Case No: 2013 FOLIO 150

Neutral Citation Number: [2014] EWHC 163 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, 7 Rolls Buildings
Fetter Lane, London EC4A 1NL

Date: 4 February 2014

Before :

MR. JUSTICE TEARE

- -

Between :

(1) SAN EVANS MARITIME INC	**Claimants**
(2) LIVANBROS MARITIME SA	
(3) Mrs CHARIKLIA LIVANOU	
- and -	
AIGAION INSURANCE CO SA	**Defendant**

- -
- -

Michael Ashcroft QC and Rupert Hamilton (instructed by **Watling & Co**) for the **3rd Claimant**
Luke Parsons QC and Benjamin Coffer (instructed by **Ince & Co LLP**) for the **Defendant**

Hearing date: 27 January 2014

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Judgment

Mr. Justice Teare :

1. This is the determination of three preliminary issues ordered to be tried by Hamblen J. on 7 August 2013. The issues arise in a claim brought by the Claimants against the Defendant, Aigaion Insurance Co.SA, (a Greek insurance company) upon the terms of a policy of insurance on the vessel *St Efrem*. The claims of the First and Second Claimants have been stayed by reason of an order of Eder J. dated 20 December 2013 because of a failure to provide security for the Defendant's costs and so on this hearing the only Claimant on whose behalf submissions were made was the Third Claimant. However, the court's determination of the preliminary issues will be binding upon all the Claimants.

2. The First and Second Claimants were Liberian companies which are now dissolved. The First Claimant was the owner and the Second Claimant was the manager of the vessel. The Third Claimant was a mortgagee of the vessel. For ease of reference I shall refer to the Claimants as the Assured, though I note that there is an issue to be resolved in due course as to whether the Third Claimant has title to sue.

3. 50% of the interest in the vessel was insured by three Lloyd's syndicates, Catlin, Ark and Brit, under a policy written on 16 and 17 March 2010 ("the Lloyd's Policy"). The insured value of the vessel was US$3.8m. The slip leader was Catlin and the "Claims Agreement Parties" were stated to be the slip leader and Xchanging Claims Services. I was told that Xchanging would act on behalf of the other two syndicates.

4. 30% of the interest in the vessel was insured by Aigaion under a policy issued on 24 March 2010 ("the Aigaion Policy"). The terms of the Aigaion Policy were not identical to those of the Lloyd's Policy. The Aigaion Policy contained a "Follow Clause" in these terms:

> "Agreed to follow London's Catlin and Brit Syndicate in claims excluding ex-gratia payments."

5. The remaining 20% interest in the vessel was uninsured.

6. On or about 27 July 2010 the vessel grounded at Paranagua, Brazil and suffered a generator breakdown. The vessel was towed from South America to Abidjan. A claim was made under both policies.

7. On 6 April 2011 Aigaion sent to the three syndicates a copy of the Aigaion Policy as had been requested.

8. By an agreement dated 24 April 2012 the three Lloyd's syndicates settled the claim against them for an aggregate sum of US$779,500, each syndicate being liable for its respective share of that sum. Clause 7 of the settlement agreement provides as follows:

> "The settlement and release pursuant to the terms of this Agreement is made by each Underwriter for their respective participations in the Policy only and none of the Underwriters that are party to this Agreement participate in the capacity of a Leading Underwriter under the Policy and do not bind any

other insurer providing hull and machinery cover in respect of the *St. Efrem*."

9. The Assured maintains that Aigaion is obliged to follow that settlement and says that the sum payable is US$450,000 being 30% of an "agreed loss" of US$1.5m. Aigaion denies that it is obliged to follow the settlement. Its reasons for doing so have given rise to the three preliminary issues:

    i) On a proper construction, did the "Follow Clause" in the Aigaion Policy:

        a) Require the Defendant under the Aigaion Policy to follow any settlement made by Catlin and Brit under the Lead Policy (as the Claimants contend); or

        b) Merely authorise Catlin and Brit to act on the Defendant's behalf in negotiating and/or agreeing the settlement of disputed claims with the Claimants (as the Defendant contends)?

    ii) If, on a proper construction of the "Follow Clause", it required the Defendant under the Aigaion Policy to follow any settlement made by Catlin and Brit under the Lead Policy (as the Claimants contend), is the "Follow Clause" triggered by the settlement agreement (as the Claimants further contend)?

    iii) Did the Claimants agree by clause 7 of the settlement agreement that the settlement agreement would not be binding on the Defendant (as the Defendant contends); and if so, is the Defendant entitled to rely on the Contract (Rights of Third Parties) Act 1999 to enforce that term ?

10. A fourth preliminary issue concerned a possible estoppel argument but that was not pursued by Aigaion.

<u>The first preliminary issue: On a proper construction, did the "Follow Clause" in the Aigaion Policy (a) require the Defendant under the Aigaion Policy to follow any settlement made by Catlin and Brit under the Lead Policy (as the Claimants contend); or (b) merely authorise Catlin and Brit to act on the Defendant's behalf in negotiating and/or agreeing the settlement of disputed claims with the Claimants (as the Defendant contends)?</u>

11. Follow clauses come in different forms. Some oblige the following underwriter to follow the lead underwriter in relation to a large number of matters including alterations to the terms of the policy, surveys and settlement of claims (as in *Roar Marine v Bimeh Iran Insurance Co.* [1998] 1 Lloyd's Reports 423) and others oblige the following underwriter to follow the lead underwriter in relation to a smaller range of matters, for example decisions, survey and settlements regarding claims (as in *The Buana Dua* [2011] 2 Lloyd's Reports 655). Some are concerned solely with alterations to the rates or conditions of the insurance (as in *Roadworks (1952) Ltd. v JR Charman and Others* [1994] 2 Lloyd's Reports 99) and others are concerned solely with the acceptance of declarations under an open cover (as in *Mander v Commercial Union Assurance* [1998] Lloyd's Report Insurance and Reinsurance 93.) Since the subject-matter and terms of follow clauses may differ the manner in which they are intended to work must depend, ultimately, upon an examination of the terms of the follow clause in question.

12. The Follow Clause in the present case is short and relates only to "claims". It provides as follows:

> "Agreed to follow London's Catlin and Brit Syndicate in claims excluding ex-gratia payments."

13. Aigaion therefore agrees to follow Catlin and Brit "in claims". There is no dispute that "claims" must include settlement of claims.

14. The commercial purpose of a follow settlements clause is that from the insurers' point of view it saves time and costs and also makes co-insurance more marketable which is attractive to those seeking insurance. It simplifies claims settlement; see *Roar Marine v Bimeh Iran Insurance* [1998] 1 Lloyd's Reports 423.

15. Nothing is said in the clause about how the settlement must be reached. The only stated exclusion is that Aigaion does not agree to follow ex-gratia payments. The agreement is with the assured. There is no agreement between Aigaion and Catlin or Brit. Nothing is said about authority. The Defendant simply agrees to follow Catlin and Brit in claims and therefore in settlements.

16. In my judgment this Follow Clause is reasonably to be understood as meaning that Aigaion agreed with the Assured to follow any settlement made by Catlin and Brit in respect of an insurance claim arising from a casualty affecting *St.Efrem*. The suggestion that the Follow Clause merely authorises Catlin and Brit to act on Aigaion's behalf when settling a claim seems to me to ignore, and add to, the simple words of the Follow Clause. Effect can be given to the clause by construing it as an agreement between Aigaion and the Assured to follow a settlement by Catlin and Brit. Giving effect to the clause in that way is consistent, in my judgment, with the simple language of the clause. Introducing the concept of agency when there is no agreement between Aigaion and Catlin and Brit unnecessarily complicates the operation of the clause.

17. My approach is consistent with the "brief opinion" of Rix J., given obiter and expressed tentatively, in *Mander v Commercial Union Assurance* (above) when dealing with a clause which obliged the following underwriters to follow the leader's acceptance of a declaration under an open cover. Rix J. said at pp.143-4:

> "I would tentatively suggest that a leading underwriter at any rate under an open cover is not constituted the agent of the following market by reason merely of a leading underwriter clause …… Rather the following market agree, by subscribing to the Cover, that they will be bound by a declaration falling within the scope of the cover and agreed by the leading underwriter: ie the agreement of the leading underwriter works as a 'trigger' rather than as an act of agency…….It seems to me that the trigger analysis also has the virtue of avoiding the danger of imposing upon a leading underwriter the unrealistic fiduciary obligations of an agent, eg to avoid any conflict of interest."

18. However, my construction is not supported by the approach of HHJ Kershaw in *Roadworks (1952) Ltd. v JR Charman and Others* (above) at pp.105-6 who accepted the analysis of agency where the follow clause provided that the agreement of the leading underwriter to an alteration of the terms of cover was agreed "to be binding on all Underwriters subscribing hereto." It must also be noted that in *Youell v Bland Welch* [1990] 2 Lloyd's Reports 423 Phillips J. explained a follow clause which stated "wording to be agreed by Leading London Reinsurer" in terms of agency (see p.429) and that in *Unum Life Insurance v Israel Phoenix Assurance* [2002] Lloyd's Reports Insurance and Reinsurance 374 Mance LJ referred to the agency analysis at p.380 as "thoroughly arguable".

19. The textbooks recognise the uncertainty in the authorities as to the basis upon which a follow clause operates but do not seek to resolve it; see *Arnould: Law of Marine Insurance and Average* 18th.ed paragraph 2-18, *Colvinaux's law of Insurance* 9th.ed. paragraph 1-040 and *Reinsurance Practice and The Law* paragraphs 31.7-31.19 (though paragraph 31.34 appears to favour the agency analysis).

20. The question of agency is related to the question whether the lead underwriter owes a duty of care to the following underwriters. Hirst J. considered such duty was "manifest" in *The Leegas* [1987] 1 Lloyd's Reports 471 at p.475. Mance J. thought such a duty "likely" or "probable" (but did not decide the point) in *Roar Marine* (above). By contrast Rix J. found the imposition of the duties of an agent on a lead underwriter "unrealistic" in *Mander v Commercial Union* (above). Although the question of duty is a related question it does not arise in the present case and I therefore say nothing about it.

21. In my judgment, for the reasons which I have already given in paragraphs 13-16 above, the Follow Clause operates as a simple agreement between Aigaion and the Assured that the Defendant will follow the settlement of claims by Catlin and Brit. This simple construction of the clause is consistent with its purpose of simplifying the process of claims settlement. The operation of the Follow Clause is not dependent upon Catlin and Brit acting as agent for Aigaion so as to bind Aigaion to the settlement and the Follow Clause is not be understood as authorising Catlin and Brit to act on behalf of Aigaion.

22. A simple approach to the construction of clauses of this nature is appropriate, as is apparent from the approach of Mance J. in *Roar Marine v Bimeh Iran* (above) when rejecting a submission that the follow clause in that case (which was relied upon with regard to a settlement of claim) was subject to a condition that that the settlement must have been concluded in a proper and businesslike way. Mance J. said, at p.430:

> "For better or worse following insurers trust and follow their leader……Following underwriters accept both the advantages and any risks of the leading underwriters' handling of settlements and of other matters affecting them."

<u>The third preliminary issue: Did the Claimants agree by clause 7 of the settlement agreement that the settlement agreement would not be binding on the Defendant (as the Defendant contends); and if so, is the Defendant entitled to rely on the Contract (Rights of Third Parties) Act 1990 to enforce that term ?</u>

23. Although this is the third issue I propose to deal with it before dealing with the second issue. The third issue concerns the proper construction of clause 7 of the Settlement Agreement and it seems sensible to consider that before considering the second issue, namely, whether the Follow Clause is triggered by the Settlement Agreement.

24. In construing the Settlement Agreement the background information available to the parties to that agreement was that the parties knew that Aigaion insured 30% of the interest in the vessel pursuant to a policy which contained the Follow Clause. The syndicates' knowledge of this arose from the copy of the policy sent to them in 2011.

25. It was also said that the background information available to the parties included the fact that "other things being equal the Assured would be expected to wish to rely on the Follow Clause".

26. Much must turn on the phrase, "other things being equal". I accept that if the Assured considers the settlement he has made with the lead underwriter is a good settlement he can be expected to rely upon the Follow Clause. But if he considers that he has been compelled to accept an unfavourable settlement with the lead underwriter for reasons which do not apply with equal force to the following underwriter he may not wish to rely upon the Follow Clause. There was no evidence as to what the Assured thought of the settlement with the Lloyd's syndicates.

27. A further point, said to be a "negative" aspect of the background, was that there was nothing to suggest that either the Assured or the Lloyd's syndicates wished to confer a benefit on Aigaion. In circumstances where there was no evidence before me as to the reasons which led the Assured and the Lloyd's syndicates to agree upon an aggregate payment of US$779,500 (in circumstances where, according to the Points of Claim, the claim made against them was for US$1.5m.) I do not consider that this further point can fairly be regarded as part of the background. The position simply is that Aigaion is unable to point to any evidence that either the Assured or the Lloyd's syndicates had a reason for conferring a benefit on Aigaion.

28. The parties to the Settlement Agreement are stated to be "the Underwriters" (Catlin, Ark and Brit) and the Assured, (the First and Second Claimants, and the Third Claimant as Mortgagee). Second, the recitals state as follows:

> "C. Underwriters subscribe to the Policy in respect of 50% of the 100% order for cover in respect of the *St.Efrem*.
>
> D. The Assured made a claim under the Policy for damage allegedly caused to the Vessel at or following departure from the Load Port.
>
> E. Underwriters dispute their liability under the Policy but now wish to settle on a compromised basis as set out herein.
>
> F. The Parties now wish fully and finally to settle all claims and disputes, actual or potential, under the Policy, whether notified to Underwriters or not and that Underwriters be provided with a full release in respect of any and all liability under the Policy, for their respective participations only."

29. Clause 2-6 of the Settlement Agreement provide as follows:

> "2. Underwriters will pay to the Assured and/or the Mortgagee their respective proportions of the total sum of USD779,500 (Seven Hundred and Seventy-Nine Thousand, Five Hundred United States Dollars) ("the Settlement Sum") that being the full settlement figure in respect of 50% of the 100% order for cover in respect of the St Efrem. The sum payable by each of the Underwriters is as follows:
>
> (i) Catlin – USD389,750 (Three Hundred and Eighty-Nine Thousand Seven Hundred and Fifty United States Dollars)
>
> (ii) Ark – USD194,875 (One Hundred and Ninety Four Thousand Eight Hundred and Seventy Five United States Dollars)
>
> (iii) Brit – USD194,875 (One Hundred and Ninety Four Thousand Eight Hundred and Seventy Five United States Dollars)
>
> The proportion of the Settlement Sum payable by each of the Underwriters set out above is referred to as the "Respective Proportion.
>
> 3. Each of the Underwriters will pay its Respective Proportion of the Settlement Sum as soon as reasonably practicable after conclusion of this Agreement by the Parties.
>
> 4. Payment is to be effected through collection of the Respective Proportion payable by each of the Underwriters by BMS Group Limited / BankServe Insurance Services Limited pursuant to payment authorities issued to it by the Assured and the Mortgagee dated 6 April 2012.
>
> 5. Receipt of the Respective Proportion of the Settlement Sum payable by each of the Underwriters shall constitute the passing of consideration in respect of each of the Underwriters under the terms of the Agreement, and each Underwriter shall be released from any and all liability under the Policy whether known or unknown, including all claims for interest, costs, expenses and disbursements, on collection of its Respective Proportion pursuant to Clause 4 above.
>
> 6. The assured will accept payment pursuant to Clause 4 by each Underwriter of its Respective Proportion of the Settlement Sum in full and final settlement of any and all claims of whatever nature against each Underwriter, under or in connection with the Policy."

30. Clause 7 provides as follows:

> "The settlement and release pursuant to the terms of this Agreement is made by each Underwriter for their respective participations in the Policy only and none of the Underwriters that are party to this Agreement participate in the capacity of a Leading Underwriter under the Policy and do not bind any other insurer providing hull and machinery cover in respect of the *St. Efrem*."

31. Mr. Ashcroft QC, counsel for the Assured, submitted that clause 7 was concerned with the capacity in which the Lloyd's syndicates entered into the Settlement Agreement and therefore made clear that each syndicate concluded the settlement in its own right and not as lead underwriter on behalf of any other underwriter of the Lloyd's Policy. It was said that the clause thereby fulfilled at least two functions.

    i) It protected the Assured against the possibility of either Brit or Ark declining to adhere to the Settlement Agreement on the basis that Catlin was not authorised to agree a settlement on their behalf and/or that they were not bound to follow Catlin.

    ii) It protected Catlin against the possibility of Brit and/or Ark alleging that the claim should not have been settled on the terms contained in the Settlement Agreement and seeking to claim against Catlin for any breach of duty in exercising any authority to bind them to a settlement by executing the Settlement Agreement.

Mr. Ashcroft said that there was therefore no need to read the clause as though it applied to anyone other than the parties to the Settlement Agreement.

32. Mr. Parsons QC, counsel for Aigaion, submitted that the obvious commercial intention of the clause was that the Settlement Agreement would not be binding upon Aigaion who was within the phrase "any other insurer providing hull and machinery cover in respect of the *St. Efrem*". Mr. Parsons said that there might be circumstances in which a lead underwriter would not wish his settlement to bind following underwriters (for example the terms of the two policies might be different or the negotiating position of the lead underwriter might be different from the negotiating position of the following underwriter) and that a recognised method of doing so, as pointed out by HHJ Kershaw in *Roadworks (1952) Ltd. v JR Charman and Others* [1994] 2 Lloyd's Reports 99 (which involved a term in a slip that alterations in conditions were to be agreed by the leading underwriter, such agreement to be binding upon all subscribing underwriters), was to make it plain that the lead underwriter, when agreeing an alteration, was doing so "only for his own syndicate" (see p.107). That is what had been done in clause 7 of the Settlement Agreement: "The settlement and release pursuant to the terms of this Agreement is made by each Underwriter for their respective participations in the Policy only and none of the Underwriters that are party to this Agreement participate in the capacity of a Leading Underwriter under the Policy…" In circumstances where it had been said by Hirst J. in *The Leegas* [1987] 1 Lloyd's reports 471 at p.475 that "underlying the whole relationship between the leading underwriter and the following underwriters…..…is the former's manifest duty of care" (referred to by Mance J. in *Roar Marine* (above) at p.430 with apparent approval though without expressing a concluded view as to whether there was such a

duty) there may well be circumstances in which a leading underwriter would wish to "step out" of his leading role.

33. The Assured's suggested purpose underlying clause 7 is that it makes clear that each syndicate concluded the settlement in its own name and not as a lead underwriter on behalf of any other underwriter of the Lloyd's Policy with a view to protecting Catlin from claims by Brit and Ark and protecting the Assured from a refusal by Brit or Ark to honour the settlement. The difficulty I have with that as the suggested purpose of the clause is that the Settlement Agreement is clearly an agreement into which all three Lloyd's syndicates entered in their own right. In this regard it is to be noted that all three are named as parties, clause 2 makes clear that each syndicate undertakes an obligation to pay its respective share of the aggregate settlement sum and the Settlement Agreement is signed on behalf of all the Lloyd's syndicates. In those circumstances there is no need for clause 7 to make clear that each syndicate concluded the settlement in its own name for each syndicate obviously did so. Similarly, there are no words in the Settlement Agreement which would suggest that Catlin entered into the Settlement Agreement as a lead underwriter on behalf of any other underwriter of the Lloyd's Policy. Mr. Ashcroft accepted that, on his construction, clause 7 must be regarded as "belt and braces". Of course some terms are included in contracts as "belt and braces" and surplus terms are often found in commercial contracts. But in the present context I find it difficult to envisage how it might be suggested that, in the absence of clause 7, Brit or Ark could decline liability under the Settlement Agreement or how Brit or Ark could allege that Catlin had bound them to the Settlement Agreement.

34. Mr. Ashcroft placed emphasis on the mention (twice) in clause 7 of "the Policy", that is, the Lloyd's policy, and suggested that the tail of the clause which referred to "any other insurer providing hull and machinery cover in respect of the *St. Efrem*" must be a reference to any other insurer who subscribed to the Lloyd's policy. I am not persuaded that this is right. When the Settlement Agreement was made the parties to it were aware that the Lloyd's syndicates insured only 50% of the interest in the vessel and that Aigaion had insured 30% of the interest in the vessel on a separate policy. In that context, the contrast between the definition in the Settlement Agreement of the Lloyd's syndicates as "the Underwriters" and the phrase "any other insurer providing hull and machinery cover in respect of the *St. Efrem*" suggests that the latter were not those who subscribed to the Lloyd's policy but other insurers who subscribed to another policy.

35. For that reason I consider that the phrase "any other insurer providing hull and machinery cover in respect of the *St. Efrem*" describes insurers of the vessel other than the Lloyd's syndicates who subscribed to the Lloyd's Policy. That description includes Aigaion. Thus the latter part of the clause would appear to express an intention that, in circumstances where each syndicate enters into the settlement agreement for its respective participation "only" and not in the capacity of a "Leading Underwriter", they "do not bind" Aigaion.

36. Mr. Ashcroft said that if this were the intention either the Follow Clause or Aigaion would have been mentioned in clause 7. If they had been mentioned the meaning of the clause would (probably) be beyond doubt but I am not persuaded that their absence means that the clause cannot bear the meaning suggested by Mr. Parsons.

37. Mr. Ashcroft also submitted that there was no commercial reason why the Lloyd's syndicates would wish to say that they were not purporting to bind another insurer to the settlement. However, Mr. Parsons' reference to the possible duty of a leading underwriter to a following underwriter, described by Hirst J. in *the Leegas* (above) as "manifest", and to the comment of HHJ Kershaw in *Roadworks (1952) Ltd. v JR Charman and Others* (above) as to how a lead underwriter may make it clear that he is acting only for himself and not for the following underwriters suggests a likely commercial reason. Against that is the absence of any evidence that the Lloyd's syndicates had any motive to do so in this case and the absence of any evidence suggesting that it would have been in the Assured's interest to agree to such a course in this case.

38. In the result, and notwithstanding that lack of evidence, I am persuaded that the clause 7 of the Settlement Agreement would be understood by the reasonable person with the background knowledge available to the parties as meaning that in settling the insurance claim the Lloyd's syndicates were not purporting or intending to bind any other insurer of *St.Efrem* such as Aigaion. I have reached that conclusion for these reasons:

i) The parties to the Settlement Agreement were aware that part of the interest in the vessel was insured by insurers other than the Lloyd's Underwriters. In particular they were aware that Aigaion insured 30% of the interest in the vessel on terms which included a Follow Clause.

ii) For that reason, and because of the contrast in the language of the policy between "Underwriters" and "any other insurer", the reference in the tail of the clause to "any other insurer" is not a reference to the Underwriters who subscribed to the Lloyd's Policy but to other insurers such as Aigaion.

iii) Thus clause 7 expressly states that the settlement and release, alternatively, the Underwriters "do not bind" any other insurer such as Aigaion.

iv) That is because, as stated in the earlier part of the clause, the Underwriters act "for their respective participations only" and none participates as "a leading underwriter".

v) The alternative construction of clause 7, that it merely makes clear the capacity in which the Lloyd's syndicates enter into the Settlement Agreement amongst themselves, is not the meaning which the clause would reasonably be understood to have because such purpose is wholly unnecessary and gives an untenable meaning to the phrase "any other insurer providing hull and machinery cover in respect of *St.Efrem*."

39. The next question is whether, for the purposes of section 1(b) of the Contracts (Rights of Third Parties) Act 1999, clause 7 purported to confer a benefit on Aigaion. In *Dolphin Maritime v Sveriges* [2009] 2 Lloyd's Reports 123 Christopher Clarke J. said at paragraph 74:

> "A contract does not purport to confer a benefit on a third party simply because the position of that third party will be improved if the contract is performed. The reference in the section to the

> term purporting to "*confer*" a benefit seems to me to connote that the language used by the parties shows that one of the purposes of their bargain (rather than one of its incidental effects if performed) was to benefit the third party."

40. I consider that the purpose of the parties, in particular of the Lloyd's syndicates, in agreeing clause 7 was to protect those syndicates from any possible liability to Aigaion in circumstances where, as they knew, the Aigaion policy contained the Follow Clause. Their purpose was not to confer a benefit on Aigaion, though clause 7 might improve the position of Aigaion if, contrary to my view, the Follow Clause operated by way of agency.

41. For that reason I have concluded that the Defendant is not entitled to rely upon the Act to enforce clause 7 of the Settlement Agreement.

42. If I am wrong in that conclusion it is necessary to consider Mr. Ashcroft's further submission that, if clause 7 is to be construed as meaning that in settling the insurance claim the Lloyd's Underwriters were not purporting or intending to bind any other insurer of *St.Efrem* such as Aigaion, such construction is wholly irrelevant because, as I have already held, the effect of the Follow Clause was a contractual agreement between the Assured and Aigaion that Aigaion would follow a settlement by Catlin and Brit, whether or not Catlin and Brit purported to bind Aigaion. Thus, if and when the Defendant sought to enforce clause 7 pursuant to the Contract (Rights of Third Parties) Act 1999 the Assured would reply by saying that, although they accepted that the Lloyd's Underwriters were not purporting or intending to bind any other insurer of *St.Efrem* to the Settlement Agreement as stated in clause 7 of the Settlement Agreement, they were relying upon, not an agreement reached by the Lloyd's Underwriters on behalf of Aigaion, but upon Aigaion's own agreement in the Aigaion policy to follow the settlement made by Catlin and Brit. This point was also emphasised at the outset of Mr. Ashcroft's oral submissions when he said that the real issue was whether clause 7 amounted to an agreement by the Claimants that they would not rely upon the Follow Clause as against the Defendant.

43. I accept Mr. Ashcroft's further submission. Although clause 7 means that in settling the insurance claim the Lloyd's Underwriters were not purporting or intending to bind any other insurer of *St.Efrem* such as Aigaion it did not contain a promise by the Assured not to rely upon the Follow Clause against Aigaion. At best, it contained an acceptance by the Assured that the Lloyd's Underwriters were acting on their own behalf and were not purporting or intending to bind Aigaion to the settlement. I do not consider this too fine a distinction to draw when construing clause 7. The Assured had the benefit of the Follow Clause in the Aigaion Policy. Clear words would therefore be required to justify a conclusion that the Assured intended to give up that valuable right. Clause 7 makes clear that the Lloyd's Underwriters were not purporting or intending to bind any other insurer of *St. Efrem*. That would or might be be of assistance to them if Aigaion alleged that the Lloyd's Underwriters had breached a duty owed to Aigaion. But Clause 7 does not contain clear words showing that the Assured intended to give up such rights as the Follow Clause conferred on the Assured.

44. For these reasons I would answer the Third Preliminary Issue as follows: The Claimants agreed by clause 7 of the Settlement Agreement that in settling the

insurance claim the Lloyd's Underwriters were not purporting or intending to bind any other insurer of *St.Efrem* such as the Defendant but the Defendant is not entitled to rely upon the Contracts (Rights of Third Parties) Act 1999 to enforce clause 7. In any event clause 7 would not assist the Defendant if and when the Claimants sought to enforce the Follow Clause in the Aigaion policy against the Defendant because the Claimant had not agreed to give up its right to rely upon the Follow Clause as against the Defendant.

The second preliminary Issue: If, on a proper construction of the "Follow Clause", it required the Defendant under the Aigaion Policy to follow any settlement made by Catlin and Brit under the Lead Policy (as the Claimants contend), is the "Follow Clause" triggered by the settlement agreement (as the Claimants further contend)?

45. Mr. Parsons submitted that the Follow Clause does not apply to a settlement which is expressly agreed not to be binding on Aigaion. He supported this submission in a number of ways. He said that the Follow Clause does not make provision for what is to happen when the lead underwriter wishes to settle a claim which the following underwriter does not wish to settle. In such circumstances he submitted that the assured and the lead underwriter may agree that the settlement will not be binding upon the following underwriter and that it would be unreasonable and uncommercial to construe the Follow Clause as requiring Aigaion to follow a settlement which the parties to the settlement agreement have agreed will not be binding upon him. He said it would be an implied term of the Follow Clause in the Aigaion Policy (in order to spell out what the Follow Clause would be reasonably understood to mean, see *A-G of Belize v Belize Telecom* [2009] 1 WLR 1988) that the Follow Clause would not apply to settlements which are not purported to made by Catlin and Brit on behalf of Aigaion.

46. I do not accept this submission. In the light of the suggestions in the authorities that a lead underwriter may owe a duty of care to the following underwriter, a lead underwriter may wish to make it clear that in settling a claim he is doing so on his own behalf only and is not purporting or intending to bind the following underwriter. However, the purpose of so doing is to protect the lead underwriter from any claim by the following underwriter. The lead underwriter is, in my judgment, unable to countermand the effect of the Follow Clause if, as I have held, the effect of such clause is to oblige the following underwriter to follow any settlement made by the lead underwriter, whether or not the lead underwriter purported to act as agent from the following underwriter.

47. It is suggested that it would be unreasonable and uncommercial to construe the Follow Clause as requiring Aigaion to follow a settlement which the parties to the settlement agreement have agreed will not be binding upon Aigaion. But if Aigaion has itself agreed to follow any settlement by Catlin and Brit, save for an ex gratia payment, it matters not (as between the Assured and Aigaion) that Catlin and Brit have purported to act only on their own behalf when settling the claim. The obvious purpose of the Follow Clause in simplifying claims settlement and reducing the costs thereof would be frustrated if the clause did not apply whenever an underwriter, fearing that he might be held to owe a fiduciary duty or a duty of care to the following underwriter, made clear that when settling a claim he was doing so only on his own behalf. For the same reason the suggested implied term would not spell out what the Follow Clause was reasonably understood to mean.

48. I would therefore answer the second preliminary issue by saying: Yes; the Follow Clause is triggered by the Settlement Agreement.

Conclusion

49. For the reasons I have given I would determine the three preliminary issues as follows:

i) The Follow Clause requires the Defendant to follow any settlement made by Catlin and Brit (save for an ex-gratia payment).

ii) The Follow Clause is triggered by the Settlement Agreement.

iii) The Claimants agreed by clause 7 of the Settlement Agreement that in settling the insurance claim the Lloyd's Underwriters were not purporting or intending to bind any other insurer of *St.Efrem* such as the Defendant but the Defendant is not entitled to rely upon the Contracts (Rights of Third Parties) Act 1999 to enforce clause 7. In any event clause 7 would not assist the Defendant if and when the Claimants sought to enforce the Follow Clause in the Aigaion policy against the Defendant because the Claimant had not agreed to give up its right to rely upon the Follow Clause as against the Defendant.