12 October 2018

Mamancochet Mining Limited v Aegis Managing Agency Limited and Others
[2018] EWHC 2643 (Comm)

BEFORE: MR JUSTICE TEARE

CASE SUMMARY

A 'sanctions clause' in a marine cargo insurance policy, on wording widely used in the industry, provided that the insurer would not be liable to pay a claim* 'to the extent that' *doing so* 'would expose' *it to US or EU sanctions. The defendant insurers sought to avoid payment of a prima facie valid claim in relation to stolen cargoes, on the ground that payment of the claim "would expose" it to sanctions under US law.

The Court held that this clause suspended the insurer's liability only if (and for as long as) payment of the claim would in fact be illegal under the foreign sanctions regime. On a true construction, the mere risk of being sanctioned by a regulator did not suffice to invoke the clause. It was common ground that payment of the claim after 4 November 2018 would be in breach of US sanctions (being the date on which the 'wind-down' provision accompanying President Trump's revocation of the US's participation in the Joint Comprehensive Plan of Action on Iran will come to an end). On the facts, payment of the claim before 4 November 2018 would not be a breach of sanctions. The insurers were therefore liable to pay the claim.

Factual Background

The Claimant was the assignee of the benefit of a marine cargo insurance policy (**"the Policy"**) governed by English law. The Policy protected the assured against the risk of theft of two cargoes of steel billets, worth some US$3.8 million, which were carried from Russia to Iran in August 2012, and which were stolen from bonded storage in Iran in September 2012. The purchaser failed to pay for the cargoes, and substitute bills of lading were issued, naming an Iranian individual (who was not a 'Specially Designated Person' under US sanctions) as consignee.

Following discovery of the theft of the cargoes, the assured made a claim under the Policy on or after 9 March 2013. The defendant underwriters accepted that the claim was prima facie valid, but resisted payment on the basis of the 'Sanction Limitation and Exclusion Clause' in the Policy, which provided that:

"*No (re)insurer shall be deemed to provide cover and no (re)insurer shall be liable to pay any claim or provide any benefit hereunder to the extent that the provision of such cover, payment of such claim or provision of such benefit would expose that (re)insurer to any sanction, prohibition or restriction under United Nations resolutions or the trade or economic sanctions, laws, or regulations of the European Union, United Kingdom or the United States of America.*"

US Sanctions Regime

The defendants[1] were 'US owned or controlled foreign entities' for the purposes of the US Iranian Transactions & Sanctions Regulations, 31 C.F.R. Part 560 (**"ITSR"**). Section 560.204 of the ITSR prohibits the provision of services to Iran (including, by common ground, the provision of insurance cover or payment of a pre-existing claim). US owned or controlled foreign entities were brought within the scope of that provision by amendment on 22 October 2012 (after the cargoes were stolen).

In 2015, the five permanent members of the UN Security Council plus Germany, the EU and Iran agreed a 'Joint Comprehensive Plan of Action' (**"JCPOA"**), which gave rise to sanctions relief in exchange for certain commitments in relation to nuclear non-proliferation, effective from 16 January 2016. To implement the JCPOA, the US Treasury issued 'General License H', which provided that (subject to certain exceptions not relevant to the present case) US owned or controlled foreign entities were "*authorized to engage in transactions, directly or indirectly, with the Government of Iran or any person subject to the jurisdiction of the Government of Iran that would otherwise be prohibited by 31 C.F.R. § 560.215.*"

On 8 May 2018 President Trump announced the withdrawal of the US from the JCPOA. OFAC accordingly revoked General License H with effect from 27 June 2018, subject to a new wind-down period ending on 4 November 2018 for transactions *'ordinarily incident and necessary to the wind down of … transactions … that would otherwise be prohibited by §560.215'*. It was common ground that the Defendants would be prohibited by the ITSR from paying the claim under the Policy on or after 5 November 2018.

Interpretation of the sanctions clause

The court concluded, at [47]:

"*Before a sanction can lawfully be applied there must be conduct which is prohibited. Further, when there is prohibited conduct the agency charged with the application of sanctions may or may not decide to penalise the prohibited conduct with a sanction. That suggests that it is necessary for the insurer to show that the payment of the claim in question would be conduct which was prohibited by the applicable laws or regulations. If that is shown then the insurer can fairly be said to be laid open to a sanction, to be at risk of a sanction, or to be left unprotected from a sanction. If that is not shown, then it cannot be said that the insurer is laid open to a sanction, or at risk of a sanction, or left unprotected from a sanction. For unless the conduct is prohibited, in law there can be no sanction.*"

Consequently, on a proper interpretation of the sanctions clause, the insurer was not liable to pay a claim if and only if payment would be prohibited under one of the named systems of law. In such a case, the insurer's obligation to pay was suspended rather than extinguished; it could rely on the sanctions clause "*to the extent that*" payment would be in breach of sanctions. If the parties had intended to provide that the insurer could avoid liability wherever there was a risk that the relevant national authority might conclude (perhaps wrongly) that there had been a breach of sanctions, clear wording would have been required to that effect.

Determination of the US sanctions issue

[1] In fact, 2 of 11 defendants were not subject to the US sanctions regime, and based their reliance on the sanctions clause upon EU sanctions only. The judge dismissed this aspect of the case quite shortly, and this summary does not consider it further.

The Court heard evidence of US law from both parties' experts. In the light of this evidence, the Court concluded, at [70], that, as a matter of US law, "*the scope of the waiver must be assessed, primarily, by reference to the "plain meaning" of the waiver. The language of the waiver, which is broad, extends the waiver to transactions that would otherwise be prohibited by section 560.215. Payment of the insurance claim in question is such a transaction*." Consequently, payment of the claim in the present case fell within the waiver, and so would not be in breach of US sanctions. Accordingly, the underwriters could not resist payment under the sanctions clause.

A further issue: The Blocking Regulation

One final question was argued but did not arise for consideration. The claimant had submitted that, if the defence had been successful, the defendants would in any event be prevented from relying on US sanctions to avoid payment of the claim by Council Regulation (EC) 2271/96 (the **"Blocking Regulation"**). The Blocking Regulation prevents EU entities from complying with certain specified foreign laws with extraterritorial effect (including the relevant US sanctions). The English implementing legislation makes breach of the Blocking Regulation a criminal offence. Since this issue did not arise for determination, Teare J declined to express a concluded view. Nonetheless, he noted that he saw "*considerable force in the Defendants' "short answer" to the point, namely that the Blocking Regulation is not engaged where the insurer's liability to pay a claim is suspended under a sanctions clause such as the one in the Policy. In such a case, the insurer is not "complying" with a third country's prohibition but is simply relying upon the terms of the policy to resist payment.*"
