Neutral Citation Number: [2024] EWHC 1555 (Comm)

Case No: **CL-2021-000625**

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

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

Date: **19 June 2024**

Before :

Mrs Justice Dias

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Between :

MOK PETRO ENERGY FZC	**Claimant**
- and -	
(1) ARGO (NO. 604) LIMITED & Ors	**Defendant**

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- -

Guy Blackwood KC and David Walsh (instructed by **HFW**) for the **Claimant**
Simon Rainey KC, Benjamin Coffer, Michael Volikas, Leah Rutley and Alexandra Khan (instructed by **Wikborg Rein LLP**) for the **Defendant**

Hearing dates: **19th June 2024**

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RULING

Mrs Justice Dias **Wednesday, 19 June 2024**
(**10:31**am)

Ruling by **MRS JUSTICE DIAS**

1. As originally pleaded in its reply, the claimant's case was in essence that because the parties had contracted out of section 10 of the 2015 Insurance Act, the consequence of a breach of warranty in "normal circumstances" was the contract was void. It was for the defendant to prove that circumstances were normal, but the claimant's case was that they were not. In any event, even if the contract was void, the defendants were estopped by conduct from so asserting.
2. An application to amend was filed last Friday, 14 June, apparently in response to paragraph 106 in Mr Rainey's skeleton argument, which stated in parentheses that there was in fact nothing in the circumstances of the breach which was not normal.
3. The application seeks to advance a new case in the following respects. First, it advances a new case on construction, namely that the word "void" is in fact to be construed as meaning "voidable". Accordingly, the defendants had an election whether or not to avoid the contract and had elected to waive the breach. By a further extremely recent proposal, the claimant says that it is to be presumed from the fact that the defendants were, at all material times, legally represented that they had knowledge of their right to avoid.
4. On behalf of the claimants, Mr Blackwood says that this is only a modest amendment. It essentially raises a question of construction of the wording and is necessary in order to give some meaning to the words "normal circumstances". In any event, even if the case on waiver and election is new, it does not involve any extensive new factual investigation because all the relevant facts are within the defendants' existing knowledge.
5. Mr Rainey on behalf of the defendants says to the contrary. Even if all the facts are within the existing knowledge of the defendants, they still have to be investigated. Moreover, any presumption is rebuttable and it is grossly unfair that the defendants should be bounced, literally on the eve of the

trial, into having to prepare and call evidence on the question of whether they were advised as to their rights on avoidance or otherwise knew about them. It is far too late, he submits, to be raising points like this now and permission should be refused.

6. In the circumstances of this case, I agree with Mr Rainey. The point of construction itself might not have been objectionable, although even then there is some force in his point that wording which is susceptible of alternative constructions is not an obvious candidate for satisfying the clear and unambiguous requirement of section 17 of the Act, which in itself gives rise to a further anterior point of statutory construction as to whether the section 17 requirements apply at all when it is the assured who is seeking to rely on the term in question.
7. This all opens up a completely different area of legal debate. Estoppel which depends on objective representations is a very different beast from election or waiver, which depends on subjective knowledge. That is something that the defendants should have a proper opportunity to investigate. It is no answer to say that they must already know of all the relevant facts about their knowledge. The defendants' legal advisors still have to ask each and every one of them and obtain evidence from them as to whether they knew about their right to avoid, whether they were advised on it at all, whether the relevant wording was even addressed with them by their solicitors.
8. There is no good reason, in my judgment, why the point could not have been raised long before now. I do not accept that there is anything in paragraph 106 of Mr Rainey's skeleton which necessitates the amendment.
9. It is not necessary to construe "void" as "voidable" in order to give coherent meaning to the words "normal circumstances". They have a perfectly coherent meaning as they stand. Indeed, it was a specific issue in the agreed list of issues as to whether the circumstances were normal or not.
10. Nor do I accept that paragraph 106 intimates a positive case that circumstances were normal. Indeed, it strikes me as having been very carefully phrased indeed so as precisely to avoid doing

that, and that would be consistent with the defendants' case that they do not bear any burden of proof in that regard.

11. There is therefore nothing in the defendants' case that seems to me to need response or clarification on that point. It may well be that the amendment was prompted by Mr Rainey's skeleton, but that is a very different matter and smacks somewhat of afterthought.

12. Whilst the proposed amendment is no longer demurrable given the proposed additional wording regarding the presumption, I have nevertheless come to the conclusion that it is too late to be raising a completely new field of legal argument, which may well require additional witnesses and evidence from the defendants, not to mention give rise to debates about privilege. I can foresee that this would be likely to be a highly contentious area.

13. I flirted briefly with the prospect of hearing argument on the question of construction and hiving off the remainder for later determination, should it be necessary. However, I have taken the view that in a case of this nature, it is not a proportionate or efficient use of either the court or parties' time and resources to leave the point open so it may have to come back at a later date. Had it been a point which genuinely could not reasonably have been raised earlier, then I might have taken a different view, but as above, it seems to me that this, if not an afterthought, is really a further and better thought which could have been advanced well before now.

14. In those circumstances, the disputed amendments in paragraphs 7.2 and 10.2 of the proposed amended pleading are not permitted.