

## CHARTERED INSTITUTE OF ARBITRATOR'S SEMINAR

### The Hon Mr Justice Christopher Clarke

1. The perspective of a judge in respect of arbitrations is somewhat myopic. Broadly speaking, the judicial contribution in the field is three fold (i) the determination of appeals on legal points arising from the arbitration itself; (ii) the determination of contentions that proceedings have miscarried because of unfairness; and (iii) the determination of the law of England in other cases, since arbitrators however distinguished are not a source of law.
2. I want to say something this evening about the second and to give some observations about a few new cases in respect of the third.
3. Serious irregularity is defined in the Act as an irregularity of one or more of certain specified kinds which the Court considers has caused or will cause substantial injustice to the applicant. The bar for success under this head has been set – by statute and, in part, by judicial decision, pretty high. The arbitrators can make a mistake of fact or law; they can fail to arrive at the “right” answer; they can (like judges) decline to deal with every point. If there is said to be a serious irregularity the judge will have read to him the passage in the Departmental Advisory Committee report which led to the Act to the effect that substantial injustice only applies where what had happened cannot on any view be defended as an acceptable consequence of the choice of arbitration. .
4. And yet; and yet; there is a backstop; and it is desirable to try and determine where it lies. The arbitrators cannot, without notice to the parties, ignore an admission made by one of them; or decide a case on the basis of a point never argued or raised as an issue. And it goes a bit further than that: the way in which the case is argued may well limit the scope of the arbitrators’ ability to decide. Thus it was that in a case called *Van Der Giessen-De-Noord Shipbuilding Division BV v Imtech Marine & Offshore BV* [2008] EWHC 2904 I came to the conclusion that an award of € 2.5 million by way of interest, made under the general power to do so, could not stand when it was set at a rate higher than any rate claimed in the pleadings, or contended for in the argument between the parties. This had boiled down to whether interest was due under the Dutch Civil Code and if so when, the Dutch Code rates being much less than the 10% awarded by the tribunal. In relation to another aspect of the case I concluded that not open to the arbitrators to ignore the agreed position of the parties.
5. Nor can the arbitrators fail to deal with an essential issue. They can do so concisely; they do not have to set out all their reasoning since a failure to set out reasoning can

be remedied by an application for reasons. There may be a fine line between (a) an issue and (b) a line of reasoning but if the line is crossed the issue has to be dealt with.

6. On the second aspect, one of the things that from time to time goes through my mind is: why am I having to decide this now? Our law, particularly in the insurance field, has a distinguished pedigree. We have been a trading and insuring nation for centuries. We have a Marine Insurance Act which to a considerable extent codifies the law both of marine and non marine insurance. The books are replete with the judgments of legal giants on the subject. And yet, and yet, blow me down, some question arises for decision which, when it does, you think simply must have been decided ages ago.
7. Let me give an example of what I mean. I imagine that everyone here is familiar with the decision in **Lumberman's Mutual v Bovis Land Lease** [2005] 1 Lloyd's Rep 494 to the effect that it is a precondition for recovery under a legal liability policy that the insured has, by virtue of the provisions of a judgment, award or settlement agreement, had *ascertained* the specific cost to the insured of discharging its insured liability. The result would be that in the event of a global settlement agreement of £ x in respect of five claims which did not specify the settlement amount for any particular head of claim, an insured who was insured in respect of one such head could not recover at all. That was a decision reached in 2005. There must have been countless liability policies written over the decades: one was somewhat surprised therefore to find the point arising at the beginning of the 21<sup>st</sup> century.
8. The decision in **Lumbermans** has, I believe, now an only tenuous foothold on life. In **AIG Europe (Ireland) Ltd v Faraday Capital Ltd** [2006] EWHC 2707 (Comm) Morison J thought it was wrong and said that he was supported in this conclusion by most writers on reinsurance: O'Neill & Wolniecki, *The Law of Reinsurance* [2<sup>nd</sup> edition, 1<sup>st</sup> supplement paragraph 5-45A; Barlow Lyde & Gilbert, *Reinsurance Practice and the Law* [para 15.2.7.4]; Butler & Merkin, *Reinsurance Law* [para C-0009/1 and C-0009/2.
9. In **Enterprise Oil v Strand Insurance** [2006] 1 Lloyd's Law Reports 500, Aikens J declined (obiter) to follow it. He did so on the basis that the Court of Appeal had held in **MDIS Ltd v Swinbank** [1999] 1 Lloyd's Rep IR 516 that

*".. in the absence of express wording to the contrary, **an insured** under a liability policy can only recover against **his insurer** if it was actually under a liability to a third party upon a proper analysis of the law and the facts".*

He went on to say:

*"**an insurer** always has the right to challenge whether the insured's right to indemnity under the policy has been established. Therefore it has the right to challenge whether*

*the insured was, in fact and law, liable to the third party. It has the right to challenge the quantum of the liability. And it must also have the right to challenge whether, on the facts of the case, the insured's liability to the third party is a loss within the scope of the liability policy, whatever is stated in a judgment, award or settlement..”*

10. By parity of reasoning the **insured** must, as between himself and the insurer be able to claim that he was in truth liable in a certain amount in respect of some cause of action which comes within the policy, whatever the settlement agreement or the judgment says.
11. A variant of this problem arose in a fairly recent case called **Omega Proteins v Aspen Insurance UK** [2010] EWHC 2280 (Comm) which I decided in mid September of last year, in which again I asked myself the question: why has this not been determined before? A company called Northern Counties supplied Omega Proteins with animal carcasses. Omega Protein processed by products from these carcasses. When mad cow disease appeared the EC passed various regulations one of which divided animal material into categories. Category 1 material had to be labelled for disposal only. It had to be coloured bright blue or green and incinerated and burnt or buried in a land fill. The regulations specified the vertebral column of cattle aged over 24 months as specified risk material and specified risk material as Category 1, Originally the UK had the benefit of a derogation from these provisions which did not require the vertebral column of cattle to be classified as specified risk material until the beast was 30 months old.
12. In 2006 as a *quid pro quo* for lifting the export ban on British beef following the BSE crisis, the UK agreed to the removal of the derogation so that cattle aged over 24 months again became specified risk material. Northern Counties supplied material aged over 24 months to Omega Proteins and that material was mixed with other material so that all of it was contaminated. Northern Counties went bust. A string of actions down a chain of sellers and buyers was initiated at the end of which Omega sued Northern Counties. The claim, which was based purely in contract, was successful. Omega did not need to go beyond contract. They had no real difficulty in establishing that Northern Counties had supplied goods to them which were not fit for the purpose nor of satisfactory quality. Northern Counties had public liability cover. Omega claimed against the insurers under the *Third Party (Rights Against Insurers) Act 1930*.
13. The insurers said that the claim must fail. The policy had an express exclusion that the insurers would not indemnify the insured against any liability arising “*under any contract or agreement unless such liability would have arisen in the absence of such contract or agreement*”. The claim against Northern Counties on which the judgment against them had been based was only in contract. The judge made an award only in contract. That’s it, they said. We are not liable. The judgment “*definitively and conclusively determines the liability of the claimant for the purposes of establishing*

*whether there is liability under the policy*". Omega said that Northern Counties had in fact been liable to them both in contract and in tort.

14. Insurers were able to rely on a powerful dictum of Tomlinson J (as he then was) in **London Borough of Redbridge v Muniipal Mutual Insurance Limited** [2001] Lloyd's Rep IR 545. In that case the Pensions Ombudsman had made a series of determinations which obliged Redbridge to pay compensation to 14 of its former employees who had taken early retirement in reliance on misleading information given them by Redbridge. His determinations of maladministration were, by statute, binding as if they were county court judgements. Redbridge was insured against anything which it became legally liable to pay as compensation for loss or damage occasioned by any negligent act or omission.
15. The insurers refused an indemnity on the basis that the conduct of the former Chief Executive in putting together an early retirement package amounted to misconduct in a public office, which came within an exception..
16. Tomlinson J held that the insurers would not be entitled to rely on the exception if the Chief Executive was found at any subsequent trial to have been guilty of misconduct in a public office. The Ombudsman's determinations were findings of legal liability on the part of Redbridge to pay sums as compensation for loss or damage. The liability was a statutory liability imposed in consequence of maladministration. The Ombudsman had found that the lack of proper arrangements and failure to exercise proper supervision amounted to maladministration which the insurers had conceded must have been attributable to negligence of one or more of Redbridge's employees. But his determination made no mention of misconduct in a public office, which would have been an allegation wholly irrelevant to anything which the Ombudsman had to decide, and upon which he had no power to give any ruling whatever.
17. The dictum relied on was as follows:

*"The policies are policies of liability insurance and in principle one would expect the enquiry whether insurers are liable to begin **and end** with the question on what basis had liability been established. ... In my judgment it is **normally** neither permissible nor possible to look beyond or outside the four corners of the determination itself for the basis of the liability to which the insured has become subject. **Impermissible**, because if liability has been established by a court or tribunal of competent jurisdiction it is not open to another court in litigation between different parties to say that the basis of liability was in fact other than that which it was determined to be. **Impossible**, because if the liability is expressed by the primary judgment or determination to have been occasioned on one basis, it is simply not a logical possibility that the imposition of liability in fact arose from different facts and matters. It may*

*of course be possible to say that liability should not have been found in the light of the facts relied upon, or even that the finding of liability could have been justified on different or additional grounds. Neither of these possibilities however detracts to my mind from the proposition that in liability insurance one is concerned, as **between insured and insurers**, with established liability and thus with the basis on which liability was in fact established. Just as it does not avail an insurer check in a case where liability has been established by judgment to say that liability ought not to have been established so, also, in my view, it does not avail an insurer to say that liability might have been established on a different basis, or that the cause of the liability arising should be regarded as different from that stated."* [Bold added]

18. I had the misfortune to disagree with that reasoning for a number of reasons. Firstly, it seemed to me odd that, if Northern Counties had been negligent, something for which they were covered under the policy, the cover was ineffective if the person who sued him chose to limit his claim to a particular cause of action, a limitation which could be purely fortuitous. As the Court of Appeal pointed out in *MDIS v Swinbank* it could be the result of an ill-informed or purely tactical decision. If the insurers were right Northern Counties and hence Omega would have lost cover because the judge had reached a decision that they were liable in contract without ever having been asked to address his mind as to whether they were also liable in tort. Secondly, It would also mean, in effect re-writing the clause so as to make the insurers liable only if: "*the judge in the trial which established liability had expressed the view that liability would arise in the absence of contract*" or something to that effect. Thirdly, it appeared to me to involve a misinterpretation of a sequence of decision.
19. The problem that arose in each of these cases was, I think this. When a judgment or award is made against, or an agreement is made with, the insured, it would be convenient if it could be regarded as settling everything i.e. (i) whether the insured was liable; (ii) for what heads of claim; (iii) for what amounts under what heads. In practice this does not happen and , even if it does the allocation may be unjustifiable. But as between the insured and the insurer the court is concerned with the actual position (i.e. what the court in the dispute between those two parties decides is the actual position): so that any judgment or agreement between parties other than those two is not, unless the parties have agreed otherwise, conclusive in favour of or against either insured or insurer.
20. It is not the prime function of the courts to supply material for arbitrations. But the decision to which I refer, unless reversed by a higher authority, will have the happy effect that insures and insured, whether in arbitration or litigation will have full liberty to dispute between themselves not only the construction of the policy but whether the insured was liable to a third party, without being bound by the decisions of others – or the lack of them.

