RR&CO
LONDON MARITIME AND ENERGY SOLICITORS
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Case Report:

Talbot Underwriting Ltd v. Nausch, Hogan and Murray

EWHC 2359 (Comm) 31 October 2005

In the High Court

The Facts:
We represented Talbot Underwriting Ltd ("Talbot") a leading London market insurer we had brought the action against the US broker, Nausch Hogan & Murray Inc ("NHM") for failure to procure suitable insurance on a shipbuilders' all risks policy.

NHM were represented by Eversheds.

Background

This was a dispute concerning insurance cover for the offshore pipe-lay construction barge, "Jascon 5", while it underwent outfitting at the Sembawang shipyard in Singapore. The outfitting contract required Sembawang to take out Ship Repairer's Legal Liability cover, and required the vessel's owners, CPL, to take out a Builders All Risks policy including Sembawang as an assured.

CPL instructed their insurance brokers, Nausch, Hogan and Murray ('NHM'), to obtain Builders Risks cover as required under the outfitting contract. NHM obtained (via placing brokers) a 40% slip from the London market which did not expressly name Sembawang as an assured.

In October 2003 the "Jascon 5" sustained flooding damage while being re-floated in Sembawang's dry-dock. Sembawang incurred expense in repairing the vessel, then attempted to claim under the Builders Risks Policy. The London market refused to pay out to Sembawang, asserting that Sembawang was not covered. CPL paid a substantial sum to Sembawang in settlement of their claim against CPL for failing to take out BAR cover for Sembawang. Sembawang compromised their dispute with the London insurers. Both CPL and Sembawang assigned to the London insurers their respective damages claims against NHM.

The Issues

NHM defended the claim by contending that Sembawang was in fact covered under the Slip Policy, so that the insurers should have paid out. They also sought summary judgment on several other issues.

Firstly, NHM submitted - relying partly on The Martin P [2004] 1 Lloyd's Rep. 389 - that

Sembawang was included in the Assured clause as an "Associated" company or a "Joint Venture". It was common ground that the only legal relationship between CPL and Sembawang was the outfitting contract. The Claimants submitted that the necessary element of familial relationship or common ownership for was lacking, and the case was more analogous to The Marine Sulphur Queen [1970] 2 Lloyd's Rep. 285 in which it was held that in a policy negotiated by time charterers, the words "affiliated and/or associated and/or allied companies" were not apt to include the demise charterer. Cooke J held that in the absence of any familial relationship, common ownership or common enterprise Sembawang did not come within the Assured clause.

A further issue of construction centered on whether another clause, which referred to "Additional Assureds…as may be required", had the effect of insuring Sembawang, either because CPL intended to do so, or because the outfitting contract 'required' them to do so. If this were the case, it would then be in issue whether such an option to extend the cover could be exercised without notifying the insurer. NHM argued that their broad interpretation was the literal and plain meaning of the contract, and also the modern equivalent of the marine SG Form. The Claimants submitted that the closely circumscribed definition of the assured was inconsistent with such a result, and that "Additional" could only refer to the categories of unnamed assured, or to entities falling within those categories which came into existence after the inception of the insurance. Cooke J held that the clause was intended to cover only existing and future members of the owner's group of companies. It was not intended to extend cover to parties which would represent an increase in the risk underwritten: a shipyard doing repairing work, against whom an insurer would otherwise have subrogation rights, was unlikely to have been intended to be included, still more so if the evidence were show the insurers were aware of Sembawang's obligation to procure Ship Repairer's Legal Liability cover.

Another issue, involving complex questions of legal principle and consideration of several leading authorities, concerned whether Sembawang could intervene on the contract as an undisclosed principal. It was common ground that CPL was authorized to procure insurance on Sembawang's behalf and intended to do so. NHM contended that this was sufficient for an undisclosed principal to sue on the policy, relying on the dicta of Colman J in National Oilwell (UK) Ltd v Davy Offshore Ltd [1993] 2 Lloyd's Rep. 582. The Court heard argument on the principles to be derived from Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd [1968] 2 QB 545, and Siu Yin Kwan v Eastern Insurance [1994] 2 AC 199. The Claimants contended that the effect of the definition of the "Assured" and the lack of a community of interest between the CPL group and Sembawang (and indeed the fact that their interests were in competition) was to exclude the possibility of an undisclosed principal intervening. Cooke J concluded that in this case the contractual terms and the factual matrix indeed excluded the possibility of intervention by an undisclosed principal.

Cooke J also acceded to the Claimants' submission that there was no scope for Sembawang to enforce the policy as beneficiaries of a trust of a promise, as alleged by NHM. Since Sembawang was not a party to the contract, there was no promise by the insurers in its favour and the principle in Les Affreteurs Reunis v Walford [1919] AC 801 could not assist NHM.

Cooke J was asked to consider whether, on the assumption that Sembawang could intervene as an undisclosed principal (or as the beneficiary of a trust of a promise), the insurers could have avoided the insurance as against Sembawang, for non-disclosure of Sembawang's role, and of the intention and authority to insure on its behalf. NHM contended that the Claimants' could not show a material non-disclosure, and that the insurers had waived disclosure of such facts, alternatively that by the

compromise and assignment the insurers had contractually abandoned the right to avoid. This issue was not directly addressed by their Lordships in Siu Yin Kwan v Eastern Insurance (see above), where it was found that the identity of the insured was immaterial to the insurers. The Claimants, relying on a number of academic authorities, submitted that where an undisclosed principal had a different interest from the named assured and where subrogation rights might be affected, those facts were material. Cooke J agreed that such facts might be material, and held that the key question must be whether, on the facts, there was a fair presentation of the risk to the insurer, as set out in Marc Rich v Portman [1996] 1 Lloyd's Rep. 430. As to waiver, since the express wording of the policy did not include Sembawang, the insurers could not be on notice that it was included, nor express contentment with Sembawang's possible intervention as undisclosed principal. It was therefore difficult to see how the insurers could have waived disclosure.

Cooke J also concluded that the insurers had not lost the right to avoid by affirmation, since (applying the test restated in ICI v Royal Hotel Ltd [1998] LRLR 151) they had neither known of the right to avoid nor had they unequivocally communicated an informed choice to affirm. Cooke J agreed with the Claimants that, since the London insurers had denied all along that any contract existed between them and Sembawang, neither the assignment agreement nor the commencement of the claim against NHM could operate as an affirmation of the contract or abandonment of their right to avoid. The Claimants also had, he found, a realistic prospect of success in showing that the insurers (had they known of the material facts) would in fact have avoided the policy, so that this issue should go forward to trial.

Even on the assumption that Sembawang was a co-assured under the policy, the Claimants asserted that NHM would still be in breach of duty for failing to obtain a policy which clearly or expressly covered Sembawang, so that losses caused by the insurers' refusal to pay out would still be recoverable. The Claimants relied on FNCB Ltd v Barnet Devanney (Harrow) Ltd [1999] LIRL 459 which made clear that a broker's duty is, as far as possible, to obtain coverage which clearly and indisputably meets its clients' requirements, and on Dixey v Parsons (1964) 192 EG 197 (an analogous case involving solicitors). Cooke J again found that the Claimants had a real prospect of success, as NHM's negligence in failing to procure the naming of Sembawang as a co-assured arguably gave rise to all the losses claimed.

NHM's fallback case was that neither Sembawang nor CPL had suffered a recoverable loss. Sembawang, they said, had not been liable to repair the damage to the vessel, as the scheme of the outfitting contract was to exempt them from liability for damage that was to be covered by the Builders Risks Policy. Cooke J rejected these submissions on the basis that (as submitted by the Claimants) the contract plainly required Sembawang to "indemnify and hold harmless" CPL from any loss caused its negligence. Cooke J also held that NHM's contention that Sembawang could set a claim against CPL for breach of its obligation to procure the insurance was not relevant to the question whether Sembawang had itself suffered a loss.

NHM also contended that CPL had suffered no loss since it was always open to CPL to recover an indemnity from the insurers. However, Cooke J held that because CPL had not borne (nor was it required to bear) any of the repair costs, it had not suffered a loss indemnifiable under the Builders Risks Policy. It had merely settled a breach of contract claim which would not have arisen if NHM had obtained a policy naming Sembawang as an assured.

Judgment of Mr. Justice Cooke

Held:
NHM lost on all central issues and indeed on most issues Talbot was successful. NHM were ordered to pay 90% of Talbots costs of and occasioned by the preliminary Issues and NHM were ordered to make a part payment in the sum of £50,000.00 to Talbot on account of costs within 14 days.

NHM sought leave to appeal from the High Court - it was refused,

NHM applied to the Court of Appeal for leave to appeal - which was granted -see case reported above.

Our Counsel:

Gavin Kealey Q.C. of 7 Kings bench Walk Chambers

Charles Kimmins of 20 Essex Street Chambers

FULL REPORT