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Court of Appeal considers law and jurisdiction clause within suite of multi-risk policies across Gulf jurisdictions

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Al Mana Lifestyle Trading L.L.C. & Others v United Fidelity Insurance Company PSC & Others [2023] EWCA Civ 61

On 31 January 2023 the Court of Appeal (by majority) held that the wording of an applicable law and jurisdiction clause contained within a suite of multi-risk policies provided for the exclusive jurisdiction of the country in which the policy was issued, with the provision for the jurisdiction of England and Wales as a fall-back. LJ Andrews dissenting agreed with the earlier finding of the Commercial Court that they should be construed as alternative options.

Allowing the appeal, the court confirmed that the English court had no jurisdiction to try the Claimants' claims.

Background

The Claimants formed part of the Al Mana Group, an enterprise conducting business in the food and beverage and retail sectors in the Middle East. The Defendants were insurance companies operating within the Gulf Cooperation Council Countries.

The parties entered a suite of 17 multi-risk policies. It was accepted that these policies were issued in the United Arab Emirates, Qatar and Kuwait, being the Defendants' individual headquarters.

The Claimants put forward claims in the region of US$40m relating to BI losses from the Covid-19 pandemic, although very little was known about the claims.

Proceedings were issued in the Commercial Court and the Defendant insurers each applied to challenge the Commercial Court's jurisdiction.

Policy Clauses

The polices were, for present purposes, on identical terms. The schedule in each of the policies contained the following jurisdiction clause (reproduced here with the numbering used by the parties in support of their arguments).

"APPLICABLE LAW AND JURISDICTION: [1] In accordance with the jurisdiction, local laws and practices of the country in which the policy is issued. [2] Otherwise England and Wales UK Jurisdiction shall be applied, [3] Under liability jurisdiction will be extended to worldwide excluding USA and Canada."

It was agreed by the parties and the Commercial Court that the clause was not a model of good drafting.

Decision of the Commercial Court

The Commercial Court considered whether, taken in context, the “Applicable Law and Jurisdiction” clause contained an agreement between the parties which gave the English court jurisdiction over the claims brought by the Claimants.

The Defendant insurers case was that part [1] in the clause amounted to an exclusive jurisdiction clause in favour of the local courts of the country in which the policy was issued. They interpreted the words “*In accordance with*” to be imperative and directory and should be read as ‘subject to’ which would be consistent with the natural purpose of the words. They submitted that part [2] in the clause related only to jurisdiction and could not be read as an exclusive jurisdiction clause which trumped part [1] and that to read it as providing non-exclusive jurisdiction would produce an unattractive and uncommercial result. They also submitted arguments in respect of part [3] in the clause which were specific to the terms of the policy and not relevant for the purposes of this note.

In the alternative, if the judge concluded that part [2] was a non-exclusive jurisdiction clause then the Defendant insurers submitted that jurisdiction should be declined by the English court under the doctrine *forum non conveniens* and they cited several factors in favour of the local courts being best placed to hear the disputes.

Mrs Justice Cockerill noted that the starting point should be the words of the clause, while appreciating that there should not be a microscopic analysis over and above what would be considered by the reasonable businessman. She accepted the Defendant insurers position that there was only one possibility for law: that of the country in which the policy was issued, and that this supported the Defendant insurers position.

However, she disagreed that there was a presumption against construing a clause as non-exclusive or that the natural purpose of the words was to stipulate which law will govern and the court which would have jurisdiction over any dispute.

The Defendant insurers submission was that parts [1] and [2] read together meant that disputes should be submitted to the local court in the first instance but there was a neutral alternative if the local courts, for whatever reason, were unable to accept jurisdiction. By contrast, the Claimants presented parts [1] and [2] simply as alternative options.

The Judge found that the difficulty with the Defendant insurers position was that it was not clear from the wording that their analysis provided a functional fall-back to be used when the first option had been tried and failed. Such an interpretation could lead to commercial and practical difficulties. Whilst the Defendant insurers considered this risk to be fanciful, the Judge agreed with the Claimants that, if the risk was so remote, then there would be no requirement for part [2] in the clause.

When considering the factual matrix of the policies being issued in conjunction with several other polices providing coverage over a range of jurisdictions, the Judge concluded that it made commercial sense for there to be an option for the claims to be considered together. The parties could have anticipated there being issues of insurance law relating to terms used in the London Market which might arise under any of the policies. In such circumstances bringing multiple claims before the courts of England and Wales, which have considerable expertise in such issues, may be the result that a reasonable businessman would want to bring about.

In conclusion, the Judge found that the reading of parts [1] and [2] together provided for the English courts to have non-exclusive jurisdiction in the alternative to the local courts.

The Defendant insurers alternative case was that the Commercial Court should decline jurisdiction under the doctrine *forum non conveniens* on the basis that none of the Claimants or Defendant insurers were based in England, the losses were not sustained in England and the local courts would be best placed to apply their own law to the facts. The Judge agreed with the Claimants that there were commercially sound reasons why the parties would want the matters to be heard before an English court and the non-exclusive jurisdiction agreement should be respected.

Appeal to the Court of Appeal

The Defendant insurers appealed, which was heard by the Court of Appeal on 19 December 2022.

The majority (LJ Males and LJ Nugee) agreed that the correct approach was to consider how the words of the contract would be understood by a reasonable policyholder and that first impressions may be as powerful as intricate linguistic and contextual analyses.

LJ Males’ first impression was that part [1] provided a primary jurisdiction selected by the parties and part [2] provided a fall-back for English or Welsh jurisdiction. That impression was then confirmed by the more analytical approach in the parties’ submissions. The fact that part [2] dealt only with jurisdiction so that even in English proceedings the local law must be applied demonstrated that “*in*

accordance with" was intended to be mandatory and, in the context of the clause as a whole, "*Otherwise*" was more akin to a fall-back. There was no difficulty in identifying in what circumstances that fall-back would arise as it would, in practice, mean where the local court would not or could not accept jurisdiction. Even where that may only arise in very limited circumstances, the court did not consider that to be an objection; neither did it raise uncertainty as to where the claimant should issue proceedings.

LJ Males found the desirability of the English court as a single neutral forum to be of limited significance where it has not been suggested that the Claimants would not be able to obtain a fair trial in the local courts.

Accordingly, the Court of Appeal allowed the appeal of the Defendant insurers, declaring that the English court has no jurisdiction to try the claims.

LJ Andrews (dissenting) found that her equally strong first impression was that the Commercial Court judge's construction had been correct. Looking at the clause holistically she found that, as a matter of plain English, "*Otherwise*" naturally meant a choice. She considered it unlikely that a reasonable policyholder would interpret the clause to mean it was mandatory to bring proceedings in the local forum unless the local court declined jurisdiction. She regarded the 'fall-back' option as making less commercial sense than the parties agreeing a limited choice of jurisdictions in which to resolve the dispute.

Comment

Although this decision was fact-specific, it is a useful reminder of the factors that will be considered by the English court when analysing the parties' intentions when drafting exclusive/non-exclusive jurisdiction clauses in policies.

Further, and perhaps more importantly, it is a reminder of the importance of clear and precise drafting of clauses. The strongly held contrary views of the Court of Appeal judges shows how the same words can strike readers differently. The objective when drafting should always be to leave as little as possible open to 'first impression' in order to avoid long and costly disputes where the position is uncertain.

The Commercial Court decision on forum non-conveniens (this issue was not pursued on appeal) also serves as a reminder that, when challenging the English court's jurisdiction, consideration must be given to the wider factual matrix and not simply where the parties or the losses are located. This is even more so in post-Covid times where the location of witnesses and documents are not factors which hold as much weight as they may have done previously.

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