:

> "*Paragraphs c and/or d above set out the true construction of Exclusion 4.2 consistent with commercial sense and the factual matrix against which the Reinsurance Policies were concluded. The factual matrix included:*
>
> *i. That the Taliban was active in Afghanistan and wished to overthrow the legitimate Afghan government;*
>
> *ii. That Taliban forces might well wish to seize the Warehouse and use it for their own purposes;*
>
> *iii. That there is a distinction drawn by the insurance / reinsurance market between the risk of action by a governing authority (such as expropriation and nationalisation), which is insured/reinsured by political risk policies; and civil disruption (such as strikes and riots) and challenges to the governing authority (such as insurrection and rebellion), which are insured/reinsured by political violence policies;*
>
> *iv. That political violence wordings such as the Deemed Wording have evolved from clauses used in the marine market, such as clause 5.1.3 of the Institute Time Clauses Hull 1.11.95, which exclude: "capture seizure arrest restraint detention confiscation or expropriation by or under the order of the government or any public or local authority of the country in which the Vessel is owned or registered*".

50. I do not consider that any of the matters relied upon (which I shall call matrix points (i)-(iv)) displace the clear wording of clause 4.2.

51. Matrix points (i) and (ii) do not assist Anham's construction. Ms Sabben-Clare KC suggested that the fact that the Information section of the slip referred to 220 armed guards suggest that it was known to the parties, at the time of contracting, that the Taliban might wish to seize the warehouse. But simply because these facts were known does not lead to the conclusion, without any evidence to support it, that Reinsurers intended to give cover for the seizure of the warehouse as opposed to excluding it (the same section of the slip also referred to the need to protect against rocket attacks, which would be likely to cause property damage). Indeed, that these facts were known might very well explain why Reinsurers were not prepared to underwrite the risk of seizure and so insisted upon exclusion 4.2. In any event, whatever may be regarded as a paradigm case of a significant risk is not relevant to construction: *Corbin & King Ltd v Axa Insurance UK plc* [2022] EWHC 409 (Comm) at [178], [202] per Cockerill J).

52. As for matrix point (iii), I address that below in paragraphs 67ff.

53. As for matrix point (iv), Ms Sabben-Clare KC suggests that Anham's construction gives the exclusion in clause 4.2 the same meaning as the exclusion in the Institute War and Strikes Clauses Hulls – Time 1.11.95, which she asserts is "equivalent" to clause 4.2 and out of which she says clause 4.2 "evolved". That exclusion reads:

> "*This insurance excludes*
>
> *5.1.3 capture seizure arrest restraint detainment confiscation or expropriation by or under the order of the government or any public or local authority of the country in which the Vessel is owned or registered*" (emphasis added).

Ms Sabben-Clare KC suggested that the underlined wording applies to each of the named perils and as a result the same approach should be taken to clause 4.2 in the present case.

54. I do not accept Ms Sabben-Clare KC's argument for the following reasons.

55. The exclusion in clause 4.2 in the present case is not *equivalent* to the exclusion in the Institute War and Strikes Clauses Hulls – Time 1.11.95. The wording is very different. Instead of *capture seizure arrest restraint detainment confiscation or expropriation*, clause 4.2 omits "*capture, arrest and restraint*" altogether and applies to *detention* (not detainment), "*legal and illegal occupation, embargo and condemnation*". The fact that the drafter of the clause has added words which do not sensibly apply to the actions of a governing authority (*illegal occupation)* or might not so apply (e.g. seizure, detention, legal occupation) and has omitted others suggests, if anything, that they were seeking to achieve a different objective to that which is provided for in the Institute War and Strikes Clauses Hulls – Time, or at least to achieve their own objective unrelated to those Institute clauses.

56. Most significantly of course, clause 4.2 is syntactically divided into 3 separate parentheses and Part [1] of clause 4.2 omits the wording in clause 5.1.3 of those Institute clauses which refers to the act of a governing authority; indeed, even the wording of Part [2] of clause 4.2 (*by law, order, decree or regulation of any governing authority*) is different to the wording of clause 5.1.3 (*by or under the order of the government or any public or local authority of the country in which the Vessel is owned or registered)*. As Mr. MacDonald-Eggers KC submitted, it seems unlikely that the wording in part [2] of clause 4.2 evolved out of the wording of clause 5.1.3.

57. Nor was there any evidence before me on this application (other than assertion) that clause 4.2 in this case "evolved" generally out of the Institute War and Strikes Clauses Hulls – Time 1.11.95. The suggestion that this is relevant factual matrix to the proper construction of clause 4.2 is unsustainable.

58. Accordingly, even if one accepts Ms Sabben-Clare KC's suggestion that the relevant question for the court to determine in this case is "*whether the parties intended Clause 4.2 to have the same meaning as the Institute War Clause 5.1.3 in relation to seizure or whether the wording is deliberately different?*", the answer is that the parties did not intend clause 4.2 to have the same meaning as

Institute War Clause 5.1.3 in relation to seizure, and the wording of clause 4.2 is different. (Whether or not it is *deliberately* different is irrelevant; moreover, posing the question in this way assumes that the drafter, in drafting clause 4.2, was working off Institute War Clause 5.1.3 as to which there is no evidence).

59. Nor do I accept Ms. Sabben-Clare KC's submission that it is clear that the first part of Clause 4.2 ("*Loss or damage directly or indirectly caused by seizure, confiscation, nationalisation, requisition, expropriation, detention, legal or illegal occupation of any property insured hereunder, embargo, condemnation"*) was intended to track Institute War Clause 5.1.3 and that "*what has happened is that words have been added with the intention of making it clear that governmental action of any sort is excluded. The customs exclusion has then been added to the same clause*". This submission is not supported by any evidence and is belied by the parties' actual choice of wording (as discussed above). Having made this evidentially unsupported submission, Ms Sabben-Clare KC then suggests that it would assist the court to have expert evidence on this point, tracing the history of PV and PR wordings from the marine clauses in order to see what light (if any) it throws on the proper construction of the clause.

60. I do not accept that this is a legitimate approach to the proper construction of this clause. First, the ordinary and natural meaning of clause 4.2 does not support any suggestion that it was intended to track Institute War Clause 5.1.3; on the contrary the ordinary and natural meaning of the clause is such that "seizure" bears its ordinary meaning, unrestricted by the wording "by law, order, decree or regulation of any governing authority".

61. Second, there is no ambiguity in the clause which enables the court to reinterpret the parties' contract in accordance with an asserted (and contested) commercial purpose: see *Grove Developments Ltd v Balfour Beatty Construction Ltd* [2016] EWCA Civ 990 at [39]-[42]. As was stated in *FCA v Arch* (*supra*), commercial common sense should not be invoked retrospectively, or to rewrite a contract in an attempt to assist an unwise party, or to penalise an astute party. Where the parties have used unambiguous language, the court should apply it.

62. Third, Anham has put before the court no evidential material to support the suggestion that contrary to the clear wording of the clause, the background and context might drive a court to the conclusion that something must have gone wrong with the language. A "strong case" is required because courts do not easily accept that people have made linguistic mistakes in formal documents, particularly where they have been drafted by professional people in the relevant market (*FCA v Arch* at [65]).

63. This is not a case of the type adverted to by the court in *Easyair*, where Anham has shown by evidence that, although material in the form of documents or oral evidence that would put Clause 4.2 in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, in which case it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success.

64. In her written submissions (but not in her oral submissions) Ms Sabben-Clare KC also submitted that "there are other standard wordings in the market which are relevant background", and that one example of that is LMA 3030, which is a terrorism wording. She argued that this contains at Exclusion 3.4 a "similar catalogue" of perils to clause 4.2 in the present case: *"Loss or damage caused by confiscation, nationalisation, requisition, detention, embargo, quarantine, or any result of any order of public or government authority*". However, seizure and occupation are dealt with separately in Exclusion 3.3 as follows: *"Loss by seizure or legal or illegal occupation unless physical loss or damage is caused directly by an Act of Terrorism or an Act of Sabotage"* (i.e. the perils insured under the policy). It follows that the caveat to Exclusion 3.3 writes back cover for seizure if it is caused by an act that is otherwise insured. Ms Sabben-Clare KC then observed that this is the same meaning as Anham gives to Clause 4.2. Anham relied upon this in support of its submission that there is cover under this terrorism wording for seizure or illegal occupation caused, for example, by terrorism notwithstanding that this is a property cover in respect of physical loss or damage.

65. I do not consider that this helps Anham's argument. First, Exclusion 3.3 provides that loss by seizure is *only* covered if *physical loss or damage* is caused

directly by an act of terrorism or sabotage. But second, and in any event, how does this assist the court to construe clause 4.2 in the present case? If anything, it suggests that Anham's construction is wrong, as the LMA 3030 wording separates out seizure and illegal occupation generally (Exclusion 3.3) from the clause which specifically refers to the actions of a public or government authority (Exclusion 3.4)[12]. In the present case, I consider that looking at differently worded standard forms is liable only to confuse rather than to assist in determining the proper construction of clause 4.2.

66. Finally on the topic of standard wordings, Ms Sabben-Clare KC submitted that clause 4.2 is a standard form of wording which is widely used in the Political Violence market and for that reason the court should not determine this summary judgment application before trial at which the parties would be free to adduce expert evidence from insurers and brokers in this market[13]. But this is too general a submission. Applying *Easyair*, Anham must persuade the court that reasonable grounds exist for believing that a fuller investigation into the facts of the case, in particular by the calling of expert evidence, would add to or alter the evidence available to a trial judge and so affect the outcome of the case. It is unable to do so. It is not enough for it simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction.

(b) Commercial sense or commercial purpose

67. Finally, matrix point (iii) which it is said must be taken into account in construing clause 4.2 is as follows:

> "*That there is a distinction drawn by the insurance / reinsurance market between the risk of action by a governing authority (such as expropriation and nationalisation), which is insured/reinsured by political risk policies; and civil disruption (such as strikes and riots) and challenges to the governing*

[12] Indeed, it is not clear, in the case of Exclusion 3.4, whether the wording "*or any result of any order of public or government authority"* is free-standing or governs the wording which precedes it.

[13] Relying upon *AC Ward v Catlin* [2009] EWHC Civ 1098 at [35] per Etherton LJ.

> *authority (such as insurrection and rebellion), which are insured/reinsured by political violence policies.*"

68. This is Ms Sabben-Clare KC's "commercial sense" argument. This is not disputed by Reinsurers as a general proposition; but it does not provide the answer as to what risks the drafter was intending to cover in the present case, nor does it in any way justify disregarding the clear wording of clause 4.2 (set out above). The short answer to this is, therefore, that there is no need for the court to hear expert evidence on this point before reaching a conclusion on the proper construction of clause 4.2.

69. To support her suggestion that it is necessary to adduce expert evidence concerning the Political Risk and Political Violence markets in order to construe this clause, Ms Sabben-Clare KC sought to rely upon two insurance market commentaries which refer, in general terms, to the distinction between Political Violence and Political Risk insurance.[14]

70. But it is not in dispute that generally speaking, Political Violence insurance typically covers acts of violence such as war, terrorism, sabotage, civil commotion, malicious damage etc and that Political Risk insurance typically covers political risks, that is political action which causes loss to property, most notably by confiscation. But generalisations in this context are unhelpful; what matters is the actual wording of the relevant exclusion in the context of the Wording as a whole. Indeed, as one of those commentators rightly states "*exclusions vary with each policy*". In the present case, similar to the position which obtained in *The Captain Stefanos (supra)*, whilst clause 4.2 excludes some traditional political risks by way of governmental action (such as confiscation and nationalisation), it also plainly excludes other risks by way of non-governmental action (such as seizure and illegal occupation of property).

71. Before me, whilst not pleaded as relevant factual matrix, Ms Sabben-Clare KC sought to develop this argument further. She submitted that, in construing the clause, the court should take account of the fact that the market distinction

[14] It was fair for her to point out that Anham relied upon this in response to assertions of the Reinsurers as to market practice.

between Political Violence insurance and Political Risk insurance concerns not the *type of damage or loss* which is covered, but *who causes the loss*, with political risk insurance covering a situation when *a government* changes its policies or regulations. Thus, she submitted that the perils insured under Political Violence policies are, as a matter of principle, focussed on actions that are politically motivated but not perpetuated by the government: perils such as riots, strikes, terrorism and sabotage are, she submits, not naturally terms used to describe acts of governments or governing authorities. She concludes that when one then comes to look at clauses limiting the political violence perils insured it would perhaps be expected that acts of government should be excluded (but might be covered under Political Risk-type insurance cover), and that clause 4.2 does just that: any seizure within the meaning of exclusion 4.2 must be by action of the governing authority because "this is the only construction of Clause 4.2 that makes commercial sense and is consistent with the commercial purpose of the Policy, namely to cover property losses caused by non-governmental actions."

72. Again, this impermissibly seeks to draw Anham's desired conclusion as to the proper construction of clause 4.2 from an overly broad generalisation without regard to the wording of the clause; but in any event, I consider the generalisation to be wrong.

73. The political violence perils which are insured under the Reinsurances are not restricted to actions by non-government actors. One of the most important insured perils is "*war*". That peril obviously requires the action of government. Indeed, "*War*" is defined in the Wording to mean "*a contest by force between two or more sovereign nations, carried on for any purpose, armed conflict of sovereign powers and/or declared or undeclared and open hostilities between sovereign nations*".

74. Furthermore, in respect of the other insured political violence perils it will frequently be the case that a government response may be expected as part of the peril, and that may itself cause damage, for example the response of government troops to a riot, thereby causing damage to property.

75. Since it is clear that clause 4.2 does not only cover what might be thought of as traditional political risks (confiscation, expropriation etc) but is wider than that, establishing this generalisation does not assist in determining the proper construction of clause 4.2 and in particular the use of the word "seizure" within it.

76. In any event, I do not consider Ms Sabben-Clare KC's generalisation (in paragraph 71 above) which she uses to support her commercial purpose argument to be correct. Rather, the Political Risk perils differ from the Political Violence perils in the present case in two important respects:

    76.1. First, they are not synonymous with violence. Each of the perils in exclusion 4.2 (which include political risk perils and non-political risk perils) may occur without violence. In particular, it is not necessary for a seizure to be attended by violence. Seizure may be by overwhelming force but it may also be by lawful authority and actual force is not required: see *Millers Marine War Risks* at [12.3]; *Bayview Motors Ltd v Mitsui Marine and Fire Insurance Co Ltd* [2002] EWCA Civ 1605; [2003] 1 Lloyd's Rep 131, at [34].

    76.2. Secondly and as Mr. MacDonald-Eggers KC submitted, they do not naturally give rise to property damage (although it is possible they may do). Rather, the natural and foreseeable loss to which they give rise is deprivation of possession (seizure, confiscation, nationalisation, detention etc).

77. This manner of distinguishing the Political violence perils and the Political risk perils finds support in both the *Kuwait Airways* case as well as *Arnould* at [24-12].

78. In *Kuwait Airways*, the policy covered loss of or damage to aircraft as caused by (a) "*war, invasion, acts of foreign enemies, hostilities… revolution … military or usurped power"* and by clause (e) "*confiscation, nationalisation, seizure … detention, appropriation, requisition for title or use by or under the order of any Government* …". During the invasion of Kuwait by Iraq, the Iraqis plundered the aircraft and spares of the insured, KAC. The court was concerned

with whether the perils in clause (e) were limited to the acts of governments within their own territories (i.e, Kuwait and not Iraq), despite its wide wording ("any Government"). At p. 814 Lord Hobhouse stated a follows:

> "*As regards the relationship between paragraphs (a) and (e), (a) is not confined to acts of governments. It relates to situations which may or may not impact upon the assured or its property. Any effect of such situations upon the assured will be through some more specific consequence, typically the destruction or damaging of its property. The confiscation of property is not an ordinary incident of war whereas its destruction or damage is; and those ordinary incidents are the consequence of activities of the combatants. A contrast therefore already exists between the obvious contemplation of paragraph (a) and that of paragraph (e). Paragraph (e) deals with matters which affect the title to or possession of property - the actual loss of possession not some anterior situation which may or may not give rise to a loss. The reference to governments and other authorities in (e) distinguishes between the acts of individuals and the acts of governments.*"

79. In Arnould at [24-12] the editors similarly observe that:

79.1. The political violence perils[15] "*refer to violent acts or disturbances of a descending order of gravity from full-scale war down to what may be isolated acts of violence by individuals*".

79.2. Whereas "*The second group of perils[16] (capture, seizure etc) are linked insofar as they typically connote events involving the dispossession or detention of the insured property*".

80. Importantly, this analysis is consistent with the wording of the Reinsurances in the present case.

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[15] i.e. those listed in cl.1.1, 1.4 and 1.4 of the Institute War and Strikes Clauses (Hulls-Time), namely "*1.1 war civil war revolution rebellion insurrection, or civil strife arising therefrom, or any hostile act by or against a belligerent power … 1.4 strikers, locked-out workmen, or persons taking part in labour disturbances, riots or civil commotions, 1.5 any terrorist or any person acting maliciously or from a political motive*".

[16] i.e. those listed in cl.1.2 of the Institute War and Strikes Clauses (Hulls-Time), namely "*1.2 capture seizure arrest restraint or detainment, and the consequences thereof or any attempt thereat*".

81. The cover which is afforded by the Reinsurances is described on the slip under "*Interest*", which lists the insured perils. These perils may be described as "war and strike" perils – i.e. war and its associated perils (civil war, rebellion, revolution etc) and strike and its associated perils (civil commotion, riots etc). These are perils which give rise to violence and a concomitant risk of property damage.

82. Consistently with the nature of the insured perils, the Interest provision of the Reinsurances provides cover "In respect of Property Damage only as a result of Direct Physical loss of or damage to the interest insured" as distinct from deprivation loss / loss of use. The damage has to be "*to the Insured's Physical assets as declared to Underwriters and held on file with Tysers*". The Wording is then headed: "*Political Violence Insurance Property Damage Wording*" and the Insuring Clause 2 indemnifies the Insured against "Physical loss or Physical damage to the Buildings and Contents" (emphasis added throughout). It is also worth noting that the definition of "Occurrence" in clause 3 of the Wording refers to the Insured sustaining "*direct physical damage*".

83. Where insured property suffers damage as a result of an insured peril, it may be rendered a partial loss by suffering damage to a certain extent[17], or it may be rendered a total loss, by being destroyed. Thus, what is covered is only property damage by reason of direct physical loss (total loss) or damage to (partial loss) the warehouse or its contents, not merely the loss of use/deprivation of the property. That is emphasised by the reference at the start of the Interest clause to "Property Damage only." Indeed, it is to be expected in a Political Violence policy that cover will be for property damage only.

84. As Potter LJ stated in *Pilkington UK Ltd v CGU Insurance Plc* [2004] EWCA Civ 23 at [50]: "*In English law* "*damage*" *usually refers to a changed physical state*"; it "*requires some altered state*"[18]. Again, this is the ordinary and natural meaning of the wording used. There is no change to the physical state of

[17] See section 56(1) of the Marine Insurance Act 1906: "A loss may be either total or partial."

[18] Applied by HHJ Pelling KC in *Sky UK Ltd v Riverstone Managing Agency Ltd* [2023] EWHC 1207 (Comm) at [83] and [86].

property when a deprivation loss occurs, and no such changed physical state is relied upon by Anham.

85. It is not an answer to this analysis to argue, as did Ms Sabben-Clare KC, that the repeated references to physical loss and physical damage is to make clear that business interruption losses are not covered. Schedule 1 and clause 4.5 of the wording in fact specially refers to Business Interruption Cover as being included if it is stated in the risk details and so the same physical damage wording would have existed alongside business interruption cover had the insured chosen to pay for it. This accordingly affords no reason to alter the clear and natural meaning of the words in the slip, namely the repeated references to "Property Damage only", "physical loss" and "physical damage".

86. Ms Sabben-Clare KC also sought to rely as an alternative argument upon sections 57 and 60(1) of the *Marine Insurance Act 1906* in support of an argument that there is an actual total loss where the assured is irretrievably deprived of his property and a constructive total loss where the assured is deprived of possession of his property and it is unlikely that he will recover it. Accordingly, she submitted, there was a loss of the warehouse in this case when Anham was irretrievably deprived of possession of it.

87. It is of course the case that a person can lose property as a result either of the physical loss of the property or by their being irretrievably deprived of it. But the reinsurance cover in this case is, on its clear wording, only for the former, namely the total physical loss of the property, not the latter.

88. Insuring Clause 2, together with the definition of "net loss" in clause 3 of the Wording, provides that if the covered property is physically lost or physically damaged, the indemnity is calculated by reference to the costs of repairing, replacing or reinstating it on the same site or the nearest available site to a condition substantially the same as the condition of the Buildings immediately prior to the loss. Ms Sabben-Clare KC argued that the use of the word "replace" suggests that there is cover even where there is no property damage. But whether property is repaired or replaced in a physical damage policy will, of course, simply depend upon the *extent* of the physical damage inflicted upon it

by the war, riot, etc. The use of the words "repairing, replacing or reinstating" is accordingly not inconsistent with the requirement for there to be physical loss or damage.

89. In the circumstances, I consider that the Reinsurances afford cover in respect of political violence risks and consequent property damage, not political risks and consequent deprivation loss.

(iii) Peril falling within the insuring clause and the exclusion

90. Finally on the issue of the proper construction of clause 4.2, it is not relevant that an insured peril may have been operating at the time of Anham's loss. Reinsurers accept that the Taliban's campaign against the *de jure* government of Afghanistan in the summer of 2021 likely engages one of the insured political violence perils. This is irrelevant because Anham's deprivation loss of the warehouse was not caused by such a peril: neither party suggests this; rather, as explained above, it is common ground that Anham's loss was caused by seizure by the Taliban.

91. In any event, even if Anham's loss were in some way caused by an insured peril, in circumstances where the cause of loss was also caused by seizure (as is common ground), the exclusion will apply: see *The B Atlantic* [2018] UKSC 26; [2019] AC 136[19].

92. In the *B Atlantic*, the vessel was detained for over 6 months by Venezuelan customs authorities by reason of the fact that an unknown third party had concealed drugs on the vessel which the authorities discovered. The owners claimed indemnity for total constructive loss under a standard war risks insurance policy which included, under clause 1.5, cover for "*loss or damage to the vessel caused by … any person acting maliciously.*" The insurers sought to rely upon an exclusion in clause 4.1.5 for a detainment "*by reason of infringement of any customs… regulations*". On the assumption that the smugglers caused the loss of the vessel acting maliciously, Lord Mance

[19] See also *National Oil Co of Zimbabwe v Sturge* [1991] 2 Lloyd's Rep 281 (QBD)

considered whether (i) clause 4.1.5 could be read as having any application at all to clause 1.5 and (ii) whether clause 4.1.5 applied, bearing in mind the apparent coincidence of the malicious act insured under clause 1.5 and the infringement of customs regulations excluded under clause 4.1.5.

93. Lord Mance stated [at 32]-[33] that

> "*32… owners themselves must, by relying on clause 3 to establish a constructive total loss, be accepting and asserting that the vessel has been the subject of seizure, arrest, restraint or detainment, and has been lost thereby, which is exactly the subject matter of the exclusion introduced by clause 4.1.5 ("loss … arising from … arrest restraint detainment …"). In these circumstances, owners were correct to regard their fall-back case with a distinct lack of enthusiasm.*
>
> *33. The second question therefore arises whether clause 4.1.5 applies in the circumstances of this case, bearing in mind the apparent coincidence of the malicious act insured under clause 1.5 and the infringement of customs regulations excluded under clause 4.1.5. Flaux J saw this coincidence as necessitating an implied limitation to the effect that clause 4.1.5 would not apply "where the only reason why there has been an infringement of the customs regulations by the vessel is because of the malicious acts of third parties" (para 258). The problem about this is that no apparent basis exists for any such implied limitation. None of the criteria for implication of an implied term is satisfied. It is entirely understandable that clause 4.1.5 should cut back or define the limits of cover otherwise available under clause 1. That is its clear role in relation to clause 1.2 or 1.6 if relied on. (It is also an element of the role of, for example, clause 4.1.2 in relation to the cover otherwise provided by clause 1.1.) It makes sense that clause 4.1.5 should have a similar effect in relation to clause 1.5, if clause 1.5 is engaged at all."*

94. This construction is reinforced in the present case by reason of the fact that Part [1] of clause 4.2 applies where the loss is " *directly or indirectly caused by seizure*", so that if the seizure had a role to play in the cause of the loss, even if it was not the proximate cause and was only an indirect clause, the exclusion will still apply[20].

[20] For cases where the courts have applied an exclusion clause with the "direct or indirect" wording in similar circumstances, see *Spinney's (1948) Ltd v Royal Insurance Co Ltd* [1980] 1 Lloyd's Rep 406, 441-442; *Grell-Taurel Ltd v Caribbean Home Insurance Co Ltd* [2002]

Conclusion

95. It follows in my judgment that Reinsurers' interpretation of clause 4.2 (i) is consistent with the clear wording of the clause; (ii) fits with the wider wording of the Reinsurances as a whole; and (iii) is consistent with the nature of Political Violence cover and Political Risk cover respectively.

96. In the circumstances, Reinsurers are entitled to summary judgment on their claims for declarations of non-liability under the Reinsurances as against the Defendants, and to the dismissal of Anham's claims for declarations that Reinsurers are liable to indemnify AGI in respect of the loss of the warehouse.

97. I am very grateful to Leading Counsel for the skilful way in which the case was presented and argued on both sides.

Lloyd's Rep IR 655, [100]-[101]; *Tappoo Holdings Ltd v Stuchbery* [2008] Lloyd's Rep IR 34, [28].