Claim No. CL-2023-000889

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)
Neutral Citation Number: [2024] EWHC 1673 (Comm)

Friday, 28 June 2024

BEFORE:
Mr Justice Calver

WRBC CORPORATE MEMBER LIMITED (AS THE SOLE UNDERWRITING MEMBER OF W.R. BERKLEY SYNDICATE 1967 AT LLOYD'S FOR THE LLOYD'S 2019 YEAR OF ACCOUNT)
Claimant

- and –

(1) AXA XL SYNDICATE LIMITED (AS THE SOLE CORPORATE MEMBER OF LLOYD'S SYNDICATE 2003 FOR THE 2019 YEAR OF ACCOUNT)
(2) BRIT UW LIMITED (AS THE SOLE CORPORATE MEMBER OF LLOYD'S SYNDICATE 2987 FOR THE 2019 YEAR OF ACCOUNT)
(3) WHITE BEAR CORPORATE CAPITAL LIMITED (AS THE SOLE CORPORATE MEMBER OF LLOYD'S SYNDICATE 5886 FOR THE 2019 YEAR OF ACCOUNT)
(4) XL BERMUDA LIMITED
(5) LIBERTY CORPORATE CAPITAL LIMITED (AS THE SOLE CORPORATE MEMBER OF LLOYD'S SYNDICATE 4472 FOR THE 2019 YEAR OF ACCOUNT)
(6) CHAUCER CORPORATE CAPITAL (NO.3) LIMITED (ON ITS OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF LLOYD'S SYNDICATE 1084 FOR THE 2019 YEAR OF ACCOUNT)
(7) CHINA RE (UK) LIMITED (AS THE SOLE CORPORATE MEMBER OF LLOYD'S SYNDICATE 2088 FOR THE 2019 YEAR OF ACCOUNT)
(8) IAT CCM LTD (ON ITS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF ALL SYNDICATES PARTICIPATING IN LLOYD'S CONSORTIUM 9638 FOR THE 2019 YEAR OF ACCOUNT)
(9) CANOPIUS CORPORATE CAPITAL LIMITED (FORMERLY FLECTAT LIMITED) (ON ITS OWN BEHALF AND ON BEHALF OF ALL OTHER MEMBERS OF LLOYD'S SYNDICATE 4444 FOR THE 2019 YEAR OF ACCOUNT)
(10) HCC INTERNATIONAL INSURANCE COMPANY PLC
(11) EVEREST REINSURANCE (BERMUDA) LTD (UK BRANCH)
(12) TRANSRE LONDON LIMITED
(13) VALIDUS REINSURANCE LIMITED
Defendants

RULING
(Approved)

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(Official Shorthand Writers to the Court)

1. **MR JUSTICE CALVER:** The claimant seeks an indemnity under two multi-line excess of loss reinsurance treaties, "the treaties". The treaties provide cover in three layers, and the limits language in the treaties is such that limits and deductibles for each layer are stated to apply by reference to the claimant's "Ultimate Net Loss each and every loss, any one risk, or each and every loss or series of losses arising out of one event".

2. The claim relates to contingency losses arising from the cancellation or postponement of insured events, such as trade shows, conferences and other large organised events, in England and in six US states in 2020 and 2021, namely California, Colorado, Florida, Illinois, Nevada and New York. The claimant seeks an indemnity on the basis that its alleged contingency losses in each of these seven jurisdictions may be aggregated under the treaties by reference to a single causative event, namely the announcement and/or introduction of a number of governmental measures related to Covid-19 in each jurisdiction on various dates in March 2020.

3. The first to tenth and twelfth defendants, whom I shall call "the Axa/Brit defendants", and the 11th defendant, whom I shall call "Everest", accept that the contingency losses, if proved, fall within the scope of the treaties and they have already made payments on account to the payment totalling around US$28.48 million in relation to those losses. Those payments exhaust their share of the layer 1 limits under the treaties.

4. The Axa/Brit defendants and Everest deny that the claimant is entitled to the further indemnity it has claimed in these proceedings. The primary case advanced by the Axa/Brit defendants and Everest is that the limits and deductibles in the treaties are to be applied subject to the class-specific definitions contained therein.

5. The "Contingency" section of those definitions includes the following wording, and I will call this the "contingency event definition":

   "It is agreed that 'Any One Event' is to mean any one Conference or Exhibition or Convention or any other 'Event' accepted by the Reinsured including the period of installation or dismantling and arrangements directly connected with the 'Event'."

6. Axa/Brit argue that the effect of the contingency event definition is that the limits and deductibles in the treaties must be applied in this case independently to each cancelled or postponed individual conference, exhibition, convention or similar.

7. The claimant, by contrast, contends that when the word "event" is used in the limits language, it is being used in a causative sense and it refers to a happening or occurrence which causes or gives rise to the losses in question, whereas the term "Any One Event" in the contingency event definition merely describes the subject matter and duration of a contingency risk accepted by the claimant.

8. The limits language does not include the capitalised term "Any One Event", or even the words "Any One Event" uncapitalised. The claimant also contends that Axa/Brit's construction cannot be reconciled with other parts of the reinsurance treaties, in particular the fact that the definition of "Contingency" in the class of business provision includes a number of categories of business other than event cancellation.

9. The claim accordingly gives rise to two central issues between the parties, each of which relates to the basis of aggregation of the claimed contingency losses.

10. First, does the contingency event definition apply to the words "arising out of one event" in the limits language, or is the contingency event definition irrelevant to the phrase "arising out of one event"? I shall call this the "contingency event definition issue".

11. Second, what is being called the "measures issue". If, as it contends, the claimant's contingency losses do not fall to be aggregated by reference to the contingency event definition, then: (a) in each of the seven relevant jurisdictions, did the introduction of the combination of measures, alternatively single measures, identified by the claimant constitute a single "event" for the purposes of aggregation; (b) in each jurisdiction, were the claimant's contingency losses caused by the combinations of measures, alternatively single measures, identified by the claimant for that jurisdiction; and (c) is the claimant entitled to a declaration that the relevant aggregating event for the purposes of the limits provisions and reinstatement provisions of the reinsurance

treaties comprises the introduction of the measures set out in sections D4 to D10 of the particulars of claim? So that is the measures issue.

12. AXA/Brit invite the court to order that the contingency event definition issue should be tried as a preliminary issue. They point out that if they succeed on this issue, then the case against them will be finally disposed of. A preliminary issue trial accordingly has the potential to save significant time and cost in these proceedings.

13. The claimant opposes the application. It contends, firstly, that witness evidence will be required on this issue of contractual construction in respect of the factual matrix surrounding the making of the contract. It suggests that it will call evidence from the brokers involved in the placement of earlier treaties and indeed these treaties.

14. The claimant makes three points on contractual construction in particular.

15. First, it says there are textual arguments based on the wording of the reinsurance treaties: in particular, when the word "event" is used in the context of limits and aggregation, it is used in a causative sense. But that, it seems to me, does not require any factual evidence.

16. Secondly, it says that there are contextual arguments based on the nature of the reinsurance provided by the reinsurance treaties, which include the point, it says, that to apply the contingency event definition to the limits language would make that a commercial nonsense of cover in respect of the contingency class of business under the reinsurance treaties. Again, it seems to me that does not require any witness evidence.

17. Thirdly, it says that the factual matrix supports the claimant's case on construction and shows how the contingency event definition came to appear in the reinsurance treaties. In this respect, the claimant relies on the following aspects, it says, of factual matrix.

18. First, the participation of each of the defendants, save for the third and eighth defendants, in the claimant's multi-line reinsurance programme -- that is a reinsurance

programme providing cover in respect of multiple classes of business -- in at least one of the treaty years from 2015 to 2019.

19. Having regard to the wording and effect of the various treaties that were entered into during this period, the claimant alleges that as at the date of entry into the reinsurance treaties, the claimant and each of the first, second, fourth, seventh and eleventh defendants knew, alternatively it was information reasonably available to them that the inclusion of the contingency event definition in the Excess Treaty (and consequently in the reinsurance treaties also), was an inapposite relic from the aggregate treaty and/or that it was irrelevant and/or had no function in the context of the limits language. In other words, Mr MacDonald Eggers KC for the claimant says it explains why this provision is in the contract.

20. Again, that ought to be largely if not entirely apparent, it seems to me, from the documents, and evidence of any subjective understanding is obviously inadmissible.

21. Mr MacDonald Eggers submitted before me that there would be relevant witness evidence as to how the contracts interact and how they came about. He also said that oral exchanges are referred to in some of the documents, and accordingly the court cannot judge at this stage whether witness evidence would be admissible or not. However, nonetheless it seems to me at this stage at least that it is unlikely that much witness evidence would bear upon this issue, as opposed to examining the documents themselves, particularly in relation to historical documents where witnesses' memories are likely to be somewhat poor.

22. Secondly, Mr MacDonald Eggers relies upon the information contained in the various placement materials provided to the defendants by or on behalf of the claimant at or before placement both in 2019 and in earlier treaty years. That included, for example, references to cover under the excess treaty as being large risk and/or catastrophe excess of loss; information about the exposure of the claimant's contingency account to catastrophic events such as storms and other adverse weather events; reporting of combined losses from the contingency and other classes of business resulting from Superstorm Sandy; and information showing the level of the claimant's exposure on

any individual conference or exhibition as being far below the limits of cover provided under the reinsurance treaties. Again, however, so far as this sort of material is admissible at all, it seems to me that this ought mostly to be apparent from the documents.

23. The third factual matrix item that Mr MacDonald Eggers relies upon are the relevant exchanges between the claimant and/or its brokers and the defendants concerning matters such as the limits written by the claimant across UK events in the context of terrorism cover for the contingency class and the claimant's maximum line in relation to cancellation business. The claimant alleges that these exchanges show that it was the parties' understanding that the claimant's contingency losses were to be aggregated by reference to a causative event and not by reference to the contingency event definition.

24. Again, in my judgment this is likely to be, mostly at least, documentary evidence, although Mr MacDonald Eggers says that there were meetings and oral exchanges around the time of the relevant placements. However, as Mr Templeman KC points out, the claimant has been unable to plead any particular oral exchanges prior to the conclusion of the treaties by way of its particulars of claim or reply, and it is likely that insofar as any such exchanges took place, there will be a written record of them, and it is in any event unlikely that witnesses will have a particularly strong memory of events in the past, as suggested by Mr MacDonald Eggers.

25. Accordingly, I consider that relevant and admissible witness evidence in relation to the contingency event definition issue ought to be very limited indeed. The claimant suggests that it may wish to call three or four witnesses, but whether ultimately it does so or not, it seems to me that their evidence, insofar, as I say, relevant or admissible, should be within a relatively circumscribed compass, and I consider that the disposal of this issue, which is potentially determinative, should take no more than four days.

26. Next Mr MacDonald Eggers says that the court will not be in a position to assess this case without regard to the nature of the contingency losses which should be aggregated. This, he says, the court can consider only at a full trial, not at a preliminary issues trial.

27. This submission is essentially that it will be necessary to consider the losses which the claimant is seeking to aggregate in order to determine the construction issue. But as Mr Templeman KC points out, so far as this information is used to construe the contract, it concerns post-contractual events which would be *prima facie* inadmissible.

28. As Mr Templeman submitted before me, whilst it may be the case that out of 162 losses, 142 fall below the excess if reinsurers are right, that does not in itself advance the construction argument: either those losses are covered on a proper construction of the contract or they are not.

29. Thirdly, the claimant submits that the measures issue (concerning the basis of aggregation of the claimed contingency issues) will occupy only two to three days of court time, thus the whole trial will last up to eight days -- that is four to five days plus two to three days for the two different issues -- so in either case Mr MacDonald Eggers submits this is a one-to-two-week hearing.

30. However, a hearing of four to five days could presently be accommodated in May 2025, whereas an eight-to-ten-day hearing could not be accommodated until January 2026, so whether this is a one-week or a two-week trial is indeed relevant to hearing times.

31. Mr MacDonald Eggers also points out that counsel availability is an issue, in that it may not be possible to have a hearing in May 2025, dependent upon the counsel's commitments, and it may instead be necessary to have a hearing in October 2025 or indeed January 2026, which is when the court could accommodate both issues in any event.

32. However, if the court were minded to order the trial of a preliminary issue, as Mr Templeman urges upon me, then I consider he is right to submit that counsel's availability should not be a driver of the outcome of the application in circumstances where one is dealing with a pure question of construction of a contract. It is an issue which any competent commercial KC could pick up in relatively short order.

33. However, despite Mr Templeman's attractive submissions, the problem I consider with ordering a trial of a preliminary issue on the contingency event definition issue in this case is that if Axa/Brit lose that issue, then the court will still have to determine the measures issue.

34. A trial date for that will not be set until after the preliminary issue and any appeal in respect of that issue has been determined. That would cause significant delay in the resolution of the overall dispute, and the dispute would then likely be delayed well beyond January 2026. I do not consider that that difficulty can be cured, as Axa/Brit suggest, by fixing a stage 2 hearing now, as that does not take account of any possible appeal.

35. Mr Templeman submitted that the putative appellant could apply for an expedited appeal and that any potential delay to the determination of the measures hearing is just one factor to weigh in the balance in determining whether or not to order a preliminary issue. But I consider this is a serious stumbling-block because there is no guarantee that the Court of Appeal would agree to an expedited appeal, particularly in circumstances where insurers and reinsurers are arguing over bespoke wording and not standard market wording.

36. Had I considered that Axa/Brit's case on the contingency event definition issue was extremely strong, then I might have been minded to order the preliminary issue, because then the entire claim would be likely to be disposed of, not least because I do not accept the claimant's contention that any significant witness evidence is required to determine the preliminary issue.

37. However, it seems to me the contingency event definition issue is highly arguable from the claimant's perspective, to put it as neutrally as possible at this stage, and so the dangers of proceeding down the preliminary issue route, with the prospect of the losing party appealing against the court's judgment and delaying matters further, are too great to countenance, and a better and accordingly, I consider, safer route is to fix now a ten-day trial of all of the issues for January 2026, with one day's judicial pre-reading.

38. I consider that, weighing all the factors in the balance, that is the safest and most sensible course to ensure that all issues between the parties are resolved as quickly as possible in all the circumstances. Therefore, for that reason, I do not grant the application of Mr Templeman for the trial of a preliminary issue, despite the strength of some of his other arguments.

Epiq Europe Ltd hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

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