Case No: 2009/307

Neutral Citation Number: [2012] EWHC 3112 (Comm)

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Rolls Building,
Fetter Lane,
London EC4 1NL

Thursday, 5 April 2012

BEFORE:

MR JUSTICE C CLARKE

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BETWEEN:

SOCIETÉ GENERALE

Claimant

- and -

CAP-MARINE ASSURANCE ET REASSURANCES & OTHERS

Defendants

- - - - - -

MR C MOGER QC (instructed by Clifford Chance) appeared on behalf of the Claimant

MR D KENDRICK QC and MR S KERR (instructed by Kerr Solicitors) appeared on behalf of Defendants

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Approved Judgment

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J U D G M E N TJ U D G M E N T

MR JUSTICE C CLARKE:

1. This is an application on the part of the defendant underwriters to re-amend their re-re-amended defence. It is opposed by the claimant, Société Generale, the well known bank. In order to decide whether the amendment should be allowed, it is necessary to consider the facts, so far as they are known or appear, in some detail.

2. Soc Gen, as I shall call the claimant, traded in physical metals. It had a non-precious metals department run by Mr de Brossard and a precious metals department run by Mr Teboul. The non-precious metals department traded in warehouse warrants. It did not buy metal from producers or afloat. It needed insurance for metals in storage, but not in transit.

3. The precious metals department had a more extensive pattern of trading, particularly in gold. In respect of gold, Soc Gen provided gold in granular form to the refinery for conversion into gold bars. Soc Gen also shipped gold bars from the refinery to customers, and about 90 per cent of this gold was airfreighted to four companies in the Goldas Group, three of which were in Istanbul.

4. Soc Gen stored, or claims that it stored, gold at Goldas' premises for up to three months or at the Istanbul Gold Exchange where Goldas was a trading member for up to 10 working days, on terms that it retained title in the gold until payment.

5. Soc Gen thus needed insurance which would cover gold both when it was in store and when it was in transit. Soc Gen claims in these proceedings approximately half a billion dollars from the insurers of its gold, or what it claims to have been its gold, which has gone missing from where it was stored in Turkey.

6. For a number of years, Soc Gen's metals insurance policy was placed by Aon in the London market. The insurance for 2005/2006 and 2006/2007 was so placed, but for 2007/2008 Soc Gen used different brokers, namely a French producing broker, Cap Marine, and an English placing broker, Cooper Gay, and different London underwriters, namely the present defendants.

7. For the 2007/2008-year, Mr Teboul of the precious metals department sought to cut the insurance premium to the bone. This was to be achieved by having one policy for both precious and non-precious metals, but with different terms applying to each. Each type of metal was, under the policy, covered for transit and storage on an all risks basis, and there were common conditions, but different bases of cover and different rates.

8. In particular, the cover for non-precious metal in storage was standard all

risks cover, but the cover for precious metal in storage was warranted to be pure contingency cover only. It is common ground that contingency cover is a form of sleep-easy cover, although what exactly pure contingency cover means is a matter of dispute. It is agreed that a contingency premium is typically in the range of 25 to 40 per cent of the standard premium.

9. Mr Teboul required a fixed premium in relation to precious metals which could not increase no matter how much gold was shipped. In contrast, Mr de Brossard was content that the premium for non-precious metals should be adjusted depending on the actual volume of metals at risk which were to be declared.

10. The fixed price premium, which was of the order of $150,000, on precious metal was recognised to be "keen" or "thin", as the expression goes.

11. Mr John Glover, the placing broker at Cooper Gay, says in his statement that the low premium on the precious metal was obtained on the basis that the rate for the non-precious metals cover was higher. Mr Morris, the lead underwriter, says that he agreed this thin or low premium in respect of precious metals because there was a much larger premium to be gained from non-precious metals.

12. In essence, the adjustable storage and transit premium on non-precious metals was to subsidise the low premium on precious metals, so that overall, the underwriters would obtain a satisfactory premium overall.

13. The cover in question in these proceedings is in respect of 2007/8 and the policy period is from April 2 to April 2.

2005/6

14. I turn now to consider the position in relation to the 2005/6 policy year. The individual involved at Cap Marine in respect of the 2007/8 year was Mr Nicholas Jugé. He had data relating to the 2005/6 year but not, I was told, the 2006/7 year. For present purposes it is necessary to focus on the placing insofar as it related to non-precious metals.

15. In the 2005/6 period, Soc Gen had made monthly declarations of the amount of non-precious metals in transit or in store. Since Soc Gen dealt in warrants, it had no need of transit insurance. All its declarations for 2005/6 thus declared a nil value for metals in transit and various different values for metals in storage.

2006/7

16. I turn then to the 2006/7 year. Miss Alix Engelhard is in the insurance department of Soc Gen. By an email of 2 June 2006, she said to Mr de Brossard that, according to the sheets that he had sent to her, being some or all of the 2005/6 declarations:

> "You [meaning the non-precious metals department] do not do shipping".

She asked him to confirm that. On 7 June 2006 he confirmed that that was so.

2007/8

17. I turn then to 2007/8. In January 2007, Cap Marine compiled a presentation file for the Soc Gen policy, which on 31 January 2007 Mr Jugé sent by email to Cooper Gay. The covering letter in the file said in relation to non-precious metal:

> "The policy is covering storage and transit on first risk or on a contingency basis at assured option declaration to be made on a monthly basis. The estimated annual insured amount (2005 basis) is US$1 billion. Rate to be applied 0.075 per cent per annum, corresponding to an estimated volume of premium of about US$700,000/750,000."

18. In his email of 31 January 2007 sending the file, Mr Jugé said this:

> "I am pleased to attach a first overview of Société Generale's stock and transit policy. Erratum page 1, the announced US$700,000 as estimated annual premium is a clerical mistake, as by reading the document, you will certainly note that premium for precious metal is US$160,000 in full, and monthly premium for non-precious metal is about US$15,000, corresponding to about total estimated budget of premium of about US$350,000."

19. The file contained a copy of the 2005/6 policy cover note. That policy provided for storage and transit cover for precious and non-precious metals. The file also included a list of average values of gold at any one time in storage at a refinery in South Africa, and at the location of five customers. Four of the customers were in the Goldas Group, three in Turkey and one in the United Arab Emirates; one customer was in India. There was also a list of average values on shipment from various refineries and to various customers.

20. A further document headed "Non-Precious Metals Exposure" said under the heading "Main terms":

> "All risks, storage only."

and that the annual estimated premium was $120,000. The document next after it gave examples of three declarations in the 2005/6 year in respect of non-precious metals.

21. On 31 January, Mr Glover of Cooper Gay emailed Mr Jugé in response, with some queries. He referred to the fact that the transits appeared to be $1 billion per annum, according to Mr Jugé's email. He then went on to say this:

> "Regarding the premium of $160,000 for precious metals, compared to the exposure, it would appear that the rates for storage/transit of precious metals is in the region of 0.005 per cent which seems incredibly thin,

> even on a contingent basis. In terms of non-precious metals, I wondered if you could advise how the premium of $180,000 is achieved as based on the rates in the cover note, as just the storage of approximately $200 million per month based on the rate in the cover note of 0.075 per cent per annum produces a premium of $180,000 for the storage alone, without any premium for the transits, and I am wondering where we go on this."

22. On 8 February 2007, Mr de Brossard emailed Miss Engelhard all the declarations for the non-precious metals over the period January 2006 to January 2007; these all had nil returns so far as transit was concerned.

23. On 12 February he sent her details of the quantities of non precious metals stored over the last 12 months which provided detailed information of the make-up of the global figures in the declarations.

24. On 13 February, Mr Jugé emailed Mr Glover two spreadsheets. One contained details of Soc Gen's precious metals exposure in 2006. It listed what are described as average values, but which would appear to be total throughput, of gold at two refineries, and on shipment from mines to refineries and to customers. This document contained no details of gold stored at any customers.

25. The second document headed "Non-Precious Metals Exposure 2006" gave details for each month from January to December 2006 of the average value of the gold, the storage premium and the estimated shipment premium. These premia were reached by applying a stated premium rate per annum derived from the 2005/6 cover. This latter spreadsheet was scratched by the leading underwriter in February 2007 when giving a quote.

26. In his email of 13 February, Mr Jugé said under the heading "Non-precious metals":

> "Société Generale sent us all 2006 declaration of storage. We have summarised into the attached spreadsheet. Our contact told us that regarding shipment of non-precious, declarations are made by each Société Generale entities directly to Aon. Thus Société Generale headquarter is not able to provide us with the exact amount of premium charged for non-precious shipment. We estimate this amount to $350,000."

27. The position, therefore, appears to be (a) that the presentation file covering letter referred to the policy in respect of non-precious metal as covering storage and transit, (b) the document "Non-Precious Metals Exposure" referred to the main terms as "all risks storage only", (c) Mr Glover had queried how all this worked, given that the total premium for non-precious was said to be $15,000 per month, and that would appear to be swallowed up by the premium for storage alone. Mr Jugé's response was that "our contact" had told him that declarations in respect of shipment of non-precious metals were made by Soc Gen directly to Aon, and he

estimated the premium at $350,000.

28. What Mr Jugé appears to have done is to take the average value of the stock per month obtained from the 2006 declarations and simply apply the shipment premium rate on a contingency basis to those values per month?

29. The underwriters thus had presented to them an exposure schedule which indicated that values had been declared in 2006 with an estimated shipment premium of $ 377,732, when in fact, no declaration had ever been made in respect of shipment, nor was it intended that shipment would be insured or any premium paid in respect of it.

30. In May 2007, an adjustment was made in respect of the 2006/7 year which included nothing for insurance of transit or shipment.

31. On 27 February 2007, Miss Engelhard emailed Mr de Brossard asking for confirmation that the non-precious metal department was still not doing shipment, and he confirmed the next day that that was so, saying:

> "Toujours pas et rien a l'horizon pour cela."

32. On 28 March, Mr Glover confirmed that coverage had been bound with the underwriters for 2007/8.

33. On 29 March, Mr Pavis of Swiss Re asked to be reminded what the total expected premium would be, and he was told on the same day by Mr Glover that the expected gross premium would be US$550,000 to US$575,000 based on non-precious transits of approximately $2.4 billion. That figure of $2.4 billion is a rounding up of the total average values for declarations in 2006 contained in the Non-Precious Metals Exposure 2006 document.

Renewal for 2008/9

34. By the beginning of 2008, thoughts must have been turning towards renewal. At this time, Soc Gen, through their brokers were seeking to have a clause accepted confirming that cover extended to any taking of gold by Goldas. Since renewal was being sought, it was desirable that some declarations in respect of the transit of non-precious metals should come through.

35. On 30 January 2008, Mr Glover emailed to Mr Jugé. In his email he said this:

> "Re: Soc Gen. Please let me have your draft clause re:misappropriation and I will then have discussions with insurers to see what can be achieved."

That was a reference to the intended clause.

> "In the interim it would be especially helpful if you could obtain confirmation that the transit values on a contingent basis will be the same or similar to the storage figures provided to date, i.e. they have at present merely forgotten to provide the transit figure or have assumed this will be the same as the storage figure."

36. It appears from this that Mr Glover was proceeding upon the basis that there were transit values to be declared.

37. On 20 February 2008, Mr Jugé emailed to Mr Pascal of Soc Gen, with a copy to Miss Engelhard. In that email, he said, and the translation is mine:

> "To complement these problems of strategy, we must equally face up to the absence of any declarations in respect of transit for the non-precious metals department, even though cover exists for that and even though, at the time of subscription, the premium projections made it appear that there were risks of transit in existence."

38. By 11 March, the claim in the present proceedings had been notified to primary insurers. On that date, Mr Richard emailed Mr Jugé and Mr Glover to tell them that Soc Gen's lawyers wanted access to the presentation file for the metal policy.

39. On 12 March 2008, a meeting took place at Soc Gen at which Mr Richard and Miss Engelhard were present, as well as Mr Jugé and two others from Cap Marine. According to the Cap Marine minutes, it was pointed out that at the time of subscription of the risk, Turkey was only included in the table for shipping and not for storage of precious metals. It was also recorded that Soc Gen had indicated to Mr Jugé that it worked in the same way with Goldas since 2002, with transportation only being insured originally and storage beginning in November 2007. The minute recorded the need to verify this, because there could have been a misdescription of the risk. The minute also refers to the fact that there was equally a misdescription of the risk for the declarations of transit for non-precious metals.

40. On the same day, Soc Gen executed a letter of indemnity in favour of Cap Marine and Cooper Gay which provided that Soc Gen agreed to cover Cap Marine/Cooper Gay, their directors and their employees, against all actions, should their liability be raised as an issue by the insurers and/or any other person or entity having an interest in taking action, and consequentially, to compensate them for any damages and/or judgment of any kind whatsoever, to which Cap Marine/Cooper Gay, their directors and/or employees might be subject, with a number of "restrictions".

41. The first restriction was that the coverage applied without restriction for all actions performed at the request or in the interest of Soc Gen, and in particular, for three actions performed by Cap Marine/Cooper Gay for the purpose of guaranteeing confidentiality with regard to the possibility of a loss on the Goldas file between 19 February and 10 March 2008.

42. One of the actions specified was that Cap Marine/Cooper Gay had delayed informing the insurers with regard to the breakdown of the assets at risk during fiscal year 2007 in order to first draw the attention of Soc Gen to the consequential risk of applying the co-insurance clause and/or the lapse of coverage for the loss in question.

43. The second matter that was referred to was that, for actions prior to

19 February, the indemnity was extended to items in the subscription documents, subject to reliable transmission of Soc Gen's request and the insurer's response.

44. The letter ended by providing that in any case, if the liability of Cap Marine/Cooper Gay should be proven, the liability would be limited to the sums covered in each broker's respective professional liability policies.

45. Thereafter, further attempts were made by the brokers to follow up the question of the declarations in respect of transit risks on non-precious metals.

46. On 18 March, Mr Glover emailed to Mr Jugé in the following terms:

> "Please note during the meeting in London, Pascal Richard expressed some surprise at the statement by the head of non-precious metals to you that they did not have any declarations to make in respect of transits, even on a contingency basis, as previously this appears to have been insured. Additionally, Pascal was aware that it might be viewed that Société Generale would not be acting as a prudent uninsured if they did not even insure precious metals on a contingent basis, and it could be considered strange that we have not been previously advised when this was clearly an important part of the renewal negotiations in 2007.
>
> Pascal advised he would be investigating this aspect and I would be grateful if you could pursue this with Pascal to ascertain either the reason they decided not to insure, even on a contingency basis, or alternatively, if in fact this is not the case, please could you ascertain the actual declaration of transits for non-precious metals for the policy period as we need to advise insurers on this point, whichever is the correct position."

47. On 25 March, Mr Jugé emailed to Mr Pascal. In that email under the heading "Non-precious metals activity" he said this:

> "As we have already touched on together, and as Cooper Gay emphasised during our recent meeting, we cannot approach the insurers without obtaining clarification on the coverage of non-precious metals in transit. When policy [then he gives the number] was sold on 1 April 2007, it was agreed that the policy should insure the transit of non-precious metals. A fee structure was proposed, negotiated and accepted. It is clear that the non-precious metals purchased by SG require prior or subsequent transit, except to the extent that SG activity with respect to these metals is limited to trading warrants. Unless there has been an error on our part, we have not received a transit declaration for the 2007/8 year."

48. On the same day, Mr Jugé told Mr Glover that he had sent an email to Soc Gen asking for non-precious transit declarations. On the next day, Mr Glover replied:

> "Thank you for your email. Let's hope the assured does the honourable

thing and presents their formal declarations for both storage and transits for non-precious metals perhaps within the next week or so. I could see the look on the lead underwriter's face when I advised they may not require even contingent coverage for their transits of non-precious, and trust you will receive a declaration of values to avoid another contentious issue which may arise on this account."

49. It would appear from this that Mr Glover was expecting, or at any rate, hoping, for such declarations in order to assist renewal and had not understood that transit was not to be covered.

50. On 26 March, Cap Marine sent a letter to Société Generale for the attention of Mr de Brossard, which, amongst other things, said that they would appreciate receiving declarations in relation to transit risks on non-precious metals.

51. On 25 March, Mr Richard sent an email to a Mr James Bain of Soc Gen, copied to, amongst others, Mr de Brossard, in which he said this:

> "I am still awaiting a formal answer from Cap Marine today, but there is one point which is sure: the London market will not accept to open the file as long as they do not get the information and the relevant premiums on the coverage during transit. Basically, you negotiated last year a specific rate on transit, then no declaration has been made during the year 2007 to now. Declaration has to be made to underwriters at the end of the insurance period, which is now."

52. To that, Mr Bain replied:

> "I am trying to make sure I understand this. Both the terms you refer to are about insurance of material in transit. As Philippe [that's Mr de Brossard] says we don't transport LME material and never have, I believe."

53. To that, Mr Richard replied, in an email of 26 March whose subject heading was "Re: renewal problems about transit coverage":

> "What I found when I read the file is this: you negotiated last year a policy including three rates for transit. The policy is placed on the specie market with marine conditions. The reason why it has been placed on this market is that there was no possibility to buy pure storage coverage. Then now you say that you do not need any transit coverage, and I assume you think in fact you never did. So the question of insurers is 'Why did you buy such a coverage?' and 'Why did you negotiate so severely?' Insurers have the feeling that you lied when you negotiated that coverage just to get access to that specific market. It is quite strange for them that the coverage that existed in the Aon policy could have been subjected to rate negotiation if you knew it would never be used. Insurers have in mind a business of $300,000. It seems that they are willing to recover that amount. They consider it as a contentious issue."

54. It is not wholly clear from that passage whether Mr Pascal is recording (a)

what insurers, or some of them, had said; (b) what he or the brokers thought the insurers would say, or (c) what the brokers were saying.

55. On 6 May, Mr Jugé emailed to Mr Glover a final storage declaration for the period from April 2007 to April 2008. In the event, in the light of the claim which has given rise to this action, insurers accepted no further premium but reserved their rights in order not to waive any defence under the policy.

The pleadings as they stand

56. The underwriters' claim, as presently pleaded is (a) that the omission of any reference to gold stored at customers' premises in the presentation of the risk was a major material misrepresentation and rendered the presentation unfair, (b) that had they known the true position, then, even if after further enquiry they were still prepared to accept the risk at all, they would have charged more premium and they would have imposed different terms, in particular they would have excluded loss through the taking by Goldas of gold held in storage by them or to their order.

57. Soc Gen disputes underwriters' case on the materiality of the 2006 summary for precious metals.

58. Mr Edwards, Soc Gen's underwriting expert, expresses the view that the policy provides extremely broad cover designed to cover the loss of Soc Gen's interest in the subject matter, whatever it may be, and that an underwriter in the specie market would expect the policy to cover gold bought from mines, gold being transferred to refiners, gold being sold to customers and gold sold on consignment, that is to say, gold delivered to the customer which is to remain the property of the bank until the customer wishes to purchase it.

59. In his report he goes on to say that a prudent underwriter, receiving the 2005 and 2006 figures, would put them next to each other and go through them line by line. He would not have discarded the 2005 information as out of date. He would thus see the reference in 2005 to five customers for gold. The 2006 information would be incomplete because the data represents annual figures and not averages or maximum levels at any one location at any one time. That information is needed to assess the premium. Without it, an underwriter could do no more than produce a non-binding indication. That that is so appears to be common ground between the experts, although Mr Morris, the leading underwriter, disagrees with it.

60. Further, Mr Edwards says that the prudent underwriter would assume that Soc Gen's interest continued until after shipment and whilst the gold was held by Soc Gen's customers.

61. For his part, the underwriters' expert considers that there was an unfair presentation. A prudent underwriter would accept the 2006 summary for precious metals at face value. There was no reason for him to think that it had omitted customer storage, even if the 2005 summary had been available, and it is, he suggests, not the prudent underwriter's job to disbelieve the

assured; instead, it is the assured's duty to make proper disclosure of material facts.

62. To complicate matters, there is an issue as to whether or not the 2005 Non-Precious Metals Exposure document was seen by the lead underwriter or the second underwriter, although it appears that Mr Garrido, of the fifth defendants, did see it.

63. Up until now the whole focus of the claim and the defence has been on the precious metals side of the cover. The defences involve inter alia claims of breach of warranty; they include consideration of when title to the gold passes under Turkish law and they assert that there was not a fair presentation of the precious metals risk. Since the claim is under the precious metals part of the cover, that focus is not particularly surprising.

64. In the light of the expert evidence and the points of agreement and disagreement in the joint experts' report, junior counsel for the underwriters decided to test Soc Gen's expert's line by line comparison by comparing the 2005 Non-Precious Metals Exposure document with the 2006 Non-Precious Metals Exposure document.

65. This exercise revealed to him that the 2005/6 coverage was described as "for all risks storage only" with a premium of only $120,000. A check was then made to see whether there had in fact been a declaration of transit values for 2006/7. There had not been such a declaration. The next step was to see if there had been some transits which had been overlooked and therefore not declared, but the emails to which I have referred showed that Soc Gen had no need for transit insurance for non-precious metals and had had no intention of seeking any or making any declarations in respect of transit for 2006/7 or 2007/8.

66. In those circumstances underwriters now seek to contend that they were not given a fair presentation of the risk in that they were shown, in respect of non-precious metals, an estimate of shipment premium for 2006 of $377,732, when no shipments had ever been or were ever intended to have been insured.

67. It was also, it is said, expressly represented to Mr Mummery of the third defendants that the estimated gross premium for 2007/8 was about $ 550,000, a figure said to be based on non-precious transit premiums, and it was represented to Mr Pavis of the fourth defendant in the email of 29 March 2007 that the expected gross premium would be $525,000 to $575,000 based on non-precious transits of about 2.4 billion.

68. The low fixed premium for the gold, would not, say the underwriters, have been agreed save on the basis that a substantial amount of premium would be generated by the non-precious transit element of the 2007/8 contract.

Discussion

69. This application to amend comes very late in the day. Clyde & Co for the

insurers sent a letter to Clifford Chance on 15 March 2012 asking for a response dealing with the points now relied on, to which they have not had a substantive reply. They issued and served the application to amend on 20 March. The trial is due to begin at the beginning of next term, and to last for ten weeks. The trial date has been fixed for 17 months. I made plain when that date was fixed that it could not be moved, and no-one suggests that it should. The application comes months after the exchange of witness statements and experts' reports. In January, following those statements and reports, there was a mediation involving all parties, and a settlement with the brokers took place on 30 January.

70. Soc Gen submits that it is now far too late to introduce this sort of amendment and that they will be unduly prejudiced by its admission. Moreover, they have settled with the brokers and that settlement cannot be undone.

71. Whether or not a late amendment should be granted requires the court to take into account and balance a number of factors which will differ from case to case, in order to decide what justice requires. The question of late amendments has been considered in a number of recent cases, particularly by the Court of Appeal in **Worldwide Corporation BGPT Limited** [1998] Court of Appeal transcript LTA 98/75263; **Swain-Mason v Mills & Reeve LLP** [2011] EWCA Civ 14, and by Mr Justice Hamblen in **Andrew Brown & others v Innovatorone Plc & others** [2011] EWHC 3221.

72. The first matter to consider is the lateness of the application. The days are long past when an amendment could be secured on payment of costs, provided the amendment had a real chance of success. The courts have become, and remain, increasingly reluctant to grant late amendments, particularly when they are sought close to or at a trial which has long been fixed. In an action such as this, the timetable will have been laid down in order to give the parties adequate time to consider the case against them and to marshal evidence, documents and their thoughts. Allowing a last minute adjournment risks making a mockery of the careful timetabling that has preceded it. A heavy onus was said in **Swain-Mason** to rest on a party who seeks a very late amendment. It is right to point out that that was a case in which an amendment was sought on the second day of the trial.

73. As Mr Justice Hamblen observed in **Andrew Brown**, the factors to be taken into account are likely to include: (i) the history as regards the amendment and the explanation why it is being made late; (ii) the prejudice which will be caused to the applicant if the amendment is refused; (iii) the prejudice which will be caused to the resisting party if the amendment is allowed; and (iv) whether the text of the amendment is satisfactory in terms of clarity and particularity.

74. Further, as appears in the commentary to the CPR at paragraph 17.3.7, an important factor for the court to consider when permission to amend is sought close to the trial date is whether the amendment will put the parties

on an unequal footing or will place or add an excessive burden to the respondent's task of preparing for trial so as to jeopardise the trial date or so as inevitably to cause a postponement of the trial.

75. In the **Worldwide** case, Lord Justice Waller said this:

> "Where a party has had many months to consider how he wants to put his case, and where it is not by virtue of some new factor appearing from some disclosure only recently made, why, one asks rhetorically, should he be entitled to cause the trial to be delayed so far as his opponent is concerned, and why should he be entitled to cause inconvenience to other litigants? The only answer which can be given, and which counsel has suggested applies in the instant case, is that without the amendment, a serious injustice may be done because the new case is the only way the case can be argued, and it raises the true issue between the parties which justice requires should be decided. We accept that at the end of the day, a balance has to be struck. The court is concerned with doing justice, but justice to all litigants, and thus, where a last minute amendment is sought with the consequences indicated, the onus will be a heavy one on the amending party to show the strength of the new case and why justice, both to him, his opponent and other litigants requires him to be able to pursue it."

76. In **Swain-Mason**, Lord Justice Lloyd said of that passage, at paragraph 72:

> "As the court said, it is always a question of striking a balance. I would not accept that the court in that case sought to lay down an inflexible rule that a very late amendment to plead a new case, not resulting from some late disclosure or new evidence, can only be justified on the basis that the existing case cannot succeed and the new case is the only arguable way of putting forward the claim. That would be too dogmatic an approach to a question which is always one of balancing the relevant factors. However, I do accept that the court is and should be less ready to allow a very late amendment than it used to be in former times, and that a heavy onus lies on a party seeking to make a very late amendment to justify it as regards his own position, that of the other parties to the litigation and that of other litigants in other cases before the court."

77. He also went on to point out that any amendment would need to satisfy the full requirements of a proper pleading.

78. Two matters which Lord Justice Lloyd considered of significance in refusing to allow an amendment in that case were that the case which the amendment sought to raise should have been one that was considered at a much earlier stage, when the original way of putting it looked shaky on the evidence that had come to hand, and secondly, that the amended pleading was itself unsatisfactory.

79. In **Worldwide**, the amendment, which was a last minute amendment sought at trial, was not sought because of the discovery of some fact previously

unknown. It involved an abandonment of a previous case and the advancement of a very different one, completely reformulating the claim. The amendment was also one which would require extensive investigation and an adjournment of the trial, which had been interrupted in order for the application to be made.

80. Waller LJ said in that case:

> "There is no doubt that the amended pleading presented a very different case to the defendants and those advising the defendants. Furthermore, it can hardly have come as a surprise to those advising the plaintiffs that a late amendment which completely reformulates the claim would be resisted. Equally, when a case has been prepared with witness statement and experts' reports on one way of putting the case, it is harsh to criticise advisers of the defendants for asserting that they would need some period in which to examine the extent to which the amendments affected them and their witnesses. The periods laid down for production of witness statements and experts' reports are there so that they can be served on the other side in good time, and so that the conduct of a trial can be as expeditious as possible. Forcing a party to look again at those statements and the experts' reports at the same time as conducting the trial is not fair or conducive to the efficient conduct of the trial."

81. It is apparent from that case that the merits of the newly pleaded case were considered to be insubstantial and in effect, to amount to an allegation of an agreement to agree.

82. Lastly, looking at the authorities, in **Andrew Brown**, the main hearing of the application took place on Day 20 of the trial.

83. In the present case, the underwriters have in their favour that the application is not made at the trial, nor is there any question of prejudicing other litigants by vacating a date which would otherwise have been available to different parties. The underwriters do not say that the existing case cannot run. Indeed they say the opposite. They seek an amendment in the light of facts and a point recently discovered to which, so they contend, Soc Gen was alive but they were not, and which, they say, Soc Gen was obliged to disclose to them.

84. Nevertheless, the amendment is very late. It is therefore necessary to consider the reasons why it has come forward when it has. In essence, it is because a passage in Soc Gen's expert's report triggered the making of a comparison between the data given for non-precious metals in respect of 2005 and 2006. This revealed that arguably the insured had misrepresented the position in relation to non-precious metals.

85. Although the reference to a line by line comparison in the Soc Gen expert's report was a trigger for discovery of the point, it does not seem to me that the contents of that report, which relates to precious metals, was such as to raise the point now sought to be advanced in respect of non-precious metals.

A comparison of the 2005 and 2006 material was always possible. The fact that the non-precious department did not insure transit risks was referred to in Mr de Brossard's witness statement.

86. Mr Christopher Moger QC for Soc Gen submitted that the underwriters must have made a decision to focus on defences that related to precious metals, even though they must have known that a defence could be founded on any misrepresentation or non-disclosure in relation to non-precious metals. In the light of that decision, he submits, they cannot, at this late stage, turn round and rely on something they have found at the last moment in the non-precious metals field. They are, in short, the authors of their own misfortune. Further, no evidence has yet been filed by the underwriters relating to the new point or dealing with any unawareness of the fact that transit had not been insured in respect of non-precious metals in 2006 and was not intended to be for 2007.He points out that the underwriters must have been aware that transit risks were not being declared for non-precious metals.

87. In response to that, Mr Dominic Kendrick QC for the underwriters points out that under the policy, adjustment was not due until the end of 2007/8, and that by then, underwriters were not accepting any premium at all because of the present claim. In response to that, Soc Gen has produced monthly bordereaux from April 2007 onwards sent to Mr Jugé which have zero figures for transit. In one of the emails, dated 16 January 2008, Mr de Brossard is informed by Cap Marine that the concerned underwriters have been informed.

88. As to that, Mr Kendrick has informed me that his clients have not, in the time available, been able to trace any monthly bordereaux being sent to or reaching Cooper Gay from documents on either broker's file. He also points to the fact that in his email to Mr Jugé of 30 January 2008, Mr Glover referred to the storage figures provided to date, and asked whether or not the transit values had been omitted by accident. He also informs me that insurers have researched their records to see if any declarations were received by them, and that they have found none in the accounting files or in the underwriters' files, whereas if they had been filed they would, in ordinary course, have been scratched.

89. He submits that it is to be expected that Mr Glover did not pass on declarations onto the insurers because there was no contractual requirement to do so until expiry in April 2008, and in January 2008 Mr Glover regarded the information that had been received as incomplete. Lastly, he observes that even if the documents in question were shown to underwriters, they do not actually state that there would be no transit adjustment at the year-end, still less do they show that there had been no transit in 2006 or earlier years, and no intention to perform insured transits at the time of placement.

90. These matters may require further investigation, but it would not appear, from that material at any rate, that any declarations were passed on.

91. I regard the fact that the underwriters focused on the precious metals aspect as of limited significance in deciding whether an amendment should be allowed. It was not unreasonable for them, when faced with a claim in respect of gold, to concentrate on what they were or were not told in respect of precious metals. A failure actively to look for defences unrelated to gold might be regarded as a fair approach.

92. In addition, it does not seem to me a compelling criticism of underwriters that they failed to investigate the position in respect of precious metals or spot the point now sought to be relied on, when the matter which they did not discover was one which, if the underwriters be right, Soc Gen was bound to reveal. It did not occur, I am told, to underwriters to think that there was a problem with what they were being told or not being told in relation to non-precious metals, and that may well be right.

93. The next matter to consider is the quality of the point and of the pleading which seeks to express it. As to that, underwriters submit that the point is both confined in scope, compelling in character, and fully set out in the amended pleading. I agree that the point is limited in scope, that it is properly pleaded, and that it is of considerable apparent weight. The misrepresentation alleged is contained in a document produced by Soc Gen through their brokers, listing estimated shipment premiums in respect of non-precious metals for 2006. The fact that in truth no shipments were intended to be insured for 2005, 2006 or 2007 is apparent from Soc Gen's internal documentation.

94. In those circumstances, there would appear to me solid ground for contending that facts were misrepresented to underwriters and the true facts not disclosed, and that those misrepresentations and non-disclosures were of critical significance because they affected the question whether any premium was to be earned from the insurance of transit risks, and it was that premium which, together with the lesser storage premium, in respect of non-precious metals, was to make up for the lean pickings to be derived from the fixed premium for gold.

95. I choose not to describe the point as compelling, because on an interlocutory application to amend, I have necessarily not heard, or may not have heard, the whole story. It may be, for instance, that the underwriters addressed their minds to the absence of any premiums in respect of transit and reached a decision to take no point on it, or that the email of 26 March 2008 reflects some discussion with the underwriters in which they complained about the absence of declarations in relation to transit. Even if there was such a discussion, it is not self-evident that the underwriters would have known or learnt that there never was any intention to insure non-precious metals in transit and that they had never been insured before.

96. As to the scope of the point, so far as evidence is concerned, there are several people who could or might have something to contribute by way of evidence to the relevant issues, but those issues are in a relatively short

compass. They are, as it seems to me, (a) what did Soc Gen intend in relation to insurance of non-precious metals in transit in respect of 2006/7 and 2007/8? (b) what did Soc Gen do in that respect in 2006/7? (c) what were the underwriters told about the insurance of non-precious metals in transit? (d) was there any misrepresentation or non-disclosure? and (e) was it material and relied on?

97. The first three of those seem to me largely established on the documents. The fourth is a matter of expert evidence which should be brief, and the last is a matter for evidence from the underwriters which, it seems to me, should also be brief.

98. It is next necessary to consider the effect of allowing an amendment on the conduct of the trial. As to that, it does not seem to me that the amendment is likely materially to increase the length of a 12-week trial. Mr Kendrick told me that his own estimate for his cross-examination was itself reducing. Many of the relevant witnesses are already scheduled to attend, namely Mr de Brossard, the head of the non-precious metals department; Mr Pascal Richard, the head of the insurance department; Mr Glover from Cooper Gay, the placing brokers, and the underwriters themselves. Mr Jugé was never scheduled to give evidence, and Miss Engelhard has served a statement, but is not coming to give evidence because she is on maternity leave.

99. I would expect that further statements from the experts on materiality and from the underwriters on reliance could be prepared in very short order. If there is an argument available on waiver, it would seem to me that it would have to be based on what was said at renewal in 2008, and that would appear to me to be within a relatively short compass. Disclosure has taken place, including the underwriters' and brokers' files, and there seems to me to be limited scope for further discovery.

100. In addition, the documentation that appears at tab 5 of the application bundle would appear to be a helpful compilation of the material documents or, at any rate, the most material documents.

101. A relevant question is whether this is a case in which dishonesty is alleged. That is relevant because it might be unjust to allow a last minute amendment which alleged that somebody was dishonest, particularly if insufficient time was allowed for a person facing that allegation to defend himself. As to that, Mr Moger for Soc Gen drew attention to the four representations that are sought to be pleaded. They are as follows: (i) the transit (shipment) of non-precious metals had been insured (under the 2006/7 insurance contract) on a declared and adjustable basis throughout the calendar year 2006; (ii) the estimated transit premium for non-precious metals for that calendar year was as set out below; (iii) the transit of non-precious metals was intended to be insured under the 2007/8 insurance contract being presented to the underwriter defendants; (iv) substantial premium was expected to be payable under the 2007/2008 insurance contract after declaration and adjustment for the transit of non-precious metals. The estimated transit

premium is a reference to the $377,732 appearing in the Non-Precious Metals Exposure 2006 sheet, whose contents are set out in the draft pleading.

102. Mr Moger submitted that as to (i), the transit of non-precious metals had indeed been insured under the 2006/7 contract and that, as to (iii), the transit of non-precious metals was intended to be insured under the 2007/2008 insurance contract since that is what the contract provides.

103. Accordingly, so he submits, the only representations that could in reality be relied on were the estimates of the premium. The estimate of premium was the only thing on which the underwriters could have relied in determining whether to take the business and, if so, at what premium. They would not, in making that decision, be relying simply on the fact that transit had been insured in the past and would be insured in the future. That estimate of future premium was a matter of expectation or belief, which was only untrue if it was not made in good faith: see section 21 (5) of the **Marine Insurance Act**.

104. Accordingly, as he submitted, good faith was in issue. If there was any doubt upon it, it was resolved by the fact that the draft pleading says

> "Insofar as necessary, the underwriter defendants will say that the said representations were not made in good faith and there was no basis for the same".

105. The fact that there is an allegation of want of good faith militates, Mr Moger submits, against allowing an amendment at this late stage. Further, there is, he submits, an inadequate explanation of the basis for the allegation of want of good faith that is relied upon.

106. The critical representation, it would seem to me, is in truth a representation of fact, viz that shipments had been insured in 2006, not in the sense that the policy provided that they could be insured, but in the sense that values had been declared for that purpose so that premiums were due, and that shipments were intended to be insured by like declarations in 2007. It appears from the disclosed material that neither of those were correct.

107. For those purposes, it does not seem to me to matter precisely why and how the brokers came to represent that transit insurance had occurred in the past and was intended to occur in 2007/8. That is what they did represent, and it appears not to have been true in respect of the past or, in the light of what was said by Mr de Brossard, in respect of the future.

108. Insofar as anybody's intention is relevant for these purposes, it would appear to me that of Mr de Brossard, who was the head of the non-precious metals department and who determined what would or would not be insured in relation to such metals.

109. In any event, the underwriters have made plain through their counsel that they are not alleging dishonesty against Mr Jugé. The contention, which they rely upon, insofar as necessary, is that the representations were not

made in good faith because there was no basis for them, and in the absence of any basis for them, their case is, they say, made out, since any expectation or estimate must have at least some basis in order to be valid.

110. As appears from the authorities, a major matter for consideration is whether either side will suffer prejudice if the amendment is allowed, what that prejudice will be, and who will suffer the more, according to whether or not the amendment is allowed or refused.

111. As to that, it seems to me material to note that the point which the underwriters seek to run is new to the action but not new to Soc Gen, who were aware of it at the latest by 20 February 2008. Further, Mr Jugé raised the question of mis-description in the 2006 summary in respect of non precious metals at the meeting of 12 March 2008. The point now sought to be raised is a point which had been perceived internally within Soc Gen and its brokers some time ago, even if, as I accept, that point has not been apparent to its lawyers.

112. Soc Gen submits that there is simply insufficient opportunity for their lawyers, whilst preparing in the few weeks leading up to trial in a case as heavy as this, properly to make the investigations which would be needed if the amendments are to be allowed, and that their preparations should not be interrupted at a critical juncture only a matter of ten days or so from the time when the opening is required to be delivered.

113. As to that, they say that if this amendment is allowed, it will be necessary to investigate and get to the bottom of a number of matters.

114. Firstly, it would be necessary to examine the good faith of Mr Jugé, who appears to have been largely responsible for the submission of the 2006 non-precious metal figures and to try to understand what gave him to understand that active cover of non-precious metal shipments was required. It was also said that he could not be found.

115. Secondly, it will be necessary, they submit, to examine the extent to which staff at Soc Gen knew about the representation of estimated shipment premiums in the 2006 document, and who was the "contact" to whom Mr Jugé referred.

116. Thirdly, it would be necessary to consider and investigate Mr Glover's understanding of the position. Mr Glover is not employed by Soc Gen and is, I am told, available for only a limited time. He only became available at all to Soc Gen following the settlement which followed the mediation. He had made a 100-page statement and he is now to be called by Soc Gen. But he has not been their witness until recently. There is a programme in place as to when he will be interviewed, and it is said that there is no spare capacity within that programme to embark on a new topic.

117. Fourthly, it is said that it would be necessary to consider the understanding held by Mr de Brossard and by Miss Engelhard, who is on maternity leave.

118. Fifthly, it will be relevant to enquire whether there has been some correction

to the brokers to tell them that transit was not to be covered. There is a note of a telephone conversation between Miss Engelhard and Mr Jugé on 14 March 2007, which is prior to the date when cover was bound. Her note has the phrase "Le client assume le transport", which suggests that she may have been saying that the customer undertook the risk or the insurance of the transport of gold.

119. Sixthly, it is necessary to consider the extent to which the topic of lack of declarations of non-precious metal transit cover was discussed with underwriters in March or April 2008 at renewal time, and whether, when it was discussed, underwriters lacked interest in the matter or whether they were given to understand that no transit cover had been sought or was intended to be sought, and have chosen to waive any right to rely on any such misrepresentation.

120. Lastly, it is said that it is necessary to see what Mr Bain, who has never been interviewed, can say.

121. The Soc Gen legal team are said not to have the time for this exercise, or time to review the trial documents with the point now sought to be argued in mind, or other documents which might be relevant but which are not in the trial bundles because their potential relevance was not apparent in the light of the issues as they stood at the time when the bundles were prepared.

122. It is, it is said, too late to introduce a new member to the team; it is not possible to complete the necessary work in time; and unfair to expect the additional work which this amendment would require to be carried out when that will distract those involved from that on which they are necessarily engaged already.

123. I am well aware of the difficulties facing solicitors and counsel in the run-up to a trial such as this, even though the trial bundles have all been assembled and the witness statements are in, together with the experts' reports. But I am not persuaded that Soc Gen, with the legal team at their command, will not have time to deal with the point now sought to be made, or that to allow the amendment would impose an intolerable burden.

124. The gravamen of the complaint in relation to non-precious metals is that, for whatever reason, insurers were told that in 2006 there had been insurance of shipments when there had not, and impliedly, that there would be similar shipments to be insured in 2007 when none was ever intended. The critical relevant facts in that respect are, as it seems to me, within a very short compass.

125. Mr Glover is already due to give evidence. I do not accept that there is not time to get him to deal with the new point, and also with what was or was not said or discussed at renewal time with underwriters. He and Mr Richard and Mr de Brossard are not due to give evidence until 16 and 17 May. Mr de Brossard is an employee. I doubt that there is much that Miss Engelhard could contribute, but it seems to me unlikely that she would

not assist her employer, even though she is on maternity leave. Mr Richard is somebody who has had some familiarity with this issue already.

126. I do not regard Mr Jugé's good faith as likely to be determinative. The representation was made on behalf of Soc Gen, and it would seem to me that it is Soc Gen's knowledge which counts. In addition, Clyde & Co say that they have located him. I have considerable doubt as to whether he would have been prepared to co-operate whenever he had been approached. He left Cap Marine within a year of the events with which this action is concerned. He has not produced a statement in the case as pleaded, even though there are many allegations relating to what he did or did not do.

127. There must, I think, also be some doubt as to what Mr Jugé and Mr Glover can say which would assist. Mr Jugé could explain how he came to put forward the 2006 document and what he was told by what contact. But I regard it as questionable whether an explanation of some internal muddle on the Soc Gen and their brokers' side of the fence will assist, given what crossed the line and was presented to the insurers.

128. Mr Glover may be able to provide useful evidence as to what was said to the insurers in 2008 at renewal time, but that would not appear to me to be a matter of extensive content.

129. Mr Moger told me that Soc Gen had not researched the facts relating to this amendment, taking the view that underwriters needed to apply to amend and that they should not divert themselves from preparation unless the application was granted. I can understand that, up to a point, although I confess that I am somewhat surprised if no inquiry has been made of Mr Richard, Mr de Brossard or Mr Glover as to the events of 2007 and 2008, particularly in the light of the fact that the point now in issue was the subject of discussion in March 2008 and that Clyde's' letters of 15 and 20 March of this year invited comment. Further, it would seem to me that the questions that needed to be asked, or at any rate, the critical ones, are not extensive.

130. In view of the lateness of the amendment, it would seem to me that if the underwriters are allowed to amend, Soc Gen should be allowed some leeway in the production of any supplementary statements, and that the court should be sympathetic, if it proved necessary, to Soc Gen reserving cross-examination of underwriters or experts in relation to the new points; or to the recall -- if that was really needed -- of witnesses.

131. I do not regard the fact that Soc Gen has settled with the brokers as a sufficiently good reason for refusing to allow an amendment. As to that, it is not readily apparent that the brokers have done anything wrong. It is noticeable that no criticism of either broker appears in the documentation that I have seen, and in particular, at or after the discussion at the meeting with Soc Gen in March 2008. Indeed, what followed that meeting was a letter of indemnity in their favour.

132. Even if the brokers did do something wrong, the misdescription point was known to Soc Gen when they settled, and they settled without any reservation in respect of it. I accept that the point was not apparent to the lawyers advising on the settlement, and I am told that Mr Richard, who had familiarity with the point, was not involved in the negotiations. But it was a point of which Soc Gen, as a whole, had some knowledge.

133. Mr Moger submitted that, if the point had surfaced earlier, the dynamics of the negotiation might have been different, which is possible, and at the least, that Soc Gen would have the brokers' answer to it. But there must have been some discussion of the issue in March 2008.

134. Mr Moger submitted that if an allegation of dishonesty or the like had been made, Mr Jugé might have been more responsive in producing evidence in order to rebut it. I am bound to say that I am sceptical of that.

135. Further, it would seem to me that the prospects of recovery are not bright. Cap Marine had 3 million euros in E&O cover. The settlement has used up 2 million of those euros. The balance is a not inconsiderable sum but it pales into insignificance by comparison with underwriters' exposure. Cooper Gay have, I was told, cover of £75 million, of which only a small portion has been used up in the settlement. However, any claim against Cooper Gay would appear to me very weak. They appear to have acted in accordance with their instructions.

136. Further, it appears to me disproportionate for underwriters, faced with a claim for around half a billion dollars, to be denied the chance of defending themselves, on the basis of what appears to be a clear representation, because Soc Gen may no longer have a claim against a small French broking company, which is unlikely to have very substantial assets other than the indemnity insurance which is two-thirds depleted.

137. Further, the waiver letter would appear to contain an obstacle to a claim. That may be surmountable, but in any event, it restricts the claim to the limits of the P&I cover.

138. There would also appear to be some doubt as to the extent to which, as a matter of French law, the producing broker owed relevant duties. The claim against the placing broker does not appear, on the material presently before me, to look promising.

139. It is also necessary, in my judgment, to consider the cogency and importance of the point sought to be raised. The complaint is of misrepresentation and non-disclosure which appears to relate directly to the basis upon which the premium was fixed. Underwriters say that it would be unjust if they were not allowed to advance that point when facing a claim of this size. There seems to me force in that contention. I do not ignore the fact that Soc Gen say that the other side of the coin is that it would be unjust for them to run the risk of losing on this point because they have insufficient time properly to deal with it. However, as I have indicated, I am not persuaded that they

will have insufficient time.

140. Taking all those matters into account and balancing the relevant considerations, including the balance of prejudice, that is to say who will suffer the more according to whether the application is granted or refused, I regard it as just to allow the amendment in order that the court may in future consider the validity of the contentions raised by it.

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