Neutral Citation Number: [2016] EWHC 904 (Comm)

Case No: CL-2015-000634

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

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

Date: 21/04/2016

Before :

MR JUSTICE BLAIR

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Between :

AXA CORPORATE SOLUTIONS ASSURANCE S.A. **Claimant**

- and –

WEIR SERVICES AUSTRALIA PTY LIMITED **Defendant**

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- -

Jonathan Hough QC (instructed by **Clyde & Co LLP**) for the **Claimant**
Alexander Layton QC (instructed by **Herbert Smith Freehills LLP**) for the **Defendant**

Hearing dates: 12th April 2016

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MR JUSTICE BLAIR

Mr Justice Blair:

1. There are two applications before the court. They relate to a coverage dispute under liability insurance policies issued by the claimant insurance company, AXA Corporate Solutions Assurance SA ("AXA"). The relevant policies are: (1) global liability policies issued in England which insured companies in Weir Group plc including the defendant, Weir Services Australia Pty Limited ("Weir"), and (2) a "broadform" liability policy issued in Australia in favour of Weir and other subsidiaries of the group in Australia.

2. There are now two sets of proceedings in different courts in relation to this dispute. The first in time are these proceedings brought in the English court by AXA against Weir seeking declaratory relief in relation to the global policies. These proceedings were filed on 27 August 2015, but not served on Weir in Australia until 10 March 2016 pursuant to permission granted by Knowles J on 19 January 2016.

3. The second are proceedings brought by Weir against AXA in the Commercial List of the New South Wales court on 8 March 2016 seeking indemnity under the Australian policy, alternatively under the global policies. There was no need to obtain leave to serve these out of the jurisdiction, since service was effected on the Australian branch of AXA. The proceedings were issued by Weir as soon as it became aware of the English proceedings.

4. The two applications are:

    1) AXA's application dated 10 March 2016 seeking an anti-suit injunction to restrain Weir from pursuing in Australia its claim to be indemnified under the global liability insurance; AXA does not seek to restrain Weir so far as the Australian proceedings relate to the broadform liability policy issued there. It does however maintain that England is the appropriate forum for its claim in relation to the global policies issued in England, and that this claim should go first. It submits that the issue of the Australian proceedings was intended to frustrate the English proceedings, and was vexatious or oppressive conduct entitling the court to grant anti-suit relief.

    2) Weir's application dated 24 March 2016 seeking to set aside the order of Knowles J dated 19 January 2016 granting permission to AXA to serve these proceedings on it in Australia. Weir accepts that there were grounds for service out in that the global policies are governed by English law, and the contracts were made here. However, it submits that AXA cannot show that England is the proper place to bring the claim, the onus being on it in this regard. The appropriate forum it argues is New South Wales. Setting aside service would of course render AXA's application for an anti-suit injunction otiose.

5. In substance, the effect is that AXA wants the claim under the global policies to be determined first by the court in England, to be followed by a determination by the court in New South Wales if the position under the Australian policy becomes relevant. Weir wants all matters determined by the court in New South Wales.

<u>The parties</u>

6. The claimant is a major insurance company based in France and operating from branches globally. The defendant is one of several Australian subsidiaries of the Weir Group plc, which is an engineering company headquartered in Scotland and listed on the London Stock Exchange.

The policies

7. There are three global policies covering years between 2011 and 2014, but for the purposes of these applications, it is not necessary to distinguish between them. Each was written on the London market, having been arranged in England between AXA's London branch and Marsh Ltd as placing brokers on behalf of Weir group.

8. The policies are part of a worldwide, integrated liability insurance programme which AXA at the material time provided for the Weir group. So far as relevant, it consisted of global policies (each described as a "Global Master Policy"), and local policies entered into in various countries where companies in the Weir group carry on business (each described as a "Local Underlying Policy").

9. The global policies provided cover for (i) public liability, (ii) products liability, (iii) pollution and (iv) professional indemnity. Relevant limits of indemnity were £15 million for products liability and £5 million for professional indemnity (both in the aggregate).

10. The relevant local policy in Australia for the policy year 2011/12 was arranged in Australia between AXA's Sydney branch and Marsh Pty Ltd as placing brokers. It covered Weir and four other Australian subsidiaries of the Weir group for public liability and products liability, but not for professional indemnity. For both types of liability, the limit of indemnity per occurrence was AUS$7,654,950 (about £5 million at the time).

11. Both policies cover costs in addition, though in different terms. This is potentially significant, because as explained below, in money terms Weir's claim consists primarily of legal costs incurred in connection with an arbitration.

12. It is important to be clear as to the interrelationship between the global and local policies, which is largely provided for in the section of the global policies headed "Global Liability Programme Memoranda". In summary, this is as follows.

13. The global policies provide cover on a DIC/DIL (difference in conditions/ difference in limits) basis. The effect is that the global policy provides primary cover either where there is no local underlying policy, or where there is such a policy (as in this case), where the claim falls outside the terms of the local policy, but inside the terms of the global policy. The global policy also provides excess cover where a claim is covered by the local and global policies, but the value of the claim exceeds the limit of the indemnity of the local policy. In essence, it is common ground that the result is that the insured looks to the local policy first, and then to the global policy so far as it provides cover over and above.

Governing law and jurisdiction

14. The global policies have a clause in the following terms:

> "The Insured is free to choose the law applicable to this policy. The Insurer proposes that the policy will be governed by the laws of England and Wales unless the Insured and the Insurer agree otherwise."

15. Though as Weir points out, this is not a choice of law clause in conventional form, it was to the same effect, since the policy was to be governed by English law unless both parties agreed otherwise. (They did not in this case, and unsurprisingly there is no evidence that there was any issue in this regard.) In any case, it is not in dispute that under usual principles, absent choice, the policies are governed by English law since they were issued by the English branch of AXA: Articles 4 and 19 of the Rome I Regulation, and see generally *Dicey, Morris and Collins, Conflict of Laws (15th ed.)* rule 236.

16. The Australian broadform policy does not have a choice of law clause, but having been issued by the Sydney branch of AXA to Australian companies, there is no dispute that it is governed by the law of an Australian State, and in all probability this would be New South Wales.

17. Neither form of policy has a jurisdiction clause.

The background facts

18. Weir's claim arises out of a 2007 contract with a Philippines company which operates a gold mining project. The contract involved Weir refurbishing a large item of plant known as a SAG mill, (SAG standing for "semi-autogenous grinding"). In 2011, the circumferential weld connecting a plate to the main cylindrical drum of the discharge end of the mill fractured.

19. On 4 December 2013, arbitral proceedings were commenced by the Philippines company claiming damages against Weir for breach of contract, and for contravention of the Australian Trade Practices Act 1974 by allegedly making representations without any proper basis as to its capacity to carry out the refurbishment works. As amended, the claim was for US$68 million, most of which arose under the statutory claim, the contractual claims being subject to a limit of liability.

20. Shortly afterwards, Weir notified AXA of a claim under both the relevant global policy, and the Australian broadform policy. AXA declined cover under both. The consequent coverage dispute negotiations and discussions have primarily involved AXA personnel in England, personnel from Marsh Ltd in London, and the insurance and control manager for Weir Group based in Glasgow. The lawyers acting for the parties in negotiations have offices in Sydney and London, but those directly concerned in the coverage dispute have been in the firms' London offices.

21. The arbitration hearing was conducted in Sydney in July 2015, pursuant to the rules of the Australian Centre for International Commercial Arbitration. Weir was represented by its Sydney lawyers.

22. Pending the award, on 8 December 2015 Weir and the Philippines company entered into a confidential agreement described as the "Cap and Collar Agreement" governed by the law of New South Wales. Among the terms, it was agreed that Weir would

pay a minimum amount regardless of the outcome of the arbitration (there was also a cap). It was agreed that each party would bear its own costs of the arbitration in any event.

23. On 6 January 2016, the tribunal issued its award in the arbitration finding that Weir had no liability. The award records that the parties had requested the Tribunal to proceed to issue a final award with no order as to costs.

24. In these circumstances the claim under the policies by Weir has crystallised into a claim for the minimum amount it paid under the "Cap and Collar Agreement", together with its own costs in the arbitration. These costs are said to exceed US$5.6 million. Although at the time the English proceedings were issued in August 2015 this was not known, it is common ground that, as crystallised, in monetary terms the claim is within the financial limits of the Australian policy.

The coverage dispute

25. Subject to what is said below, the details of the coverage dispute are not presently relevant. In summary, the dispute concerns whether the "Product" as defined in the policies was the SAG mill or the circumferential weld, whether there is a late notification defence, whether having been found not liable in the arbitration Weir is entitled to indemnification in respect of the amount it paid under the Cap and Collar Agreement, and whether in these circumstances, the defence costs incurred in the arbitration are recoverable.

26. The position may not be the same under the global and local policies. Professional indemnity is not covered by the Australian policy, and as regards defence costs, which amount to the bulk of the claim, AXA says that the position under the Australian policy is arguably less generous to the policy holder than the position under the global policy, where the coverage is in respect of costs incurred "in respect of any originating cause which *may* be the subject of indemnity" (italics added).

Weir's application: England not the appropriate forum

The parties' contentions

27. In these proceedings, AXA claims declaratory relief that Weir is not entitled to be indemnified under the global policies in respect of any liability to the Philippines company or any costs of the arbitration.

28. As noted, Weir accepts that there are grounds for service of the proceedings on it out of the jurisdiction in that the global policies are governed by English law, and the contracts were made here. However, it submits that AXA cannot show that England is the proper place to bring the claim

29. The test in that regard is conveniently summarised in the defendant's skeleton argument as follows:

    1) A claimant requiring leave to serve out of the jurisdiction bears the onus of establishing that England is "clearly" the most appropriate forum for the trial of the action, *i.e.*, the forum in which the case can be most suitably tried "for

the interests of all the parties and for the ends of justice" (CPR r. 6.37(3); *Spiliada Maritime Corporation v Cansulex Ltd* [1987] 1 AC 460 at 464-465, 480-481; *VTB Capital plc v Nutritek International Corp.* [2013] 2 AC 337 at 356-357 [12]-[13], 375 [80]).

2) The factors which the court is entitled to take into account in considering whether England is the most appropriate forum are "legion", and include: the law governing the pleaded cause(s) of action; the locations of the parties and potential witnesses; and the existence of parallel proceedings in a foreign jurisdiction.

30. AXA submits that England is the natural forum for these proceedings, and the appropriate forum for the resolution of the coverage dispute under the global policies, i.e. the dispute to which these proceedings relate, being the forum with which these proceedings have the most real and substantial connection:

1) The global policies are governed by English law.

2) The principal issues concern the construction and application of the global policies as a matter of English law, including whether the "Product" which caused the damage was to be regarded as the SAG mill as a whole or as a particular component; the construction of the exception dealing with "Damage to the Product"; the construction of the exception in the Professional Indemnity Section (Design or Advice); and the construction of the provisions relating to the late notification defence.

3) Weir's claim to indemnity for the Collar payment cannot succeed in English law since it cannot show that the claimant in the arbitration had claims worth at least the amount of the Collar payment which ought to have succeeded: *Astrazeneca Insurance v XL Insurance* [2013] Lloyd's Rep IR 290 at [96] (upheld on appeal: [2014] Lloyd's Rep IR 509 at [17]. (Exceptions in the policy terms will also be relevant.)

4) This form of global policy is widely used by AXA and in general such policies are governed by English law. It is desirable that key provisions of such policies (including something as fundamental as the definition of "Product") should be construed by the English courts.

5) The global policies and the coverage dispute under those policies are most closely connected to England:

a) The global policies are contracts of insurance written on the London market, and issued by the English branch of AXA.

b) The policies were arranged by communications between that branch and Marsh Ltd, the English-based placing brokers for Weir group.

c) The principal insured under the policies is Weir group, a UK-based company with headquarters in Scotland and listed on the London Stock Exchange.

d) The coverage dispute negotiations have primarily involved (i) AXA personnel in England, (ii) personnel from Marsh in London and (iii) Mr Young of Weir Group (based in Glasgow).

e) The solicitors acting for the parties in the coverage dispute are in the London offices of Clyde & Co and Herbert Smith Freehills.

6) Practical considerations such as the location of witnesses and other evidence do not militate against litigation in England:

a) It is unlikely that significant witness evidence will be needed. The arbitral tribunal reached its conclusions by reference to the documents. Insofar as any evidence is needed about the works, it can be given in written form. In any event, the principal refurbishment works took place in Canada and the mill failed in the Philippines. Although AXA's late notification defence may require some limited witness evidence, the key witness from Weir is now resident in Iraq.

b) It is also unlikely that technical evidence about the failure of the mill will be required. The nature of the damage and the process by which it happened were common ground in the arbitration.

c) The material submitted in the arbitration is in documentary form and can be transmitted electronically to England.

31. Weir submits that England is not clearly the most appropriate forum for the conduct of proceedings. It relies on the following points:

1) AXA is liable under the global policies to the extent that indemnity is not available under the Australian policy, so that determining the parties' positions under the Australian policy is necessarily a logically anterior step to determining their positions under the global policies; the attempt by AXA to hive off the global policy aspect of the overall controversy into the English proceedings is therefore misconceived – this court would be bound to be drawn into a consideration of the Australian policy, even without that policy being directly litigated.

2) The English proceedings will not resolve the parties' rights and obligations insofar as they relate to the Australian policy, but will only consider the Australian policy as an anterior step of reasoning in determining whether to make negative declarations in relation to the global policies – in contrast, the totality of the parties' rights and obligations, including the key issue of Weir's entitlement to a money judgment, can be resolved in the Australian proceedings, in which there are claims for monetary relief made under both the Australian policy and the global policies.

3) The Australian policy is to be construed in accordance with principles of Australian law and is subject to the Insurance Contracts Act 1984 (Cth), and the Supreme Court of New South Wales has intimate familiarity with that jurisprudence.

4) Issues arise under both the Australian policy and the global policies which raise the question of Weir's prospects of defending the claims in the arbitration, which claims were governed by Australian law.

5) Some or all of the likely witnesses in relation to both the Australian policy and the global policies are located in Australia, and not in England.

6) Weir is an Australian company, and AXA is a French company. AXA is registered in Australia as a foreign corporation and has a branch in New South Wales at which it was validly served with the Australian proceedings without the need for leave, whereas AXA served the English proceedings on Weir only pursuant to leave.

7) The arbitral proceedings which give rise to the claims were conducted by Weir's Sydney lawyers, in Sydney, pursuant to the rules of the Australian Centre for International Commercial Arbitration; its procedural law was Australian law; and the Cap and Collar Agreement which gives rise to a claim under the policies is governed by the law of New South Wales.

8) The costs incurred in the arbitration proceedings which are directly claimed under the policies were incurred in Australia by Australian lawyers, and the reasonableness of, and possible apportionment of, those costs is likely to arise as a factual issue.

Discussion and conclusions

32. As a preliminary matter, I do not accept AXA's reliance on what it describes as the "hopeless" nature of Weir's claim under the Australian policy. The court is in no position to form a view as to the strength or otherwise of the claim on the present application.

33. In its own "merits" argument advanced in oral submissions, Weir submitted that the court should take the view that the English proceedings are premature, and that the court cannot be sure to the requisite standard that the declaratory relief sought will ever be required. Whereas at the time of issue, it is accepted that the size of the potential claim greatly exceeded the limits of the Australian policy, it no longer does, so to that extent the claim is no longer needed.

34. However, financial limits aside, as AXA points out, the global policies and the Australian policy define cover in slightly different ways—this point has already been noted in relation to costs, which form the bulk of the claim. Further, the global policies extend to professional indemnity, whereas the Australian policy does not. The position under the global policies remains relevant therefore.

35. AXA is in my view entitled to submit that negative declaratory relief is useful in this case: see *Tiernan v Magen Insurance Co Ltd* [2000] I. L. Pr. 517 at [14], Longmore J, citing the criteria adopted in *New Hampshire Insurance Co. v Philips Electronics North America* [1999] 1 Lloyd's Rep. I. R. 58, 61-62. This is because the English court is being asked to decide questions of construction on policies entered into here and subject to English law. Whether or not the claim should be progressed at this stage given the fact that (on Weir's case) it should make full recovery in New South

Wales raises different considerations that can be addressed through appropriate case management—see below.

36. In this regard, the strongest point in favour of AXA's contention is that the global policies are governed by English law. Although Weir downplayed the precedential nature of the dispute as to the construction of the policies on the facts of this case, AXA responds with force that the definition of "Product"—i.e. whole item or component parts—is potentially an important one, and if possible it should be construed by the English court.

37. On the other side, the strongest point in favour of Weir's contention is that the New South Wales court can try the whole dispute, whereas the English court can only deal with the position under the global policies. There is no jurisdictional basis for the English court to deal with the claim under the Australian policy, and the English proceedings do not purport to do so. On the other hand, the Australian court has jurisdiction because service of the claim based in the alternative on the global policies was effected on AXA's Australian branch. Further, Weir submits, since the global policies respond to the extent that the Australian policy does not, the question of liability under the Australian policy should be determined first. There might be issues as to whether the Australian court would deal with the claim under the global policies if, for example, AXA raised forum non conveniens arguments in relation to it, but that is not a question for this court.

38. In principle, Weir's approach has the potential of referring the whole dispute to a single commercial court, and I accept that this is a strong argument in its favour.

39. Weir's other points do not appear to me to carry so much weight. It is correct that the claim under the Australian policy raises issues of Australian law, as does the Cap and Collar Agreement, which the Australian court is best able to address. However that does not in itself impinge on whether England is the appropriate forum for the claim so far as it relates to the global policies. Witness evidence is unlikely to feature strongly in deciding the claims under either of the policies, since questions of fact were gone into in the arbitration and are dealt with in the award. It is correct that the arbitration was dealt with in Sydney, and the Australian court is best placed to assess the reasonableness of the costs incurred. However, it is difficult to see this being much of an issue so far as the English proceedings are concerned.

40. In any event, there is the countervailing consideration that the insurance claim has been dealt with in England throughout, and it has been handled by the Weir group out of its UK headquarters.

41. In a relatively balanced debate, the point that seems to me decisive is that the global policies are subject to what is in effect a choice of English law. Further, they stand at the apex of the worldwide, integrated liability insurance programme which AXA at the material time provided for the Weir group, with local policies in various different countries coming in beneath. Further and importantly, the evidence is that this form of global policy is widely used by AXA and in general such policies are governed by English law. I accept AXA's submission that it is desirable that key provisions of such policies (including something as fundamental as the definition of "Product") should be construed by the English courts.

42. The view that England is the appropriate forum in relation to a claim under an English law policy has support in both the case law and the commentaries:

    1) Where the primary issues in a case concern the construction and application of terms in an insurance policy written in England and subject to English law, the governing law is a significant factor in favour of English jurisdiction: *Lincoln National Life Insurance Co v Employers Reinsurance Corp* [2001] 1 Lloyd's Rep 853, 858 at [25]; *CGU International Insurance plc v Szabo* [2002] 1 All ER (Comm.) 83 at [52]; *Ass. Generali SpA v Ege Sigorta AS* [2002] 1 Lloyd's Rep 480 at 485-487; *Faraday Reinsurance Co Ltd v Howden North America Inc* [2012] 1 Lloyd's Rep IR 631, 643 at [66].

    2) "In cases concerned with insurance written on the London market and governed by English law, there is a strong tendency for the court to consider England as the natural forum": *Dicey*, ibid, para. 12-034 at p.557.

    3) "[I]n some categories of case there is an institutional view, which tends to displace individual assessments that England will be the most appropriate place to bring the claim. For example, insurance written on the London market will almost always be governed by English law, and the proposition that England will be the most appropriate forum will be easily sustained." (*Briggs, Civil Jurisdiction and Judgments* (*6th ed*.) at para. 4.89)

43. Despite the attraction of the solution proposed by Weir, in a case involving the construction of a standard form of master policy, I do not think I can readily depart from these principles. I find that AXA has made out its case that so far as the English proceedings are concerned, England is clearly the most appropriate forum for the trial of the action. That leaves open the question as to the sensible management of the proceedings—see below.

AXA's application for an anti-suit injunction

44. AXA seeks an anti-suit injunction to preclude Weir from pursuing claims under the global policies in Australia. This is based on submissions that England is the natural forum for proceedings which concern the scope of cover under the global policies, and that Weir began the Australian proceedings in an obvious effort to frustrate AXA's pursuit of the English proceedings. The effect has been significantly to increase costs, by requiring the parties to contest two sets of proceedings. If the court were to accept that England is the natural forum but were to refuse relief, the risk would arise of the global policies coverage dispute being addressed in two parallel sets of proceedings. This would in turn give rise to a risk of either (i) inconsistent judgments on the construction and application of the global policies; or (ii) an unruly rush to judgment in each jurisdiction.

45. The applicable principle is as follows. Where, as here, there is no English jurisdiction clause in the contract, the court's power to grant an anti-suit injunction depends on the applicant showing that pursuing the proceedings before the foreign court would be unconscionable, vexatious or oppressive (see e.g. the summary in *Seismic Shipping v Total E & P* [2005] 2 Lloyd's Rep 359 (CA) at [44]).

46. The fact that a claim is brought in a forum other than the natural forum is not, in itself, a ground to grant an anti-suit injunction, nor is the risk of inconsistent judgments. The bringing of a claim in another jurisdiction with the object of derailing existing proceedings in England can amount to unconscionable conduct grounding the grant of an injunction. However, that is not the case here. The fact that Weir brought an action in Australia when it learned of the English action was plainly tactical in the sense that it was intended to strengthen its aim of having its insurance claim tried in Australia. However, that is not an illegitimate aim—it does not amount to unconscionable conduct, and no good grounds have been demonstrated that would justify the court granting an anti-suit injunction.

Case management

47. These conclusions mean that proceedings in relation to Weir's insurance claims will be on foot in the commercial courts in both Sydney and London. The proceedings should be managed so that the litigation can be sensibly accomplished. No defence has yet been filed in either jurisdiction, and this should be readily possible. I am told that there is a hearing in Sydney on 22 April 2016, and this judgment is being made available at the parties' request in advance of that hearing.

48. The main question is as to the order of claims. AXA says that the English proceedings should go first because if Weir is successful in these proceedings, there would be no need for any further litigation in either jurisdiction. If AXA is successful, it is very unlikely that Weir could succeed before the Australian court.

49. However, I agree with Weir that, since AXA is liable under the global policies to the extent that indemnity is not available under the Australian policy, determining the parties' positions under the Australian policy is a logically anterior step to determining their positions under the global policies.

50. That being my view, AXA's position is that these proceedings should be stayed pending resolution by the Australian court of the claim under the Australian policy. Weir correctly points out that the decision as to the course to be taken in Australia is solely one for the Australian court, but that undertakings from both parties could lead to a sensible resolution enabling the Australian issues to be resolved first.

51. As a first step, the proceedings here will be stayed for the time being, either formally or by way of undertakings, meaning that Weir need not serve a defence at this stage. Should the claim under the global policies remain relevant, the position will be reviewed in the light of the decisions of the Australian court, with a view if necessary to lifting the stay and proceeding to a determination of the English action.

52. I am grateful to the parties for their assistance, and will hear them as to any consequential or further directions that are required.