West London Pipeline and Storage Ltd v Total UK Ltd [2008] APP.L.R. 06/09

JUDGMENT : Mr Justice David Steel : Commercial Court. 9th June 2008

1. This is an application by the First and Second Defendants ("Total") for information and disclosure in respect of the insurance arrangements of the Third Party ("TAV"). Their application is advanced on two bases:
   i) the material is relevant to the issues; and/or
   ii) the material is necessary from the perspective of efficient case management.

2. In their claim Total seek a contribution from TAV in respect of any liability that Total may incur to those interests damaged by the Buncefield explosion. It is Total's case that TAV were the designers, manufacturers or suppliers of the TAV F16 switch which failed to operate whereby an overflow of fuel occurred leading to the explosion. The claims total over £700 million.

3. Part of TAV's original defence was a plea of reliance, so far as any level of contribution was concerned, on the modest cost of the switch and on its standard terms and conditions which limited any liability to 5% of the contract price.

4. In its reply Total pleaded that the modest price was immaterial in the light of the potential consequences of failure which could or should have been covered by liability insurance. It was further contended that, if incorporated, the standard terms relied on were unenforceable by reason of the Unfair Contract Terms Act 1977 for which purpose the resources available to TAV to meet any liability would include any (or any available) insurance cover.

5. Concurrently however with the issuance of the present application TAV notified Total that it was proposing to amend its defence to delete the reference to the cost of the switch and to its standard terms and conditions. As was no doubt intended, the impact of the proposed amendment was substantially to undermine the first basis upon which the application was advanced.

6. Nonetheless Total continued to press their contention that the nature and scope of TAV's liability insurance cover was material to the issues and in particular the question of apportionment (although with somewhat less vigour in the face of the amendment to the defence). I can deal with this proposition shortly.

7. The material provisions of the Civil Liability (Contribution) Act 1978 are: *"…the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the person's responsibility for the damage in question."*

   This involves consideration of both the blameworthiness of the party and the causative potency of any fault on its part: ***Madden v. Quirk [1989] 1 WLR 702***.

8. However it is now well established that the Act is not expressed exclusively in terms of causative responsibility and thus there may be breaches of duty or other factors relating to the acts or omissions of a party which may be taken account of even if not causative: see ***Re-source America Int Ltd v. Platt Site Services Constr. Ltd [2004] EWCA Civ 665***, ***Warwicker Partnership v. Hok Int. Ltd [2005] EWCA Civ 962***, but cf. ***Miraflores (Owners) v. George Livanos (Owners) [1967] 1 AC 826 at 845 per Lord Pearce***. Examples would include a non-causative breach of duty (***Warwicker***), deliberate breach together with reprehensible conduct of the defence (***Re-Source***), dishonest profiteering (***Dubai Aluminium v. Salaam [2003] 2 AC 366***).

9. However, the circumstances in which non-causative factors can properly be taken into account will be exceptional (and of limited impact). Certainly, in my judgment, there needs to be a close connection between the non-causative factors which it is just and equitable to take into account and the causative activity (or lack of it) which has given rise to the liability.

10. I do not regard it as arguable that the existence or scope of any insurance cover can be material to the issue of apportionment. There is nothing exceptional in there being some form of insurance cover. It has no connection whatsoever with the alleged causative conduct. In this regard I should note that it is expressly disclaimed by TAV that it proposes to rely upon the fact of it being an economically small business in assessing blameworthiness.

11. This leads to consideration of the alternative submission that the insurance terms need to be revealed in the interests of sound case management. Total's submission can be summarised as follows:
    i) TAV's latest financial statements reveal that it does not trade. Its current assets in 2006 (in common with 2005) amount to only £1500 made up of "amounts owed by group undertakings".
    ii) It follows that both TAV's ability to contest the litigation and its ability to pay any damages are dependent on its liability insurance.
    iii) It is clear that such insurance exists. Indeed it is referred to in TAV's accounts in noting the contingent liability in respect of the claim.
    iv) It is also clear that it is reasonably substantial. The estimate of TAV's own costs amount to something in excess of £3.7 million.
    v) However even a contribution of 5% (probably the lowest possible apportionment that the court would contemplate making) would amount to £35 million.
    vi) Disclosure of the insurance position is thus necessary and appropriate to determine whether the continuance of the litigation serves a useful purpose from the perspective of Total and/or the court.

12. In support of those submissions, Total rely on a decision of Irwin J in ***Harcourt v FEF Griffin [2007] EWHC 1500 (QB)***. This was a personal injury action in which liability had been settled on the basis of the claimant recovering

75% of the full claim. Even this proportion was said to amount to between £6 and £7.5 million. It was obvious, however, that the defendants were individuals of limited wealth.

13. The claimant accordingly made a CPR Part 18 request for further information as to the insurance cover enjoyed by the defendants. The basis of the application was that it would be wasteful to engage in a contested quantum phase if the result would be that the costs of so doing and the fruit of any success would not be recovered.

14. CPR Part 18.1 reads as follows:

"18.1

(1) The court may at any time order a party to—

(a) clarify any matter which is in dispute in the proceedings; or

(b) give additional information in relation to any such matter,

whether or not the matter is contained or referred to in a statement of case.

(2) Paragraph (1) is subject to any rule of law to the contrary."

15. Irwin J held that, although the nature and content of the defendants' insurance cover was not in itself a matter in dispute between the parties, nevertheless the wording of the rule should be construed "*reasonably liberally*":-

"[10]*…. The purpose of the jurisdiction must be taken to be to ensure that the Parties have all the information they need to deal efficiently and justly with the matters which are in dispute between them. Moreover, the wording need not be taken to imply that there must be a live disagreement about the relevant issue, since on very many occasions parties are properly required to furnish information pursuant to CPR r 18 precisely to discover whether there is or is not a live disagreement between the parties on a given point. The whole thrust of the new approach to civil litigation enshrined in the Civil Procedure Rules is to avoid waste of time and cost and to ensure swift and, as far as possible, proportionate and economical litigation. Therefore, I have no hesitation in finding that if there is no rule of law or significant rule of practice to the contrary, then the wording of CPR r 18 is broad enough to cover information of this kind."*

16. Having dealt with the issue of jurisdiction, the judge summarised the defendants' arguments on discretion as follows:-

"[15] *Stripped to their essentials, the Defendants make five points in reply. Firstly, it is said that it is elementary that an outsider to a contract, in this case any contract of insurance between Defendants and insurers, has no right to know any of the terms of that contract. Secondly, the statutory exceptions to that rule derived from the Third Party (Rights Against Insurers) Act 1930, the Contract (Rights of Third Parties) Act 1999 and/or the legislation relating to the Motor Insurers Bureau all constitute statutory exceptions which prove the rule. If Parliament had intended other exceptions, then further legislation would have followed. Thirdly, if such a request were granted it would hand an unfair advantage to a Claimant in litigation such as this. Fourthly, it is said that were such a request to be granted, it would rapidly become standard practice in every case for a Claimant to request such information and indeed for Defendants to reply in kind, setting up undesirable and wasteful satellite litigation. Fifthly, the Defendants argue that the periodical payments regime and the various obligations of the parties and the court do, taken together, have an effect on what must be disclosed, but the effect is limited in scope, does not extend to disclosure of the actual figure of the limit of cover and in any event no such obligation can arise until the date (in the instant case, in January 2008) when the parties would otherwise be required to indicate a preference for periodical payments or otherwise.****"***

17. In dealing with those submissions, Irwin J. recognised their force but commented a. that contracts with third parties are readily produced if relevant to an issue, b. that the absence of statutory authority was not decisive and c. that as regards a tactical advantage in gaining information as regards the insurance cover no prejudice was alleged.

18. As regards the regrettable potential for such applications becoming standard practice, Irwin J said as follows:

"19. ….It seems to me that, setting aside any other point, disclosure of this kind should only be ordered where a claimant (or where the situation arises, any other party) can demonstrate that there is some real basis for concern that a realistic award in the case may not be satisfied. I do not intend to attempt any general statement of principle as to the limits of such an obligation, applicable across all cases. I am however certain that the exercise of any jurisdiction to order disclosure of information such as this will be approached with caution. There must be some real basis for suggesting that the disclosure is necessary, in order to determine whether further litigation will be useful or simply a waste of time and money."

19. It was Total's submission that this decision was precisely in point: indeed it was contended that the circumstances of the present case provided a paradigm example of the necessity of the disclosure sought so as to discover whether the action against this non-trading asset-less company was a waste of Total's money and the court's time.

20. TAV submitted as follows:-

i) The insurance documentation was not disclosable under CPR Part 31 as relevant to any issue in the action.

ii) As already discussed, it was well established that the issue of apportionment was dependent on an assessment of culpability and causative potency in respect of both of which the insurance position was irrelevant.

iii) Equally, information as to the insurance position was not directly pertinent to "any matter which is in dispute in the proceedings" within CPR Part 18.

iv) In any event, there was a well established rule of law (or at least of practice) that such confidential information should not be made available to the opposing party.

v) There were statutory carve outs from the position of which the provisions of the Third Parties (Rights against Insurers) Act 1930 was an obvious example but otherwise those defending civil proceedings usually have no obligation to disclose their financial assets, including any insurances policies which they may have.

vi) Thus while it could be argued with some force that it would be advantageous for a litigant to know what his opponent was worth such did not justify disclosure. Indeed, any such advantage would be outweighed or at least matched by the prejudice to the insured and his insurers in their opponents knowing the "depth of the pocket" whether for negotiation purposes or otherwise.

vii) The decision in ***Harcourt*** was made without reference to the relevant authorities and was wrong. In any event, it concerned a judgment on which an interim payment of £1 million had been ordered. Given the prospect of exhausting any insurance cover on costs, it might be that similar information could have been furnished pursuant to CPR Part 71.

viii) Even if the court had jurisdiction to make the order, it should exercise its discretion against Total:

a) revealing the financial "bottom line" would be highly prejudicial to TAV with no undertaking to abandon the claim at any given level of cover.

b) if the rationale advanced was the risk of wasted costs and time such an order would become staple fare.

c) the application is being made well into the litigation with witness statements prepared and expert evidence in preparation.

21. In my judgment, TAV is correct in its submission that the court has no jurisdiction to require disclosure of their insurance position. It appeared to be common ground that the insurance policies were not disclosable under CPR Part 31 whether as part of standard disclosure or otherwise. They do not support or adversely affect any party's case, they are not relevant to the issues nor do they constitute documents which may lead to a train of inquiry enabling a party to advance his own case or damage his opponent's.

22. By the same token it is difficult to see how information furnished under CPR Part 18 would relate to any matter which is in dispute in the proceedings. Such was the position in ***Harcourt*** as well:

"10. The nature and extent of the Defendants' insurance is not in itself a "matter in dispute in the proceedings" between the parties, in the sense that the proper quantum of damages payable to the claimant could be determined without determining whether the defendant can actually pay those damages."

23. Is it possible to construe the rule more liberally? The first difficulty is the terms of the Practice Direction supplementing CPR Part 18:

"1.2 A Request should be concise and strictly confined to matters which are reasonably necessary and proportionate to enable the first party to prepare his own case or to understand the case he has to answer."

I detect no conflict in this practice direction with the terms of the rule which it supplements. The insurance position does not impact on the ability to prepare the case let alone understand any potential defence.

24. It is not suggested that the court has power to order production of the information otherwise than under the provisions of the CPR. CPR Part 18 accordingly provides the only avenue for Total to pursue. I bear well in mind the overriding objective of the CPR and in particular the need for the court to manage cases in a manner which will save expense and achieve expedition. I have also not forgotten that the court must have regard to the overriding objective in exercising any power under the rules or otherwise interpreting the rules. That said Total's submission requires a rewriting of both the rule and the practice direction.

25. The decision in ***Bekhor v. Bilton [1981] QB 923*** is instructive on the issue (although it is desirable to recognise that strict caution must be exercised in construing the CPR by reference to the former rules of court). The plaintiff had applied for disclosure of assets under the Rules of the Supreme Court in support of a freezing order. The rules were held not to provide any such power: disclosure of assets could not be obtained as part of discovery as the documents concerned did not relate "to matters in question in the action" and the power to order interrogatories did not relate "to any matter in question between the applicant and that other party in the cause or matter". The terms of the relevant former rules as compared with the equivalent CPR are strikingly similar. Furthermore the scope for disclosure is if anything now more circumscribed under the terms of the CPR.

26. A similar dispute to that arising in the present case was considered in ***Cox v. Bankside Members Agency C/A 29 November 1994*** in which names and members agents sought disclosure of the errors and omissions cover provided by underwriters. The application was made by way of an originating summons for which disclosure was not automatic. It had to be established that documents related to one of the matters in question in the cause and was necessary for fairly disposing of the matter or for saving costs. The underwriters sought to excise or redact the limits of the cover, the excess and so on.

27. The underwriters argument was summarised as follows:

"The argument advanced by the Errors and Omissions Underwriters is that these matters have no bearing at all on the resolution of any of the questions posed in the Originating Summons, since the answer to those questions will be the same whatever these limits or amounts etc may be. These details, therefore, do not relate to any matter in question in the proceedings. The fact that, for obvious reasons it is of the greatest importance to the Names to know what funds (if any) are available for their claims does not begin to mean that accordingly this information relates to the issues

the Court is asked to resolve. Were the position otherwise, then in any case the parties to litigation would be able to obtain discovery as to their respective financial resources, in order to decide whether or not it was worthwhile pursuing or defending the claim."

28. The court accepted that argument:

"It seems to me that much of the argument advanced on behalf of the Names really went to this second requirement, rather than the first, and on this aspect of the matter I consider that it can be said with great force that the disclosure of the information in question would be calculated to dispose fairly of the matter or would save costs. This was clearly also the view of Phillips J. For example, disclosure in any given case might reveal that there was no practical point in continuing to litigate against the Agents or even to take part in the resolution of the issues raised by the Underwriters. Be that as it may, however, it is clearly the law that only documents that relate to the matters in question in the cause or matter are disclosable.

In my judgment Mr Hirst is right in his submission that the information sought does not (for the reasons he put forward) relate to those questions; and furthermore that the suggestion that some of the questions might prove hypothetical or futile really has only to be stated to be rejected in the circumstances of the Lloyd's litigation while the suggestion that such questions include the stance to be taken up by the Names is incorrect. The reason I believe the second of these suggestions to be incorrect is because the same point could be made in any case where there was doubt whether the opposing party had the funds to make it worthwhile pursuing the litigation or any particular point in the litigation, whereas the law is clearly otherwise: see, for example, ***Bekhor v Bilton*** *[1981] QB 923 at 939 and 948, [1981] 2 All ER 565. The funds available (or not available) are relevant to the question of whether the Names will recover anything from their Agents or the Errors and Omissions Underwriters; they are not in my judgment relevant to the questions which fall to be answered under the originating summons:" per Saville LJ*

"The Underwriters claim to be entitled to cover up the financial particulars in the relevant policies (the limit of the cover, the excess, the premium). These particulars, they contend, do not relate to any matter in question in the cause, since none of them can affect in any way the answers which the Court will give to the legal questions raised. In this context, as in many litigious contexts, it is highly advantageous for a litigant to know what his opponent is worth, and this knowledge may be very relevant to enforcement. But the ease or difficulty of enforcement cannot bear on the matters of legal principle in question in the cause:" per Sir Thomas Bingham MR.

29. It was against that background that, as TAV pointed out, the Law Commission made plain in their Paper on Third Parties – Rights against Insurers Cm 5217 2001 that information about cover held by a solvent assured was not available to a claimant unless it was volunteered. It was accepted that details of insurance were a private matter between an insurer and an insured production of which would encourage speculative "deep pocket" litigation. In short a claimant must take a defendant as he finds him: ***Insolvency at Sea: Mance J: [1995] LMCLQ 34 at 43.*** None of this material was drawn to the attention of Irwin J in ***Harcourt.*** It would obviously have had some bearing on the existence of a rule of law (or at least "a significant rule of practice") in deciding whether CPR Part 18 was broad enough to cover insurance information even if not issue in the proceedings.

30. It follows that there is in my judgment no jurisdiction to make the order sought. I have reached this conclusion with some considerable hesitation – not least because it is contrary to the view of Irwin J in ***Harcourt.*** The trend is strongly towards a more open approach to litigation. Albeit the potential for prejudice to the defendant and his insurers must be borne in mind, in the modern age of "*cards on the table*" the question is readily posed why should not the one factor which may be key to a claimant's view of the merit of pursuing a claim, namely what is the limit of cover and will the costs eat it up anyway, be known? By the same token, concerns as the appropriate share of court resources to be allocated to a case ought to include allowance for the prospects of an effective recovery. But I am not persuaded that the provisions of CPR, however liberally interpreted, have led to a significant change in law and practice. In notable contrast, as I understand it, the Federal Rules of Civil Procedure now expressly impose an obligation of disclosure of potential insurance cover for any judgment.

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