Unum Life Insurance Co Of America v Israel Phoenix Assurance Co Ltd [2001] APP.L.R. 07/18

CA on appeal from Commercial Court (Mr Justice Andrew Smith) before Mance LJ; Keene LJ. 18th July 2001

LORD JUSTICE MANCE

1. This is a renewed application by the defendant in the proceedings, the Israel Phoenix Assurance Company Limited ("Israel Phoenix"), for permission to appeal in respect of a judgment by Andrew Smith J given on 16th March 2001, whereby the judge refused Israel Phoenix's application to stay the proceedings as against the first claimant, Unum Life Insurance Company of America ("Unum"), pursuant to section 9 of the Arbitration Act 1996 in favour of arbitration in Tel Aviv.

2. The relationship between Israel Phoenix and Unum was one of reinsurance, incorporated, at least originally, in a slip which Unum stamped and signed as reinsurer on 27th March 1995. That slip in the usual brief form recorded that the reinsurance was by way of continuous treaty subject to three months' notice of cancellation as at 31st March in any year. It was a quota share in respect of personal accident insurances with certain ancillary cover, and it contained under the heading "*General Conditions*" the words "*As Original Policies LSW 1001 (Reinsurance)",* with a list of exclusions; and under the heading "*Wording"* the words *"Wording to be agreed by Leading Reinsurer only."*

3. The judge after argument accepted that there was a leading reinsurer, consisting of a company called Liberty. On 19th July 2000 Unum sought to avoid the reinsurance for reasons which we need not go into but which the judge held for present purposes were established as likely to be valid, and only subsequent to that, and indeed subsequent to the commencement of these proceedings by Unum claiming to establish that it had validly avoided the reinsurance, did the leading underwriter, Liberty, on 5th December 2000 agree any sort of wording. There is apparently an issue as to whether it agreed that wording simply on its own behalf or as leading reinsurer in a way which could potentially bind following reinsurers. But for present purposes I assume, as I think the judge did, that it agreed it in a way which could potentially bind following reinsurers.

4. Following perusal of that wording it appears that it contained, in a way which is in no way surprising, an arbitration clause which was not contained in the original slip, and as a result of that Liberty Israel now maintains that the proceedings begun by Unum should be stayed pending arbitration under that clause.

5. The judge decided against that submission on two principal grounds which are presently relevant. First, he considered that a leading underwriter clause such as that present in this slip does not encompass agreement of an arbitration clause. His reasons for that were based on cases relating to the incorporation in reinsurances of arbitration clauses in original insurances by virtue of general words of incorporation such as "follow the same terms as the original insurance".

6. Mr Edwards criticises (with justification in my view) that reasoning. It seems to me that the cases on incorporation have little if anything to do with the scope of a leading underwriter's capacity to bind the following market under a clause such as the present clause "wording to be agreed by Leading Reinsurer only". That capacity is either to be defined in terms of agency which is Mr Edwards' preferred approach and which is certainly thoroughly arguable for present purposes, or in terms of a trigger mechanism whereby the leading underwriter, although not agent in legal terms, acts as a trigger in a way which has the effect that the following market is bound to follow his action. So, if that first reason stood by itself and were critical, I for my part would certainly consider that permission to appeal was justified on the grounds that there was a very real prospect of success in upsetting it.

7. But it was the second reason that led me on paper to conclude that there was no ground for permission to appeal and on which Mr Edwards has rightly focused his concise oral submissions today. The second reason given by the judge was that, assuming, as it is accepted that he rightly did for the purposes of the application for a stay under the Arbitration Act in view of his provisional conclusion as to the validity of the avoidance, that there had been a valid avoidance of the reinsurance by Unum on 19th July 2000, then the leading underwriter clause could no longer bite on 5th December 2000 when the leading underwriter agreed a wording, or, to be strictly accurate, could no longer affect Unum, whatever its effect on other following market reinsurers might be. This in his view applied whether the leading underwriter was in law an agent or a trigger under the leading underwriter clause, because there was no longer any contract in relation to which the leading underwriter could act as either an agent or a trigger. That was the view that I took on paper also.

8. The applicants, Israel Phoenix, knew of the claimed avoidance. The leading underwriter had been informed by letter of 13th October 2000 of the avoidance. It is true that the applicant did not know for certain that the leading underwriter had been informed, but that would be the normal assumption and in any event I do not for my part think that it makes any difference whether the applicant knew or not. The question, which is a short one, is whether it is properly arguable for the purpose of giving permission to appeal that the leading underwriter continued to have the capacity as regards Unum to bind Unum to at least an arbitration agreement. Is there a real prospect of success on that point? Is there some other compelling reason for an appeal? It seems to me that the latter approach adds little to the former in this case, although I bear in mind what Mr Edwards said about the market significance of the point.

9. Mr Edwards focused on three particular submissions. First, he identified the nature of the relationships and he distinguished the relationship with the leading underwriter under the "wording to be agreed" clause from the bipartite contract of reinsurance between Israel Phoenix and Unum. He pointed out that, when a reinsurer avoids the bipartite contract of reinsurance as far as his proportion is concerned, he does just that and no more: he does not avoid the relationship, if it is contractual, with the leading underwriter. But, as I think he accepts, that is not

really the ultimate point. There is no basis for avoiding that relationship; it was not induced by misrepresentation or non-disclosure. Whether it is an agency or a trigger relationship the question is not whether it was avoided but whether the capacity to act pursuant to it came to an end as a result of the avoidance, which, as I have said, must, for present purposes, be taken to have been valid, of the bipartite contract of reinsurance.

10. Mr Edwards' second submission was that mere termination of the reinsurance contract – and indeed I think he submits mere termination for other purposes of the relationship with the leading underwriter - left open the possibility of the leading underwriter agreeing a wording which might flesh out the contract made - at least as regards the past, although it could not affect the parties' conduct for the future. He submitted that it must remain within the parties' contemplation and expectation that a leading underwriter should act and be able to act as the leading underwriter here did and bind the whole of the following market; otherwise, he pointed out, unity would cease and different terms would prevail potentially as regards different members of the following market. He pointed out, and this is of course correct, that wordings are usually much more extensive than slips. That is their purpose.

11. He reminded us that arbitration clauses are regarded as severable agreements, and that they embrace, where agreed, disputes relating to avoidance as indeed they may embrace disputes as to whether contracts are void (for example for illegality see ***Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Company Ltd*** [1993] QB 701). He therefore suggested (this is his third point) that even though the contract must, for present purposes, be taken to have been validly avoided, still the leading underwriter must be taken to have had the capacity to continue to regulate the issue whether it was avoided and to do so in particular by an arbitration clause.

12. All those are of course points not without some general force. But it seems to me the force really relates not to any problem attaching to the judge's second reason, but to a problem affecting the insurance market generally when it enters into a short-form slip providing for a wording to be agreed at a later stage, and then fails, as so often it does fail, to agree any wording for a very long period thereafter. There is an inevitable risk that in the meanwhile some issue, including avoidance, may have arisen, and that it may then have to be determined under the short-form slip when, if a wording had been agreed, there might have been more specific terms relating to the matter in issue and there might also have been an arbitration clause to regulate its resolution. In the absence of a wording, however, it is no use asserting that, if the parties had got round to agreeing a wording, then it would have covered the situation.

13. It seems to me that the present situation is a variant on the same problem. In this case, the leading underwriter did not agree any wording for over five years after the placing of a reinsurance. By the time he agreed a wording, even assuming as I am that he did so as leading underwriter and so potentially binding the following market, in the case of Unum there had been an avoidance and there had indeed also been litigation commenced by Unum to establish the validity of its avoidance. The notion that the leading underwriter could at that stage still agree terms which would either affect the question whether the avoidance was valid, or affect the question whether a dispute relating to its validity should be regulated by arbitration rather than pending litigation, seems to me somewhat extreme. It does not seem to me to correspond with what the parties could possibly have contemplated or expected.

14. It seems to me, therefore, as it did when I saw the matter on paper, that the judge's second reason is one which presents an insuperable hurdle for Mr Edwards' clients. Once there has been a valid avoidance and once it has been followed by litigation, which to my mind is merely confirmatory of the position, it is simply too late for a leading underwriter to act either as an agent or a trigger. His authority terminates on a valid avoidance; that is the end of the matter. The particular reinsurer, here Unum, is free in matters of avoidance to act for himself, he does not have to depend on the leading underwriter. If he acts for himself at a time when the contractual relationship which he has for his proportion is regulated by the slip and his avoidance is valid he is entitled to regard that as the end of the matter and the leading underwriter must be regarded as no longer having power to affect retrospectively a contract which is in all respects gone. That to my mind includes the proposition that he has no power to agree a dispute resolution mechanism any more than he has power to agree a varied wording.

15. For my part therefore I remain of the view that this is not a case where it is appropriate to grant permission to appeal.

LORD JUSTICE KEENE:

16. I agree. If Mr Edwards is right in regarding Liberty as acting as an agent then it seems to me that Liberty's authority to so act and to bind Unum to an arbitration clause must have been terminated by the avoidance by Unum of the reinsurance contract. That preceded Liberty's agreement of wording on 5th December 2000 and was known to them. I can see no real prospect of success in appealing this matter.

17. I too would dismiss this renewed application.

(Application dismissed; no order for costs).

MR D EDWARDS (instructed by Barlow Lyde & Gilbert, London EC3A 7NJ) appeared on behalf of the Appellant
The Respondent did not attend and was unrepresented.