

Neutral Citation Number: [2024] EWHC 3409 (Comm)

Case No: CL-2022-000603 CL-2023-000795

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES

COMMERCIAL COURT (KBD)

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

Date: 29 November 2024

Before :

Peter MacDonald Eggers KC
(Sitting as a Deputy Judge of the High Court)

Between :

Novitas Loans Limited	<u>Claimant</u>
- and -	
AmTrust Europe Limited	<u>Defendant</u>

Saul Lemer and James Fox (instructed by Slaughter and May) for the Claimant
Jonathan Hough KC and Dr Benjamin Archer (instructed by Clyde & Co LLP) for the
Defendant
Ben Elkington KC, George McDonald and Ed Grigg (instructed by DWF Law LLP) for the
Defendant

Hearing dates: **29th November 2024**

RULING 1

Peter MacDonald Eggers KC
(10:56am)

Friday, 29 November 2024

Ruling by **PETER MACDONALD EGGERS KC**

1. In these proceedings, the claimant, Novitas, is bringing a claim against the defendant, AmTrust. I will not describe what those claims are for the purposes of this application, but AmTrust then brings claims against the third party, who I will describe as Sompo, and there are two different types of claims. There are Part 20 proceedings and there are subrogation proceedings, as the parties have described them.
2. In relation to the Part 20 proceedings, which essentially rely upon AmTrust exercising rights under the Third Parties (Rights Against Insurers) Act 2010, having had assigned to it the rights belonging to the scheme solicitors who were insured by the third party (Sompo). In that context, AmTrust is seeking disclosure of documents within Disclosure Issues 1A and 1B, which are described as follows:
3. "What communications (if any) were there between the scheme solicitor [by that I mean PURE and HSS] and Sompo at any time prior to the inception of the 20/21 policy regarding the solicitor's involvement in the scheme and/or any agreements the scheme solicitor had with AmTrust or CLE?"
4. These disclosure issues are said to relate to Generic Issue Number 2, which is referred to in the agreed statement of issues between the parties, and that reads as follows:
5. "Would any of the contractual and/or tortious liabilities which AmTrust alleges that Pure and HSS have to it fall within clause 1.1 of the PI Policies as being civil liabilities rising out of and/or in connection with 'the conduct of any Professional Business carried on by, or on behalf of, the Insured'; and, if so, which of the liabilities alleged?"
6. Of course, in those circumstances, it is AmTrust who is making a claim against the scheme solicitors, and so far as the scheme solicitors are liable for those claims, it is those claims which fall

within the scope of the policy issued by Sompo (according to AmTrust). Of course, Sompo does not accept that. Indeed, Sompo denies coverage under the insuring clause and also has other defences.

7. In order to consider whether or not disclosure ought to be ordered in relation to Disclosure Issue 1A and 1B, one needs to consider the insuring provision of the relevant policy. I have been taken to one policy and that policy reads as follows. Section 1 is the insuring provision and the insuring provision provides:

8. "In consideration of the payment or promise of payment to the Insurers of the premium specified in the Schedule the Insurers agree

9. "1.1 Civil Liability

10. "to indemnify the Insured up to the Limit of Indemnity in respect of any civil liability... resulting either:

11. "(a) from a Claim or Claims first made against the Insured during the Period of Insurance;
or

12. "(b) from Circumstances first notified to the Insurer during the Period of Insurance,

13. "provided that such Claim, Claims or Circumstances arise out of and/or in connection with the conduct of any Professional Business carried on by, or on behalf of, the Insured."

14. The phrase "Professional Business," which is obviously an important term used to define the scope of cover under s.1, is itself defined by cl.6.27 of this policy to refer to:

15. "... the provision of services as a Solicitor or as a registered European lawyer in private practice from offices in England and Wales..."

16. Then there follows a number of different types of service which are said to be included within the definition of "provision of services as a Solicitor or as a registered European lawyer."

17. Mr Ben Elkington KC, on behalf of AmTrust, states that the communications, or any communications, which were exchanged between the scheme solicitors as the insured and Sompo as

the insurer under this policy are relevant in two different respects to the construction of this policy.

In no particular order, the first is that the policy itself begins with the words:

18. "Whereas a representative of the Insured has made to the Insurers a written proposal containing particulars and statements made to the best of the representative's knowledge and belief which, together with any other information supplied to the Insurers shall be incorporated into this contract."

19. So, it is said by Mr Elkington KC, that any information communicated by the scheme solicitors to the insurers prior to the conclusion of the policy are themselves terms of the contract and therefore are relevant to the construction of the policy.

20. The second basis on which the communications are said to be relevant to the construction of the policy are that they form part of the factual matrix or the background information, which is known to, or readily available to, both parties and which therefore should be taken into account in order to determine what the policy should mean. In this particular context, Mr Elkington KC focuses on the construction of the words in the proviso of the s.1, the insuring clause, which reads, again:

21. "... provided that such Claim, Claims or Circumstances arise out of and/or in connection with the conduct of any Professional Business carried on by, or on behalf of, the Insured."

22. So, I think Mr Elkington KC then submits that the communications are relevant to, firstly, identifying what the words "arise out of or in connection with" might mean and, secondly, how one defines "Professional Business," in particular the "services provided as a Solicitor."

23. Mr Jonathan Hough KC, on behalf of Sompco, resists disclosure on a number of grounds. The first is that this is a standard form policy - or something close to it at least - and, in those circumstances, although the factual background material may be of limited assistance in terms of construction, it will not be in this particular case because the phrase "services as a Solicitor" is an

autonomous, stable provision and it is very difficult to understand what further information could be said to have been communicated to the insurers which could have altered that definition.

24. In this context, Mr Hough KC refers to the decision in *BNP Paribas Trust Corporation UK Ltd v Uro Property Holdings SA* [2022] EWHC 3251 (Comm), at [115], where Jacobs J said in the context of a financial instrument construction that:

25. "... the authorities do not suggest that the factual matrix can be disregarded, particularly when the factual matrix evidence does not concern particular dealings between the parties, but rather explains the general commercial background to the documentation and to the terms used in that documentation."

26. So, the point being made, I think, according to Mr Hough KC, is that insofar as the factual matrix deals with the particular dealings between the parties, such as communications between the parties, then the information question has very little assistance to provide in understanding true construction of the policy.

27. As far as the "basis of the contract" clause is concerned - when I say that, I mean the provision by which the policy incorporates the information provided by the insurer to the insureds prior to the conclusion of the policy - Mr Hough KC says that unless one can actually identify the relevant information, it is very difficult to determine how it will impact the construction of the policy but, in any event, it is unlikely, if not impossible, for any such information to affect the autonomous meaning to be given to the proviso used in the insuring provision, particularly the phrase "services as a Solicitor." Indeed, Mr Hough KC goes on to say that this is in reality no more than a fishing expedition.

28. In response, Mr Elkington KC does say that his client, AmTrust, as a statutory assignee of the insureds' rights under the policy, was not a party to the conclusion of the policy and therefore it does not have access to the communications between the contracting parties themselves, and therefore the requirement, for example in the Commercial Court Guide which requires issues of

factual matrix to be pleaded, is very difficult to comply with in circumstances where, as a stranger to the contracting process to begin with, that information is just not available to him, and I have much sympathy with that submission.

29. So, bearing in mind the parties' submissions, should disclosure be ordered in relation to Disclosure Issues 1A and B? Whatever I say is not intended to bear on the issues to be determined at the issues trial or the party's ability to argue those issues. I am not engaging in any issue of construction as matters stand, but I look at the definition of "Professional Business" and I ask myself, what will the court have to consider when it determines what "services as a Solicitor" in fact means, and I imagine the type of information which may have been provided - without knowing, of course, but what information was in fact provided - by the insureds to the insurers prior to the conclusion of the policy, which may well have included, for example, the fact that the insureds had entered into Terms of Business Agreement, TOBA, with AmTrust, and how that may impact the construction of the policy.

30. The mere fact that the insureds may have referred to this transaction and the terms of business does not, in my view, or is not likely to affect the construction of the policy. It may do, and if it became relevant later, it may be open to argument to either party to say it does, but for the purpose of ordering disclosure, I am sceptical as to the relevance of this material for the purposes of assisting the court or indeed the parties when it comes to the issues trial. For the very same reason, I do not think that the mere fact that any communications which may exist that have been incorporated as terms of the contract advance the matter. Whether these communications are terms of the contract or they are factual background material, I struggle to see how the meaning of the phrase "Professional Business" in this particular circumstance could be influenced by this material.

31. Mr Elkington KC did rely on the fact that it is not just the phrase "Professional Business" which is relevant, but it is also the question whether the relevant claim is made by AmTrust against the scheme solicitors, who are the insureds under the policy, in fact, "arise out of or in connection

with the conduct of any Professional Business." Again, I struggle to see how the communications in question could influence the phrase, "arise out of or in connection with the Professional Business," at least to the degree which would justify an order for disclosure. That all said, I do find it somewhat unsatisfactory that AmTrust, as a third-party assignee of rights under the policy, had not got access to relevant material, at least for the purposes of understanding at least what was said, but even though I find that unsatisfactory, I am not sure that it helps me come to the conclusion that material will be relevant for the purposes of construing this particular contract in this particular way. So, with some reluctance, I have to admit, I refuse the disclosure sought on the basis of Disclosure Issues 1A and 1B.