IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)

Case No: CL-2018-000245

Commercial Court
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

11.37am – 4pm
Friday, 15th June 2018

Before:
HIS HONOUR JUDGE WAKSMAN QC

B E T W E E N:

ASPEN INSURANCE & ANOR

and

SANGSTER & ANNAND LTD

MR C WINSER appeared on behalf of the Applicant
MR STACEY appeared on behalf of the Proposed Third Party

APPROVED JUDGMENT

HHJ WAKSMAN QC:

1. I have got to deal with an application by Britannia Hotels, a well-known hotel group, to intervene in proceedings here which involve a claim by insurers against the defendant insured, Sangster & Annand Limited, who are building contractors, for declaratory relief to the effect that the relevant contract of insurance does not respond in the particular circumstances which have arisen.
2. As it is a claim for declaratory relief, the Court has to be satisfied that it is a proper case for such relief but cases involving this kind of declaration, are far from unknown in this Court.
3. The circumstances giving rise to the dispute are that, in 2016, the defendant's employees were working on the roof of a Britannia hotel and they were using a blowtorch to do what is commonly known as hot work. The result of that was that very shortly after the hot work was purportedly complete, the roof caught fire and the result was extremely serious and substantial damage to the hotel.
4. Two things happened as a result. First, the hotel brought proceedings in Scotland against the defendant contractors. I will have to deal in a little more detail with the precise allegations, but the broad effect was that they did not take any of the usual protective steps required when conducting hot work, so as to avoid the possibility of the area where they were working combusting as a result of the equipment they were using. Such steps would ensure that, if there was a fire, it could be, first of all observed as soon as it happened by a watch person, and secondly it could be put out swiftly by available fire extinguishers.
5. It became apparent that, in the Scottish proceedings, the defendant contractor was saying that it could not or would not really take any part in them because of financial difficulties. At that stage, the claimant insurers here had not accepted liability under the policy but while it was considering its position, it required, as is usual, the insurer to act as prudent uninsured; to that extent, it actually provided funding for the defendant to respond to the claim.
6. The defendant had a firm of solicitors, Mackinnon, who were instructed initially. It is right that they later came off the record, apparently because of a conflict of interest, but not before the relevant response to the Scottish claim had been made.
7. The Scottish claim was set out in considerable detail and it is relevant in a number of different ways.
8. It alleged that there was a contract between the claimant and the defendant and the claim was made, both in tort and then as a matter of contract as well, including the implied terms. It referred to some of the conditions of the contract, including for example, that there should be protection by the use of non-combustible or purpose-made blankets, drapes or screens; that there should be two approved and certified extinguishers of a suitable type; that a fire watch should be there for at least 30 minutes after the work is completed, with regular checks at up to 60 minutes thereafter. This is very redolent of the standard guidance for hot work.
9. Then what is said is that they did not do any of that; they did not provide necessary and sufficient safeguards or precautions. None were provided, no precautions were taken, there were no safeguards in place to inhibit or prevent the outbreak of fire in circumstances while hot work was being carried out.
10. It is then said that there was an implied term that they would exercise reasonable skill and care, so that is coterminous with the tort claim:

> ‘No ordinary and competent contractor would fail to undertake the various safety measures detailed in our C7. No contractor would have failed to have had a second employee on a continuous fire watch. No such

> contractor would have failed to have had fire extinguishers located on the scaffolding or roof adjacent to where hot work was being carried out.
> They would not have failed to use fire blankets to protect the roof structure around the area where a blowtorch was being used, or to fail to have a fire watch for at least half an hour afterwards and check for intervals of up to 60 minutes after the completion'.

11. The defendant had broken the implied and expressed terms of the contract and separately they broke the coterminous, as it is put here the coextensive duty of care for the same reasons.
12. I should add that Britannia, in bringing that claim, also have the benefit of an expert report. I refer to parts of it at 257 of the bundle:

> 'It is said that the fire was discovered about 40 minutes after Mr Kirkton said he completed his work with his blowtorch in the vicinity of where the flames were first seen. The probable cause was the fire is associated with the roofing work. It is likely that the heating of the torch on the combustible materials on the roof construction ignited, then it smouldered and the fire took place'.
> The witness evidence suggests Mr Kirkton was the only employee working on the roof on the day of the fire, contrary to recommendations in industry guidelines.
> The evidence also suggests there was no fire extinguisher located on the scaffolding or roof adjacent to where the hot work was being carried out. There is no mention he used any fire blankets to protect the roof structure close to where he was using the blowtorch'.

13. The suggestion that has been made in argument by Mr Stacey before me that where you are working on a roof, it would be inappropriate to put something on the roof itself which is of a non-combustible material is therefore contradicted by his client's own expert.
14. The report continued: 'And that he left after 23 minutes and that was the end of it. There was no recommended 60 minute fire watch'. He also says that:

> 'In accordance with published industry guidance, they would have expected a risk assessment to be carried out prior to the hot work commencing, and a copy of the document retained. If it had been produced, it would have become apparent that the hot work permit would have been required; the Britannia hot work permit was not completed'.

15. Now, in answer to that pleaded claim, and assisted by solicitors at the time, the response from the contractors was remarkably terse. There was no attempt to deal with the particulars. Instead it was said, 'The contract work was carried out in a reasonably safe fashion by the defendant. Mr Kirkton took reasonable care and applied reasonable standards of workmanship. A second operative was not required, given the scope of the contract work'.
16. That last sentence is not actually to the point. I think it is reasonable to infer that the reason at that stage why nothing further was said is probably because nothing further could be said, if it was attempted to deal with the particulars alleged against the defendant.
17. At that stage, after the solicitors came off the record, there was very little going on in the Scottish proceedings and, indeed, it would be possible for the claimant, in the event of non-involvement on the part of the defendant, to apply for something like we would call

judgment in default.

18. That brings me to this claim. In this claim, what happened is that the defendant did not file an acknowledgment of service. On that basis, the claimants applied for judgment in default. It had to be an application, not a request, because it involved declaratory relief.

19. I do not need to say too much about declaratory relief. It is a discretion on the part of the Court, but in these sorts of cases, the usual thing that the Court will be looking at is to see whether the declaration is really required by the action concerned or whether it could cause injustice to third parties, such that further procedural steps should be taken.

20. I am told that, in fact, Britannia Hotels were aware of this action being commenced because they were put on notice by insurers and indeed were put on notice about the application for judgment in default.

21. Judgment in default would have been entered, indeed Picken J was minded to do so until, just in time, Britannia came on the scene and indicated that, as there was a third party involved in this, he should not grant the judgment which he was minded to do and he saw the force of that and that results in the hearing today, which is the claimants' application now for judgment in default against the defendant.

22. The defendant does not appear today, although they seem to have come back to life a bit, because they now have intimated that, in Scotland, they wish to defend the case and, in England, they have served, although late, an acknowledgment of service.

23. But it is Britannia who come to Court today to say, not only should the Court not grant a default judgment against the defendant, which would affect it, but also it should be allowed to intervene and, as it were, effectively take up the cudgels on behalf of the defendant, because the party which will ultimately be affected by any non-response of the insurance policy here is, of course, Britannia in the event of the insolvency of the contractors (which seems to me to be not unlikely) where Britannia would then normally be making a claim under the Act.

24. As both counsel, in their helpful and comprehensive submissions before me today, have accepted, in order for me to decide in these circumstances whether Britannia Hotels should be joined, there has got to be at least some good reason for doing so.

25. Mr Winser says that since, in the absence of Britannia coming forward, they would have got a judgment in default, and if that had happened Britannia would have to show a reasonable prospect of success; that is the test I should apply.

26. Alternatively, it would come to the same thing because, even if there was not a judgment in default, there would be a summary judgment application in due course and that requires the defendant to show that there is a reasonable prospect of success.

27. I am not sure it is quite as cut and dried as that. There is not any direct authority on the point and, giving Britannia the benefit of the doubt, I take the view that the merits' test is somewhat less than that. There has got to be real utility in the third party being joined and, in this context, that utility can only be achieved if there is at least a seriously arguable defence which could be put forward so as to avoid the policy being repudiated after a trial.

28. I use that wording advisedly on the basis that while it is something less than a real prospect of success, that there is nonetheless a merits threshold which has to be passed and it has certainly got to be something which is more than barely, or speculatively, arguable. I do not propose or need to elaborate on that further.

29. It is, I think, helpful to start with the clauses of the insurance policy. The reason why the insurers say that there can be no defence to the claim for declaratory relief is concerned with, first of all, primarily clause 10 of what are said to be exclusions.

30. It is quite right that they are headed 'Exclusions to section two'. Section two provides, among other things, public liability indemnity cover to the contractors against legal liability

for damages and the claimants' costs and expenses in respect of personal injury, damage to property or nuisance happening during the period of the insurance and then that is qualified by what are said to be exclusions.

31. I say 'what are said to be exclusions' because when one looks at the exclusions themselves, a lot of them are really about areas of activity which the insurance simply does not reach. For example, anything to do with product liability; anything to do with pollution or contamination; anything to do with particular kinds of vehicles or vessels or underground services, that can be fairly described as simply defining the reach of the relevant insurance. Work offshore is another example. Here, what is said is as follows. It will also not reach a case where:

> 'The insured is using any process which involves the application of heat, oxyacetylene, electric arc or similar welding and cutting, grinding or other spark admitting equipment, away from the insured's own premises, unless:
>
> a) the immediate area in which the operation is to be carried out has been segregated to greatest practicable extent by the use of screens made of metal or fire-retardant material;
> b) the whole of the segregated area is cleared;
> c) combustible floors, substances in or surrounding the segregated area, have been liberally covered with sand or protected by overlapping sheets of incombustible material before operations commence;
> d) where the work is being carried out in any enclosed area, an additional employee of the insured, or
> e) an employee of the occupier of the main contractor, is present at all times', and then:
> f) the following are in readiness for immediate use: small[?] suitable fire extinguishers, by number and size for the scope of operations, for use at the scene of operations;
> g) a thorough examination has been made one hour after the termination. In the event it is not practicable to be carried out by the insured's own employees, then appropriate arrangements must be made and signed off by the occupier'.

32. That is all I need to refer to, though there are some other points as well.

33. It will be immediately apparent from that list that it is redolent of the typical industry guidance which applies to the undertaking of hot work. It will also be apparent that it is in very similar, though I accept not identical terms, to the positive claim which Britannia is making against the insured.

34. It maybe something of a forensic point, but it is not wholly irrelevant to say that that, on the face of it, would seem to me to cause a large problem to Britannia, who would have to be saying one thing in its Scottish claim and then saying virtually the opposite in order to defend the claim here, but I will return to that in a moment.

35. First of all, simply dealing with clause 10, Mr Winser says, effectively, that there cannot be a seriously arguable defence to the application of clause 10, therefore the non-application of cover, and he says that for a number of reasons, by reference to the materials.

36. First of all he says that the nature of clause 10 is effectively defining the scope or the reach of the insurance, despite the word 'exclusion' and therefore it is not necessary to construe these clauses particularly narrowly or *contra proferentem*. I agree with that, although, for reasons I shall give, I do not think it makes any difference in this case.

37. Secondly, he deals with an argument that Mr Stacey made which says that, in any event, clause 10 is a clause which, as a matter of general law, would require recklessness to be shown by the insured. He says there are authorities to establish that.

38. What the authorities establish is that where there is a general clause which says that the insured, as a condition, must take reasonable precautions, then the courts have consistently required that what needs to be shown there is recklessness - for the understandable reason that, if it were not otherwise, some indemnity insurance for negligence would hardly be worth it because the very act of negligence would then invoke the lack of reasonable precautions exclusion or clause.

39. This is not such a case. This is a highly defined and circumscribed set of particular safeguards which have to be put in place, drawn from industry guidance. There is a quite separate general clause requiring reasonable precautions in this policy, which is at page 34 of the policy, 'Reasonable precautions', but that is not what these insurers rely upon.

40. Mr Stacey says that one should expand the category of clauses to which the recklessness condition applies, because the logic of it is that you cannot give with one hand and take away with the other. While obviously that is part of the reasoning in the cases, it is clear from the decision of Jackson J, in the *Trustees of the Tate Gallery (Board of Trustees of) v Duffy Construction Ltd & Anor (No 2)* [2007] EWHC 912 (TCC) (02 April 2007), and in the numerous decisions that he refers to, that they are all concerned with the general 'reasonable precaution' clauses.

41. There is no authority for applying the recklessness condition to this case. In any event, it is not a case of giving and taking away, it is a case where what is said is that the insurance policy will not reach into the area of hot work at all, unless certain preconditions are complied with. There is nothing in the recklessness point.

42. The core question is whether there is any real material to show a seriously arguable case on what we have at the moment, or what might reasonably be contemplated. That is the real point.

43. The disconnect between the claimants' claim in Scotland and the insurer's claim here is of some relevance but it is not actually what I need to be concentrating on; so although Mr Stacey spent some time explaining why the nature of the case being made in Scotland was not necessarily incompatible with rejecting the clause here, because the terms were slightly different, that is not actually the test.

44. We go to the next point which is that Mr Stacey then says that causation is required. In other words, if there is a breach of part of clause 10, but it would not have made any difference in the circumstances, then that becomes irrelevant. For example, he says, 'The fact that the fire extinguishers might not have been available because they were in fact still in the contractors' van, does not really matter, because there was nobody around to do anything about it anyway. That is simply wrong as a matter of law.

45. It was, until recently, a well-established principle of insurance law that, if there is a breach of a clause (which would include a clause of this kind), its causative impact or otherwise is wholly irrelevant. That is set out at, and criticised it is fair to say, in Colinvaux, see 8.091, which also refers to an extreme example of the case of *Vesta v Butcher* (1986) 2 All ER 488, 508 where a 24-hour watch warranty did not take place. It was fatal to a claim, even though the failure to provide the watch had no conceivable connection to a loss caused by a storm. That is directly comparable to this case, in my judgment; see 8.119.

46. Mr Stacey then says, 'But it is an exclusion clause and one is entitled to import a causative test'. Even if it is to be regarded as a straight exclusion clause, there is no basis at all for implying a causative test. The position is now, of course, different after the introduction of the Insurance Act 2015, but this case is a pre-Act case so there is nothing in the causation

point.

47. One sees the positive claim in the Scottish case as to protective fire blankets and I have read what the expert evidence says all about that. In the light of that, what is said first of all is that there was a breach of clause 10c), 'Combustible floor substances in or surrounding have been liberally covered with sand and protective overlapping sheets of incombustible material before the operation commenced'. There is a clear breach there. 'Combustible floor substances in or surrounding the segregated area', that means around the roof or the part of the roof that was being done and there were combustible areas around because they combusted.

48. There was no covering by non-combustible blankets. It is a point that is pleaded against the defendant and it is stated by the expert. That, in my judgment, is a clear breach of clause c).

49. One then goes on to clause e) which says that, 'The work must be specifically authorised and signed for by the occupier, or the main contractor, who must also approve the safety arrangements'. There is no evidence that that was done either. It is not enough to say that there is a contract with particular terms; it is that this scheme of work had to be approved.

50. The proof of the pudding is in the eating. If the contractor's scheme of work was what they did, it is inconceivable that Britannia would have approved it and that, therefore, is a clear breach of c).

51. One then comes to f) i), 'The following are in readiness for immediate use at the scene of the operation: suitable fire extinguishers, by number and size, for the scope of the operations'. Again commented by the expert and put in the Scottish claim. The two fire extinguishers were in the van, which does not, on the CCTV evidence, even appear to have been parked directly outside.

52. The notion that two fire extinguishers, in a van, is 'in readiness for immediate use at the scene of the operations', which is the roof of a building is, frankly, absurd. There is no meaningful distinction to be taken between the scene of the operations and the area where the operations is to be carried out and therefore there are, in my judgment, very clear breaches of those three clauses.

53. In response really all Mr Stacey could realistically say is, first of all, that he maintained the recklessness and the causative points. Well they do not work. The fact that it is a roof does not make any difference, as I have already said.

54. Otherwise, all he could say, and I do regard this as Micawberish, is that something might turn up at the trial in Scotland. That seems utterly unlikely, especially since the claimants are claiming precisely the opposite and, on the face of all the evidence I have got at the moment, there appears to have been absolutely nothing by way of compliance with these industry standard conditions, by the defendant.

55. It is, I am afraid to say, cloud cuckoo land to suggest that something is going to emerge which will change the position as far as compliance with clause 10 is concerned.

56. That would be enough, and is enough, to dispose of the claim made against the insured so far as tort is concerned. It must, in my judgment as well, be sufficient if it were otherwise possible to provide cover, for a contractual claim against the insured, but on the basis of either the detailed contractual terms which are pretty similar to clause 10, or an implied term as to reasonable care and skill, clause 10 would operate to negate all of that, or the failure to comply with it.

57. However, Mr Stacey says there is a distinction because, quite apart from all of that, there is a separate clause in the contract with the insured which effectively says that the insured would indemnify Britannia Hotels in the event of any losses of any kind and what is therefore said by Mr Stacey is that, irrespective of all of these points, there is a straight contractual claim which the policy would have to respond to and that clause 10 would

simply be irrelevant.

58. There are a number of fatal answers to that. First of all, if there were a straight contractual claim and the contract of insurance covered it, I still do not see why clause 10 would not apply, because it would still remain the case that it all arose out of hot work, whether giving rise to tortious or contractual consequences, is then qualified by condition 10.

59. Secondly, there is the case of *Tesco Stores Limited v Constable and Others* [2008] EWCA Civ 362 which establishes, by a strong Court of Appeal in 2008, that typical public liability insurance clauses, of the kind that we have got here, protecting against the legal liability of the kind that we have got here, are designed to cover, and cover only, tortious claims.

60. 'A public liability policy provides cover against liability of public at large. It is not private liability arising from contracts entered into between individuals. Public liability arises only in tort. It does not and cannot arise only in contract'.

61. There is then a separate point that, 'As a general rule, a claim in tort cannot be founded upon a claim of pure economic loss, which would be the subject of a contract claim'. It goes on to say, 'The judge is right to say it was public liability insurance and such policies do not generally cover liability in contract for pure economic loss'. It is a strong pointer to the meaning of the words used. It is not conclusive.

62. Then there are similar passages which refer to the Court's limitation of the scope of public liability to tort cases, see paragraphs 16 to 21.

63. I am afraid that, in my judgment, the claimants are stuck between a rock and a hard place here. If they are going to argue the contractual claim which is coterminous with the tortious claim then, on any view, clause 10 would provide an answer.

64. If, on the other hand, they want to use a pure contractual indemnity claim for their financial losses, then that seems to be well within the words of *Tesco v Constable*, even if its impact is not to exclude contract claims in general, which I believe that it is. Either way, the contractual claim will not rescue the position of Britannia and I say, for the avoidance of doubt again, so far as I can see, there is no reason why clause 10 should not apply, however the claim is put, if the claim against the insured would otherwise be covered by the insurance, because it is all about hot work and then clause 10 has to be complied with.

65. It therefore seems to me, for all those reasons, that there is not only no seriously arguable case; there is really no case whatsoever which can avoid the consequences of clause 10. In those circumstances, questions about the precise limits of the Court's discretion in relation to declaratory relief simply do not arise because one is now simply looking at the ordinary case, in the insurance context.

66. In a judgment in default context where this sort of declaratory relief is very frequently granted, it is the only kind of relief which the insurer can have at this stage because there is no present claim for the insurer to fight. The utility of all of this to the insurer is that it does not have to have a fight, because there is effectively nothing to fight about.

67. It may have been fortuitous that the defendant did not file an acknowledgment of service on time so that the insurer here could take the convenient step of seeking a judgment in default, but I do not think that makes any difference.

68. Where there is really no serious case, it is unjust to make the insurers fight one. Equally, there is no injustice to Britannia because it could not have succeeded at the end of the day anyway. It is unfortunate that Britannia finds itself in these circumstances, but I am afraid I have got to apply the legal principles as they appear to me.

69. For all of those reasons, I refuse the application to intervene and I grant the judgment in default against the defendant in the terms sought.

Transcript from a recording by Ubiqus
291-299 Borough High Street, London SE1 1JG
Tel: 020 7269 0370
legal@ubiqus.com

This transcript has been approved by the judge.