

London and Bermuda

NEWSLETTER

Spring 2006

A Periodic Review of New Developments
in Law and Insurance

ANNOUNCEMENT

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A Challenge to *Lumbermans*: Enterprise Oil Ltd. v Strand Insurance Co. Ltd. (2006) EWHC 58

James Pilgrim-Morris

Background

The dispute concerned a claim for indemnity under a liability policy placed by Enterprise Oil with its captive insurer, the defendant, Standard Insurance. The relevant underlying litigation between the third party, "Rowan", and Enterprise Oil was in Texas, USA. There were claims in those proceedings of tortious interference with contract. The action sought recovery of damages under various heads and for consequential loss, including \$52 million in relation to a stock buy-back programme. Shortly before trial, pursuant to an order of the trial judge, a mock jury "heard" the case and "found" for Rowan, "awarding" damages of \$85 million. However, the mock jury gave nothing for losses relating to the stock buy-back. The Texas proceedings were subsequently settled and the right to an indemnity was said to arise

from Enterprise Oil's liability under the settlement agreement, of which the stock buy-back element formed a significant part.

The decision addressed a number of important issues. Of greatest importance to the market are the comments of the Court¹ challenging the decision in *Lumbermans v Bovis Lend Lease*.² There were also significant comments on, and the case itself turned on, the nature of Enterprise Oil's liability and how it must be proved. The Court ultimately ruling that Enterprise Oil was not actually liable to the Rowan and so there was no entitlement to an indemnity. Finally, the Court made certain comments about fortuity, indicating that that doctrine is perhaps of more limited scope than previously thought.

The Decision in *Lumbermans*

By way of a reminder, in *Lumbermans*, the judge³ ruled that a global settlement (of underlying litigation) which did not impose on the insured any identifiable loss in respect of any identifiable insured eventuality, did not satisfy the requirement of ascertainment of loss under the liability insurance policy in issue. Furthermore, it was not open to the insured to adduce evidence to prove the liability and the quantum in the face of such a (defective) settlement. The Court could not cure the deficiency in the validity of the ascertainment of loss by hearing evidence which went behind that which was expressed by the settlement agreement.

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The Challenge to *Lumbermans*

In *Enterprise Oil*, the Court rejected the *Lumbermans* approach. While it must be noted that the comments in relation to *Lumbermans* were not part of the judgment in *Enterprise Oil*, and so strictly *Lumbermans* remains English law, the judge gave a fully reasoned decision on the point, making a powerful challenge to *Lumbermans*.

The Court said that, to make a recovery, an insured did not have to show that the amount of its loss to be claimed under an insured peril covered by the liability policy had been specifically ascertained in the wording of a judgment, award or settlement. The Court gave two (compelling) reasons in support of this position:

- First, *Lumbermans* itself is not supported by authority and is inconsistent with the insurer's right to challenge whether the insured's

¹ Mr Justice Aikens

² *Lumbermans Mutual Casualty Co. v Bovis Lend Lease Limited* [2005] 1 Lloyd's Rep 494

³ Mr Justice Colman

right to indemnity under the policy has been established. The Court stated what it saw as the relevant principle, as follows:

“... it is open to an insured to assert and prove, by extrinsic evidence, that it is liable to a third party for a particular sum under a settlement that has been made and that the particular sum represents a loss covered by an insured peril under the liability policy. Equally, if an insured had made a settlement which purported to identify a particular sum as representing the quantum of liability for a particular type of loss that equated to an insured peril under the liability policy, the insurer would be free to challenge the insured’s liability to the third party, the quantum of the liability and whether the particular liability identified in the settlement did, in fact, constitute a loss covered by an insured peril under the policy.”

“The Court held that in order to recover the insured must have a liability covered under the policy – but the liability need not have been specifically ascertained in the wording of a judgment, award or settlement.”

■ Second, the Court thought that, if the decision in *Lumbermans* was correct, it would lead to great commercial inconvenience and to artificial statements, not only in settlement agreements, but also in judgments and awards.

Judgment on the Liability Issue

A central decision in *Enterprise Oil* related to the Court’s interpretation of the insuring clause in the policy. Cover was provided for sums that Enterprise Oil was obligated to pay by reason of “*liability imposed on the assured by law*” or “*liability assumed under contract or agreement*” or “*otherwise*”. In each case the liability had to be “*on account of personal injury...committed or alleged to have*

been committed.” “*Personal injury*” was defined to include “*infringement of contractual rights*”.

On the basis of this language, Enterprise Oil submitted that it needed only to establish an *arguable* liability; Strand Insurance submitted that what was required was proof of an *actual* liability. The Court agreed with underwriters and held that, absent express words to the contrary, under a liability policy, the assured must show an actual liability to a third party (albeit such liability does not have to have been specifically described in words in a judgment, award or settlement).

The issue then arose as to what test applied to assess whether Enterprise Oil was actually liable. In line with prior authority⁴, the Court found that it had to determine, not what could

legitimately have been decided in Texas, but what should have been decided under Texas law. As a matter of Texas law, the Court ruled that Enterprise Oil failed to prove any tortious interference in contract, or that the losses were reasonably foreseeable or that the alleged breach was the proximate cause of the losses. Accordingly, there was no liability under Texas law for the amounts claimed, and so no entitlement to an indemnity under the policy.

Fortuity

Although technically not part of his judgment, the judge also commented on the issue of fortuity. Consideration was given to the question of whether, had Enterprise Oil proved itself liable

for the tort of deliberate interference with contract, cover would in any case have been excluded for want of fortuity. On the wording of the policy, the Court said not. The insuring clause envisaged cover for any loss arising from any legal liability. The judge thought that this wording would be wide enough to cover tortious liability for the deliberate act of inducing breach of contract.

Comment

The lawyers for both parties in this case acknowledged that the decision in *Lumbermans* was “*very controversial*”. Although technically not part of his decision, the judge gave a compelling view rejecting the *Lumbermans* approach. The *Lumbermans* point will, no doubt, only finally be resolved following further litigation, but it would appear that the decision may struggle to find support in the English courts.

Lloyd’s Brokers’ Responsibilities Re-examined by the Court of Appeal

Adam Barker

In *Goshawk Dedicated Ltd. v Tyser & Co. Ltd.* EWCA Civ 54 the Court of Appeal issued a judgment which emphasises the dual role of Lloyd’s brokers. The leading judgment was delivered by Rix LJ.

The insurance involved “*viatical*” companies which purchased life policies from persons over 65 or suffering from terminal illnesses. The business was placed through Lloyd’s brokers, and the face value of the life policies purchased by the companies exceeded US\$1 billion.

The Lloyd’s Underwriter in the present case was in run-off and, in order to assess its position, wished to obtain three classes of documents from the brokers:

⁴ *Commercial Union Assurance Co Plc v NRG Victory Reinsurance Ltd [1998] 2 Lloyd’s Rep 600*

1. Placing documents, namely documents contained in the brokers' placing files, which were disclosed to the Underwriters at the time of placement and retained by the brokers but not the Underwriters.

2. Claims documents, presented by the brokers to the Underwriters for the purpose of making claims, presented to the Underwriters but not retained by them; and

3. Premium accounting documents relating to the collection, processing and accounting for premium, showing premiums due, charged and paid

A number of the assured companies had no objection to disclosure, but some did object and others failed to respond to the broker's request for authority to release the documents. The brokers took the view that, as agents of the assureds, they could not disclose documents without the consent of their principals. The Underwriters sought a disclosure order against the brokers.

At first instance Christopher Clarke J rejected the bulk of the application. In particular the judge held that there was no custom in the Lloyd's market for disclosure; expert evidence and various brokers' codes of conduct showed that there was no consensus in the Lloyd's market on the point, and the most that could be said was that there might have been a common or habitual practice whereby documents were retained by the brokers alone but that the implication of a custom would not be reasonable as it would give rise to a possible conflict of interest. The overall theme of the judgment was the desire of the Court to give primacy to the brokers' role as agents of the assured.

The arguments before the Court of Appeal were different. The

Underwriters did not pursue certain claims. Instead the focus was on the relationship between the assured and the Underwriters. The argument was that there was an implied term in the contract of insurance under which the assured was required to authorise the brokers to release the relevant documents to the Underwriters. Rix LJ summarised the brokers' argument as follows:

"The brokers say that there is no contract between them and their client's underwriters and no such implied term for re-inspection. If the underwriters want documents, they will be happy to provide them if their client consents, but otherwise their duty is to their client, not to their client's underwriters. If the client does not consent, the underwriters can only seek disclosure under the rules of procedure which govern in the context of legal proceedings".

This argument was not accepted by the Court of Appeal on the ground that there was an implied term that was necessary to give business efficacy to the contract, given the market background whereby brokers typically retained documents which had been shown to Underwriters but Underwriters themselves did not receive or take contemporary copies.

"It is merely reproduction of what the insureds had originally disclosed to Underwriters, as a matter of good faith..."

So far as placing information is concerned, Rix LJ felt that the absence of an implied term would mean that the Underwriters were operating the contract in the dark. He stated:

"What is requested ... is not production for the first time of the insureds' private documentation which might reveal that there had been non-disclosure on the part of the

insureds. It is merely reproduction of what the insureds had originally disclosed to Underwriters, as a matter of good faith, in the making of a purportedly fair presentation. If the disclosure of this information was thought at the time to be necessary for the purpose of making the contract, I cannot understand what embarrassment or other difficulty there could be about its availability to Underwriters who have not retained it. Such documentation is discrete, not voluminous, defined by its prior use in placing and presentation and thus not open-ended nor expanding, and it therefore should be easily identifiable."

Rix LJ extended the same analysis to the brokers' claims file.

"It is not concerned with the formation of the contract, but again the subject matter of discussion is not the insureds' or brokers' private documentation, but discrete and identifiable material which has already been presented to Underwriters for the purpose of making claims. Where those claims are ongoing, they cannot be resolved without mutual access to the documentation. But even where earlier claims have been settled, it is quite possible to see that the

resolution of ongoing claims cannot be achieved without access to earlier claims documentation."

Finally, as regards accounting documents, Rix LJ concluded that it was both reasonable and necessary for the documents to be available to the Underwriters, as they contained information demonstrating the calculation of the premium and thus was for the benefit of both parties.

The implied term formulated by the Court of Appeal in *Goshawk* was summarised by Rix LJ as follows:

“[P]lacing and claims documents which have been previously shown to Underwriters, and premium accounting documents which are necessary to the operation of the contract, where retained by the insureds’ Lloyd’s brokers, should be available to Underwriters in case of reasonable necessity. Availability includes the right to take copies ... [T]he costs of inspection and copying fall to be met by the Underwriters who make the request.”

While this case shows how difficult it is to prove the existence of a legal custom, it is certainly helpful that the High Court’s ruling has been overturned. A lot of the disclosure issues are now covered by market Terms of Business Agreements, but thanks to Rix LJ it should now be simpler for Underwriters to secure placing claims documentation from Lloyd’s brokers.

New Concerns for Directors: The Company Law Reform Bill *Adam Kemal-Brooke*

The Company Law Reform Bill is presently before the House of Lords as part of the government’s drive to make company law simpler, more accessible and more economic for smaller companies.

The Bill does not repeal the Companies Act 1985, but rather the two will sit side-by-side. There are three key subjects under the proposed legislation which will impact directors (and therefore their insurers), these are: (1) a director’s duties are now codified, rather than residing only in case law, making the concepts easier to locate and understand for the average company; (2) a proposed statutory right for shareholders to commence proceedings against directors for negligence, breach

of duty or trust, and (3) provisions relating to the ability of a company to indemnify its directors for losses.

Directors’ Duties have been codified for the first time, but whether this will clarify or confuse things remains to be seen.

Directors’ Duties

A director will now owe the company the following general duties.

- To act “within powers” i.e. to act in accordance with the company’s constitution and to exercise powers for the purposes for which they are conferred.
- To act in good faith to promote the success of the company for the benefit of members. In fulfilling this duty, a director must have regard to a number of specified (but somewhat vaguely defined) aims.
- To exercise independent judgment.
- To avoid conflicts of interest, specifically in relation to the directors use of information, property or opportunities available to the company.
- Not to accept benefits from third parties which are conferred on him as a result of his directorial position.
- To declare any interest in a proposed transaction or arrangement with the company.
- To exercise reasonable care, skill and diligence as would a “reasonably diligent person.”

It is difficult to know whether the provisions summarised above will introduce the clarity that the government sought to encourage. Undefined terms such as “success” might be difficult to interpret, while the new social responsibility imposed

on directors adds to the myriad of interests that an average director needs to consider when making a

decision on behalf of the company. A director’s life appears to be further complicated by the introduction of duties owed not only to members, but to members while having regard to such things as employees and “the community and environment” as well.

Recent advances in human rights and environmental legislation, as well as anti-discrimination measures, have seen directors become susceptible to personal liability as a result of their acts or omissions which affect employees and the environment. Now it appears that directors might also face a shareholder derivative suit if it is alleged that they breached their duty to the company by acting in a way that is not in the best interests of an employee or environmentalist, if those employees or environmentalists also happen to be shareholders. While it is unlikely that this will lead to a flood of claims, it does provide another example of the growing burden of responsibility and personal liability that a director now faces in everyday situations and perhaps suggests an increased need for protection from that exposure.

Shareholders

While some commentaries have highlighted as radical the proposed ability of shareholders to bring an action against a director for negligence and breach of duty or trust, the bill does not attempt to implement anything so dramatic. There is still some way to go before we see mass shareholder litigation against British directors in the same way as happens in the United States.

Previously, shareholders were only able to bring a derivative action against directors in a few instances, the most common being an alleged fraud perpetrated on the minority shareholders by the majority. A similar approach has been widely adopted in Europe, and is possibly the main reason why the European D&O insurance market has traditionally seen less activity than in the U.S. Apart from regulatory actions, such as those now brought by the FSA, and criminal investigations, the only other claims against directors generally come from their own company. Such claims would usually be excluded from D&O cover by an Insured v. Insured provision.

Under the new bill, while directors' duties remain owed to the company and not to its shareholders, a shareholder may be able to bring an action to enforce the company's rights against a director for negligence, breach of duty or trust. There are two points to note. Firstly, a shareholder can only sue on the company's behalf if he has previously received the consent of the court to do so; secondly, any damages obtained are payable to the company. When considering whether to grant consent for such an action, the court will have regard to whether it considers the applicant to be acting in good faith, whether the directors have ratified the acts complained of and whether a person acting in accordance with the general duty of directors to promote the success of the company would not seek to continue the claim. It remains to be seen if this consent requirement will be enough to prevent spurious and vexatious claims.

The situation as to costs has not changed; if the application for the court's consent fails then the applicant will have to bear his own costs. If consent is granted, then the company will pick up the tab. Potentially, the company could end

up paying to pursue a claim against a director for whom it is also paying defence costs (subject to repayment as the derivative action would be for the benefit of the company and therefore the company would not be entitled to indemnify the director for any defence costs and liability should he fail to successfully defend the action, see below).

“A company will be able to advance funding of defence costs ... even if the suit is brought by the company or on its behalf by the shareholders.”

Indemnity

Generally, the bill does not aim to change the position which has existed since introduction of the Companies (Audit, Investigations and Community Enterprise) Act 2004, which became law on 6 April 2005.

There remains no indemnity available for directors who are fined by regulators or as a result of criminal proceedings. Nor can a director be indemnified for damages he causes by way of his negligence, breach of duty or trust in relation to the company. However, a company will be able to advance funding of defence costs to a director in any of the above situations (*i.e.* to loan the director the money to defend himself), even if the suit is brought by the company or on its behalf by shareholders. Should the director subsequently lose in civil or criminal proceedings then the money must be repaid to the company in full. The company can elect, if it so chooses, to provide full indemnification for damages and defence costs to the director for civil claims made by third-parties.

One clarification that the bill does provide (and, depending on one's interpretation, this may be a narrowing of s.310 of the Companies Act 1985), is that any associated third-party indemnification for fines,

penalties, negligence or breaches of duty or trust in relation to the company will now be specifically prohibited if the indemnification is by a company which is part of the same group. The ability of a company to purchase D&O insurance on behalf of the directors to protect them from all types of liability, including those that the company is not allowed to

directly indemnify the director for, remains unchanged.

Timing

While a spokesman from the Institute of Directors has commented that they are “happy” with the bill in its present form, it is likely that the wording that will finally become law will not be identical to that in the current bill. It is expected that the new legislation could be in force as early as summer 2006.

Implied Terms in Reinsurance Contracts: *Bonner v. Cox Eleanor Heine*

The recent case of *Bonner & Ors. v. Cox & Ors.* (EWCA Civ. 1512, 8 December 2005) has provided some clarification to the question of implied terms in the context of reinsurance contracts. (Issues of avoidance were also the subject of the appeal, but are not considered here.)

The case involved reinsurance of an open energy cover known as the ‘77 Cover 1999 (“the cover”). Reinsurance had been arranged by the broker in advance of the underwriting of the primary cover. A declaration subsequently made under the cover proposed that the cover should accept a non-proportional reinsurance of risks which were probably bad, and which in fact exposed the reinsurers

disproportionately in relation to the premium which was to be paid. None of the reinsurers raised any query or objection as to these risks, although the aggregate excess on the reinsurance had been exhausted at that point, and they would be exposed to the first \$10 million of any loss (the cover retaining \$5 million of any loss excess of \$10 million). A loss ensued which the reinsurers declined to pay arguing, *inter alia*, that there had been a breach of duty on the part of the reinsureds to the reinsurers.

Morison J held that, while some terms should be implied into the reinsurance contract, no breach had been established in respect of the declaration. The appellant reinsurers challenged that finding.

“The somewhat curious result of this decision is that the law offers more protection to a proportional...than to non-proportional reinsurer.”

The Court of Appeal noted the fundamental difference between proportional reinsurance, where there is a sharing of the risks (premium and losses), and non-proportional, where there is not. The Court further noted that, in the case of non-proportional reinsurance, the reinsurer and reinsured had adverse and competing interests; the Court concluded that it was unlikely that any general duty on a reinsured to act prudently or reasonably carefully could be implied into such a contract of reinsurance. The judge at first instance had found that two terms could be implied into the contract at issue: (1) that risks would only be accepted to the cover which the lead underwriter would write in the ordinary course of business; and (2) that the reinsured would write its risks with the ordinary skill and care of a reasonable underwriter. The Court of Appeal ruled that there was no need to imply any such terms in respect of non-proportional

reinsurance: doing so would introduce a significant element of uncertainty and might open up the spectre of retrospective underwriting by reinsurers who had underwritten loss-making business. The alleged duties would also be difficult to reconcile with the Marine Insurance Act 1906.

In any event, reinsurers could protect themselves by other means. In this regard (and noting that the parties accepted that the reinsurance in this case had been written imprudently), the Court emphasised the importance of pre-contract disclosure and careful attention to wordings, for example to clearly define the nature of the risks to be reinsured and to provide reinsurers with rights to monitor the progress of the business being ceded. Reinsurers

were more likely to be protected from a reinsured's dishonesty, wilful misconduct or recklessness on the basis of a proper construction of the policy, than by reference to any implied term.

The somewhat curious result of this decision is that the law appears to offer more protection to a proportional reinsurer (who probably needs it less) than to a non-proportional reinsurer. Further emphasis is thus given to the need for careful attention to express contract terms.

When is an Exclusive Jurisdiction Clause not Exclusive? – *Konkola Copper v. Coromin*
Jolyon Grey

The last 18 months have seen the reporting of a number of cases (particularly in reinsurance) in which the English courts have been ruling on applicable law and jurisdiction

issues. A number of these have involved contracts in which there was no specific choice of law or jurisdiction clause, and the courts had to construe the parties' intentions with regard to these issues by applying conflict of laws principles, and to determine which was the proper forum for dispute resolution. However, there has recently been a case that has highlighted the curious consequences which can result under English law even when the parties may have agreed to select an exclusive jurisdiction.

Konkola Copper Mines Plc & Ors. v. Coromin Ltd. & Ors. came at first instance before Colman J. His decision has been reported at [2005] 2 Lloyd's Rep. 555. The judgment was appealed to the Court of Appeal, and the Court handed down judgment on 17 January 2006 ([2006] EWCA Civ. 5). Colman J was fully upheld by the appeal court.

The facts and legal issues in *Konkola* are extremely complicated. Rix LJ described the case as one “*of procedural and factual complexity, and to some extent mystery too...*” For present purposes we need not dwell on more than one of those complexities. In a claim against reinsurers under a reinsurance contract, the reinsurers argued that there was an exclusive jurisdiction clause which ought to be imported into the reinsurance contract (“the *Zambian clause*”), giving exclusive jurisdiction to the courts of Zambia (where the original insured, who was the initial claimant in the proceedings, was located). Relying upon this argument, the reinsurers contended that certain proceedings which had been commenced against them in England ought to be stayed.

As regards this issue, Colman J found that: (i) the *Zambian clause* was indeed an exclusive jurisdiction clause; (ii) the reinsurers had not shown a strong enough case that

the reinsurance was subject to the Zambian clause so as to engage the jurisdiction of the court to grant a stay of the relevant proceedings; (iii) however, had the reinsurers established a good arguable case that the Zambian clause applied, the English court did have jurisdiction to grant a stay, even though the reinsurers were domiciled in England; (iv) nevertheless, if a good arguable case for the application of the clause had in fact been made out, in the exercise of the court's discretion a stay would still have been refused. Whereas much weight had to be given an entitlement to the benefit of an exclusive jurisdiction clause, and also to the location of the evidential centre of gravity of the dispute (*i.e.* Zambia) and to the interest of Zambian law be administered in Zambian courts, these considerations were outweighed in the instant case by the general interests of justice that conflicting decisions on key issues should be avoided, and keeping the proceedings as manageable as possible.

“...the English courts have a discretion, in certain cases, whether to uphold an exclusive jurisdiction clause.”

It is the last finding which it is suggested is particularly interesting. First, it illustrates the principle that the English courts have a discretion, in certain cases, whether to uphold an exclusive jurisdiction clause. Second, it shows how that discretion is to be exercised. In reviewing Colman J's judgment on this issue, and approving it, Rix LJ in the Court of Appeal noted that, as a result of the decision of the European Court of Justice in *Owusu v. Jackson* (Case C-281/02; [2005] 1 Lloyd's Rep. 452), there will now be no discretion in the English courts to refuse to give effect to an exclusive jurisdiction clause in favour of the courts of a state which is party to Council Regulation No. 44/2001 (and a signatory to the Brussels

Convention). However, where there is a clause in favour of the courts of a state outside the ambit of the Regulation, it is clear from *Donoghue v. Armco Inc. & Ors.* [2001] UKHL 64; [2002] Lloyd's Rep. 425, that a discretion remains as to whether it should be enforced. The discretion to refuse to do so is available, according to Rix LJ, “*if there are strong reasons for taking that course, such as to enable all aspects of an overall dispute to be canalised into a single set of proceedings.*” (para. 28).

Developments in Bermuda

Mark Chudleigh

a) *BDA Confidential*

The Bermuda Supreme Court has confirmed that arbitrations governed by Bermuda's international arbitration statute are subject to an implied duty of confidentiality.

In *ABC Insurance Company v XYZ Insurance Company* (2 February 2006), a reinsurer (“the Reinsurer”)

was engaged in an arbitration with its reinsured (“Reinsured A”) in which the Reinsurer was seeking a declaration that it had validly rescinded two excess of loss treaties with Reinsured A. The Reinsurer had failed in an earlier arbitration to rescind its contracts with a separate reinsured, Reinsured B. Reinsured A wished to refer in the arbitration to materials generated in the earlier arbitration with Reinsured B in an effort to demonstrate that the Reinsurer was precluded from rescinding the treaties as regards Reinsured A. It was asserted that the issue had previously been determined in the earlier arbitration and that this had resulted in an “issue estoppel” that bound the Reinsurer as against both Reinsured

A and Reinsured B. The Reinsurer denied that there could be an issue estoppel in these circumstances and contended that the earlier arbitration materials were confidential. The Reinsurer sought an injunction to restrain Reinsured A from disclosing them to the arbitration panel. The Bermuda International Conciliation and Arbitration Act 1993 adopts the UNCITRAL Model Law and arbitrations under the Act differ materially from the English arbitration régime. Reinsured A thus asserted that it was inappropriate to look to English authorities to determine the existence and scope of a duty of confidentiality. The Bermuda Supreme Court disagreed and noted that the Bermuda Court of Appeal had previously followed English precedent in *European Re v. AEGIS* (30 March 2001) where it was held that arbitrations under the 1993 Act were subject to an implied obligation of confidentiality.

The Bermuda Court also accepted that, just as in England, the implied duty of confidentiality under Bermuda law is subject to certain exceptions, such as to demonstrate an issue estoppel. However, the court regarded Reinsured A's assertion of an issue estoppel as unsustainable as the treaties in question were “composite” and not “joint” reinsurance contracts. On this basis, it was not possible for a decision in a separate arbitration (to which Reinsured A was not a party) to be used to found an issue estoppel. The Bermuda Court thus rejected Reinsured A's assertion that it fell within an exception to the implied duty of confidentiality.

b) *A Commercial Court*

Effective 1 January 2006, Bermuda's civil procedure rules underwent a radical amendment that included incorporating a number of reforms previously adopted in England in

1998. A Commercial Division of the Bermuda Supreme Court has also been established to hear disputes involving insurance and reinsurance as well as other commercial matters.

There have been several procedural changes which represent a significant departure from the prior practice in Bermuda's civil courts. These include the adoption of an "overriding objective" to deal with cases justly. This should reduce the prevalence of "technical" procedural points being taken and encourage a more commercial and pragmatic approach to procedural issues in line with that which has been introduced successfully in England. Another significant change is the introduction of written witness statements to replace the prior practice of oral evidence-in-chief at trial. This presented a risk of "litigation by ambush" as often a litigating party would have little or no idea of the substance of its opponent's witness evidence prior to the trial (there is no procedure for deposition discovery in Bermuda). Bermuda has also adopted new costs rules that allow for costs penalties in the event that reasonable settlement offers are not accepted and it is thought likely that the changes will result in a higher percentage costs recovery for successful litigants. These reforms should encourage settlement at an earlier stage in the litigation process.

c) *Bermuda Choice of Law Clauses*

Bermuda-based (re)insureds and (re)insurers often wish to avoid the application of US law and jurisdiction. This is best achieved by incorporating express choice of law and exclusive jurisdiction clauses citing the applicable law and preferred jurisdiction (usually Bermuda or England). A recent decision demonstrates that care must be taken to ensure that a choice of law clause is sufficiently wide.

In *Ghose v CNA Reinsurance Company et al* (case no. 108121/04, 26 January 2006) a New York State Court considered a choice of law clause in an insurance policy providing that "*this Policy shall be interpreted under, governed by and construed in accordance with the laws of the jurisdiction of [Bermuda]*". In *Ghose*, the defendant directors and officers liability insurers had given notice to rescind a D&O policy. The insurers asserted that there were significant differences between the law relating to rescission as applied in New York and Bermuda and argued for the application of Bermuda law.

The court acknowledged that the choice of law clause was sufficient to bind the parties in respect of "contractual" causes of action. However, the court did not consider it to be wide enough to encompass "non-contractual" causes of action or defences, such as a claim of fraudulent inducement which, if proven, would entitle an insurer to rescind. The court therefore proceeded to address the substantive issues by reference to New York rather than Bermuda law. If the insurers in the *Ghose* case had wished for the choice of law clause to encompass "non-contractual" as well as "contractual" causes of action then the prospects of achieving this would have been significantly enhanced by adding language to confirm that the clause extended to controversies "arising out of or relating to" the Policy.

London and Bermuda Newsletter

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If you would like information concerning any of the above, please contact:

Adam C. Barker

Sedgwick, Detert, Moran & Arnold
120 Cannon Street
London EC3N 6LR
England
Tel: +44 (0)20 7929 1829
Fax: +44(0)20 7929 1808
Email: adam.barker@sdma.com

Visit us at www.sdma.com

For Sedgwick's affiliated firm (Sedgwick Chudleigh), please contact:

Mark Chudleigh

Sedgwick Chudleigh
Mercury House, Fourth Floor
101 Front Street
Hamilton HM12, Bermuda
Tel: +441 296 9276
Fax: +440 201 6600
www.sedgwick-chudleigh.com

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