

Neutral Citation Number: [2024] EWHC 3411 (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 3

Peter MacDonald Eggers KC
(12:20pm)

Friday, 29 November 2024

Ruling by **PETER MACDONALD EGGERS KC**

1. The final disputed issue for disclosure between the parties today concerns Sompo's request that the disclosure list of issues include Issue 1 and 2. Issue 1 reads:
2. "From whom, in what form(s) and in what terms AmTrust received claims for the payments it has made, which form the basis of the Subrogation Proceedings."
3. And then it has in brackets:
4. "(For example, whether and to what extent those claims were (a) claims from Novitas based on the indemnity or (b) claims by or on behalf of the Policyholders under the ATE Policies.)"
5. Then Disclosure Issue 2 reads:
6. "How AmTrust responded to and dealt with the claims which form the basis of the Subrogation Proceedings, including: (a) what communications it had with the Policyholders, Novitas, PCSS or others in response to those claims; and (b) on what basis and what terms AmTrust made payments in relation to the claims."
7. I should explain of course that, in relation to the subrogation proceedings, this concerns AmTrust's claim against Sompo as the scheme solicitor's insurers, insofar as AmTrust is subrogated to any rights of the policyholders which it has acquired by virtue of any payments which have been made. These two disclosure issues really concern the question: has AmTrust actually acquired certain rights of suit by virtue of subrogation? This is reflected in Generic Issues 13 and 14, which have been agreed by the parties, or which have been at least ordered by the court. Issue 13 reads:
8. "Is AmTrust entitled (on any basis, whether as a matter of contract and/or as a matter of common law and/or equity) to be subrogated to claims of policyholders against Pure and HSS in respect of disbursements funded by Novitas loans (and interest thereon)? In particular, does any entitlement depend on any of the following considerations: (a) whether AmTrust received claims by or on behalf of the relevant insureds; (b) whether it accepted liability under the ATE Policies; (c)

whether it made payment expressly or impliedly pursuant to the ATE Policies; and/or (d) whether it made payments in good faith with the intention of satisfying the relevant Policyholder's losses?"

9. Generic Issue 14 reads:

10. "Is AmTrust not entitled to be subrogated to any such claim(s) if: (a) The payment made by AmTrust in respect of disbursements funded by Novitas Loans (and interest thereon) was made pursuant to the Indemnity with Novitas? (b) AmTrust has at any relevant times disputed an obligation to indemnify the relevant policyholder in respect of disbursements funded by Novitas Loans (or interest thereon)? (c) AmTrust had no obligation to indemnify the relevant policyholder in respect of disbursements funded by Novitas Loans (or interest thereon)?"

11. Now, as I understand it, the purpose of the disclosure issues is to obtain at least some documentation, within AmTrust management level in relation to particular claims, because it concerns claims for payments, which would assist the court, and indeed the parties, in answering Generic Issues 13 and 14. The difficulty I have with this disclosure issue is that it does venture into the individual claims, of which there are more than 2,000, and therefore the forbidden territory referred to by Mr Simon Colton KC (sitting as a Deputy Judge of the High Court), who heard the second CMC in this action. In addition, it also gives rise to the concern expressed by Mr Justice Foxton at the first CMC when deciding upon the proper approach to the issues trial, where Foxton J said that:

12. "... it is in everyone's interest that as many issues as possible which do not require factual findings as to the circumstances of particular claims are identified and determined at an initial trial; and second, that that initial trial should not be concerned with findings that concern the individual factors of specific claims. That is because when one gets to that level of granularity, I am not persuaded that what did or did not happen in relation to a particular claim and a particular client at the level of one of the two principal solicitors will crystallise an issue of principle or even a factor weight which is capable of meaningful extrapolation across the wider pool so as to provide the

parties with a better idea of the outcome of those cases than they will have simply as a result of their ordinary litigation experience applied to the facts as they know them."

13. Now, as I read Generic Issues 13 and 14, and again I am not sure there was much dispute between the parties in this context, but as I read them, the questions being asked are to be answered by reference to various assumptions: for example, in Issue 13, that AmTrust received claims by or on behalf of the relevant insureds, that AmTrust accepted liability on the policies, that AmTrust made payment pursuant to the ATE policies expressly or impliedly, and that AmTrust made payments in good faith with the intention of satisfying the policyholders' losses; as regards Issue 14, that AmTrust made payment in relation to disbursements pursuant to the indemnity with Novitas, that AmTrust disputed an obligation to indemnify any policyholder, and finally that AmTrust was not in fact obliged to indemnify the policyholder.

14. Now, none of those assumptions require a factual determination by the court, and therefore it ought not to require any disclosure to be produced by the parties in relation to these issues. I understand Mr Hough KC's submission that there may be some benefit attached to some disclosure, and I understand that the search terms may have been formulated with a view to limiting any false impressions which one might get from the limit of disclosure one might receive. But in circumstances where the generic issues are formulated as they are, I do not see that there is any value associated with these disclosure issues, and therefore they should not be included.