CA on appeal from Commercial Court (HHJ Havelock-Allan QC) before Ward LJ; Clarke LJ; Longmore LJ. 27th May 2005

Lord Justice Clarke:

Introduction

1. This is an appeal from an order made by His Honour Judge Havelock-Allan QC in the Commercial Court on 2 September 2004 in which he dismissed the application of the appellant and 14th defendant, XL Specialty Insurance Co Ltd ("XL"), to set aside the order for service of the claim form upon it out of the jurisdiction made by Morison J on 26 February 2004. The claimants, to whom (like the judge) I shall refer collectively as "Carvill" and (for the most part) individually as "Carvill America" and "Carvill UK" respectively, obtained permission to serve XL on the basis that XL was a necessary or proper party to an existing claim against thirteen other defendants. Both the claimants and the 1st to 12th defendants are respondents to this appeal, which is brought with the permission of Potter LJ. As I understand it, the thirteenth defendant is not a party to this appeal.

2. XL's application challenged the jurisdiction of the court under CPR Part 11 on three bases as follows:
   i) that there was no serious issue to be tried against it on the merits;
   ii) that there was no good arguable case that XL was a necessary or proper party for the purposes of CPR 6.20(3); and
   iii) that England was not the *forum conveniens* for the trial of this action, given particularly that the same issues are the subject of proceedings brought by Carvill America in the courts of Connecticut.

3. The judge rejected XL's challenge on each of those bases but XL appeals only in respect of the first two. It does not seek to challenge the judge's decision on the third. On the footing that there was a serious issue to be tried against XL on the merits and that there was a good arguable case that XL was a necessary or proper party for the purpose of CPR 6.20(3), the judge held that the claimants had shown that England was the proper place in which to bring the claim within the meaning of CPR 6.21(2A).

4. Mr Richard Millett QC submits on behalf of XL that neither of the two issues which arise in this appeal involves any real element of discretion. He says that the first issue turns on the construction of a short written contract, while the second issue involves a consideration of the particulars of claim, the contract between Carvill and XL and the contract between XL and the other defendants. He submits that the judge misdirected himself in law in the case of both issues and that if XL succeeds on either issue the appeal must be allowed and the service of the proceedings set aside.

The facts

5. The facts are set out in some detail in the judgment. In so far as it is necessary to recite them here I can do so shortly, principally on the basis of the judgment. The dispute concerns brokerage under reinsurance treaties of non-marine risks placed by Carvill as broker for XL as reinsured with the first to thirteenth defendants as reinsurers ("the reinsurers"). The substantial issues are: (1) whether the brokerage was earned on placement or only earned when the premium in question was due and payable or was paid, and (2) whether the reinsurers or XL are liable to Carvill for the amount of the brokerage. The first issue arises because XL terminated Carvill's appointment as broker mid-way through a period of cover. The second issue arises because XL has withheld an amount equivalent to brokerage from its premium payments to reinsurers from the date of termination of Carvill's appointment, with the result that payment of Carvill's remuneration ceased as soon as its appointment as broker was terminated.

6. Carvill America and XL are both Delaware companies and have their principal places of business in Atlanta, Georgia and Wilmington, Connecticut respectively. Carvill America is a reinsurance broker, whereas XL is an American insurance company. Both have subsidiary or associated companies incorporated in England which carry on insurance business in London. Carvill UK is a subsidiary or associate of Carvill America.

7. In 1999 XL appointed Carvill America to act as its reinsurance broker on the terms of a "Reinsurance Broker of Record Appointment Letter" dated 26 August 1999. It provided, so far as relevant, as follows:

   "1. Effective on 8/26/99 Executive Liability Underwriters, an XL Specialty Division ("ELU") hereby appoints Carvill America ("Carvill") as its exclusive reinsurance Broker of Record for the purpose of procuring and servicing the Reinsurance program(s)/contract(s) specified in Addendum B ("the Program placement(s)").

   2. This appointment shall continue in force until Carvill resigns this appointment, ELU terminates this appointment, or ELU appoints a successor broker of record, any of which may be done at any time.

   3. At least quarterly, Carvill will render accounts to ELU accurately detailing all material transactions, including information necessary to support all commissions, charges and other fees received by, or owing to, Carvill from ELU. Carvill will remit all funds due to ELU within 30 days of receipt.

   4. All funds collected for ELU's account will be held by Carvill in a fiduciary capacity in a bank acceptable to the regulatory authorities involved. Carvill's records shall identify ELU's ownership interest in any funds held for more than one insurance company. Upon request from ELU, Carvill shall furnish copies of records relating to deposits and withdrawals for or on behalf of ELU. It is understood and agreed that all fees and expenses charged by the bank(s) for service shall be paid by Carvill, and any interest on said funds shall accrue to Carvill. It is further understood that Carvill's obligations under this paragraph are in addition to its obligations under any federal law.

   5. After expiration or termination of each Program placement transacted through Carvill for ELU, for a period of time at least equal to the period specified by the regulatory authorities having jurisdiction over this appointment, Carvill will keep a complete record for each transaction, showing the following:-

…

f. Rates of all reinsurance commissions …

10. It is understood that Carvill has not been granted authority to establish terms and conditions of the Program placement(s) nor to make the final selection of the reinsurer(s) allowed to participate in the Program placement(s). Nor is Carvill granted any authority to effect claim or other settlements on behalf of the ELU without prior written authority from the ELU. This authority rests solely with ELU. There are no fees or other remuneration to be paid to Carvill by ELU under this appointment letter. Remuneration earned by Carvill is to be received from the reinsurer(s) to which ELU's premium is ceded as is customary in the industry."

8. There was an addendum to the letter which provided by clause 1 that Carvill's appointment was to last for a minimum of 5 years and that any termination of the appointment was to take effect at the date of renewal of Carvill's reinsurance placements. It also included these two clauses, which (like the judge) I have included because Carvill say that they form part of the factual matrix against which the critical letter dated 2 October 2002 falls to be construed:

"2. Brokerage: ELU confirms Carvill's understanding that it has contractual entitlement to full brokerage remuneration for all business ceded to Carvill Program placement years, including brokerage on any future adjustment and reinstatement premiums arising therefrom. Carvill agrees to return brokerage on any premiums.

3. Servicing: It is agreed that where ELU appoints a successor intermediary to procure and service placement(s) covering the same class(es) of business, Carvill's servicing obligations will cease with effect from the date of termination of Carvill's appointment without any diminution of Carvill's brokerage entitlement as specified in 2 above."

9. Notwithstanding the terms of the addendum, the letter quoted above was replaced by a further appointment letter dated 2 October 2002, which provided for the retainer to continue with effect from 1 January 2002. The second appointment letter was in almost identical terms to the first, except that the wording of clause 10 was slightly different and it contained no addendum. As the judge observed, the difference in the wording of clause 10 was very slight. In the last sentence the phrase "*is to be received from*" was replaced by the phrase *"will be paid entirely by"*, so that the last two sentences of clause 10 now read as follows: *"… There are no fees or other remuneration to be paid to Carvill by ELU under this appointment letter. Remuneration earned by Carvill will be paid entirely by the reinsurer(s) to which ELU's premium is ceded as is customary in the industry."*

10. There was no addendum to the second appointment letter because in the United States it is a requirement of the NAIC (National Association of Insurance Commissioners) model law (and seemingly of the law of the state of Connecticut) that a reinsurance agency should be terminable at will. In these circumstances it is common ground that Carvill's retainer was terminable at will. It is this second letter, which was referred to in argument as "the BOR letter" (BOR standing for Broker of Record), which formed the relevant contract between the parties and it is upon the true construction of that letter that the first issue in the appeal depends. That is because all the claims brought by Carvill arose in the period after 1 January 2002.

11. Pursuant to its retainer, Carvill America placed two treaties of reinsurance, or made two "Program placements", on behalf of XL. The first was an Excess of Loss Reinsurance Treaty. The second was an Excess Cession Reinsurance Treaty. The risks reinsured were classified as Directors' and Officers' liability, General Partners' liability, Employment Practices liability, Pension Fiduciary liability, Fidelity Bonds, Financial Institution Errors and Omissions liability and Multi-Line combined programmes. Cover under both treaties was subscribed in part in the US market by US reinsurers and in part in the London and European market by European reinsurers. Carvill America procured the cover from the US reinsurers and Carvill UK, acting on behalf of Carvill America, procured the cover from the European reinsurers. Cover commenced on 12 July 1999 and ran initially to the end of that year. Thereafter it was renewed through Carvill for 12 month periods from 1 January 2000, 1 January 2001, 1 January 2002 and 1 January 2003. Not all of the European reinsurers subscribed to the cover in each period or for the same percentage of risk from year to year, but that is immaterial to the issues both before the judge and in this appeal.

12. The cover was effected in the conventional manner by Carvill presenting slips to the reinsurers which the reinsurers signed. The slips contained details of the risk, the premium and the brokerage or commission payable to Carvill. Cover notes were then prepared and sent to XL. They contained details of the proportion of the risk which each reinsurer had underwritten on the terms of the treaty and details of the premium payable to that reinsurer. The cover notes said nothing about the details of the brokerage. The treaties themselves provided for a total gross premium to be paid to reinsurers which was calculated by reference to a percentage of XL's gross premium income as insurer of the reinsured risks or relating to the policies ceded. The treaties contained, in identical terms, two other provisions to which I should refer. The first is an arbitration clause providing that all disputes or differences between XL and reinsurers should be referred to arbitration in Hartford, Connecticut and that the arbitration should be conducted in accordance with the procedures of the AAA (American Arbitration Association). The second is an intermediary clause expressly recording that Carvill America was recognised by the parties as the intermediary negotiating the agreements.

13. In about March 2003 differences arose between Carvill and XL over the amount of brokerage which Carvill was earning under the treaties. The rate being charged in respect of the European reinsurers was about 10 per cent of the gross premium. Carvill says that this was within the normal range for the European market. It would appear that XL disagreed. XL requested the return of a portion of the brokerage that had been earned. In other words,

as the judge put it, XL demanded a rebate. Carvill refused to repay any of the brokerage. As a result, on 14 July 2003 XL wrote to Carvill America giving notice that it was terminating Carvill's retainer with effect from 13 August. It is common ground that, in accordance with that notice, Carvill's appointment as XL's reinsurance broker came to an end on 13 August 2003, although cover under the treaties was not due to be renewed until 1 January 2004.

14. From the moment the appointment was terminated, Carvill ceased to receive brokerage. Until then Carvill had been paid brokerage calculated as a percentage of the premium paid by XL to reinsurers in respect of each line of cover, in accordance with formulae set out in the reinsurance slips. However, in practice, at least in relation to the European reinsurance, brokerage was accounted for by being deducted by Carvill from the gross premiums which XL paid to Carvill for onward transmission to the reinsurers. The result was that premiums were paid by Carvill to the European reinsurers net of the commission which had been agreed between Carvill and the reinsurers at the time the slip was signed. As soon as Carvill's appointment was terminated, XL ceased paying premiums to Carvill. So Carvill was unable to deduct its brokerage. Instead XL paid premiums to the new brokers it had retained, which I will call "Benfield". XL instructed Benfield to deduct from the premiums an amount approximately equivalent to the brokerage which Carvill would have deducted and hold it in one or more segregated bank accounts to the order of XL. XL gave this instruction whilst at the same time writing to reinsurers both in Europe and in the United States to reassure them that the switch from Carvill to Benfield during the period of cover would not expose them to the risk of having to pay brokerage twice.

15. On 1 December 2003 XL wrote a letter to one of the London reinsurers in these terms:

"We have instructed Benfield that the "brokerage" segregated account (which Benfield holds to XL's order) will be maintained pending a resolution of the XL/Carvill dispute as to brokerage. In this regard, XL agrees that if a court or arbitrator finally decided in favor of Carvill (were the dispute to go down a litigious route), then XL would honor their obligation (to Carvill) and therefore authorize the release of the appropriate amount of such monies held in the segregated accounts either directly to Carvill or, in the event reinsurers were held liable for these monies, to reinsurers so that they could duly release such monies to Carvill.

Alternatively, if XL prevails, the monies will be paid to XL. In these circumstances, we cannot immediately see why Carvill would thereafter have the right to pursue underwriters for brokerage."

The proceedings

16. The claim in this action is for unpaid brokerage and brokerage adjustments in respect of premiums paid to the European reinsurers under both treaties ("the European brokerage"). The total sum claimed is about US$4.7 million, of which US$180,000 relates to cover in 2002 and the remainder to cover in 2003. The first to eleventh defendants are reinsurers at Lloyd's, the twelfth defendant is Hannover Re and the thirteenth defendant is a Swiss reinsurance company called Converium Limited. All of these defendants have been duly served with the claim form and have accepted the jurisdiction of the English court. The first to twelfth defendants are represented by Reynolds Porter Chamberlain and have served a common defence. Converium is separately represented and has also served a defence. So far as I am aware, there is no relevant difference for the purposes of this appeal between the first to twelfth defendants.

17. The claim form in the action was issued on 8 March 2004. Later in March, two actions were commenced in the Superior Court of the Judicial District of Hartford in Connecticut, one by XL and one by Carvill America. The judge described the American proceedings in paragraphs 15 to 21 of his judgment. It is not necessary to repeat that description here in order to determine the issues which arise in this appeal, except to note that Carvill claims American brokerage in the American action and European brokerage in this action.

18. Like the judge I set out here the two bases on which Carvill claims the European brokerage from the European reinsurers in this action. The two bases are first custom and practice and second implied contract and are pleaded in paragraphs 12 and 13 of the particulars of claim as follows:

"12. The Reinsurers are liable to pay all such outstanding brokerage (including brokerage adjustments) to the First and Second Claimants pursuant to:

12.1 A custom or practice in the London and European reinsurance markets whereby a reinsurance broker is paid brokerage by the reinsurer out of the premium paid to that reinsurer on the reinsurance cover placed with it by the reinsurance broker. The said custom and practice was expressly referred to in clause 10 of each Appointment Letter which stated that "Remuneration earned by Carvill is to be received from the reinsurer(s) to which [XL's] premium is ceded as is customary in the industry.

12.2 Further or alternatively, an implied contract (by reason of the said custom or practice) between each of the Reinsurers and the First and Second Claimants, as reinsurance brokers, whereby each of the Reinsurers agreed to pay the First and Second Claimants brokerage calculated by reference to the premium due and payable to each of the Reinsurers on the reinsurance cover placed with it by the First and Second Claimants. The said implied contract was entered into by each of the Reinsurers at such time as it entered into a reinsurance contract placed by the First and Second Claimants.

13. The entitlement to brokerage arose when the reinsurance cover was placed by the First and Second Claimants (i.e. when each of the Reinsurers entered into a reinsurance contract), and such brokerage became due and payable to the First and Second Claimants at the same time as premium and/or premium adjustments became due and payable by XL to the Reinsurers in respect of such cover. The First and Second Claimants rely upon:

13.1 A custom or practice in the London and European reinsurance markets to that effect.

13.2 Further or alternatively, an implied term to that effect in the said implied contract (such term being implied by reason of the said custom or practice and/or as being the obvious intention of the parties)."

19. Carvill's primary case is that it is entitled to recover the brokerage from the reinsurers but, in case that fails, it advances an alternative claim against XL, which is pleaded in paragraphs 15 and 16 of the particulars of claim as follows:

"15. Alternatively, if the Reinsurers are not liable to pay outstanding brokerage (including brokerage adjustments) due in respect of the placement of the aforesaid reinsurance cover, the First and Second Claimants contend that XL is liable to pay all such outstanding brokerage (including brokerage adjustments) pursuant to the retainer on the basis that:

15.1 It was an express term of the retainer that the Claimants would be paid brokerage, such express term being contained in or evidenced by clause 10 of each Appointment Letter, and

15.2 It was an implied term of the retainer that XL would be liable to pay such brokerage (even though clause 10 of each Appointment Letter provided that, as a matter of mechanics, such payment would be "… received from the reinsurer(s)" ["paid entirely by the reinsurer(s)"]). The said term was implied as being the obvious intention of the parties to the retainer and/or so as to give business efficacy to the retainer.

16. It was a further implied term of the retainer that the entitlement to brokerage (including brokerage adjustments) arose when the reinsurance cover was placed by the First and Second Claimants, and that such brokerage (including brokerage adjustments) became due and payable to the Claimants at the same time as premium and/or premium adjustments became due and payable by XL to the Reinsurers. The First and Second Claimants rely on a custom or practice in the London and European reinsurance markets to that effect, alternatively the same is to be implied as being the obvious intention of the parties."

20. Although pleaded as implied terms, Carvill advance similar arguments by way of construction of the BOR letter. Further, since the hearing before the judge they have amended (or re-amended) the particulars of claim to claim damages in the amount of the unpaid brokerage for alleged breach of contract as follows:

"17A. Alternatively, XL has acted in breach of the retainer in the event that (1) Reinsurers are liable to pay outstanding brokerage (including brokerage adjustments) due in respect of the placement of the aforesaid reinsurance cover, but (2) Reinsurers' liability to make such payment only arises once XL has remitted to Reinsurers the gross premium from which such outstanding brokerage would be paid.

17A.1 It was an implied term of the retainer that XL would not deprive the Claimants of the opportunity of earning brokerage (including brokerage adjustments) in respect of any cover placed by the Claimants with any reinsurers pursuant to the retainer. The said term was implied so as to give business efficacy to the retainer or as being the obvious intention of the parties to the retainer (given that, on this alternative case, the Claimants had no other means of earning commission under the retainer).

17A.2 XL has prevented the Claimants from earning brokerage (including brokerage adjustments) in respect of the placement of the aforesaid reinsurance cover in that it has failed and/or refused to remit to Reinsurers the gross premium from which the brokerage (including the brokerage adjustments) pleaded in paragraph 11 above would have been paid by Reinsurers to the Claimants."

21. The judge described the stance of the European reinsurers in paragraph 24 of his judgment. They deny liability. Pending the provision by XL of full particulars of the grounds on which it claims to be entitled to withhold the brokerage from Carvill, they reserve the right to deny that Carvill is entitled to be paid any brokerage on premiums paid after the date on which the termination of Carvill's appointment took effect. Their primary defence, however, is that they deny that there is any custom or practice in the London and European reinsurance markets whereby brokerage is paid by the reinsurer and consequently they deny the alleged implied contract which is said by Carvill to arise by reason of that custom and practice. They contend that Carvill acted at all times as agent of XL and that no contractual relationship, express or implied, arose between Carvill and the European reinsurers. Hannover Re and Converium additionally refer to the fact that reinsurance business in the German and Swiss reinsurance markets is predominantly transacted directly between reinsurers and reinsured without the intervention of reinsurance brokers or intermediaries. Hannover Re also contends that the question whether it is liable to pay brokerage to Carvill after 13 August 2003 is governed by German law and that in German law the liability lies upon XL rather than Hannover Re.

22. In short, the European reinsurers say that it is XL, as reinsured, which is liable to pay any outstanding brokerage. They further say that Carvill is not entitled to any brokerage after the termination of its retainer by XL or that, if they were under any liability to pay brokerage to Carvill after 13 August 2003, the brokerage did not become due and payable unless and until they were paid the gross premium by XL. I should add that in the counterclaim the reinsurers claim declarations which include a declaration that XL is liable to Carvill. However, it is fair to say that the declarations are sought only against Carvill and not against XL and in the course of the argument we were told on behalf of the reinsurers that they would not seek a declaration to the effect that XL was liable to Carvill, either as against Carvill or as against XL.

Serious question to be tried

23. XL's case can be shortly summarised in this way. The claim brought by Carvill against XL rests in contract, namely the BOR letter. The BOR letter made it plain, as a matter of language, that it was the reinsurers who were liable to Carvill for the brokerage earned by Carvill in placing and administering the reinsurance contracts. Mr Millett focuses in particular on the last two sentences of clause 10, which it will be recalled provide: *"There are no fees or*

other remuneration to be paid to Carvill by ELU under this appointment letter. Remuneration earned by Carvill will be paid entirely by the reinsurer(s) to which ELU's premium is ceded as is customary in the industry." (Mr Millett's emphasis)

To hold XL even arguably liable for the brokerage is thus directly contrary to the express language of the BOR letter. Any construction or implied term contended for by Carvill is misconceived and bound to fail. There is accordingly no serious issue to be tried.

24. It is common ground between the parties that the merits test under CPR 6.20 is in substance no different from the test of a real prospect of success under CPR 3.4 or 24.2: see eg ***De Molestina v Ponton*** [2002] 1 Lloyd's Rep. 271 per Colman J at p 281 and ***MRG v Engelhard Metals Japan*** [2004] 1 Lloyd's Rep 731 per Toulson J at p 732. As Toulson J put it, the underlying rationale is that the court should not subject a foreign litigant to proceedings which the defendant would be entitled to have summarily dismissed. It is, however, important in my opinion to have in mind that the test is not a high one. A claimant has a real prospect of success if its chances of success are not fanciful.

25. I should add that, as Colman J said in ***De Molestina v Ponton*** in paragraph 3.6, there may in some cases be good reason to determine a question of law at the application stage. This is not, however, such a case. As appears above, there are issues between the parties in respect of the custom and practice of the London and European reinsurance markets as to the existence and/or scope of the reinsurers' liability to pay brokerage to a reinsurance broker. Those issues arise as between all three parties and raise questions to be tried upon which evidence is likely to be required. The BOR letter itself refers to "*ELU's premium*" being "*ceded as is customary in the industry*". The questions which industry and what is customary are likely to form part of the debate at the trial. These considerations to my mind make this an unsuitable case to decide the application as a pure question of law at this stage.

26. It is, as I understand it, common ground that the BOR letter is governed by the law of Connecticut and there was some evidence of that law before the judge, although he held that the evidence of it was incomplete. The precise relevance of that evidence is not entirely clear to me. Carvill have not pleaded reliance upon the law of Connecticut in support either of their case on the true construction of the contract or of their alleged implied terms. As to XL, in its supplementary skeleton argument, it relies on English law and submits that, given that Carvill have not pleaded Connecticut law, the judge should simply have decided the question whether there was a real question or issue to be tried as between Carvill and XL on the basis of English law. There seems to me to be some force in that submission and I shall therefore consider the question whether the judge was correct to hold that Carvill have a real, as opposed to a fanciful prospect of success, against XL on the basis that, although the BOR letter is subject to Connecticut law, that law is (or is presumed to be) the same as English law.

27. I agree with the view expressed by the judge in paragraph 33 of his judgment that it is at least arguable that, in construing the BOR letter under English law, the court should have regard to the circumstances surrounding the first letter, dated 26 August 1999, as part of the factual matrix or background to the BOR letter which replaced it. I also agree with the judge that it is at least arguable that those circumstances include the genesis of clause 10 of the letter and clauses 2 and 3 of the addendum.

28. Mr Millett submits that the terms of the reinsurance treaties also form part of the relevant matrix against which the BOR letters, and in particular the second letter should be construed. By the time of the second letter the treaties had been operated by the parties, that is Carvill, XL and the reinsurers for some time and, for my part, I would accept the submission that both the treaties and the way they operated were part of the background circumstances relevant to the construction of the second BOR letter. As I see it, the relevant terms of the treaties include the arbitration clauses and the provisions that XL was to pay premiums gross.

29. The way in which the contract operated under the first letter, and indeed under the second letter until 13 August 2003, was (as stated above) as follows. XL paid gross premium to Carvill for onward transmission to the reinsurers. Carvill deducted its brokerage and accounted to the reinsurers for the net commission. Carvill's case is that it earned brokerage on placement and, moreover, that it did so even though it owed duties under the contract to service the reinsurance programme after the programme had been placed. That case is consistent with the view expressed by His Honour Judge Hallgarten QC in ***Velos Group Ltd v Harbour Insurance Services Ltd*** [1997] 2 Lloyd's Rep 461 at 463. It is to my mind plainly arguable but it is not the point raised in this application.

30. Mr Millett's submission is that, whenever the brokerage was earned, it is not XL but the reinsurers who are liable to pay it. In so far as custom and practice in the reinsurance market in Europe or London is relevant in the light of the last few words of clause 10, he submits that the custom and practice of the London market (and I think he also says the European market and indeed the American and Connecticut markets) are that the broker is agent of the assured but is paid by the underwriter. As the judge observed in paragraph 29 of his judgment, he submits that this was settled as a matter of English law by such cases as ***Lord Norreys v Hodgson*** (1897) 13 TLR 421, ***McNeill v Law Union & Rock Insurance Co Ltd*** (1925) 23 Lloyd's List Rep 314 and ***Pryke v Gibbs Hartley Cooper*** [1991] 1 Lloyd's Rep 602. He also points to the ***Velos case*** p 463 and to what he says is a similar unanimity of view in the English textbooks: see *Reinsurance Practice and the Law* (edited by Barlow Lyde & Gilbert) at section 13.3, *The Law of Reinsurance* by O'Neill and Woloniecki at paragraphs 9-24 and 11-08, *Colinvaux's Law of Insurance* (7th ed) at paragraph 15-37 and *Kluwer's Reinsurance Law*, Chapter D.3.2.

31. Mr Millett submits that that practice is consistent with the last two sentences of clause 10, upon which he relies. Thus he says that the position is clear. The reinsurers and not XL are liable for the brokerage and the judge should have held that XL is not liable for the brokerage. There is undoubtedly considerable force in these submissions. The question is, however, whether a contrary case is sufficiently arguable.

32. It has seemed to me throughout the argument that the contrary must be at least arguable. It must be assumed for the purpose of this argument that Carvill earned its brokerage when the business was placed, although whether that is so or not will be a matter for trial. Under the treaties it was XL's duty to pay gross premiums. There are two possible views of XL's obligations under the BOR letters. The first is that it was its duty to pay the gross premiums to Carvill and the second is that it was its duty to pay the gross premiums to the reinsurers. In the first case, it was then for Carvill to remit the premiums to the reinsurers (or at least to account to them for the premiums) but Carvill was entitled to deduct its brokerage and remit or account for the net premiums to the reinsurers. In the second case, if (as Mr Millett submits with force) it was the reinsurers' obligation to pay brokerage, it seems to me to be at least arguable that that obligation only arose on receipt of the premiums. Thus the reinsurers would discharge their obligation to pay brokerage, either on receipt of premiums or, if the gross premiums were paid to Carvill (as contemplated in the letters) on receipt by Carvill of the gross premiums, when the reinsurers must be treated as authorising Carvill to deduct the brokerage before remitting the net premium.

33. On that footing, in the instant case, the argument is that XL has failed to pay the gross premiums to the reinsurers, either directly or through Carvill but has paid them to Benfield and instructed them neither to pay the gross premiums to the reinsurers nor to pay the brokerage to Carvill, but to hold the amount that would have been paid to Carvill to its order. It has indicated in the letter of 1 December 2003 quoted above that, if it is subsequently held that Carvill is entitled to the brokerage, it will "honour [its] obligation (to Carvill) and therefore authorize the release of the appropriate amount to Carvill". As that letter shows, the real issue in this whole affair is between Carvill and XL as to whether Carvill should be entitled to the brokerage. In these circumstances it is to my mind difficult to see how it can fairly be concluded that there is no serious question or issue between them to be tried.

34. The considerations in those two paragraphs stem from a consideration of the relative positions of the parties. I turn to consider the terms of the BOR letter. Ms Barbara Dohmann QC submits that the points identified above are at least arguable, either by way of construction or through the implication of appropriate implied terms. She recognises of course the force of Mr Millett's submissions based on the last two sentences of clause 10. However, she points to the distinction between "earned" and "paid" in the last two sentences and submits that clause 10 must be construed in the context of the contract as a whole and of the other terms of it, including in particular, clause 3.

35. As to clause 10, she notes that the last sentence makes it clear that Carvill earned the commission but otherwise simply provides for the mechanics of the payment of that commission, namely "by the reinsurers to which [XL's] premium is ceded as is customary in the industry." It is strongly arguable that that expression contemplates the payment of gross premium by XL to the reinsurers, with Carvill to be paid by the reinsurers out of that premium. Thus clause 10, either by a process of construction or of implied term, imposes an obligation upon XL owed to Carvill to pay gross premium to the reinsurers in order to enable them to pay the brokerage to Carvill.

36. Ms Dohmann also relies upon clause 3, which provides: *"At least quarterly, Carvill will render accounts to ELU accurately detailing all material transactions, including information necessary to support all commissions, charges and other fees received by, or owing to, Carvill from ELU. Carvill will remit all funds due to ELU within 30 days of receipt."*

    Ms Dohmann submits that clause 3 supports the case that brokerage is or may be owing to Carvill from XL, so that, read together, clauses 3 and 10 support the conclusion that XL is liable to Carvill for the brokerage but that it is to be paid in the way described above, by deduction from the gross premiums paid to Carvill by XL for onward transmission to the reinsurers net of the brokerage. Further or in the alternative she submits that clause 3 at least arguably makes it clear that XL is to be liable to Carvill for commission in circumstances in which, for any reason, it is not paid by the reinsurers.

37. Mr Millett submits in XL's supplementary skeleton argument that "c*ommission"* does not mean or include brokerage and that the judge was wrong to say in paragraph 34 of his judgment that "commission" was the word used in the United States to describe brokerage. It may be that the evidence does not go so far but it seems to me that, simply as a matter of construction of clause 3, it is at least arguable that *"all commissions …. owing to Carvill from ELU"* is wide enough to include brokerage. I recognise that it is also arguable that "commissions" does not include brokerage because brokerage is Carvill's remuneration and remuneration is expressly dealt with in the last two sentences of clause 10.

38. In my opinion the construction proposed by Ms Dohmann is at least arguable. I would reach that conclusion without regard to the terms of the addendum but, it seems to me to be arguable that, if regard is had to clauses 2 and 3 of the addendum, that construction argument receives some support.

39. There were two further points which struck the judge and which he discussed in paragraphs 35 and 36 of his judgment. For present purposes it is I think only necessary to refer to the first of them. The judge said in paragraph 35: *"The first is Miss Dohmann's contention that if the last sentence of clause 10 exonerates XL from liability for Carvill's remuneration, it does so only so long as XL continues to cede premium to the reinsurers "as is customary in the industry". One aspect of customary practice which was common ground in the argument before me was that the reinsured remits the gross premium to the broker for onward transmission to the reinsurer and the broker*

deducts his commission on the way. After 13th August 2003 XL ceased remitting gross premium to the reinsurers via Benfield and instead instructed Benfield to withhold a sum in a separate account equivalent to the brokerage that would have been due to Carvill before Carvill's appointment was terminated. In those circumstances it seems to me to be fairly arguable (I put it no higher) that the liability to pay that brokerage reverted to XL, always assuming that Carvill is right in saying that the brokerage was earned. The contrary argument advanced by Mr Millett is that the words "to which ELU's premium is ceded" in the last sentence of clause 10 merely identify the reinsurers and must be read as if they said "to which ELU's premium is cedable". To my mind this riposte merely serves to indicate that there is a triable argument as to the meaning and effect of the last sentence of clause 10."

I agree.

40. I would also add that it seems to me that, notwithstanding Mr Millett's submissions to the contrary, it is arguable that a term of the kind pleaded in paragraph 17A.1 of the amended particulars of claim should be implied into the contract. XL accepts that the court will imply a term into the BOR letter that XL will not breach or fail to perform the reinsurance contracts by failing to pay premiums in accordance with their terms so as to deprive Carvill of their remuneration. That concession is made on the basis of the decision of this court in ***Alpha Trading Ltd v Dunnshaw-Patten Ltd*** [1981] 1 Lloyd's Rep 122, especially per Brandon LJ at p 128. However, XL submits that the alleged implied term is much wider than that because it amounts to an unqualified restriction on XL doing anything to deprive Carvill of the opportunity of earning brokerage.

41. It appears to me that, once it is accepted that a term should be implied, there is plenty of scope for debate as to the precise form of the term. However, for the reasons already given, it is in my opinion arguable that it was an implied term of the BOR letter that Carvill would pay gross premiums either to the reinsurers or to Carvill and/or that it would not fail to do one or the other so as to deprive Carvill of its brokerage. It appears to me to be arguable that XL was in breach of contract in failing to pay the gross premium because it is arguable that that failure caused Carvill to be deprived of its brokerage. Whether it in fact had that effect depends upon the outcome of the dispute between Carvill and the reinsurers.

42. For all these reasons, I have reached the clear conclusion that, if the issue is to be determined under English law, the question whether XL is liable to Carvill for commission raises an issue to be tried and that the judge was correct to hold that there is between Carvill and XL "a real issue which it is reasonable for the court to try" within the meaning of CPR 6.21(2). In these circumstances I do not think that it is necessary for me to consider the relevance and possible effect of such evidence of the law of Connecticut as was put before the judge. Nor is it necessary to express a view on any of the other points made in the skeleton arguments, including those in the respondents' notices. I would only add that, so far as Connecticut law is concerned, it does seem to me that the precise basis upon which it is said by any party that such law is relevant and admissible should be clarified at a case management conference well in advance of the trial.

43. Finally, I should stress that, in reaching the conclusions set out above, I intend to express no view upon the likely construction of the BOR letter. The true construction of the letter and the question what, if any, terms should be implied into it are matters to be determined at the trial.

Necessary or proper party

44. Under CPR 6.20(3) a claim form may be served out of the jurisdiction if

"(3) a claim is made against someone on whom the claim form has been served or will be served and –

(a) there is between the claimant and that person a real issue which it is reasonable for the court to try; and

(b) the claimant wishes to serve the claim form on another person who is a necessary or proper party to that claim."

45. As to paragraph (a), it is not in dispute that there is a real issue to be tried between Carvill and the reinsurers. The question is whether XL is a proper party to that claim within the meaning of paragraph (b). The judge correctly held in paragraph 39 of his judgment that the test is that of a "good arguable case": *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islam Iran* [1994] 1 AC 438, especially per Lord Goff of Chieveley at 453D-G. As the judge observed, that test is somewhat higher than the test under CPR Part 24, but less stringent than a balance of probabilities: see *MRG v Engelhard Metals Japan* [2004] 1 Lloyd's Rep. 371 per Toulson J at 732 paragraph 9. It was thus for Carvill to demonstrate a strong argument which was short of a balance of probabilities that XL was a necessary or proper party to the action in London against the European reinsurers. The judge rejected Mr Millett's submission that they could not do so. The question in this part of the appeal is whether he was correct to reject that submission. Since it is sufficient for a claimant to show that a proposed party is a necessary or proper party, the question is whether XL is a proper party to the claim against the reinsurers.

46. I have reached the conclusion that XL is indeed a proper party to the claim against the reinsurers and that the judge was correct to hold that Carvill had demonstrated a strong argument to that effect. In my judgment, it is clear from the above discussion on the first issue that Carvill's claim for brokerage against the reinsurers is closely bound up with the alternative claim for brokerage or damages against XL. While I accept that it is not inevitable that Carvill will succeed against either the reinsurers or XL, it seems to me to be likely that they will succeed against one or the other. In any event, if these claims were brought in England, without the necessity of serving the claim forms out of the jurisdiction, there can be no doubt that they would be tried together.

47. If there were no complication derived from the fact that there is an arbitration clause in the reinsurance contracts, I can see no sensible basis for concluding that XL was not a proper party to the claim against the reinsurers. The contracts are closely related, as are the relationships between the three entities, the reinsured, the reinsurers and

the brokers. Good sense suggests that any questions of implied contract or of custom and practice should all be tried together in one action.

48. In ***Petroleo Brasiliero S.A. v Mellitus Shipping Inc, The Baltic Flame*** [2001] 2 Lloyd's Rep 203, Potter LJ, with whom Jonathan Parker and Sedley LJJ agreed, said this at paragraph 33, dismissing an appeal from a decision of Longmore J: *"Although the wording of rr 6.20 and 6.21 differs from that of the former O 11 r 1(1) and r 4, the principles expounded in former authorities relating to O 11 remain applicable. That being so, the starting point for the grant of leave is that generally a person who may be joined in proceedings in accordance with the rules as to joinder [of] parties is a "proper party" and that, when the liability of several persons (whether cumulative or alternative) depends on one investigation, if one of them is a foreigner residing out of the jurisdiction then CPR 6.20 applies: see* ***Massey v Haynes*** *(1881) 21 QBD 330."*

49. The judge applied that principle to the facts of this case and held, in my opinion correctly, that it is unquestionably the position that Carvill's claims against the reinsurers and XL depend on one investigation, even if it is possible that the alternative claims against the reinsurers and the reinsured could both fail. The judge said that it was in his view immaterial that the alternative claims do not arise under one and the same transaction. There is, he said, a common thread to the claims in the custom and practice of the market which, on Carvill's case, plays a central role in each. I entirely agree.

50. The principal point advanced by Mr Millett on behalf of XL under this head was based upon the arbitration clauses in the treaties. He submits that, given the stance of the reinsurers in these proceedings (viz that it is XL and not the reinsurers themselves which is liable to Carvill for brokerage), the resolution of the question whether XL is liable to Carvill will or may prejudice XL's right to arbitrate all "disputes and differences arsing out of or connected with" the reinsurance treaties, their interpretation or implementation. He submits that in these circumstances Carvill should be left to bring any claim they may have against XL in Connecticut.

51. Mr Millett puts his reliance upon the arbitration clauses in a number of ways but, in my opinion, the judge was correct to reject all his submissions in this regard. The question is whether XL is a proper party to the claim between Carvill and the reinsurers. In my judgment, that question should be determined by the application of the principles set out in *The Baltic Flame* to which I have referred. The existence of the arbitration agreements between XL and the reinsurers may have some relevance to that question but I would give them little, if any, weight. Carvill are not parties to the contracts containing the arbitration clauses.

52. The issues in this action involve the determination of the rights and obligations as between Carvill and the reinsurers and as between Carvill and XL but not as between the reinsurers and XL. As I see it, no issue is joined between XL and the reinsurers. If any dispute between them fell within the terms of the arbitration clauses, a claim to that effect could be met by an application for a stay under **section 9 of the Arbitration Act 1996**. Any such dispute could then be determined in arbitration on what might be different evidence. It is however to be noted in this regard that, as I indicated above, the reinsurers have undertaken not to claim in this action a declaration that XL is liable to Carvill.

53. In their supplementary skeleton argument Carvill submit that it cannot fairly be said that the existence of an arbitration clause in a contract between A and B can operate to prevent C from bringing court proceedings against both A and B jointly. In such proceedings neither A nor B could obtain a stay of such proceedings under section 9 of the 1996 Act for the very good reason that C is not a party to the contract containing the arbitration clause. In short C is entitled to bring separate proceedings against A and B without infringing the arbitration clause and there is no reason why C should not join them both in the same proceedings. I would accept those submissions.

54. In all the circumstances, I am not persuaded that the joinder of XL as a party to this action, in which Carvill claims brokerage from the reinsurers, is a breach of or interference with XL's rights, including its arbitration rights, under the treaties. Nor am I persuaded that such joinder is in any way inappropriate. On the contrary, the judge was correct to hold that XL was a necessary or proper party to the claim against the reinsurers.

CONCLUSION

55. For the reasons set out above, I agree with the judge that there is a serious issue to be tried against XL on the merits and that Carvill have shown that there is a strong case for argument that XL was a necessary or proper party to their claim against the reinsurers. I would therefore dismiss the appeal.

Lord Justice Longmore:

56. I agree. The fact that XL has felt it necessary to promise the European reinsurers that, if by any unhappy chance, reinsurers were to be held liable to Carvill for sums which reinsurers never themselves received, XL will discharge that liability on their behalf only emphasises the artificiality of XL's position. XL is seeking to prevent the English court from fastening on it any liability of its own in a situation where it is prepared to pay up if the liability is attributable to the only other candidate for such liability. It is, to my mind, clear that there should be one investigation as to liability for European brokerage and that both XL, as reinsured, and the European reinsurers should be parties to that one investigation.

Lord Justice Ward:

57. I agree.

Mr Richard Millett QC and Ms Philippa Hopkins (instructed by Leboeuf, Lamb, Greene & Macrae) for the 14th Defendant
Ms Barbara Dohmann QC and Mr Andrew Green (instructed by DLA Piper Rudnick Gray Cary UK LLP) for the Claimants
Mr Timothy Howe and Ms Tamara Oppenheimer (instructed by Messrs Reynolds Porter Chamberlain) for the 1st to 12th Defendants