Neutral Citation Number: [2019] EWHC 2768 (Comm)

Case No: CL-2018-000791

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2019

Before :

MRS JUSTICE CARR

- -

Between :

MUNICH RE CAPITAL LIMITED (suing as the sole corporate member of Munich Re Syndicate 457 at Lloyd's)	**Claimant**
- and -	
ASCOT CORPORATE NAME LIMITED (as sole corporate member of Lloyd's Syndicate 1414)	**Defendant**

- -
- -

Mr Gavin Kealey QC and Mr Shane Sibbel (instructed by **Elborne Mitchell LLP**) for the **Claimant**
Mr Jawdat Khurshid QC and Ms Sandra Healy (instructed by **Kennedys Law LLP**) for the **Defendant**

Hearing date: 3rd October 2019

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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.

....

MRS JUSTICE CARR

Mrs Justice Carr :

Introduction

1. This is a dispute between two Lloyd's insurers as to the proper construction of a Facultative Excess of Loss Reinsurance policy with unique market reference B08752011L6J5119 and dated 10 May 2011 ("the Reinsurance Policy"). By that policy, the Defendant ("Ascot"), as the only subscribing reinsurer and slip leader, reinsured the Claimant ("Munich Re") in respect of the latter's exposure under an underlying policy between Munich Re (and others) and Chevron Corporation ("Chevron") and its (many) project partners and contractors in respect of two projects ("the Insurance Policy"). One of those projects was a very substantial offshore construction project in the Gulf of Mexico known as Project Bigfoot.

2. The Insurance Policy, with unique market reference B0823EE1100211 and dated 10 February 2011, was an Offshore Construction All Risks policy on (amended) WELCAR 2001 Offshore Construction Project Policy terms ("the 2001 WELCAR terms"). It provided cover to Chevron against all risks of physical loss and/or physical damage to each part, item or portion of Project Bigfoot. The Reinsurance Policy incorporated all of the terms and conditions of the Insurance Policy. It is common ground that it was intended to be "back-to-back" with the Insurance Policy.

3. As set out in more detail below, Munich Re agreed to extend the period of the Insurance Policy. However, apparently through oversight on its own part and/or that of its broker, it omitted at the same time to (seek to) extend correspondingly the period of the Reinsurance Policy.

4. Following losses on Project Bigfoot in 2015, Munich Re paid Chevron some US$26 million in respect of its portion of liability on claims. The losses were accepted as a construction loss under the all risks "Project Period" as defined in the Insurance Policy.

5. Munich Re now seeks to recover by way of indemnity from Ascot under the more limited "Maintenance Period" provision in the Reinsurance Policy:

   i) the relevant proportion of its payment out on Chevron's claim (after deduction of excess), which amounts to approximately US$14.5million;

   ii) the relevant proportion of fees and expenses incurred of approximately US$3million, which amounts to approximately US$145,800.

6. Ascot has declined to provide such an indemnity. It contends that Munich Re's construction of the Reinsurance Policy leads to cover where none was intended; it is a construction that Munich Re is forced to adopt only because of Munich Re's failure to extend the Reinsurance Policy in line with the Insurance Policy.

7. The issue before the Court is thus the nature, scope and application of the cover provided by Ascot under the Reinsurance Policy in the "Maintenance Period", being the 12-month period following the expiry of the "Project Period".

Background and events giving rise to claims under the Insurance Policy on Project Bigfoot

8. The Bigfoot oilfield was discovered in 2005, some 220 miles offshore in the Gulf of Mexico and 220 miles south of New Orleans, in about 5,200 feet of water depth. Project Bigfoot involved the creation of an extended Tension Length Platform ("eTLP"), an oil and gas drilling facility developed from the basic TLP concept of tensioning a buoyant hull to anchor plates on the sea floor using steel tendons between the hull and piles driven into the seabed. It was to be constructed in South Korea, Gulf of Mexico and Texas, wet towed to site and then installed.

9. The facts to be assumed for present purposes can be summarised briefly as follows. The eTLP was made of a large number of substantial components, including:

   i) The hull, initially built in South Korea and dry towed to an inshore heavy lift site in the Gulf of Mexico;

   ii) The topsides, initially constructed in Texas and barged to the inshore heavy lift site in the Gulf of Mexico for mating to the hull;

   iii) The piles and 16 tendons, initially fabricated at the inshore heavy lift site in the Gulf of Mexico and barged to the offshore site.

10. The process by which the tendons were to be anchored to the seabed and thereafter connected to the hull involved feeding the tendons through clamp assembly modules ("CAMs") suspended on the water by temporary buoyancy modules ("TBMs"). The TBMs were to hold the tendons until they were connected to the hull. Munich Re contends that the design, procurement and fabrication of the TBMs and CAMs were completed by 31 December 2013 at the latest. At this point the TBMs with integrated CAMs were despatched to the inshore heavy lift site in the Gulf of Mexico.

11. By 9 May 2015 all 16 tendons had been anchored to the seabed piles and were awaiting connection to the platform. However, bolts connecting the TBMs to the CAMs failed in 9 of the 16 tendons, causing them to collapse to the seabed between the end of May and the beginning of June 2015. A root cause analysis performed by Chevron concluded that the collapses were caused by the fatigue failure of the bolts in the flange of the CAMs when exposed to loads and forces incidental to the procedures necessary to maintain the tendons in place. Munich Re contends that this was due to faulty and defective construction, material and/or design arising from causes occurring prior to 31 December 2013.

12. The loss of 9 of the tendons gave rise to substantial claims by Chevron under the Insurance Policy which, as already indicated, were paid out under the all risks "Project Period" as defined in the policy.

The Insurance Policy

13. Munich Re was the slip leader under the Insurance Policy, and put down a 5% line on 15 April 2011. The written line was subsequently signed down to 4%.

14. The policy slip incorporated the 2001 WELCAR terms (as amended and agreed between the parties) as follows:

> "CONDITIONS:
>
> All risks of physical loss and/or physical damage all as more fully described in the WELCAR 2001 wording (amended) as agreed and as endorsed hereto…"

15. Having identified the type of insurance (offshore construction all risks) and the parties, the policy slip provided as follows:

> "ESTIMATED PERIOD:
>
> PROJECT PERIOD
>
> This Policy attaches 00.01 hours 1st March 2011 at the address of the Assured and insures in respect of each part, item or portion of the property Insured herein, which is at the risk of an Assured at Inception and thereafter shall cover continuously until 23:59 30th March 2014 but not beyond 23.59 30th September 2014. The policy period may be extended at terms and premium to be agreed by the Slip Leaders and agreement parties. All dates are inclusive and at the location of the risk.
>
> Coverage shall attach from the time materials and/or parts come at risk of an Assured including work carried out at contractors and/or sub-contractors and/or manufacturers and/or suppliers premises and all transits (on and offshore) and shall continue during all operations until expiry as defined above.
>
> Subject No Known or reported losses at date of binding slip leader.
>
> MAINTENANCE PERIOD
>
> Coverage shall continue during the maintenance period(s) (subject to the terms, conditions and exclusions in the wording), up to a period of 12 months after expiry of the Project Period.
>
> DISCOVERY PERIOD
>
> The Discovery Period (subject to the terms and conditions in the wording) shall commence on expiry and run for 12 months, concurrently with the maintenance period."

16. The definition of the Project Period was an amended version of the relevant definition in the 2001 WELCAR terms which provides materially as follows:

> "PROJECT PERIOD
>
> The Policy attaches at (DATE), and insures in respect of each part, item or portion insured herein which is at the risk of an

> Assured at inception or which becomes at risk of an Assured after inception and shall cover continuously thereafter until completion of the last part, item or portion of the property insured herein, expected not later than (DATE). The Project Period may be extended at terms and premium to be agreed by the lead Underwriter."

17. The expiry dates in the definition of the Project Period chosen by the parties reflected the information in the Underwriting Information Report prepared by Aon Benfield ("Aon") in January 2011 ("the Underwriting Information Report"). That stated, amongst other things:

> "For the purpose of Insurance, the period of cover will commence from April 2011 until final completion of the project and handover to the operational insurances when steady state operations following first oil (expected June 2014) has been achieved when the project team will hand over the facilities to Operations. This is predicted to be latest circa **September 2014**."

18. This explains the absolute cut-off point of September 2014. The range of March to September 2014 is explained by the Project Schedule contained in the report which showed handover of the project to the Gulf of Mexico occurring between Quarter 2 (commencing March) and Quarter 4 (commencing October) 2014, and the statement in the report that the project team was targeting 31 March 2014 for expected first oil in all of their current plans (even though expected first oil was scheduled for 30 June 2014). Further, in the Bigfoot Project Presentation to Underwriters dated February 2011 first oil production was anticipated by the end of the second quarter of 2014 culminating in handover to Operations by the end of the third quarter of 2014. The Insurance Policy recorded the Underwriting Information Report as having been seen and noted by all underwriters.

19. The definition of the Maintenance Period was also an amended version of the relevant WELCAR 2001 definition which provides materially as follows:

> "Coverage…shall continue during the maintenance period(s) of specific contracts (subject to the terms, conditions and exclusions in the wording), up to a period of 12 months after expiry of the Project Period."

20. The scope and interest of the insurance for Project Bigfoot was defined as follows:

> "SCOPE OF INSURANCE:
>
> Covered activities include but not limited to: Project studies, engineering, contingencies, design, project management, procurement, fabrication, construction, prefabrication, storage, load out, loading/unloading, transportation by land, sea or air (including call(s) at port(s) or (s) as may be required), towage, mating, installation, burying, hook-up, connection and/or tie-in operations, testing and commissioning, existence, initial operations and maintenance, testing, trials, pipelaying, trenching, and

> commissioning. Covered activities also include direct consequences from drilling operations, if declared within the project information.
>
> INTEREST:
>
> Physical Loss and/or Physical Damage
>
> This insurance covers works executed anywhere in the world in the performance of all contracts relating to the Project including (provided they are included in the contract values declared to Underwriters and insured herein) materials, components, parts, machinery, fixtures, equipment and any other property destined to become a part of the completed project, or used up or consumed in the completion of the project.
>
> This insurance shall extend to cover physical loss and/or physical damage caused to the project works to install the Nabors drilling rig and associated work scope, subject to policy terms and conditions.
>
> Temporary Equipment (Option) – to be agreed subject schedule
>
> This insurance shall also cover all temporary works, plant, equipment, machinery, materials, outfits and all property associated therewith, whether such items are intended to form a permanent part of the works or not, including site preparatory work and subsequent operational risks and shall be deemed, irrespective of liabilities, to be the property of the Principal Insured shall be covered hereunder subject always to the policy terms and conditions. The values are to be covered within the final adjustment and at rates to be agreed Slip Leader and Agreement Parties of the policies. It is further understood that such equipment includes heavy lift equipment, inclusive of rigging, guides, bumpers and grillage.
>
> SITUATION / TERRITORIAL SCOPE: Anywhere in the world in connection with the Bigfoot Project."

21. The Estimated Contract Value (at inception) was US$1,953,529,096. There was a combined single limit of US$2 billion on any one occurrence. As for premium, the slip provided:

> "PREMIUM / RATES: As per the attached premium worksheet and adjustable on Final Contract Value at end of the project period."

22. In the attached (and amended) 2001 WELCAR wording clauses 20 and 21 ("Clause 20") ("Clause 21") of the General Terms and Conditions provided:

> **"20. DISCOVERY CLAUSE**

> Claims under the Policy shall only be recoverable hereunder if the Assured has damage discovered and reported such loss, damage or Occurrence to Underwriters within 12 months from expiry of the Project Period set out in ~~Item 3 of the Declarations~~ Risk Details and concurrent with specific maintenance period(s) set out in ~~Item 3 of the Declarations~~ Risk Details and described in Terms and Conditions, Clause 19 *[21]* below.
>
> This clause shall not, however, restrict the time otherwise allowed for establishing the extent and/or effecting of repairs and/or presentation of a claim in respect of such loss and/or damage and reported in accordance with the foregoing paragraph.
>
> **21. MAINTENANCE**
>
> The cover provided hereunder shall be no wider than that contained elsewhere in the Policy. Coverage shall continue during the maintenance period(s) ~~specified in individual contracts but not exceeding~~ for a further 12 months from expiry date of the Project Period as set out in ~~Item 3 of the Declarations~~ Risk Details. During such maintenance period(s), coverage is limited to physical loss or physical damage resulting from or attributable to:
>
> a) faulty or defective workmanship, construction, material or design arising from a cause occurring prior to the commencement of the maintenance period; and
>
> b) operations carried out by Other Assureds during the maintenance period(s) for the purpose of complying with their obligations in respect of maintenance or the making good of defects as may be referred to in the conditions of contract, or by any other visits to the site necessarily incurred to comply with qualifications to the acceptance certificate."

23. The amendments to the 2001 WELCAR terms are apparent on the face of the policy, save for the addition of the word "for" after the deleted word "exceeding" in Clause 21. It is common ground that the reference to clause 19 in Clause 20 is an error and should be a reference to Clause 21. The "(s)" at the end of the words "period" in Clause 21 is also a mistake. The draftsman appears to have failed to have made the alterations necessary as a result of the deletion of the words "specified in individual contracts".

24. The "Covered Perils" in the Physical Damage section were identified as follows:

> "Subject to the terms, conditions and exclusions herein, this policy insures against all risks of physical loss of and/or physical damage to the property covered hereunder, provided

> such loss or damage arises from an Occurrence within the Policy Period set out in item 3 of the Declarations."

25. An Occurrence was defined materially as meaning "one loss, accident, disaster, or casualty or series of losses, accidents, disasters or casualties arising out of one event".

26. In crude summary, therefore, for there to be cover under Clause 21a), an assured would need to establish physical loss or damage which i) was discovered and reported within 12 months from expiry of the Project Period and ii) resulted from or was attributable to faulty or defective workmanship, construction, material or design arising from a cause occurring prior to the commencement of the Maintenance Period. This cover was described by Mr Kealey QC for Munich Re as "very narrow cover indeed". Clause 7 of the Physical Damage section further provided that the policy did not provide cover for loss or damage to any defective part, save in particular circumstances.

27. The Insurance Policy was governed by the law of Texas and subject to the exclusive jurisdiction of the Courts of Texas.

28. As a result of significant construction delays, the Project Period in the Insurance Policy was extended three times:

    i) By Endorsement 10 dated 1 May 2014 from 30 September 2014 to 30 September 2015;

    ii) By Endorsement 16 dated 4 August 2015 from 30 September 2015 to 31 March 2018;

    iii) By Endorsement 22 dated 6 March 2017 from 31 March 2018 to 31 December 2018.

29. Endorsement 27 to the Insurance Policy recorded that:

> "The Project will transfer to the Operational Insurances as of 00:01 1st January 2019 local standard time at the address of the Insured, at which time the maintenance and discovery period will commence."

The Reinsurance Policy

30. The policy slip for the Reinsurance Policy commenced as follows:

> "**Type** Facultative Excess of Loss Reinsurance
>
> **Perils** All Risks of Direct Physical Loss Destruction or Damage and as described in the Original Policy Wording."

31. Mirroring the Insurance Policy, the term of the policy is described as follows:

> **"Estimated Period**

Project Period

A) Bigfoot Project

This Policy attaches 00.01 hours 1st March 2011 at the address of the Assured and Insures in respect of each part, item or portion of the property Insured herein, which is at the risk of an Assured at inception and thereafter shall cover continuously until 23:59 30th March 2014 but not beyond 23.59 30th September 2014. The policy period may be extended at terms and premium to be agreed by the Slip Leaders and agreement parties. All dates are inclusive and at the location of the risk.

Coverage shall attach from the time materials and/or parts come at risk of an Assured including work carried out at contractors and/or sub-contractors and/or manufacturers and/or suppliers premises and all transits (on and offshore) and shall continue during all operations until expiry as defined above…

Maintenance Period

Coverage shall continue during the maintenance period(s) (subject to the terms, conditions and exclusions in the wording), up to a period of 12 months after expiry of the Project Period.

Discovery Period

The Discovery Period (subject to the terms and conditions in the wording), shall commence on expiry and run for 12 months, concurrently with the maintenance period..."

32. These dates of the Project Period mirrored those in the Insurance Policy, again reflecting the contents of the Underwriting Information Report. An Information Appendix to the Reinsurance Policy formally recorded that Ascot had been provided, amongst other things, with "all Information deemed seen and agreed by Reinsurers hereon".

33. The "Interest" of the Reinsurance Policy mirrored the equivalent section in the Insurance Policy. The sum reinsured (using 100% values) was US$400,000,000. Ascot put down a 5% written line (corresponding to Munich Re's original written line on the Insurance Policy), signed to 4%, again to reflect the 4% signed line of Munich Re on the Insurance Policy.

34. The slip addressed its relation with the Insurance Policy, as follows:

"**Reinsurance conditions**:

Following Original Policy Wording Reference Number: B0823EE1100210

> This Contract is subject in all respects (excluding the rate and/or premium hereon and subject always to the Limits Reinsured hereon and except as otherwise provided herein) to the same terms, clauses and conditions as original and without prejudice to the generality of the foregoing, Reinsurers agree to follow all settlements (excluding without prejudice and ex gratia payments) made by original Insurers arising out of and in connection with the original insurance…"

35. The Reinsurance policy is governed by English law and subject to the exclusive jurisdiction of the Courts of England and Wales.

36. As already indicated, no extensions were granted to the Project Period in the Reinsurance Policy as occurred with the Insurance Policy. Munich Re's broker (according to Munich Re without its authority) first requested an extension of the project period from Ascot in October 2015, after its claim under the Reinsurance Policy was notified. That request was refused.

37. Thus at all times after the extension under Endorsement 10 to the Insurance Policy there were different Project Periods and different Maintenance Periods under the two policies.

The parties' positions in overview

38. Ascot was not made aware of any extension to the Insurance Policy until October 2015 and after Chevron's claim had been notified. Ascot declined to extend to the Reinsurance Policy. Originally and for some time Munich Re argued that an "automatic extension" of the Reinsurance Policy had occurred when the Insurance Policy was extended and/or that Munich Re could unilaterally extend the Reinsurance Policy. It no longer maintains its original position that there had been such an extension.

39. Rather, Munich Re contends that on a true and proper construction of the Reinsurance Policy:

    i) Upon the expiry of the Project Period, meaning the period of time defined under the heading "Project Period" in the slip, limited cover would continue over the whole project for the 12-month maintenance period;

    ii) Alternatively, such limited cover would continue in respect of each item, portion or part insured the construction of which had, at the point that the Project Period expired, been completed;

    iii) In either case, such limited cover includes cover in respect of "physical loss or physical damage resulting from or attributable to faulty or defective workmanship, construction, material or design arising from a cause occurring prior to the commencement of the maintenance period", as set out in Clause 21 of the WELCAR terms.

40. Ascot contends that on a true and proper construction of the Reinsurance Policy:

i) Upon the expiry of the Project Period, meaning the period of time defined under the heading "Project Period" in the slip, limited cover would continue over the completed project for a period of 12 months. Contrary to the expectations of the parties at inception, however, the project was not in the event completed on the expiry of the relevant "Project Period" on 30 September 2014. That being the case, there was no completed project that fell to be covered during the "maintenance period(s)";

ii) Alternatively, if effect is to be given to the expectations of the parties at inception that limited cover would be provided for the completed project during "maintenance period(s)" for 12 months, then such cover would commence when the project had completed. In the event, the project was completed on 1 January 2019 such that the limited cover is being provided during "maintenance period(s)" until 31 December 2019. Such cover, however, is confined to physical loss or damage arising from a cause referred to in Clause 21 of the WELCAR terms which occurred prior to the expiry of the "Project Period" on 30 September 2014.

41. Munich Re's central reasoning on its primary case can be summarised as follows:

i) Clause 21 is clear on its face. Its words are unambiguous – the Policy Period expired on 30 September 2014 and the Maintenance Period commenced immediately thereon. This is a case where a literalistic approach is the correct one. Context does not trump the language of the contract unless there has been an obvious mistake. The fact that Munich Re's benefit may be opportunistic is irrelevant;

ii) Clause 21 is concerned with two strands of cover, the first (and relevant) part of which is not linked to any maintenance operations, not dependent on any installation activities being carried out or on completion of construction as a whole or in part or on steady state operations yielding first oil having commenced or on handover from the project team;

iii) The heading to Clause 21 (i.e. "MAINTENANCE") cannot be ignored but does not dictate the scope and meaning of its substantive contents. Clause 21 is recognised has having separate strands (see *Upstream and Offshore Energy Insurance* David Sharp (2009) ("*Sharp"*) at 8.7.0 and *Construction All Risks Insurance* Reed 2nd Ed. (2016) (*"Reed")* at 24-032). The heading must be read in that light;

iv) The ("very narrow") coverage provided under Clause 21 continues without discontinuity or interruption from the end of the Project Period;

v) As for wider context, the parties chose to simplify the wording of the 2001 WELCAR definition of the Project Period, by selecting dates certain for the identification of the Project and Maintenance Periods rather than by reference to the "completion of the last part, item or portion of the property insured" (and by removing the references to maintenance periods identified in individual contracts, something to which the court is entitled to have regard – see *The Interpretation of Contracts* Lewison 6th ed. at 3.04). They should be held to their bargain. The relative importance of the language is high, having

been agreed between two commercial parties with substantial expertise and experience of the relevant market. Whilst the parties contemplated project overruns and recognised the possibility that there would not be any agreed extension to the Project Period, they did not agree that the Maintenance Period would not begin and end with the dates in Clause 21;

vi) The date-defined end point reflects a wider trend in offshore construction insurance (see *Sharp* at 6.33), partly explained by the disinclination of insurers to expose themselves to a project period of open-ended length and arguments as to the meaning of "completion" of the overall project. The corollary is that the limited forms of cover which continue after the end of the project period are capable of commencing either whilst construction of the project is progressing or some time after completion of construction. On a project such as Project Bigfoot, it would be wrong to consider "construction" and "maintenance" as two binary, mutually exclusive concepts or stages. In the "real world", it is unreal to say that maintenance only begins after construction of the entire project;

vii) Munich Re paid Ascot a premium for 12 months of "maintenance" cover under Clause 21 calculated by reference to contract values which included the value of the TBMs and CAMs, and the extension of the Project Period in the Insurance Policy did not materially alter the nature of the risks being insured;

viii) Finally, and in direct response to Ascot's position, the correct approach is not to identify the parties' expectation at the time of contracting and see how it is to be applied to changed circumstances. If, as here, the position (of mismatching policies) was reasonably foreseeable, then the parties can be expected to have addressed that position explicitly if they did not want the plain language of the contract to bind them. Ascot's approach confuses what the parties may have foreseen or expected with the objective meaning of the Reinsurance Policy.

42. Ascot's case in summary is that the parties, at inception, intended that cover provided during the "maintenance period(s)" would apply to the completed project, after an "acceptance certificate" had been issued on completion of the construction of the Bigfoot platform. The essential nature of that cover did not change so as to provide cover for losses occurring during the construction phase simply because, contrary to the parties' expectation, Munich Re omitted to ask for the Project Period in the Reinsurance Policy to be extended:

i) The ordinary expectation of parties to an offshore CAR policy is for the Project Period to cover all operations up to the completion of construction. In the not unusual event of delays, it is expected that the parties will agree an extension to the Project Period. At the end of the construction phase, an offshore CAR policy will provide limited cover during an additional period of post-completion maintenance. Both parts of this extension provide cover for physical loss and damage during operations and after the project has been handed over to an operational policy (see *Sharp* at 6.3.5 and 8.7.0; *Reed* at 24-032; *Mopani Copper Mines v Millennium Underwriting* [2008] EWHC 1331 (Comm); [2009] Lloyds Rep IR 158 at [12] and [14]). Endorsement 27 records as much;

ii) The expectation and intention of the parties to the Reinsurance Policy, judging from the language of their contract, was no different to that ordinary expectation;

iii) The issue that falls to be decided here is a question of contractual interpretation in changed factual circumstances, where there has been an extension of the Insurance Policy period but not of the Reinsurance Policy period. Both the wording and the context of the Reinsurance Policy show that the parties, at inception, objectively intended the cover during the Maintenance Period to be provided after the project had been finally completed and handed over to the operational insurances, after steady state operations following first oil having been achieved and the construction team having handed over the facilities to operations. Thus, there is no cover under Clause 21 for the loss of the tendons, since that loss occurred during the construction of the Bigfoot platform and not after its completion;

iv) Although, in the changed factual circumstances which transpired, the project had not completed by the time that the Project Period in the Reinsurance Policy had expired (on 30 September 2014), the parties did not intend for the maintenance provision to cover losses occurring during the course of construction. On the contrary, the expectation of the parties to the Reinsurance Policy at inception was that the cover provided during the Maintenance Period would be for losses occurring after the project had been completed. The cover was rated accordingly for premium purposes – at a rate of 0.25% of the contract value (for 100%) as opposed to approximately 3.5%. Munich Re's construction ignores the fact that the risk under Clause 21 was different to and would have been rated differently from risk during the construction phase of the project. Contrary to the suggestion by Munich Re, Munich Re never paid premium in relation to the tendons for the Maintenance Period;

v) Munich Re's construction also ignores the express wording of Clause 21 (with its references to "maintenance" and "acceptance certificate");

vi) Thus, in short, there was no completed project that fell to be covered during the Maintenance Period.

The Law

43. The well-known principles of contractual construction are to be found in a series of recent cases, including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36; [2015] AC 1619 and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173.

44. In *Arnold v Britton* (supra) the relevant legal principles of contractual interpretation were identified as follows:

> "15. When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the

language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words, in this case clause 3(2) of each of the 25 leases, in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions. In this connection, see *Prenn* [1971] I WLR 1381, 1384-1386; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (trading as HE Hansen-Tangen)* [1976] I WLR 989, 995-997, per Lord Wilberforce; *Bank of Credit and Commerce International SA v Ali* [2002] I AC 251, para 8, per Lord Bingham of Cornhill; and the survey of more recent authorities in *Rainy Sky* [2011] I WLR 2900, paras 21-30, per Lord Clarke of Stone-cum-Ebony JSC.

16. For present purposes, I think it is important to emphasise seven factors.

17. First, the reliance placed in some cases on commercial common sense and surrounding circumstances (eg in *Chartbrook* [2009] AC 1101, paras 16-26) should not be invoked to undervalue the importance of the language of the provision which is to be construed. The exercise of interpreting a provision involves identifying what the parties meant through the eyes of a reasonable reader, and, save perhaps in a very unusual case, that meaning is most obviously to be gleaned from the language of the provision. Unlike commercial common sense and the surrounding circumstances, the parties have control over the language they use in a contract. And, again save perhaps in a very unusual case, the parties must have been specifically focussing on the issue covered by the provision when agreeing the wording of that provision.

18. Secondly, when it comes to considering the centrally relevant words to be interpreted, I accept that the less clear they are, or, to put it another way, the worse their drafting, the more ready the court can properly be to depart from their natural meaning. That is simply the obverse of the sensible proposition that the clearer the natural meaning the more difficult it is to justify departing from it. However, that does not justify the court embarking on an exercise of searching for, let alone

constructing, drafting infelicities in order to facilitate a departure from the natural meaning. If there is a specific error in the drafting, it may often have no relevance to the issue of interpretation which the court has to resolve.

19. The third point I should mention is that commercial common sense is not to be invoked retrospectively. The mere fact that a contractual arrangement, if interpreted according to its natural language, has worked out badly, or even disastrously, for one of the parties is not a reason for departing from the natural language. Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made. Judicial observations such as those of Lord Reid in *Wickman Machine Tools Sales Ltd v L Schuler AG* [1974] AC 235, 251 and Lord Diplock in *Antaios Cia Naviera SA v Salen Rederierna AB (The Antaios)* [1985] AC 191, *201,* quoted by Lord Carnwath JSC at para 110, have to be read and applied bearing that important point in mind.

20. Fourthly, while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party.

21. The fifth point concerns the facts known to the parties. When interpreting a contractual provision, one can only take into account facts or circumstances which existed at the time the contract was made, and which were known or reasonably available to both parties…

22. Sixthly, in some cases, an event subsequently occurs which was plainly not intended or contemplated by the parties, judging from the language of their contract. In such case, if it is clear what the parties would have intended, the court will give effect to that intention. An

> example of such a case is *Aberdeen City Council v Stewart Milne Group Ltd* 2012 SC (UKSC) 240, where the court concluded that "any..approach"other than that which was adopted "would defeat the parties' clear objectives", but the conclusion was based on what the parties "had in mind when they entered into" the contract: see paras 21 and 22…."

45. Thus, the court is concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. It does so by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of the natural and ordinary meaning of the clause, any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed and commercial common sense, but disregarding the subjective evidence of the parties' intention. While commercial common sense is a very important factor to be taken into account, a court should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed. The meaning of a clause is usually most obviously to be gleaned from the language of the provision.

46. In *Wood v Capita Insurance Services Ltd* (supra) at [9] to [11] Lord Hodge JSC described the court's task as being to ascertain the objective meaning of the language which the parties have chosen to express their agreement. This is not a literalist exercise focused solely on a "parsing of the wording of the particular clause"; the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning. The interpretative exercise is a unitary one involving an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences investigated.

47. The importance of context in a case concerned with the proper construction of provisions relating to delay in a shipbuilding contract was emphasised by Leggatt J (as he then was) in *Zhoushan Jinhaiwan Shipyard Co Ltd v Golden Exquisite Inc* [2014] EWHC 4050 (Comm); [2015] 1 Lloyd's Rep 283 at [25]:

> "Identifying the meaning of the words used, however, and the shared purposes and values which the parties may be taken to have had are not two separate inquiries. The meaning of all language depends on its context. To paraphrase a philosopher of language, a sentence is never not in a context. Contracting parties are never not in a situation. A contract is never not read in the light of some purpose. Interpretive assumptions are always in force. A sentence that seems to need no interpretation is already the product of one. At the same time the main source from which the shared purposes and values of the parties can be ascertained is the contract they have made. It is for these reasons that it is a fundamental principle of the interpretation of

> contracts that the contractual document must be read as a whole."

48. Given the issues arising on the facts of this case, it is helpful to refer to two further authorities specifically dealing with the exercise of contractual interpretation in changed factual circumstances (and against the background of [22] of *Arnold v Britton* (supra)):

    i) *Bromarin AB v IMD Investments* [1999] STC 301 at 310e to j where Chadwick LJ said this:

    > "…it is commonplace that problems of construction, in relation to commercial contracts, do arise where the circumstances which actually exist at the time when the contract falls to be construed are not circumstances which the parties foresaw at the time when they made the agreement. If the parties have foreseen the circumstances which actually arise, they will normally, if properly advised, have included some provision which caters for them. What that provision may be will be a matter of negotiation in the light of an appreciation of the circumstances for which provision has to be made.
    >
    > It is not, to my mind, an appropriate approach to construction to hold that, where the parties contemplated event 'A', and they did not contemplate event 'B', their agreement must be taken as applying only in event 'A' and cannot apply in event 'B'. The task of the court is to decide, in the light of the agreement that the parties made, what they must have been taken to have intended in relation to the event, event 'B', which they did not contemplate. That is, of course, an artificial exercise, because it requires there to be attributed to the parties an intention which they did not have (as a matter of fact) because they did not appreciate the problem which needed to be addressed. But it is an exercise which the courts have been willing to undertake for as long as commercial contracts have come before them for construction. It is an exercise which requires the court to look at the whole agreement which the parties made, the words which they had used and the circumstances in which they used them, and to ask what should reasonable parties be taken to have intended by the use of those words in that agreement, made in those circumstances, in relation to this event which they did not in fact foresee..."

    This approach is consistent with that adopted by Leggatt LJ in *W Nagel v Pluczenik Diamond Co NV (CA)* [2019] Bus LR 692 (at [33] to [34]);

    ii) *Debenhams Retail plc v Sun Alliance and London Assurance Company Ltd* [2005] EWCA Civ 868, [2006] 1 P & CR 8 where Mance LJ (as he then was), when considering what he described as "an interesting exercise of contractual interpretation in changed factual circumstances", stated:

> "27. To speak even of objective intention in such circumstances involves some artificiality. Even if we were judicial archaeologists, we would find in the wording of the lease negotiated in 1965 no actual or buried intention regarding VAT, since it was introduced in April 1973, and the regime in force in 1965 was the different purchase tax regime. But no-one suggests that the lease cannot or should not apply in the changed circumstances. We have to promote the purposes and values which are expressed or implicit in its wording, and to reach an interpretation which applies the lease wording to the changed circumstances in the manner most consistent with them."

49. Examples of this approach in practice include *Aberdeen City Council v Stewart Milne Group Ltd* [2011] UKSC 56, [2012] SC (UKSC) 240, SC (Sc), (cited in [22] of *Arnold v Britton*) and *Lloyds TSB Foundation for Scotland v Lloyds Group plc* [2013] UKSC 3, [2013] 1 WLR 366 (SC)(Sc) where (at [21] to [23], [34] and [50] to [52], the court rejected a "mechanical application" of the language of a deed, construing it in light of the parties' original intentions and purposes in the context of unforeseen changes in accounting practices.

Analysis

50. On a purely literal reading of Clause 21, Munich Re's construction must be correct. The Project Period expired on 30 September 2014 and the Maintenance Period commenced immediately on 1 October 2014 for 12 months, irrespective of the construction stage reached on Project Bigfoot. However, despite Mr Kealey's elegant submissions, I am not persuaded that Munich Re's construction is correct.

51. Clause 21 falls to be construed in circumstances not (objectively) envisaged at the time that the parties entered into the Reinsurance Policy. As the structure and express wording of the Reinsurance Policy indicate, it was always (objectively) contemplated that the two policy periods would mirror each other at all times. Munich Re's original position that upon extension of the Insurance Policy there had been an automatic symbiotic extension of the Reinsurance Policy graphically illustrates as much.

52. The express reference to the possibility of extension of the policies (in the definition of "Project Period") in fact added nothing as a matter of law; it would always have been open to the parties to agree to extend the respective policies. It did, however, indicate that the parties expressly contemplated the possibility of the need for extension (readily foreseeable on the basis of construction overruns, for example). Munich Re suggested that extension of the Insurance Policy (itself foreseeable on the basis of construction overruns) but not the Reinsurance Policy was always a possibility. Thus Mr Kealey referred to the possibility of a corresponding extension to the Project Period in the Reinsurance Policy not being capable of agreement for any number of reasons (eg. change of risk, structure, inability to agree premium).

53. However, such a (theoretical) scenario was clearly not what the parties – on an objective basis – either intended or contemplated. The whole structure of the Reinsurance Policy was to mirror the Insurance Policy; that was its commercial rationale. Moreover, had Munich Re been unable to agree terms for a corresponding

extension of the Reinsurance Policy with Ascot, Munich Re could always have refused to extend the Project Period in the Insurance Policy. Munich Re was always in a position to prevent itself being in the position that it is – committed under the Insurance Policy to an extended Project Period but without the comfort of a similar extension in the Reinsurance Policy.

54. As the authorities suggest, the exercise of construction is therefore to consider how the Reinsurance Policy is to be construed in circumstances where, contrary to the original (objective) expectation of the parties, there has been an extension of the Insurance Policy period but not (for whatever reason) an extension of the Reinsurance Policy period.

55. It is a question of contractual interpretation in changed factual circumstances. The task of the court is to decide, in the light of the agreement that the parties made, what they must have been taken to have intended in relation to the events which have arisen which they did not contemplate, namely an extension to the Project Period in the Insurance Policy but no corresponding extension to the Project Period in the Reinsurance Policy.

56. As to assessing the parties' objective intentions at the time of Reinsurance Policy, the commercial context is important:

    i) The reasonable person in the position of the parties is someone with substantial expertise and experience of the offshore construction all-risks market, familiar with the ordinary workings of that market and of the ordinary expectations of parties to an offshore CAR policy;

    ii) It is (or should be) common ground that such a person would ordinarily expect the Project Period in such a policy to cover all operations up to the completion of construction: see for example the letter from Munich Re's solicitors dated 17 April 2018 where they wrote:

    > "Ordinarily, of course, the expectation of the parties would be that the Project Period of a CAR policy (as defined by its date) would cover (at least) all construction activity (see Sharp at 6.3.3), and any operations thereafter up to the relevant end date."

    And also *Sharp* at 6.3.0 and 6.3.3:

    > "As the policy covers all components making up the permanent field development, it must be of a duration sufficient to cover the risk of physical loss or damage from start to finish of the entire project. This means that the policy should ideally commence before any materials are at risk of an insured party and, initially, be able to cover transit and storage risk during the procurement stage. It should then flow continuously through all subsequent stages of construction until the overall completion of the project….

> Reference has previously been made to completion of the overall project being the time at which the construction risk terminates, but this can mean different things. The question is often posed as to whether completion of overall project means final handover of the completed works and obtaining a completion certificate, first oil and gas from the system, or first delivery of the product to customers. First oil and gas can be concurrent with the facility owners obtaining sanction from the regulatory authority to commence production operations, and this date may also be considered as overall completion. There are a number of variables.
>
> As shown in the previous chapter, the construction process includes a period of testing and commissioning of systems and start-up. Some of this testing can be accomplished prior to the introduction of hydrocarbons, but full testing, commissioning and start-up cannot really be attained until the oil or gas, or both, are pumping through the platform. It is logical that the CAR policy continues through to at least this stage. In practice, a date will be chosen that provides for a short period of start-up of production, but not to the point where insurers consider they are insuring a full production operation with the facility running at near peak capacity. Some sense of proportion must be adopted and it is not uncommon to find that the policy is capable of running for a couple of weeks or so after first oil or gas, during what is known as a 'shake-down' period."

And *Reed* at 24-017. There is nothing to support any suggestion that insurers in the market are generally moving or have moved to date-defined cover for the construction phase that ignores actual progress in construction;

iii) Such a person would also expect an extension to the Project Period beyond the date originally agreed, on terms and at a premium to be agreed in the event of delays: see *Sharp* at 6.3.4:

> "There have been many situations where start-up of the project has been delayed because of technical difficulties or accidents during the construction period. In such cases the parties will agree to an extension of the policy beyond the date previously agreed. The policy scope, as indicated in the previous chapter and as above, should enable the Assured to have coverage through to operational start-up, so the date previously agreed as the scheduled start-up should be considered provisional. In fact, many CAR policies will allow the insurance to run through to 'the commencement of operational insurance', to underline the fact that the intention is to provide cover until the completion of an activity (i.e. construction) rather than a point in time. However, the parties will need to determine the basis of additional premium for the time extension, since it would normally only have been agreed and paid up to the earlier expiry date."

iv) Such a person would understand that the general rationale for maintenance cover in such a policy is to provide limited cover during an additional period of post-completion maintenance in order to avoid any potential gap in coverage between CAR and operational policies. Thus in the 2001 WELCAR terms:

a) cover is provided for the manifestation of physical loss or damage resulting from faulty or defective workmanship, material or design arising from a cause that occurred during the construction phase, prior to the commencement of the maintenance period;

b) cover is provided for physical loss or damage resulting from operations in respect of maintenance and the making good of defects, or for the purpose of complying with qualifications to the acceptance certificate issued at the handover of the works, following the completion of construction.

Sharp at 6.3.5 makes this rationale clear when speaking of the second strand of cover:

> "Supply and fabrication contracts will invariably contain warranties and guarantees with respect to the performance of the work, and requirements that defects occurring within a specified period are rectified. This means that the contractor may need to revisit the site for rectification, or the component may be retrieved and brought back to its premises for repair or replacement and then subsequently re-installed. Similarly, contractors may be required to provide maintenance services or repairs pursuant to an accidental loss. As a result of these activities further damage may be caused to the installed works, even though by this time the facility is in production and covered by an operational policy. Operators do not generally include contractors as additional Assureds under operational policies and, even if they did, the operational policy deductibles and coverage may not be suitable to protect the contractor if he has a responsibility for damage to the works during this period.
>
> For this reason the CAR policy should be capable of providing coverage to the contractor, and indeed the Principal, for damages resulting from defects correction and maintenance during the period of these further works. CAR policies will achieve this by means of a Maintenance clause. The coverage under this clause will, to some degree, overlap the coverage provided by the operational policy, even though only limited coverage is intended to be provided. …"

Likewise, some standard form operational policies (such as the London Standard Platform Form) will exclude cover for physical loss or damage resulting from error in design or the cost of repair or replacement due to defective design, workmanship or material, as contemplated in the first strand of the maintenance cover.

57. These are high level commercial propositions which provide legitimate context in which to examine the intention of these sophisticated insurer parties at the time of contracting the Reinsurance Policy. At a general level, the reasonable person in the parties' position would have intended the definition of the Project Period to coincide with the estimated completion of the construction phase of the project.

58. Against this background, I consider the specific terms and circumstances of the Reinsurance Policy at the time of inception, and in particular the Underwriting Information Report.

59. The definition of the "Estimated" Project Period provided for continuous cover ("during all operations") until 30 March but not beyond September 2014. The choice of a date range is important: it is inconsistent with Munich Re's submission that the parties are to be taken to have chosen a date-defined cover irrespective of the stage of construction reached. Rather, it confirms that the period of cover was directly linked to completion of construction and handover. If handover had occurred in March 2014, then the Project Period would have ended then. This is all consistent with the general market understanding of this type of policy as identified above. The selected date range for an "[e]stimated" Project Period can be seen to coincide with the estimated completion of the construction phase as set out in terms in the Underwriting Information Report.

60. The definition of the Project Period in the Reinsurance Policy (by reference to a date range of 30 March to 30 September 2014) is thus entirely consistent with an understanding that the Project Period would cover all operations up to completion and handover of the construction phase.

61. As set out above, Munich Re relies on the parties' choice not to proceed on the basis of the definition of "Project Period" in the 2001 WELCAR terms. Ascot submits that it is highly doubtful whether this is a permissible approach to construction: see *Mopani Copper Mines v Millennium Underwriting* (supra) at [120] to [123] (approved in *Narandas-Girdhar v Bradstock* [2016] EWCA Civ 88; [2016] WLR 2366 at [19]). But in any event, the amendments to the 2001 WELCAR definition of Project Period are not inconsistent with Ascot's construction when it is understood that both parties had before them specific information as to dates for the construction and hand-over phase (in the very full Underwriting Information Report), reflected in the amendments. The parties chose to extend the Project Period to a period covering right up to the predicted date for handover to the operational team and operational insurances.

62. There are further factors which militate in favour of Ascot's construction by reference to the wording of Clause 21 itself:

    i) Its heading is "Maintenance". As a matter of ordinary language that itself suggests cover for a completed project, rather than one that is still under construction. The fact that maintenance work may be required earlier during the construction phase does not alter this;

    ii) That is reinforced by the wording of Clause 21b) which is clearly addressing a post-handover situation, with its reference to "the acceptance certificate" and obligations in respect of maintenance and the making good of defects.

63. It is common ground that Clause 21 contains two separate strands: a) and b) (albeit linked by the word "and"). Clause 21a) recognises that there are different activities being conducted in different periods. But the sub-clauses are part of a single unitary clause and expressly subject to the same time period, running in each case from "expiry date of the Project Period". As a matter of objective construction, the parties cannot be taken to have intended that they would operate from different start dates and in different periods.

64. It is also to be noted that, as a matter of commercial common sense, Munich Re's construction would leave Chevron as insured with only very limited cover (under Clause 21) in a period when, on its case, full construction works could be ongoing. Endorsement 27 to the Insurance Policy (set out at paragraph 29 above) makes it very clear that both Chevron and Munich Re did not understand the Maintenance Period to commence until the project transferred to operational insurances.

65. For the sake of completeness, I should add that I am not persuaded that Munich Re can find support for its case by reference to the payment of any premium for the tendons during the Maintenance Period. It appears that Munich Re did not pay any such premium during the Maintenance Period, and only for the Project Period.

66. For these central reasons, as a matter of objective contractual construction, a reasonable person in the position of the parties at the time of the Reinsurance Policy would have understood the Project Period to cover the construction phase of the project up to handover.

67. Applying this construction to the changed factual circumstances, the Project Period did not expire on 30 September 2014 (and the Maintenance Period did not commence thereafter). The cover under Clause 21 would provide cover for a completed platform after handover. That is the interpretation which applies to the changed circumstances in the manner most consistent with the parties' original intentions and expectations.

68. Munich Re's alternative case also falls to be dismissed: it cannot overcome the fact that the alternative construction contended for, namely that the limited cover in the Maintenance Period would continue in respect of each item, portion or part insured the construction of which had, at the point that the Project Period expired, been completed, is wholly at odds with the decision of the parties expressly not to proceed on such a basis - as reflected in their deletion of the words "specified in individual contracts" in Clause 21. The 12 month period was to run from the expiry of the overall Project Period. Clause 21 was (objectively) intended to cover the completed platform on completion of all construction operations, not constituent parts during ongoing construction. There was to be a single maintenance period for the project as a whole.

69. I therefore accept Ascot's primary case that, on a proper construction of the Reinsurance Policy, upon the expiry of the Project Period (meaning the period of time defined under the heading "Project Period"), limited cover would continue over the completed project for a period of 12 months. Contrary to the expectations of the parties at inception, however, the project was not in the event completed on the expiry of the Project Period (on 30 September 2014). That being the case, there was no project to be covered during the "maintenance period(s)".

Conclusion

70. For these reasons, I refuse to grant the declarations sought by Munich Re. On the assumed facts, the underlying claim does not fall to be covered by the Reinsurance Policy and Ascot is not liable to indemnify Munich Re accordingly.

71. I invite the parties to reach agreement on all consequential matters, including costs, so far as possible. I conclude by thanking all counsel for the quality of their submissions and able assistance throughout this matter.