Hanwha Non-Life Insurance Co Ltd *v* Alba Pte Ltd
[2011] SGHC 271

Case Number : Suit No 927 of 2008/N

Decision Date : 30 December 2011

Tribunal/Court : High Court

Coram : Tan Lee Meng J

Counsel Name(s) : Toh Kian Sing SC, Elaine Tay Ling Yan and Tang Bik Kwan Hazel (Rajah & Tann LLP) for the plaintiff; Thio Shen Yi SC and Kong Shu Hui Charmaine (TSMP Law Corporation) for the defendant.

Parties : Hanwha Non-Life Insurance Co Ltd — Alba Pte Ltd

Insurance

Contract

30 December 2011 Judgment reserved.

Tan Lee Meng J:

Introduction

1 The plaintiff, Hanwha Non-Life Insurance Co Ltd, a Korean insurance company, merged with the original plaintiff in this action, First Fire & Marine Insurance Co Ltd ("FFM"), in December 2009. The defendant, Alba Pte Ltd ("Alba"), a Singapore company that is presently in run off, was an underwriter and reinsurer. The plaintiff sought from Alba an indemnity under a reinsurance contract between FFM and Alba for a fire loss in December 2007 at a model house in Korea that was insured with FFM. Alba contended that the fire loss was not within the ambit of its reinsurance contract with FFM for a variety of reasons.

Background

2 On 27 March 2007, FFM's client, Dae Hye Construction Co Ltd ("Dae Hye"), which is in the business of constructing model houses and apartments in Korea, successfully bid for a project to renovate an existing model house, the Daewoo Kangnam Model House at #832-21, Yeoksam I-Dong, Kangnam-gu, Seoul ("DMH"), which belonged to Daewoo Engineering and Construction Co Ltd ("Daewoo"). No formal written agreement between Dae Hye and Daewoo was signed at that time.

3 Sometime in May 2007, Dae Hye approached FFM to insure its liability in relation to the construction of model houses and apartments in Korea. In turn, FFM requested its insurance broker, BRM Korea ("BRM"), to reinsure part of the risks under its proposed insurance contract with Dae Hye.

4 On 25 May 2007, BRM's director, Mr Bongjoo Moon ("Mr Moon"), approached Alba for the requisite reinsurance cover. He conducted negotiations on the terms of the proposed reinsurance cover with Alba's then regional manager, Ms Margaret Sze To ("Ms Sze To"). On 11 June 2007, Alba agreed to provide reinsurance cover to FFM. Mr Moon then informed FFM that 45% of its risk under the underlying insurance contract with Dae Hye was reinsured by Alba and 25% by another reinsurer. FFM then issued Dae Hye a Master Contractors All Risks policy ("the Master CAR policy") for a period

of one year with effect from 11 June 2007.

5 On the next day, Ms Sze To forwarded a signed document that specified the terms of the reinsurance contract to Mr Moon.

Events between the reinsurance contract and the fire

6 The system adopted by the parties to the reinsurance contract was that declarations of Dae Hye's model house projects covered under the Master CAR policy in a particular month would be made in the following month by BRM to Alba. The main details furnished by BRM to Alba in each monthly declaration form included the following:

(a) The name of the model house project;

(b) The location of the project;

(c) The period of insurance;

(d) The insured sum; and

(e) The reinsurance premium due to Alba.

7 On 10 July 2007, the first monthly declaration was forwarded by BRM to Alba in respect of projects insured by FFM in the *previous* month. This retrospective declaration was as follows:

> *Facultative Closing Slip for June, 2007*
>
> With reference to the captioned, please find declaration of below risk in particulars which read as follows;
>
> ...
>
> 2. Details
>
> a. Instruction: New Addition of 3 projects during one month from June 11th to June 30th, 2007 (Refer to the attached)
>
> ...
>
> e. Period: Individual insurance period as attached (less than 9 months)
>
> ...
>
> g. Other Terms & Conditions: Same as the original Master Policy

3. Reinsurance

a. Your Share: 45% of Original Line

b. Net Reins. Premium due to you (45%): KRW 3,117,465.-

We are looking forward to your debit note for premium remittance.

8 BRM's subsequent declarations to Alba were also made retrospectively. Alba accepted the premiums with respect to *all* the projects declared without asking for further details or documents.

9 In regard to the renovation of the DMH, the preliminary construction work, which commenced on 25 July 2007, was not insured under the Master CAR policy because the existing model house was insured under a property insurance package provided by another insurer. When that other insurance lapsed after stripping work commenced on the existing model house, Daewoo asked Dae Hye to arrange for fresh insurance cover. On 22 August 2007, FFM insured the DMH under the Master CAR policy from 22 August to 31 October 2007 ("the original cover"). The insured sum was KRW2.34bn. On 5 September 2007, the original cover for the DMH was included in the third monthly declaration sent by BRM to Alba.

10 It was common ground that the original cover was reinsured by Alba. The dispute between the parties relates to the extension of cover under the Master CAR policy beyond 31 October 2007. The circumstances of the extension of cover on the DMH are as follows. On 7 September 2007, a written construction contract was finally signed between Dae Hye and Daewoo for the DMH. The contract value was KRW3.3bn (excluding VAT), and the contract period was eight months, from 1 April to 30 November 2007. However, by October 2007, construction costs on the DMH had exceeded KRW3.3bn and it became clear that the works were unlikely to be completed by 30 November 2007.

11 On 31 October 2007, the original cover for the DMH expired. On 12 November 2007, the construction contract for the DMH was amended when the contract price was increased to KRW5.63bn and the contract period was extended to 31 January 2008. On 15 November 2007, Dae Hye forwarded a copy of the amended construction contract for the DMH to FFM and sought a retrospective extension of the insurance period and an increase in the insured sum. FFM acceded to this request and issued an endorsement to Dae Hye on 19 November 2007 ("the 19 November Endorsement"), effecting the following changes to the insurance cover:

(a) the period of insurance was extended to 31 January 2008; and

(b) the sum insured was increased from KRW2.34bn to KRW5.63 bn.

12 On the same day that the 19 November Endorsement was issued, FFM informed BRM about the amendments to the original cover in relation to the DMH.

13 BRM took a longer time to collate the project list for November 2007 for reasons which need not be discussed. As such, the retrospective monthly declaration of projects covered by the Master CAR policy in November 2007 was only forwarded to Alba on 14 December 2007 at 2.33 pm Korean time. Included in this declaration was the 19 November Endorsement for the DMH.

14 Mr Moon said that when he forwarded the monthly declarations for November 2007 to Alba on 14 December 2007, he did not know that the DMH had been extensively damaged by a fire some 9 hours earlier at around 5.24 am Korean time.

Events after the fire

15 Apparently, FFM's deputy general manager of the claims department, Mr Young Mock Park ("Mr Park"), was informed of the fire at the DMH at around 2.00 pm to 3.00 pm Korean time on 14 December 2007. On 17 December 2007, Mr Moon was informed about the fire at the DMH. On the following day, Mr Moon notified Alba about the fire at the DMH.

16 When informed of the fire at the DMH, Alba did not reject liability under its reinsurance contract with FFM. Instead, it took a keen interest in the matter and asserted that it was entitled to information on investigations more speedily.

17 FFM's loss adjusters, International Adjusters & Surveyors Co Ltd ("IASCO"), submitted a preliminary report dated 18 December 2007 on the fire at the DMH. On 15 January 2008, Mr Moon emailed a copy of the report to Alba. On 16 January 2008, Ms Sze To wrote to FFM, stating that "bearing in mind that we [are] actually insuring 45% of the risk, we'd like to know more and receive the information much quicker." An interim report by IASCO dated 23 January 2008 was subsequently forwarded to Alba.

18 Significantly, on 28 January 2008, Alba engaged its own loss adjusters, McLarens Young International ("McLarens"), at a cost of around US$57,500 to investigate the fire loss at the DMH.

19 More than two months after the fire, on 21 February 2008, FFM paid the reinsurance premium for the 19 November Endorsement. It is crucial to note that Alba accepted the premium with full knowledge of the fire.

20 On 20 March 2008, FFM demanded an indemnity from Alba for the cost of repairing the fire damage. Despite having taken such a keen interest in the matter, some four months after the fire, Alba repudiated liability for the damage at the DMH on 23 April 2008 and asserted that its reinsurance cover for the DMH had ended on 30 October 2007. In short, Alba's position was that it did not reinsure the extension of cover to the DMH which was effected by the 19 November Endorsement.

21 On 31 March 2008, FFM paid KRW2.5bn to Dae Hye. It paid a further sum of around KRW1.7bn to Dae Hye on 2 December 2008.

22 As Alba refused to indemnify FFM under the reinsurance contract, the latter commenced the present proceedings. Among the defences relied on by Alba to avoid liability were the following:

(a) It had offered facultative reinsurance to FFM, which meant that it had to specifically agree to accept any reinsurance risk ceded to it and it did not agree to reinsure FFM's extension of the risk to the DMH under the 19 November Endorsement;

(b) the terms of the 19 November Endorsement took the insurance on the DMH outside the scope of the reinsurance policy;

(c) the 19 November Endorsement was issued by FFM without its written consent;

(d) the 19 November Endorsement was issued after the fire had occurred; and

(e) FFM was itself not at risk when the fire occurred at the DMH because the building project had already been completed by then.

Alba also asserted that it was entitled to avoid liability on account of alleged misrepresentations by FFM.

Whether Alba offered facultative reinsurance to FFM

23 The first defence relied on by Alba concerned the nature of its reinsurance contract with FFM. It claimed that it had offered FFM facultative reinsurance cover with respect to risks assumed by the latter under the Master CAR policy issued to Dae Hye. Under such a policy, the reinsurer is entitled to accept or reject any risk which the reinsured wishes to cede to it. Alba asserted that while it may have agreed to reinsure the initial risk on the DMH until 30 October 2007, it did not agree to reinsure the *extension* of that risk, which was effected by the 19 November Endorsement. As such, it claimed that it was not at risk when fire substantially damaged the DMH on 14 December 2007.

24 In contrast, the plaintiff contended that Alba had offered FFM open obligatory reinsurance. Under such a reinsurance contract, FFM was obliged to cede to Alba all risks accepted from Dae Hye under the Master CAR policy and Alba was obliged to provide reinsurance cover for such risks, which attached to the reinsurance contract automatically.

25 The terms of the reinsurance contract must be examined to determine whether the reinsurance offered to FFM was facultative or open obligatory. The rather brief terms which may throw some light on the nature of the reinsurance contract are as follows:

CAR Master Program (Closing Advice)

...

4 PERIOD OF MASTER CONTRACT: One year from June 11th 2007

- All projects declared on the monthly basis

- Individual Project Duration not longer than 12 months, each model house has not longer than 9 months

5 INTEREST: Construction Works of Model House for residential

...

7 SUM INSURED: Section 1 - Property Damage KRW70,000,000,000.- (Annual Estimation)

8 LOL:KRW5,000,000,000.- any one occurance [sic]

...

10 TERMS & CONDITIONS

- Munich Re's Standard CAR Policy Form

...

- Monthly declaration and payment

...

11 Net to Underwriter Premium (Rates): 0.130%

12 Reinsurance to You: 45% of Original

26 The policy was described as a "CAR Master Policy Program". Mr Moon, who has worked in the Korean insurance and reinsurance industry for 17 years, testified that in the Korean reinsurance market, a "master policy" refers to open obligatory cover. This assertion was not effectively challenged by Alba. Mr Moon added that he had clearly indicated right from the start that FFM was looking at a "type of annual Master Policy" and that Alba understood this.

27 The nature of the reinsurance contract may also be gleaned from the term regarding the premium payable under the policy. Significantly, the contract fixed the reinsurance premium at the outset at 0.130%. A fixed premium is a typical term under such an open obligatory policy. If the reinsurance contract was facultative in nature, and Alba was entitled to accept or reject any risk undertaken by FFM under the Master CAR policy, the premium need not be fixed at 0.13% for every case and Alba should have had flexibility in fixing the reinsurance premium for any of Dae Hye's model house projects in respect of which reinsurance was sought.

28 The fact that the reinsurance policy stated that the insured sum for the period 11 June 2007 to 10 June 2008 was KRW70bn also indicated that open obligatory reinsurance was contemplated. If facultative reinsurance had been intended, there would have been no need to set a limit of KRW70bn or any other limit for the simple reason that Alba would have been entitled to examine each risk and decide whether to accept it and on what terms.

29 It is also pertinent to note that the reinsurance contract expressly provided that the reinsurance cover was for "one year from June 1st 2007" and that *all* projects were to be declared on a monthly basis. When cross-examined, Ms Sze To accepted that FFM was obliged to declare *all* its risks in relation to Dae Hye's model houses to Alba. If the reinsurance contract was facultative in nature, FFM would not have had to declare all risks to Alba as such a contract would have given FFM the liberty to decide which risks to cede to the reinsurer, who is entitled to accept or decline any risk ceded to it. The requirement to declare all risks thus suggests that an open obligatory reinsurance contract was envisaged by the parties.

30 It is rather telling that while *all* projects undertaken by Dae Hye and insured by FFM had to be declared to Alba on a monthly basis, there was no provision in the contract that the monthly declarations were subject to Alba's acceptance of the declared risks. It is most unlikely that Ms Sze To, who had proposed rather substantial amendments to the draft terms of the reinsurance contract on three occasions, would have overlooked having an express term making the attachment of risk conditional upon Alba's acceptance if a facultative reinsurance contract had been intended.

Furthermore, the contract did not specify a timeframe within which Alba was to reject a risk and there was no procedure for the repayment of the monthly premiums payable by FFM if a declared risk was subsequently rejected by Alba. All these facts also suggest that an open obligatory reinsurance contract was envisaged by the parties.

31 If the terms of the reinsurance contract alone are considered, the better view is that the contract between FFM and Alba concerned open obligatory reinsurance. In view of the rather brief terms of the reinsurance contract, it was not surprising that the background to the creation of the reinsurance contract was relied upon by both parties to shed some light on the nature of the reinsurance contract. In this context, it is noteworthy that our courts have moved away from the traditional manner of interpreting contracts and have adopted the contextual approach for the interpretation of contracts outlined by Lord Hoffman in *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-913 although this has been done in tandem with the provisions of the Evidence Act (Cap 97, 1997 Rev Ed), which incorporates the parole evidence rule in s 94.

32 In *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2009] 3 SLR(R) 1029, ("*Zurich Insurance*"), the Court of Appeal endorsed the contextual approach for the interpretation of a contract with a qualification (at [122]) that when interpreting a contract, "extrinsic evidence is only employed to illuminate the contractual language and not as a pretext to contradict or vary it". VK Rajah JA stated (at [132]) as follows:

> To summarise, the approach adopted in Singapore to the admissibility of extrinsic evidence to affect written contracts is a pragmatic and principled one. The main features of this approach are as follows:
>
> (a) A court should take into account the essence and attributes of the document being examined. The court's treatment of extrinsic evidence at various stages of the analytical process may differ depending on the nature of the document. In general, the court ought to be more reluctant to allow extrinsic evidence to affect standard form contracts and commercial documents ....
>
> (b) If the court is satisfied that the parties intended to embody their entire agreement in a written contract, no extrinsic evidence is admissible to contradict, vary, add to, or subtract from its terms (see ss 93-94 of the Evidence Act). In determining whether the parties so intended, our courts may look at extrinsic evidence and apply the normal objective test, subject to a rebuttable presumption that a contract which is complete on its face was intended to contain all the terms of the parties' agreement .... In other words, where a contract is complete on its face, the language of the contract constitutes *prima facie* proof of the parties' intentions.
>
> (c) Extrinsic evidence is admissible under proviso (*f*) to s 94 to aid in the interpretation of the written words. Our courts now adopt, via this proviso, the modern contextual approach to interpretation, in line with the developments in England in this area of the law to date. Crucially, ambiguity is not a prerequisite for the admissibility of extrinsic evidence under proviso (*f*) to s 94 ....
>
> (d) The extrinsic evidence in question is admissible so long as it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context .... However, the principle of objectively ascertaining contractual intention(s) remains paramount. Thus, the extrinsic evidence must always go towards proof of what the parties, from an objective viewpoint, ultimately agreed upon.... [T]here should be no absolute or rigid prohibition against evidence of

previous negotiations or subsequent conduct, although, in the normal case, such evidence is likely to be inadmissible.... (We should add that the relevance of subsequent conduct remains a controversial and evolving topic that will require more extensive scrutiny by this court at a more appropriate juncture.) Declarations of subjective intent remain inadmissible except for the purpose of giving meaning to terms which have been determined to be latently ambiguous (.... see ... sub-para (e) below).

(e) In some cases, the extrinsic evidence in question leads to possible alternative interpretations of the written words (*ie*, the court determines that latent ambiguity exists). A court may give effect to these alternative interpretations, always bearing in mind s 94 of the Evidence Act. In arriving at the ultimate interpretation of the words to be construed, the court may take into account subjective declarations of intent .... Furthermore, the normal canons of interpretation apply in conjunction with the relevant provisions of the Evidence Act, *ie*, ss 95-100 ....

(f) A court should always be careful to ensure that extrinsic evidence is used to explain and illuminate the written words, and not to contradict or vary them. Where the court concludes that the parties have used the wrong words, rectification may be a more appropriate remedy ....

33 In the present case, the parties clearly did not intend to embody their entire agreement in a written contract. That was why both parties relied on extrinsic evidence to shed light on the nature of the reinsurance policy. Such evidence would be useful if it is relevant, reasonably available to all the contracting parties and relates to a clear or obvious context.

34 In regard to the background of the contract, the most telling evidence on the nature of the reinsurance cover appears in Ms Sze To's own handwritten remarks on Alba's internal documents. On 30 May 2007, she noted in an internal document that the reinsurance contract with FFM was one that is "like Marine". In another internal document dated 12 June 2007, she gave instructions on the reinsurance contract with FFM as follows:

Chantel, pls "sign". Note Pem, pls follow *Marine open cover premium booking.* [emphasis added]

35 The term "open cover" indicates that the reinsurance contract is open obligatory in nature. In Robert H Brown, *Dictionary of Marine Insurance Terms and Clauses* (Witherby, 5th ed, 1989), the term "open cover" was explained at p 7 as follows:

A form of long term insurance contract whereby *the insurer guarantees to accept risks* when they are put forward by the assured as they arise during the period of the contract. The assured agrees to declare every item that falls within the scope of the cover and does not have the option to place such risk elsewhere should he consider it advantageous so to do. *Thus, the open cover is an obligatory contract binding both parties to its terms*,*rates and conditions.* [emphasis added]

36 Similarly, in C Bennett, *Dictionary of Insurance* (Pitman, 1st ed, 1992), the term "open cover" was defined at p 240 as follows:

This is a marine insurance term. When there are regular sendings of goods, it is usual to arrange an open cover to avoid the necessity of separate policies for each sending. The two most common methods are the floating policy and the open cover. The following features are common to both: *(a) The assured is bound to declare and the insurer to accept all endings coming within the scope of the contract.* [emphasis in original omitted, emphasis added]

37 Both the above-mentioned definitions of the term "open cover" were put to Ms Sze To during cross-examination. She agreed with the definitions but sought to confine the meaning of this term to marine insurance contracts. However, when cross-examined further, she conceded as follows:

> Q: [A] marine policy is necessarily different from a construction policy, but if you call this policy a construction open policy and that policy a marine open policy, *the common character they have is the openness, correct?*
>
> A: *Yes.*
>
> [emphasis added]

38 When further cross-examined on the nature of the reinsurance contract, Ms Sze To again referred to the "openness" of the reinsurance when she admitted as follows:

> Q: So this is not a case where FFM would declare the project, wait for Alba's acceptance of the project and then calculate the premium payable based on what risks Alba is prepared to accept. That's not the arrangement?
>
> ….
>
> A: [A]*s long as their declaration falls within the pre-agreed limit, then yes, it would be accepted. That is the whole point of organizing an open cover in advance so that we can expedite all these process.*
>
> [emphasis added]

39 Ms Sze To's concession that Alba would accept a declaration that fell within the agreed limit and that Alba had organised an "open cover" in advance to expedite the process of reinsurance certainly undermined Alba's case that it had provided facultative reinsurance to FFM.

40 The plaintiff pointed out to the court that the first copy of the email of 12 June 2007 that it received from Alba omitted Ms Sze To's hand written remark "pls follow Marine open cover" and that this remark was revealed only after it had obtained a Court order directing Alba to produce the emails in their original format. Obviously, Alba knew just how much these excluded words affected its assertion that it had only offered facultative reinsurance to FFM.

41 Alba laid emphasis on the fact that BRM's Mr Moon had used the term "facultative" when he negotiated with Ms Sze To and that in his first email on 25 May 2007, he stated that he was pleased to "offer facultative reinsurance" to Alba. However, when construing the legal nature and consequences of an agreement, the court looks at the substance of the transaction and not the labels parties attached to it (see *Street v Mountford* [1985] 1 AC 809). It appeared that Mr Moon had used the word "facultative" rather loosely and it cannot be overlooked that the draft contract attached to his said email made it clear that it covered "*all* projects declared" and proposed a fixed reinsurance premium for 50% of the risk. The significance of the declaration of all projects and of a fixed reinsurance premium, which suggested that open obligatory reinsurance was being sought by BRM, has already been considered earlier on. In any case, upon receipt of Mr Moon's email, Ms Sze To replied to ask why would "any cedant want Fac R/I" given that the average construction value was only KRW1.4bn per model house. Mr Moon's reply that Korean insurers generally do not wish to retain 100% of the insured risk and that FFM wished to cede at least 50% of the risk to Alba, made it plain to Ms Sze To that Alba was being asked to take on a large part of the reinsured risk and not such

risks that Alba agrees to accept.

42 In her next email to Mr Moon, Ms Sze To made two significant proposals which indicated that the reinsurance policy could not have been a facultative policy. First, she proposed that the reinsurance premium be increased to 0.15%. As has already been stated, if a facultative policy was intended, there would have been no need to fix the premium. Secondly, she proposed that 80% of the reinsurance premium *for the year*, based on the annual insured sum of KRW70bn be paid to Alba *at the beginning of the year*, with adjustments to be made only at the end of the policy period. If the reinsurance contract was a facultative one, it would not make much commercial sense to propose that FFM pay 80% of the reinsurance premium upfront when the eventual reinsurance premium may well be zero if Alba rejects all the risks declared to it. When cross-examined, Ms Sze To conceded as follows:

> Q: Ms To, if it is a pure facultative policy, there is no notion of a minimum premium, because the minimum premium could well be zero. Do you agree?
>
> A: *At the end of it, agree, yes.*
>
> [emphasis added]

43 I was not impressed by Ms Sze To's claim that Alba required an upfront payment of premiums "for ease of administration". In truth, the proposed upfront payment would be detrimental to FFM's cash-flow, and especially so when the paid premiums would only be adjusted one year later. Such an arrangement would only have made sense if the reinsurance policy was an open obligatory policy.

44 Another proposal by Ms Sze To also indicates that she must have had in mind an open obligatory policy. This was that declarations by FFM of cover offered to Dae Hye under the underlying insurance contract would be made quarterly. If this was a facultative reinsurance policy, there would be a period between FFM's offer of insurance cover to Dae Hye and Alba's acceptance of the declared risk during which FFM would be left without reinsurance cover until Alba's acceptance of the risk is obtained. No insurer who wants reinsurance cover would procure reinsurance under such conditions, and especially so when FFM wanted to have a large part of its risk covered by Alba on a "back to back" basis. The following part of Ms Sze To's cross-examination shows how unworkable facultative reinsurance would be in the context of her original proposal:

> Q: [G]iven that the declaration was retrospective, it would mean that for a good three months until FFM makes a declaration through BRM, and until Alba accepts or rejects that model house risk, so far as FFM is concerned there is no insurance cover, and there is no [certainty] of insurance cover either, correct? If this is in fact a facultative arrangement.
>
> A: Yes.
>
> ....
>
> Q: As an underwriter, do you agree with me that an underwriter would prefer to have the certainty of reinsurance cover than to be left in abeyance, not knowing for a good three months or more whether he's going to be reinsured or not.
>
> A: Agree.

45 When re-examined, Ms Sze To claimed that she was expecting quarterly declarations to be

made "*before* the quarter" begins, an important point that she could easily have made in response to questions during cross-examination. I find that this additional evidence was an after-thought following her realisation that her earlier evidence was inconsistent with there being facultative reinsurance.

46 Finally, Alba's argument that the insurance was facultative in nature if one looked at some of the "reinsurance slips" will be addressed. These slips, which were sent by FFM to BRM, were, at best, equivocal. For instance, in a slip dated on 11 June, it was stated:

> Reinsurance Slip
>
> ...
>
> CAR Insurance/Fac Reinsurance *Application*
>
> ...
>
> With reference to the captioned, we have pleasure of *ceding* you [reinsurance], particulars of which read as follows...
>
> ...
>
> Your prompt [arrangement] for Cover/Debit Notes on this reinsurance would be highly appreciated
>
> [emphasis added]

47 Alba laid emphasis on the words "Fac Reinsurance Application" in these slips forwarded by FFM to BRM and submitted that they were "requests" or "applications" for reinsurance rather than declarations. However, Mr Baek testified that the slips were based on an internal existing template which he adopted and that these slips were understood as having been churned out for the sole purpose of providing BRM with the details of insurance policies already issued by FFM to Dae Hye under the Master CAR policy to enable Mr Moon to declare the same to Alba and calculate the reinsurance premiums. Furthermore, while these slips referred to an "application" for reinsurance, they also stated that FFM was "ceding" the risk. It could be argued that the last sentence in the slips is merely an instruction to BRM to obtain proper documentation of the reinsurance cover and that Mr Moon was not securing reinsurance but was simply declaring the risks to Alba. I agree.

48 To sum up, if only the written terms of the contract are considered, I would find that the reinsurance contract was open obligatory in nature. An examination of the relevant extrinsic evidence confirms this view. As the reinsurance contract was open obligatory in nature, the reinsurance risk run by Alba commenced immediately whenever FFM accepted a risk on Dae Hye's model houses under the underlying insurance policy. It follows that Alba had no right to reject the 19 November Endorsement as the attachment of risk under the reinsurance contract was independent of the submission of declaration of the risk: see *Glencore International AG v Ryan* [2002] 1 Lloyd's Rep 574. As such, the risk run by FFM as a result of the 19 November Endorsement on the DMH was reinsured by Alba.

Whether Alba accepted the extended risk to the DMH

49 The plaintiff also submitted that even if facultative reinsurance had been offered to FFM and Alba had the right not to offer reinsurance with respect to the extension of the underlying insurance effected by the 19 November Endorsement, Alba had shown by its actions that it had included the

extended risk to the DMH arising from the 19 November Endorsement as a risk that fell within the ambit of its reinsurance cover. As such, Alba's actions after its receipt of the retrospective declaration of the 19 November Endorsement on 14 December 2007 will be examined to determine whether it had in fact accepted the extended risk on the DMH.

50 The system adopted by FFM and Alba was that the former would make retrospective declarations of cover afforded to Dae Hye under FFM's underlying insurance contract with Dae Hye. From the inception of the reinsurance, Alba never informed FFM whether it approved or rejected any such risk ceded to it. This was not surprising as Ms Sze To testified that so long as FFM's declaration fell within the pre-agreed limit, it would be accepted by Alba.

51 Four days later after receiving the retrospective declaration of the 19 November Endorsement on 14 December 2007, Alba was informed on 18 December 2007 of the massive damage caused by fire to the DMH. As such, Alba knew by 18 December 2007 that it faced a massive claim and that it would be paid a premium of US$2,000 for reinsuring the DMH. If Alba had not reinsured the extended risk on the DMH, it would have insisted immediately after being informed about the fire loss at the DMH that its reinsurance cover for the DMH ended on 30 October 2007. Instead, Ms Sze To, who had personally negotiated the reinsurance contract with Mr Moon, and Alba, took a very consistent stand for *more than four months* after the fire that it had a 45% share of FFM's liability to Dae Hye for the fire loss and hurried FFM for more details about the fire.

52 Alba expanded much time and resources on investigating the fire and the extent of the damage caused to the DMH. On 28 January 2008, which was more than a month after the fire, Alba went so far as to appoint it own loss adjusters, McLarens, to investigate the loss at the DMH at a hefty cost of around US$57,500 even though FFM's loss adjusters, IASCO, had already submitted a preliminary report, which had been forwarded to Alba. If Alba had not accepted the risk on the DMH, it would not have spent around US$57,000 to investigate the fire at the DMH.

53 Ms Sze To accepted that the appointment of McLarens was a "sensitive" matter and she sent Mr Moon two e-mails on 28 January 2008 regarding the appointment. In her second e-mail, she confirmed that Alba was at risk when she explained why McLarens had to be appointed:

> Many thanks for your understanding of our position.
>
> I'd like to explain a bit more [*sic*] the reason of us appointing McLarens.
>
> *It is primarily due to Lloyd's requirement that for accounts Alba has majority share*, we need to engage our own loss adjuster to represent our interest especially when there is a Claim Cooperation Clause in place.
>
> By no means it's [*sic*] out of distrust or disrespect towards [FFM's] judgment or IASCO's professionalism.
>
> Please convey the same message to [FFM] and seek their understanding.
>
> [emphasis added]

54 Ms Sze To, who was Alba's sole witness, testified that when she received the IASCO interim report from Mr Moon on 24 January 2008, she was already treating the DMH matter as a claim. Her testimony was not surprising. After all, on 16 January 2008, which was more than a month after the fire, she wrote to Mr Park, stating that as Alba "writes 45% on this account", it would like to

understand the situation. In the following e-mail to Mr Moon on the same day, Ms Sze To also stated that Alba reinsured 45% of the risk:

> *I'd also like to highlight that we need to be informed quicker that [sic] it is now.*
>
> The PLA [ie preliminary loss adjustor's report] was issued on Dec 18 and we only received it one month later.
>
> *Bearing in mind that we [sic] actually insuring 45% of the risk*, we'd like to know more and receive the information much quicker. [emphasis added]

55 Consistent with Alba's initial stand that it was liable for 45% of the loss at the DMH, Ms Sze To suggested in an internal e-mail to her colleagues on 16 January 2008 that a reserve of US$2.45m based on Alba's 45% share of the risk be set aside to meet claims arising from the fire. Furthermore, she was stated that she was considering the possibility of relying on a warranty in the reinsurance contract to avoid or reduce Alba's liability for the fire loss. Her email was as follows:

> *Another potential big claim to be recorded.*
>
> Fire happened when the model house is almost completed.
>
> Cause of fire un-identified yet but it seems it started from the contractor's site office.
>
> However, we might be [able to] use one warranty to decline or minimise the loss – camps and stores – which warranted that individual storage units are either at least 50 m apart or separated by fire walls.
>
> ….
>
> Policy LOL per event is KRW5bn
>
> *We have 45% share.*
>
> *To be conservative though, suggest a reserve of USD2.45m net of deductibles for our share for the worst case scenario* ….
>
> [emphasis added]

56 Considering that Ms Sze To is very experienced in reinsurance matters, she must have known that Alba had agreed to cover the DMH for the period stipulated in the 19 November Endorsement when she suggested to her colleagues that a reserve of USD2.45m be set aside for Alba's 45% share of the fire loss at the DMH.

57 As Alba regarded itself liable under the reinsurance policy for the fire at the DMH at the material time, it was not surprising that on 21 February 2008, which was more than two months after the fire, it accepted the reinsurance premium for the 19 November endorsement without any hesitation whatsoever. Furthermore, despite having rejected the claim with respect to the fire at the DMH on April 2008, Alba did not offer to refund the premium until it filed its Defence on 16 January 2009, more than a year after having been notified of the fire.

58 I was unimpressed by Ms Sze To's testimony that Alba did not reject FFM's claim from the outset because of "commercial reasons". It would take much more to convince the court that an

insurer in Alba's circumstances would, for commercial reasons, prefer to pay US$2.45m for a loss that has already materialised in return for a premium of around US$2,000, only to turn round and deny liability altogether a few months later after having accepted the premium.

59 Whatever excuses Alba may have had for not rejecting the claim initially or for accepting the premium for the extension of risk afforded by the 19 November Endorsement on 21 February 2008, it should not have waited until 23 April 2008 to finally assert that it was not at risk when the DMH was substantially destroyed by fire on 14 December 2007. Ms Sze To had ample opportunities to make it plain to FFM that Alba was not at risk at the material time. In fact, between 14 December 2007, when Alba received notice of the 19 November Endorsement in the monthly declaration, and 23 April 2008, when it finally decided to deny liability for the fire at the DMH, it could have rejected the risk on the DMH on any of the following occasions:

(a) on 14 December 2007, when it first received notice of the 19 November Endorsement;

(b) around 18 December 2007, when it was notified of the fire at the DMH;

(c) around 16 January 2008 after it received IASCO's preliminary loss report dated 18 December 2007;

(d) by mid-February 2008, when documents and information relied on in the present proceedings to justify its case that it was not at risk were already in its hands; and

(e) on or after 21 February 2008 when the premium was tendered to it and accepted by it.

60 For the reasons stated, even if the reinsurance contract had been a facultative reinsurance contract, it may be said at the very least that Alba had by its conduct waived any right to assert that it did not accept the risk under the 19 November Endorsement. In fact, I would go further and find that Alba did not repudiate liability for the 19 November Endorsement under its reinsurance contract with FFM for several months after the fire because it had accepted the risk of the extended cover afforded by FFM to Dae Hye under the 19 November Endorsement. This explained why Alba took such an active interest in the investigation of the fire, hurried FFM for more information on the ground that it was liable for 45% of the loss, appointed its own loss adjuster, accepted the premium for the extended coverage to the DMH and arranged to set aside US$2.45m to pay for its share of the potential loss to the DMH. As such, Alba is in no position to deny that it was at risk when fire substantially destroyed the DMH on 14 December 2007.

Defendant's other grounds for avoiding liability

61 Alba's other grounds for avoiding liability will now be considered.

Whether the 19 November Endorsement was valid

62 Alba contended that the 19 November Endorsement did not have the effect of extending the risk on the DMH the following reasons:

(a) the reinsurance policy only covered projects which had a design and construction period ("the contracts work period") of 9 months or less;

(b) the reinsurance policy did not cover any project if the value of the design and construction contract exceeded KRW 5 billion and the value of the contract works covered by the 19 November Endorsement exceeded this sum;

(c) there was no prior written approval for the extension of the original reinsurance period by the 19 November Endorsement; and

(d) it was issued *after* the fire occurred on 14 December 2007.

Whether the maximum period of reinsurance cover was exceeded

63 It was common ground that the reinsurance period for any model house was not to exceed 9 months. Alba did not dispute that construction work on the DMH started on or around 25 July 2007. As such, the construction period covered by the underlying insurance contract was from 25 July 2007 to 31 January 2008, a period of around 6 months. However, Alba contended that as the *design* and construction of the DMH exceeded 9 months, the DMH project was not covered by the reinsurance policy. On the other hand, the plaintiff argued that the period of reinsurance only concerned the construction of the DMH and had nothing to do with the period during which it was designed.

64 For the purpose of considering whether the maximum reinsurance period for the DMH had been exceeded, the following terms of the underlying insurance contract between FFM and Dae Hye must first be considered:

2. Covered risk: Construction of Model House

...

4. Period: *No more than 9 months* (To be separately discussed for period longer than 9 months)

[emphasis added]

65 The relevant terms of the reinsurance contract in relation to the maximum period of cover for construction of the DMH, were as follows:

4 PERIOD OF MASTER CONTRACT: One year from June 11th, 2007

- All projects declared on the monthly basis

- Individual Project Duration not longer than 12 months, *each model house not longer than 9 months*

5 INTEREST: Construction Works of Model House for residential

[emphasis added]

66 Alba's interpretation of the reinsurance contract cannot be accepted. Alba's sole witness, Ms Sze To, agreed that the limit of 9 months in the Master CAR policy and the reinsurance contract was with respect to the period of insurance and reinsurance respectively. When cross-examined, she stated:

Q: You have told us throughout your testimony that the insurance contract and the reinsurance contract should mirror each other. That's your testimony; correct?

A: That is my opinion.

Q: Given that clause 4 of the insurance contract and clause 4 of the reinsurance contract both [refer] to nine months, you would agree with me, therefore, that the reference to nine months in clause 4 of AB 52 is to the period of insurance? Correct?

A: *Yes* but it's specifically to the period of reinsurance of each model house.

[emphasis added]

67 Both the insurance and reinsurance contracts referred only to "Construction" or "Construction Works". Furthermore, the Munich Re form, which was the basis of the underlying insurance contract, specified that the insurer is not liable for "loss or damage due to faulty design". Admittedly, Mr Moon had proposed in an initial draft on 25 May 2007 that "Cover for Designer's Risk Clause" be included. However, this clause was deleted in the final version of the reinsurance contract. As such, there was no reference to "design" in both contracts and there was no reason to include the design period within the 9 months of reinsurance cover. I thus reject Alba's argument that the DMH was not within the scope of the reinsurance contract because its design and construction period exceeded 9 months.

The KRW5bn limit

68 It may be recalled that when the insurance cover for the DMH was extended on 19 November 2007, the cost of construction was noted as having increased from KRW2.34bn to KRW5.63bn. It was Alba's case that the increased cost of the construction to KRW5.63bn brought the extended project outside the scope of its reinsurance cover as that cover was only operative for projects that did not exceed KRW5bn.

69 The relevant terms of the insurance contract in relation to the amount of cover are as follows:

5. Amount insured:KRW70,000,000,000.- (per year)

6. Limit of Liability:KRW5,000,000,000.-a.o.o. (To be separately discussed for projects more than KRW5billion)

70 The relevant terms in the reinsurance contract on the amount of cover were worded slightly differently:

7. Sum Insured:Section 1 - Property Damages KRW 70,000,000,000.- (Annual Estimation)

8. LOL:KRW 5,000,000,000 - any one occurance [sic]

71 The plaintiff asserted that the limit of liability in the underlying insurance contract was specifically stated as KRW5bn and there was no reason for the phrase "LOL" in the reinsurance contract to bear a different meaning.

72 In contrast, Alba argued that the effect of the term "LOL" in the reinsurance contract was that if either the design and construction contract value or the sum insured exceeded that amount, the reinsurance contract would not apply. However, its sole witness, Ms Sze To accepted that this was not the case. When cross-examined, she testified:

Q: .... You told us earlier that LOL refers to the limit of liability per event; correct?

A: Correct.

Q: So basically, *this clause would cap [Alba's] liability at KRW 5 billion for each incident even if the sum insured is higher.* That's the purpose of this clause; correct?

A: *Correct*.

[emphasis added]

73 As for Alba's contention that its retrocession arrangements, under which its own reinsurance risks were ceded to other reinsurers, limited its underwriting of a reinsurance risk to one that is less than KRW3bn, this need not be considered as it was not pleaded. In any event, Ms Sze To confirmed that she did not disclose Alba's retrocession arrangements to BRM.

74 I agree with the plaintiff that the effect of clauses 7 and 8 of the reinsurance contract is that the limit of liability for any one claim was KRW5bn. Admittedly, the "Limit of Liability" clause in FFM's underlying contract with Dae Hye also provided that "projects more than KRW5 billion" should be separately discussed but this may be interpreted as requiring a separate agreement for increasing the limit of liability for projects that exceeded KRW5bn. As such, the mere fact that the constructions cost at the DMH exceeded KRW5bn did not bring that project outside the scope of Alba's reinsurance cover

Was written approval for the 19 November Endorsement required?

75 Alba also denied that it was not liable for the fire loss at the DMH because its written approval was not sought for the extension of the reinsurance cover afforded to the DMH beyond 31 October 2007. On the other hand, the plaintiff contended that Alba's written approval was not required for the extension.

76 Alba's case on written approval rests on the "Period of Cover" clause in the Munich Re form, which provided:

Period of Cover

….

At the latest, the Insurance shall expire of the date specified in the Schedule. *Any extensions of the period of insurance are subject to the prior written consent of the Insurers.*

[emphasis added]

77 The plaintiff retorted that the period of cover clause in the Munich Re form, which was the form used in the underlying insurance contract with Dae Hye, had nothing to do with FFM's reinsurance contract with Alba.

78 Whether the plaintiff or Alba is right depends on the interpretation of clause 10 of the reinsurance contract, which is as follows:

10. Terms & Conditions

- Munich Re's Standard CAR Policy Form

...

79 The plaintiff submitted that clause 10 of the reinsurance contract was only intended to make it clear that reinsurance was offered if the underlying insurance cover afforded to Dae Hye was based on the terms of the Munich Re form. Clause 10 did not have the added effect of incorporating all the terms of that form into the reinsurance contract. The plaintiff added that this must be so as the Munich Re form is inappropriate in the context of a reinsurance contract. For instance, general condition 3 of the Munich Re form provides that the *insured* shall at his own expense take all reasonable precautions and comply with all reasonable recommendations of the *insurers* to prevent loss, damage or liability and comply with statutory requirements and manufacturers' recommendation. General condition 3 cannot be read as requiring the plaintiff to incur reasonable expenses to prevent loss arising out of any damage to the insured property or take measures to follow the manufacturers' recommendations. The plaintiff also referred to general condition 5 of the Munich Re form, which provides that the insurer shall not be liable for loss, damage or liability if notice of the loss has not been received by the insurers within 14 days of its occurrence. If this clause was incorporated into the reinsurance contract, it would mean that if the original insured was dilatory and reported a loss 13 days after the loss, the reinsured would have only one day left to report the loss to the reinsurer. This could not have been intended by the parties to the reinsurance contract.

80 Ms Sze To conceded during cross-examination that general conditions 3 and 5 of the Munich Re form did not apply to the reinsurance contract. The plaintiff submitted that there was nothing to distinguish the period of cover clause in the Munich Re form from general conditions 3 and 5 of the said form as all these provisions refer to obligations to be performed by the "insured" and the "insurer". As such, since Ms Sze To had conceded that general conditions 3 and 5 of the Munich Re form did not apply to the reinsurance contract, the same result should follow in the case of the period of cover clause in the Munich Re form.

81 Often enough, the terms of an underlying insurance contract are referred to in the reinsurance contract without necessarily incorporating those terms into the reinsurance contract. This was recognised by the House of Lords in *Home Insurance Company of New York v Victoria-Montreal Fire Insurance Company* [1907] AC 59 and *Forsikringsaktieselskapet Vesta v Butcher* [1989] 1 AC 852 ("*Vesta*"). Admittedly, in appropriate cases, terms can be incorporated into a contract with some verbal manipulation. However, this only arises in compelling cases where such verbal manipulation was intended. In *HIH Casualty and General Insurance Ltd v New Hampshire Insurance Co* [2001] Lloyd's Rep IR 224, Steel J laid down (at [39]) the following four conditions for the incorporation of a term in an underlying insurance contract into a reinsurance contract:

(i) The term is germane to the reinsurance;

(ii) The term makes sense, subject to permissible manipulation, in the context of the reinsurance;

(iii) The term is consistent with the express terms of the reinsurance; and

(iv) The term is apposite for inclusion in the reinsurance.

His Lordship's approach was adopted by the English Court of Appeal: see [2001] Lloyd's Rep IR 596 at [162]. Rix LJ, who approved of this method of analysis, stated that these are well known criteria.

82 Whether or not the period of cover clause in the Munich Re form is germane to the contract, it cannot be saved by verbal manipulation of the words therein, and especially so since it is premised on a schedule which determines the latest expiry date of the insurance. Clause 10 of the reinsurance contract did not refer to any Schedule. In *CNA International Reinsurance Co v Companhia de Seguros Tranquilidade SA* [1999] Lloyd's Rep IR 289, Clarke J held that the following clause in the underlying insurance contract did not apply because of the absence of any attached schedule in the reinsurance contract:

> It is a condition precedent to the liability of Underwriters that in the event of any happening or circumstance which could give rise to a claim under this Insurance, the Insured shall (a) as a matter of urgency give notice by the most expeditious means of the happening of any circumstances, to the name(s) designated in the attached Schedule...

83 On the basis of Clarke J's decision, the plaintiff argued that the period of cover clause in the Munich Re form was never intended by the parties to apply, and did not apply, to the reinsurance contract and added that Alba should not be allowed to cherry-pick different parts of the clause to apply to the reinsurance contract.

84 It may be recalled that in *Miramar Maritime Corporation v Holborn Oil Trading Ltd* [1984] 1 AC 676, the House of Lords made in plain that in deciding whether verbal manipulation of a clause in another contract should be allowed, the commercial context of the terms and the contracts in question should be considered. In my view, so long as the period of reinsurance fell within the 9 month period envisaged in the reinsurance contract, FFM was not required to seek Alba's prior written consent for any extension of the underlying insurance contract. After all, the parties had specifically agreed to a fixed reinsurance premium of 0.13% for a period of up to 9 months. Even with the extended period of insurance for the DMH, the period of cover ran for around 6 months from 22 August 2007 to 31 January 2008. If Alba was right, it would mean that it was entitled to refuse prior written consent for any extension or charge additional premium for it, even though the 9-month period of cover afforded under the contract had yet to be exhausted. This would arguably be contrary to the commercial intent of the parties who were prepared to apply a fixed reinsurance rate irrespective of the length of the period of reinsurance so long as it came within 9 months.

85 I find that it is more likely than not that the reference in clause 10 of the reinsurance contract to the Munich Re form was intended to ensure that the insurance offered by FFM to Dae Hye was on the basis of the terms in that form. As such, there was no requirement in the reinsurance contract that Alba's written approval was required for the 19 November Endorsement. In any case, even if written approval of Alba was required for the 19 November Endorsement, Alba had by its numerous actions referred to in the earlier part of this judgment in relation to Alba's acceptance of the risk effected by the 19 November Endorsement, waived its right to insist on the obtaining of its written consent. In short, the absence of Alba's written consent to the 19 November Endorsement does not stand in the way of the plaintiff's claim.

Whether the 19 November Endorsement was issued after the fire

86 Alba clutched at straws when it contended that it was not liable under the reinsurance contract because the 19 November Endorsement for the extension of insurance cover for the DMH had in fact been issued on 17 March 2008, months after the fire occurred on 14 December 2007. This assertion need not be considered at length as there was ample evidence that the endorsement in question was in fact issued on 19 November 2007 and not on 17 March 2008. Apart from the fact that Dae Hye paid FFM the premium for the extended insurance cover on 19 November 2007, Ms Sze To accepted that the endorsement in question was issued on 19 November 2007.

Whether FFM was at risk when the fire occurred

87 The next defence relied on by Alba was that it was not at risk when the DMH was damaged by fire because the DMH had already been completed before the fire occurred. It pointed out that in the underlying insurance contract between FFM and Dae Hye, the "Period of Cover" clause in the Munich Re Form specifically provided that the insurers' liability "expires for parts of the insured contract works taken over or put into service". In its closing submissions, Alba went further and added that the project had been handed over before the fire.

88 In *Wasa International Co Ltd v Lexington Insurance Co* [2010] 1 AC 180, Lord Mance reiterated (at [35]) that an insurer seeking indemnity under a reinsurance contract must, in the absence of special terms, establish both its liability under the terms of the insurance policy issued by it and its entitlement to indemnity under the terms of the reinsurance contract. Unfortunately for Alba, its contention that FFM was no longer at risk when the fire occurred on 14 December 2007 was not proven because there was sufficient evidence that the DMH had not been completed by that date.

89 Both FFM's loss adjuster, IASCO, and Alba's own loss adjuster, McLarens, accepted that the DMH had not been completed. McLarens stated in its first report dated 23 April 2008 that they were advised that "the works were *almost* 100% complete at the time of the loss" [emphasis added]. It also reported that "some minor finishing was agreed to be necessary in the third meeting on 11 December 2007" and that "interior work for the Prugio show room had not been finished at the time of the loss". More importantly, McLarens added that the sprinkler system in the DMH had failed the completion test on 12 December 2007 and that the system was to be inspected again on 17 December 2007. Obviously, the DMH cannot be said to have been completed when its sprinkler system failed the completion test and was scheduled to be inspected again three days after the fire.

90 Alba's assertion that the celebratory dinner on 13 November 2007 was evidence that the DMH project had already been completed before the fire also lacked substance. Dae Hye's manager of general affairs, Mr Dong Sub Sung ("Mr Dong"), explained in his affidavit of evidence-in-chief ("AEIC") that the said dinner was held to celebrate the *anticipated* completion of the DMH. When cross-examined, he stated that the works would only be completed if Dae Hye's workers had all left the site, the project had been handed over to Daewoo and the site office had been dismantled and removed. Mr Dong testified that but for the fire, Dae Hye's workers would have returned to the site on 14 December 2007. While he did not attend the evaluation meetings before the fire, he knew that there had been outstanding works just before the fire occurred because he was responsible for contract administration matters, the dispatch of equipment to the site and the removal of equipment from the site office upon completion of the works. He explained that there were two types of evaluation meetings. The second type of meeting, which involved the president or vice-president of Daewoo, would only take place on completion. According to him, this meeting had not been conducted when the fire occurred.

91 Mr Dong's evidence was consistent with Art 16 of the construction contract, which provided as follows:

Article 16 (Completion of Work)

1. When Daehye completes work, it should notify Daewoo thereof and Daewoo should complete inspection of such work within 14 days unless there is a special reason and if the inspection result finds that the work has been completed in accordance with the design documents, Daewoo should accept the work without delay.

2. When Daehye does not pass the inspection specified in Paragraph 1, it should reinforce and modify the work without delay and receive a second inspection.

3. When Daehye does not agree to the inspection of Daewoo, it may demand Daewoo a re-inspection and Daewoo should conduct such re-inspection without delay if such re-inspection is demanded.

4. Upon completion, Daehye should immediately clean up the construction site including removing and bringing out all construction facilities, waste and temporary objects.

92 Art 16 required a series of steps to be taken before the project may be said to have been completed. There was no evidence that these steps had been taken before the fire on 14 December 2008. In fact, as mentioned above, the sprinkler system had failed the inspection on 12 December 2008 and was due for a further inspection on 17 December 2008.

93 In an email on 16 January 2008 to her colleagues, Ms Sze To accepted that the "fire happened when the model house [was] almost completed". When cross-examined, she said that she had changed her mind about the issue of completion because of the reference to a celebratory dinner in the loss adjusters' reports. Regardless of whether this change of opinion was credible, Ms Sze To finally accepted that the *whole* project had not been completed at the time of the fire. The relevant part of the proceedings is as follows:

Q Can you be a little bit more specific. Having had the opportunity to look at this loss adjuster's `report, in which particular report does it say that the construction of the model house was not yet or was completed, because there was a celebratory dinner?

A I believe the celebratory dinner was one factor, but there was other documents that demonstrated that at least partial – *the first part of the project has completed, and they went on to construct the second part or the modification of it, and that was not completed*.

[emphasis added]

94 To establish that the DMH project had been completed, Alba also relied on the official Seoul police report on the fire. However, it ought to be noted that the police report had merely stated that a "related person" informed the police that "the place was about to be open to the public as the construction work had been completed". This is a statement by an unidentified person and is clearly inadmissible. In any case, the plaintiff rightly pointed out that the police report was not referred to in any of the AEICs, and was not put to any of its witnesses during cross-examination.

95 A final argument relied on by Alba to show that the DMH had been completed by the time of the fire was that Daewoo paid the final 10% for the DMH on 23 January 2008. Alba argued that this

payment would not have been made if the extended works had been fully completed and handed over before the fire. While acknowledging that the final 10% under the construction contract was paid to Dae Hye, the plaintiff contended that Art 16 of the construction contract, which defines contractual completion, did not link completion of construction to payment. Mr Dong, who testified that the final payment was made even though construction had not been completed, added that the payment was for "restoration work that was expected." I thus find that the DMH had not been "completed" on 14 December 2007.

Material non-disclosure

96 Alba alleged that there was material non-disclosure of the following matters:

(a) that the construction contract was stated to have been executed on 1 April 2007 and that the works commenced on 1 April 2007 before inception of the reinsurance contract on 12 June 2007;

(b) that the period of works for the DMH exceeded 9 months;

(c) that the value of works and the sum insured for the DMH exceeded KRW5bn; and

(d) the occurrence of the fire before declaring the endorsement to Alba.

97 Alba acknowledged that this defence was not one of its main defences, and that it was a ground which will not succeed if it failed on its other defences. Apart from the fact that the other defences have been rejected, Alba did not prove the alleged misrepresentations.

Conclusion

98 For the reasons stated, Alba is obliged to indemnify the plaintiff under the reinsurance policy. The plaintiff is entitled to 45% of the total loss suffered by Dae Hye (minus scrap value and insurance deductible) amounting to KRW1,890,126,589 and 45% of the loss adjusters' fees, amounting to KRW18,065,700.

99 The plaintiff is entitled to interest at the rate of 5.33% as from the date of the writ and to costs.