The 1989 Annual Conference

4. REINSURANCE

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(NB. The first three Updates are printed in the January 1990 issue).

1. My subject is reinsurance. The Association's programme introduces the slightly unlikely tennis foursome of reinsurance, aviation, medical malpractice and liability law. One may be tempted by interesting authorities on other courts, for example *Banque Keyser Ullman* -v- *Skandia* (alias *La Banque Financiere* -v- *Westgate)* or *The Good Luck,* both recently discussed by Brian Davenport Q.C. in Lloyds Maritime and Commercial Law Quarterly (1989) Part 3 page 251. But I am warranted same terms as, and to follow the settlements of those inviting me to speak, and confine myself therefore to reinsurance.

2. Taking litigation, it has been a year when procedural decisions have been to the fore, though there was an important decision on substance and reinsurance drafting in *Vesta* -v- *Butcher* [1989] 1 Ll.R. 331 (H.L.).

3. *The customary jurisdictional dispute. Finnish Marine* -v- *Protective National* [1989] 2Ll.R. 99 (11th January 1989). This was the now familiar attempt by reinsurers to launch a pre-emptive claim for a declaration of no liability. Commonly reinsurers assert that they have validly avoided.

   It is clear that the English courts have jurisdiction in such a case to give leave to serve outside the jurisdiction in a country not party to the Brussels Convention (see Civil Jurisdiction and Judgments Act 1982): *Insurance Corporation of Ireland* -v- *Strombos* [1985] 2 Ll.R. 138, 142. But in the *Finnish Marine* case reinsurers claimed a declaration of no contract at all, on grounds of want/excess of authority by alleged underwriting agents. Held: this was not a claim to "affect a contract" within R.S.C. Order 11 at all. The contract affected must be between Plaintiff and Defendant. It was not sufficient to say that reinsurers' contract with their underwriting agent was affected.

   Contrast *E.F. Hutton* -v- *Mofarrij* [1989] 2 A.E.R. 633 (C.A.) (21st February 1989). A Greek law cheque was there given as security for performance of an English law commodity dealing contract. Held: although the cheque was a separate contract, an action on it could be within Order 11 as affecting the English law dealing contract. [Sed quaere].

The *Finnish Marine* case is also useful authority that *Henry* -v- *Geoprosco* [1976] Q.B. 726 (C.A.) has no place in either English conflicts principles (see Civil Jurisdiction and Judgments Act 1982) *or* in English domestic law: merely applying to stay proceedings pending arbitration will not constitute submission to English jurisdiction.

4. *Pan Atlantic* -v- *Pine Top* [1989] 1 Ll.R. 568 (C.A.): an appeal from Hirst J., who gave Order 14 judgment, was dismissed. Pan Atlantic as front company for a pool had brought proceedings in its own name against the pool's excess of loss reinsurance on behalf of all pool members.

   Pan Atlantic for its 10% proportion in the pool was a direct claimant against the excess of loss reinsurers in respect of original losses. Other pool members for their remaining 90% reinsured Pan Atlantic and were therefore as reinsurers of Pan Atlantic claimants against the excess of loss reinsurers.

   There were also disputes between Pan Atlantic and pool members.

   Held: none of that mattered. Pan Atlantic could represent all pool members under Order 15. What mattered was their common interest in pursuing excess of loss reinsurers.

   There is a useful simplicity here for practitioners.

   The Judge's further point that Pan Atlantic could sue as trustee (applying *Trans-continental Underwriting Agency* -v- *Grand Union Insurance Co.* [1987] 2 Ll.R. 409) was not considered in the Court of Appeal.

5. *Meadows Indemnity* -v- *Insurance Corporation of Ireland* [1989] 2 Ll.R. 298 (C.A.)

   A claim by reinsurers for declarations:

   (i) against insurers that reinsurers were entitled to avoid the reinsurance: this creates no problem;

   (ii) against the original insured to the effect that insurers were entitled to avoid the original insurance.

   As regards (ii) reinsurers were supported by insurers. But the Court of Appeal

upheld the original insured's objection to such a claim.

Absent a cut-through clause, there is no contract between an original insured and reinsurers. There is no basis for any involvement of reinsurers until liability had been ascertained as between the original insured and insurers. That had to take place separately, and until it had taken place reinsurers had no locus standi. (After it had taken place, it was too late for reinsurers to become involved!)

The result is welcome as leading to some limitation on the proliferation of parties to insurance and reinsurance litigation.

6. *Home and Overseas Insurance Company* -v- *Mentor Insurance Company* [1989] 1 Ll.R. 473 (C.A.).

A claim by reinsurers of Mentor (a company in liquidation) for a declaratory judgment under Order 14 of no liability under excess of loss reinsurances which provided for reinsurers to pay the excess of an ultimate net loss, defined as "the sum *actually paid* by the reassured in settlement of losses or liability".

The claim was on the basis that Mentor had not paid (could not pay) anything (at least before recovering from reinsurers – and even then probably not in full) because it was insolvent and in liquidation.

Mentor cross-claimed for a stay pending arbitration. This cross-claim was upheld.

The members of the Court of Appeal gave differing weight and perhaps somewhat different interpretations to the effect of the "honourable engagement" arbitration clause in their reasoning, leaving scope for future revisiting of this point.

7. *Overseas Union* -v- *New Hampshire*. This arose out of the activities of the same underwriting agency as the *Finnish Marine* case.

A French extended warranty insurance issued by New Hampshire was reinsured with Overseas Union (domiciled in Singapore) and with two other English insurance companies, each of its own proportion.

New Hampshire sued on the reinsurance in France. The reinsurers brought English proceedings thereafter, contending that there was jurisdiction in Eng-

land under the Civil Jurisdiction and Judgments Act (Brussels Convention) and no jurisdiction in France.

The insurers applied for a stay of the English proceedings under Article 20 of the Brussels Convention.

Held by Hirst J.: the French courts should review French jurisdiction, and not the English courts. The Brussels Convention requires the court second seized to defer to the court first seized, even in cases where the Defendant in the second court is *not* domiciled in a Convention State.

The Court of Appeal remitted the matter to the European Court, including a possible issue as to whether insurance in the Brussels Convention (see Section 3 articles 7 to 12A) includes reinsurance. (The current English view, based on the Schlosser Report, appears to be that it does not: see *Citadel Insurance* -v- *Atlantic Union Insurance* [1982] 2 Ll.R. 543, 549).

Compare *Kloeckner* -v- *Gatoil* (Hirst J.; [1990] 1 Ll.L.R. 177) distinguishing the position where the second court seized has exclusive jurisdiction under the Brussels Convention. The *Overseas Union* case has since been followed by Hobhouse J. in *S & W Beresford* -v- *New Hampshire (27/11/89).*

Cases on the Brussels Convention will be very frequent in the next few years. The Convention language is full of scope for interpretation, particularly in its application to insurance and reinsurance.

8. *Vesta* -v- *Butcher* [1989] 1 Ll.R. 331 (H.L.).

This is my one case on substance. But it is also another case which stresses how important it is to think about conflicts of law and jurisdictional problems in the context of reinsurance.

There was insurance by Vesta on a fish farm in Norway, subject to Norwegian law. The insurance contained a warranty that there would be a 24 hour watch on the site, and failure to comply with the warranty was to render the policy null and void. There was no watch. There was storm damage, not in any way due to lack of a watch. Under Norwegian law, in the absence of any causative link between the breach of warranty and the loss, the insured was entitled to make and made a full recover from Vesta as insurers.

Vesta in turn looked to its reinsurers in London. The reinsurance contained a full reinsurance clause which warranted that it was on the same terms and conditions as and to follow the settlements of the original insurance and was treated as incorporating the same warranty as the original.

The reinsurance was held to be subject to English law, under which any breach of warranty discharges a reinsurer from a liability irrespective of any causative link with any loss.

But it was held by all courts that English law required (as a matter of construction) that the warranty in the reinsurance should be given the same (Norwegian) effect as in the original insurance – in order to achieve the intended back-to-back effect of the insurance and reinsurance.

Two members of the House of Lords were very critical of the thoughtless incorporation in reinsurances of original terms, and expressed doubt (obiter) whether the original warranty really had been incorporated in the reinsurance (or whether the true analysis was not that it had just been identified in the reinsurance as being in the original insurance). (On this point see an article by Professor Robert Merkin in [1988] 1 Lloyds Maritime and Commercial Law Quarterly page 5).

What brokers have, until perhaps recently, focused on either the proper law or the need to relate or marry the proper law of insurance and reinsurance contracts, in the placing of which they are involved?

Or on the need to relate and marry insurance and reinsurance wordings?

The answer is very few (despite the international nature of much insurance and reinsurance business), but that in today's climate much greater attention will need to be devoted to such matters. There are signs already that the insurance market and informed insureds (for example banks in relation to financial transactions where insurance is an element) are beginning to employ and use lawyers at the placing stage.

9. So much for the centre court of insurance litigation. I turn to the comparative privacy of the inside court where arbitration, the traditional means of dispute resolution, has also had an active year. This is particularly so in the area of asbestosis. Old reinsurances have been dusted off and their excess limits and aggregation clauses examined. Run-off contracts have been examined for their validity and scope. There have been allegations of non-disclosure in placings a

decade or decades ago and the scope and intent of briefly worded run-off reinsurance slips has become of critical importance. To take one example, on whom was the risk intended to fall of irrecoverability of losses from other prior specific reinsurers?

The market has heard and seen differing views and to a limited extent awards as to the recoverability from reinsurers of sums paid under the Asbestos Claims Facility (1985 to 1988), for example on such issues as whether:

(i) Are such sums insurance payments at all within the meaning of original reinsurances? One view put forward regards the Facility as a complete restructuring of responsibilities (by agreement between producers and insurers) whereby any claimant is guaranteed a recovery to which producers and insurers contribute generally – irrespective whether actually on risk for that particular claimant's injury. If that be correct are payments under the Facility to be viewed as "settlements" at all within the meaning of a "follow the settlements" clause? Or are they made under a completely fresh arrangement for which reinsurers do not answer? Can insurers recover if and to the extent that they can prove that any particular payment did in fact relate to a particular insurance on which they as insurers were or would have been liable in any event apart from the Facility?

(ii) Gaps and Surcharges. These represent other areas of dispute under the Facility. Are surcharges to be viewed as administrative costs of the Facility (analogous to underwriting or claims expenses) or are they to be viewed as analogous to legal costs? And what is the position regarding gaps, that is payments made in respect of years when no relevant insurance issued by the insurer party to the Facility was in force? Are they recoverable from reinsurers?

10. *Conclusion.* Lovers of reinsurance litigation (if there are any) can all be reassured! The insurance market will continue to requite their enthusiasm for quite a while yet. More seriously, in this continuing process of interaction of the worlds of law and insurance in matters of both procedure and substance, a number of points are likely to be raised and decided of general importance for both worlds.