THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

NESSIM

Claimant

and

NADER

Defendant

ORDER WITH REASONS OF JUSTICE MICHAEL BLACK KC

UPON the Defendant's Application No. CFI-013-2024/1 dated 25 June 2024 seeking a stay of proceedings pending a final and binding (and non-appealable) judicial determination (the "Application")

AND UPON reading the first witness statement of Neil dated 5 July 2024 with the accompanying exhibit

AND UPON reading the second witness statement of Norwood dated 12 July 2024 with the accompanying exhibit

AND UPON reading the skeleton arguments filed on behalf of the Claimant and the Defendant submitted on 23 July 2024

AND UPON hearing Leading Counsel for the Claimant and the Defendant at the hearing held on 25 July 2024 (the "Hearing")

IT IS HEREBY ORDERED THAT:

1. The following shall be struck out from the Particulars of Claim:

   (a) paragraph 10;

   (b) the first sentence of paragraph 11; and

   (c) the words "clause 11 and/or 22 of the Cl.280 as incorporated into Cl.281 and therefore the Reinsurance Contract, alternatively pursuant to" in paragraph 26.

2. The Claimant shall have permission (if so advised) to amend the Particulars of Claim to replead its case that the Federal laws of the UAE are the governing laws of the Reinsurance Contract no later than 14 days following the date of this Order.

3. The Application to stay or adjourn these proceedings in whole or in part is dismissed.

4. The parties are directed to agree directions leading to trial of these proceedings in or about April 2025 with liberty to apply to the Court (reserved to Justice Michael Black KC) in default of agreement.

5. The costs of the Application shall be costs in the case.

Issued by:
Delvin Sumo
Assistant Registrar
Date of issue: 6 August 2024
At: 8am

SCHEDULE OF REASONS

INTRODUCTION

1. By an Application Notice issued on 25 June 2024 (the "Application"), the Defendant makes application for orders that:

   (a) these proceedings be stayed generally, or adjourned generally, under Rule 1.6 and/or Rule 4.2(6) of the Rules of the DIFC Courts (the "RDC"), pending a final and binding (and non-appealable) judicial determination of the latest of (a) the DIFC Court Proceedings that are pending between the Claimant and Nephi and/or its subsidiary or affiliated companies (the "Underlying DIFC Proceedings") and/or (b) the Sharjah Court proceedings that are currently pending between the same parties but are currently stayed (the "Sharjah Proceedings") (the "Stay Application"); and/or

   (b) paragraphs 10 to 11, the final clause of paragraph 25, and/or paragraph 26, as well as paragraph (2) of the Prayer, to the Particulars of Claim be struck out, under RDC 4.15, 4.16(1) and 4.16(2), on the basis that they disclose no reasonable grounds for the allegations or

claims contained therein, and/or constitute an abuse of the Court's process, and/or are likely to obstruct the just disposal of these proceedings, in circumstances where the Reinsurance Contract is clearly governed by English law (and the Claimant itself has alleged and relied upon the fact that the Reinsurance Contract is governed by English law in the Underlying DIFC Proceedings) (the "Strike-Out Application"); and

(c) the Claimant should pay the Defendant's costs of these applications (and the costs of those aspects of the Particulars of Claim that are struck out).

THE FACTUAL BACKGROUND

2. The Claimant is an insurance company incorporated in Sharjah, United Arab Emirates (the "Insurer"). The Defendant is a syndicate of reinsurers and is incorporated in the Kingdom of Bahrain (the "Reinsurer").

3. The Insurer entered into 2 insurance policies: (1) a Marine Hull & Machinery Policy and (2) a Marine Hull War Policy (the "Underlying Policy"). The insured under the Underlying Policy was Nephi, a company incorporated in Dubai, together with its subsidiaries and/or affiliated companies and/or other interests as named for their respective rights and interests, which included Nessim, a Liberian company ("the Insured"). Nessim was the owner of a tanker, (the "Vessel"). The Underlying policy insured the Vessel against Hull War Risks, Hull War Protection and Indemnity and Crew War Protection and Indemnity for the period from 10 June 2018 to 9 June 2019. The sum insured was USD 70 million.

4. By a contract of reinsurance, the Reinsurer participated on a facultative basis in the 100% reinsurance of the Underlying Policy (the "Reinsurance Contract"). It is common ground that the Reinsurance Contract was evidenced by a cover note for the underwriting year 2015 (the "Cover Note") and but there is an issue between the parties as whether a document entitled "Facultative Reinsurance Placement " dated 28 June 2018 ("the Placement Document"), contains or evidences terms of the Reinsurance Contract.

5. The Reinsurer only reinsured the Underlying Policy and therefore these proceedings only relate to that policy and the Reinsurance Contract.

6. The Insurer pleads that there were terms of the Reinsurance Contract:

"(a) As set out in the Cover Note:

COVER: INSTITUTE WAR & STRIKE CLAUSES HULL TIME DATED 1/11/95 ... PIRACY, VIOLENT, THEFT AND BARRATRY DATED 17/10/2005 SUBJECT TO COMPLIANCE OF BMP 2010 AND PIRACY WARRANTY HULL

.

JURISDICTION: UNITED ARAB EMIRATES

(b) the Institute Time Clauses Hulls dated 1/11/95 (Cl. 280) in relevant part, incorporated into the Institute War & Strike Clauses Hull Time dated 1/11/95 (Cl.281), by Clause 2 of Cl.281, provide

11. DUTY OF ASSURED (SUE AND LABOUR)

11.1 In case of any loss or misfortune it is the duty of the Assured and their servants and agents to take such measures as may be reasonable for the purpose of averting or minimising a Joss which would be recoverable under this insurance

11.2 Subject to the provisions below and to clause 12 the Underwriters will contribute to charges properly and reasonably incurred by the Assured, their servants or agents for such measures ...

22. DISBURSEMENTS WARRANTY
22.1 Additional insurances as follows are permitted:
22.1.1 Disbursements ... ."

7. On about 18 November 2020, the Insured advised the Insurer of a claim under the Underlying Policy, stating, among other things, that the Vessel had disappeared *"within the insurance cover period."* The Insurer says that this document together with those attached to it were sent to the Reinsurer under cover of an email dated 6 January 2021. The Reinsurer acknowledges that it received an email with certain attachments on or about 6 January 2021.

8. By letter dated 25 October 2021, the Insured gave formal notice of a claim in respect of the loss of the Vessel ("the Notice"). In the Notice it was stated:

(a) on 6 November 2018, the Insured had employed a company to provide security services for three vessels, including the Vessel;

(b) towards the end of November 2018, the Insured had arranged for the Vessel to be *"anchored at borders of outer port of Fujairah, UAE"*;

(c) to the best of the Insured's knowledge the Vessel was anchored in May 2019 at 25°38.5'N / 056°44.4'E and this was the last known location of the Vessel;

(d) on 12 May 2019, the UAE Coast Guard had written to the Federal Transport Authority Land & Maritime requesting its assistance in towing the Vessel together with two other vessels to the nearest port *"due to risks posed to vessels in that area."* The Insured claimed not to be aware of this contemporaneously;

(e) in mid-November 2019, the Insured had become aware that the security company was unable to access the three vessels, including the

Vessel; and while it had been able to locate two of them at Khor Fakkan anchorage no information had been provided as to the whereabouts of the Vessel;

(f) the Vessel appeared to have been located in Iran, since mid-May 2019 and to have been converted into a Naval Auxiliary Vessel in the service of the Iranian navy; and

(g) the conclusion to be drawn was that the Vessel was the subject of a *"capture, seizure, arrest, restraint, detainment, confiscation or expropriation by persons connected with the Iranian government and/or navy"* and cover under the Underlying Policy had been triggered.

9. The Insurer says that the Notice was sent to the Reinsurer by email on 3 November 2021. The Reinsurer acknowledges that it received an email with certain attachments on or about 3 November 2021

10. On or about 7 November 2021, the Insured filed a complaint with the UAE Insurance Authority under Article 110 of Federal Law no. 6 of 2007 (as amended) claiming that under the Underlying Policy it was entitled to an indemnity from the Insurer in the amount of USD 70 million, being the agreed value of the Vessel (the "Complaint"). The Complaint was then referred to an Insurance Dispute Resolution Committee (the "IDRC").

11. On 10 November 2021, Solicitors acting for the Insurer wrote to the Insured notifying the Insured that the Insurer was avoiding the Underlying Policy and the claim was not covered under the policy on the following grounds:

(a) Non-disclosure of matters that would have caused the Insurer to decline to underwrite the policy, namely that the Vessel had ceased trading and was *"cold-stacked"*;

(b) The Insured was aware of these arrangements at the time it approached the Insurer to request the renewal of insurance cover for 2018/2019 and at the time the 2018/2019 cover was concluded;

(c) The Vessel's classification was withdrawn in/around February 2016 by Lloyds Register and the Liberian Registry had de-registered the Vessel as a result. The Insured ought to have disclosed the declassification of the Vessel at the time of the policy's renewal;

(d) The Insured the failed to adhere to its ongoing obligations to disclose any and all material information relevant;

(e) Losses due to cold-stacking of vessels were not covered the policy;

(f) The Insured failed to provide information with respect to the Vessel's whereabouts or movement and/or its awareness of the Vessel's whereabout or movements between May 2019 to December 2019;

(g) In breach of the terms of the policy the Insured failed to notify the Insurer of its claim within the required twelve (12) month period and therefore the Insurer had an automatic right to avoid cover;

(h) The Insured's failure to notify the Insurer of its claim "promptly" following its first awareness of the Vessel's disappearance prejudiced the Insurer's ability to investigate the claim and make a potential recovery;

(i) The Insured failed to act as a prudent uninsured and take all necessary steps to investigate the Vessel's alleged disappearance in a timely manner;

(j) The Insured failed to conduct appropriate internal and external investigations to determine the circumstances surrounding the Vessel's disappearance, while also failing to notify the Insurer of the same. In doing so the Insured had prejudiced the Insurer's position to its detriment;

(k) Further to the Insured's failure to disclose the material information relating to the Vessel's classification, this failure was a breach of the warranties contained in the policy regarding the Vessel's classification;

(l) At the time of renewing the policy, the Insured confirmed that the Vessel's classification was in the process of being renewed and confirmed this in the schedule sent to the Insurer at the time or renewal. This was false and incorrect information which was misrepresented to the Insurer during the relevant policy period; and

(m) The Insured failed to pay the premiums due under the policy and was thereby in breach of condition.

The Solicitors informed the Insured that the Insurer was taking steps to protect its position by commencing proceedings in the DIFC Courts for a declaration of non-liability.

12. On 11 November 2021, the Insured commenced the Underlying DIFC Proceedings. The Insured challenged the jurisdiction of the DIFC Courts.

13. On 27 April 2022 the DIFC Court of First Instance dismissed the Insured's jurisdiction challenge. The Reinsurer draws the Court's attention to the submission made by the Insurer summarised at paragraph [24] of the judgment of Justice Roger Giles that:

"The Policies are in English, and the governing law is English law. They incorporate a number of standard London marine market clauses, and in particular Institute Clauses. Nessim's submissions included they are on back-to-back terms with its reinsurance, also governed by English law, but I do not think I can pay regard to this as a circumstance known to Nephi.)."

14. On 13 June 2022, the IDRC dismissed the Insured's Complaint.

15. On or about 7 July 2022, the Insured initiated the Sharjah Proceedings.

16. On 19 April 2023, the DIFC Court of Appeal dismissed the Insured's challenge to the jurisdiction of the DIFC Courts over the Underlying DIFC Proceedings.

17. On or about 20 September 2023, the Sharjah Court stayed the Sharjah Proceedings in favour of the Underlying DIFC Proceedings.

18. On 12 October 2023, the DIFC Court of Appeal dismissed an application by the Insured to refer the Underlying DIFC Proceedings to the Union Supreme Court.

19. On 25 March 2024, Justice Robert French gave directions in the Underlying DIFC Proceedings, including that:

(a) Production of documents as to which no objection is made should have occurred by 2 May 2024;

(b) Witness statements and witness statements in reply should have been exchanged by 6 June and 4 July 2024 respectively; and

(c) Expert evidence and expert evidence in reply should be exchanged by 25 July and 29 August 2024 respectively.

20. The Reinsurer says that as matters currently stand, the Insurer has not disclosed copies of all the documents produced by the parties in the Underlying DIFC Proceedings, or its draft or final witness statements, or draft or final expert reports. It does not appear from the papers before me that the Reinsurer has made any application that Insurer does so.

21. It is common ground that the trial of the Underlying DIFC Proceedings has been fixed for 16-18 September 2024.

THESE PROCEEDINGS

22. On 13 February 2024, the Insurer commenced the current proceedings against the Reinsurer claiming that:

(a) The Courts of the DIFC had jurisdiction over the proceedings;

(b) The governing law of the Reinsurance Contract is the Federal laws of the UAE;

(c) Pursuant to clause 11 and/or 22 of the Cl.280 as incorporated into Cl.281 and therefore the Reinsurance Contract, the Reinsurer is liable to indemnify the Insurer in respect of (a) commencing the Underlying DIFC Proceedings, pursuing the same and making, applications in them, (b) responding to the Complaint, and (c) defending the Sharjah Proceedings;

(d) Alternatively, applying Article 2 of Federal Law No. 18 of 1993 (the "Commercial Code") to the interpretation of the Reinsurance Contract, there is an implied term of the Reinsurance Contract that the Reinsurer shall pay all reasonable costs of the Insurer incurred in defending claims brought against it by the Insured and/or taking such action as is reasonably necessary to limit or avert its potential liability to the Insured, it being a custom or practice in the UAE that such costs are payable by a reinsurer, particularly in circumstances where the reinsurer has agreed - as the Reinsurer has in this case - to reinsure 100% of the risk. Under the implied term the Reinsurer is liable to indemnify the Insurer as set out in the preceding sub-paragraph;

(e) The Insurer is entitled to the following:

(i) A declaration that, to the extent that it is found liable to the Insured under the Underlying Policy, it is entitled to be indemnified by the Defendant in like amount, together with all costs and expenses incurred by it in connection with seeking to avoid and/or limit its liability under the same,

(ii) A declaration that it is entitled to be immediately indemnified against all costs and expenses incurred in proceedings brought by or against the Insured in respect of the Underlying Policy; and an indemnity in respect of the same;

(iii) To the extent that the Insurer is found to have any liability to the Insured under the Underlying Policy, an indemnity; and

(iv) Interest and costs.

23. On 25 April 2024, the Reinsurer served its Defence. The Reinsurer denied that the Placement Document either contained or provided any admissible or reliable evidence of the terms of the Reinsurance Contract. The Reinsurer does not contest the jurisdiction of the DIFC Courts but denies that the governing law of the Reinsurance Contract is the Federal laws of the UAE, and/or that the Reinsurance Contract is subject to Federal Law No. 18 of 1993 (the Commercial Code). It avers that the applicable law is that of England and Wales.

24. The Reinsurer denies that it was either an express term, or an implied term, of the Reinsurance Contract that it should pay any or all of the Insurer's costs (whether reasonably or properly incurred, or at all), or that there is a relevant custom or practice prevailing in the relevant market in this respect.

25. Mr Neil of the Insurer's Solicitors gives detailed evidence in these applications concerning the negotiation of the Reinsurance Contract in which he was not personally involved. He also gives evidence of market practice. Leading Counsel for the Reinsurer pointed to Practice Direction No. 1 of 2016, concerning the content of witness statements filed by legal practitioners. I recently observed in Nancy v Narcissa [2023] CFI 098 (8 July 2024) that the Practice Direction does not provide for a blanket prohibition on lawyers providing witness statements on behalf of their clients (unless the contents are formal or uncontroversial, or the witness statement is being filed solely to introduce documents), but rather the Court retains a discretion as to the weight (if any) it will give to controversial statements made in evidence given by legal practitioners. In the present case, I need only have regard to the fact that there is a dispute between the parties as to the terms of the Reinsurance Contract, particularly as to the governing law. So far as market practice is concerned, both parties accept that, if and insofar as it becomes necessary for the Court to consider

the same, it would have to hear expert evidence.

26. It is the Reinsurer's case that the Insurer has no legal, contractual, statutory, or equitable right to be indemnified by the Reinsurer against any sums that the Insurer might be liable to pay to the underlying Insured, unless and until it is established by a final and binding judgment of a court of competent jurisdiction that:

(a) the underlying Insured has a valid claim under the Underlying Policy;

(b) the judgment was not entered in breach of an applicable jurisdiction or arbitration agreement;

(c) the Insurer took all proper defences and there is no possibility of appeal;

(d) the judgment was not manifestly perverse; and

(e) the Insurer has a valid claim against the Reinsurer under the Reinsurance Contract.

27. Further, the Reinsurer denies that the Insured has any right to the indemnity claimed in respect of any legal or other costs or expenses.

28. In any event, the Reinsurer denies liability under the Reinsurance Contract on the following grounds:

(a) The Insured misrepresented and/or failed to disclose to the Insurer, and then the Insurer appears to have misrepresented and/or failed to disclose to the Reinsurer, in turn, prior to entering into the Reinsurance Contract with effect from 10 June 2018, the material facts that:

(i) the Vessel was not *`trading'*, but that it had ceased trading and was cold-stacked in a high-risk zone in international waters offshore Khorfakkan, UAE;

(ii) the Vessel's classification and/or registration had been withdrawn or cancelled by Lloyds' Register and the Liberian Shipping Register as of February 2016, and/or the Vessel had never been properly classed by Bureau Veritas;

(b) As a result, the Underlying Policy is void ab initio, and the Reinsurance Contract is also void, or voidable, in turn;

(c) the Insured is not entitled to any insurance coverage for the Vessel, and the Insurer is not entitled to any reinsurance coverage for the Vessel, given the facts that the Vessel was not trading (but had been cold-stacked), and/or was not classified or registered, in breach of warranties on the part of the Insured;

(d) It is not admitted that the loss of the Vessel was caused by an insured peril or that the alleged loss took place during the period of the Reinsurance Contract (i.e. between 19 June 2018 and 9 June 2019), and not after 10 June 2019;

(e) The Insured, and/or the Insurer, have acted in breach of Clause 4 of the Institute War & Strikes Clauses Hull Time dated 1/11/95 (CL. 281), by failing to give notice to the Defendant promptly (and/or in any event within twelve months) after the date on which the underlying Insured, or the Insurer, or their respective agents, became aware, or should have become aware, of the alleged accident suffered by the Vessel. As a result, the Reinsurer is automatically discharged from any liability for any claim in respect of or arising out of any accident or any loss or damage suffered with respect to the Vessel;

(f) Clause 5.1 of the Institute War & Strikes Clauses Hull Time dated 1/11/95 (CL. 281) contains express exclusion clauses, including clauses excluding "*loss damage liability or* expense *arising from . the operation of ordinary judicial process, failure to provide security or to pay any fine or penalty or any financial cause"*;

(g) The Reinsurer will rely on any and all additional coverage defences available to the Insurer against the Insured;

(h) If the Insurance and Reinsurance Contracts are governed by UAE law any claims are time barred under Article 399 of the UAE's Federal Law on Maritime Commercial Law (No. 26 of 1981), since they have been brought more than two years after the alleged date upon which the Vessel disappeared and/or more than two years after the underlying Insured first made a claim against the Insurer.

29. On 17 May 2024, the Insurer served its Reply. The Insurer alleges, and the Reinsurer disputes, that the Reinsurance Contract included a *"follow the settlements"* or *"follow the fortunes"* clause as evidenced by the Placement Document. The Insurer claims that it is entitled to be indemnified against sums that:

(a) it agrees to pay the Insured in a compromise of the claim under the Underlying Policy, as long as such payment is made honestly and with due care and skill;

or

(b) are found to be due by either the DIFC Court in the Underlying DIFC Proceedings or the Sharjah Court in the Sharjah Proceedings in a final binding judgment.

30. The Insurer denies:

(a) misrepresentation or non-disclosure on the grounds that it was wholly unaware that (1) the Vessel was not trading but was cold-stacked, and (2) the Vessel was not classified;

(b) breach of Clause 4 of the Institute War & Strikes Clauses Hull Time dated 1/11/95 (CL. 281); and

(c) that Article 399 of the UAE Federal Law on Maritime Commercial Law (No.26 of 1981) applies to reinsurance contracts; without

prejudice to that denial, the Insurer makes other submissions it is not necessary to record for present purposes.

31. A Case Management Conference ("CMC") was listed for 27 June 2024. The Insurer proposed a procedural timetable leading to trial no earlier than 8 weeks after 6 February 2025, i.e. 3 April 2025. The Reinsurer foreshadowed its applications and served its Application Notice on 25 June 2024. Having heard the parties on 27 June 2024, H.E. Justice Nassir Al Nasser adjourned the CMC pending the outcome of the Application and gave directions for filing evidence and skeleton arguments and identified a hearing window.

32. On the basis of the pleadings a non-exhaustive list of the issues in these proceedings appears to me to include the following:

(a) What documents contain or evidence the Reinsurance Contract? This is a fact-sensitive enquiry;

(b) What is the governing law of the Reinsurance Contact? It seems to be common ground that this should be determined according to DIFC conflict of law principles as the *lex fori*;

(c) Is the Reinsurance Contract void or voidable for misrepresentation or non-disclosure under the applicable law? This is a mixed question of fact and law. All further issues are dependent on a negative answer to this issue;

(d) If the Reinsurance Contract is governed by UAE law, are the Insured's claims against the Insurer and/or the Insurer's claims against the Reinsurer time barred under Article 399 of the UAE's Federal Law on Maritime Commercial Law (No. 26 of 1981), since they have been brought more than two years after the alleged date upon which the Vessel disappeared and/or more than two years after the Insured first made a claim against the Insurer? This is a mixed question fact and law;

(e) What are the express and implied terms of the Reinsurance Contract? The interpretation and implication of terms will depend on the applicable law. Whether UAE or English law applies, the issue will require some evidence, albeit more if the former is the case;

(f) Is the Insurer entitled to any reinsurance coverage for the Vessel, given the facts that the Vessel was not trading (but had been cold-stacked), and/or was not classified or registered, in breach of warranties on the part of the Insured. These are mixed questions of fact and law;

(g) Pursuant to clause 11 and/or 22 of Cl.280 as incorporated into Cl.281 and therefore the Reinsurance Contract, alternatively pursuant to an implied term, is the Reinsurer liable to indemnify the Insurer in respect of all reasonable steps taken for the purpose of averting or minimising loss under the Reinsurance Contract? This is initially a question of law and (possibly) expert evidence of custom and practice, but if the answer is in the affirmative, it will be necessary to consider the steps taken and whether they fall within the indemnity;

(h) Is the Insurer's claim for costs and expenses expressly excluded by Clause 5.1 of the Institute War & Strikes Clauses Hull Time dated 1/11/95 (CL. 281)? This is a question law;

(i) Will the Reinsurance Contract respond unless and until the liability of the Insurer to the insured is established by a final and binding judgment of a court of competent jurisdiction? Even if the Insured obtains such judgment, is it necessary for the Insurer to show (a) it took all proper defences and there is no possibility of appeal and (b) the judgment was not manifestly perverse. These latter issues are questions of fact and (possibly) expert evidence;

(j) Was the alleged loss of the Vessel caused by an insured peril and, if so, did it place during the period of the Reinsurance Contract (i.e. between 19 June 2018 and 9 June 2019), and not after 10 June 2019? The anterior question is a mixed question of fact and law, the latter question one of fact;

(k) Was the Insurer in breach of Clause 4 of the Institute War & Strikes Clauses Hull Time dated 1/11/95 (CL. 281), by failing to give notice to the Reinsurer promptly (and/or in any event within twelve months) after the date on which the Insurer, or its respective agents, became aware, or should have become aware, of the alleged accident suffered by the Vessel? If so, is the Reinsurer automatically discharged from any alleged liability for any claim in respect of or arising out of any alleged accident or any alleged loss or damage suffered with respect to the Vessel? The former is a question of fact, the latter one of law;

(l) If the Insurer is entitled to any indemnity, what is the quantum of the indemnity and is it reasonable? This is a question of fact.

THE STRIKE-OUT APPLICATION

33. It is logical to address the Strike-Out application before the Stay Application as it is necessary to understand what issues remain in contention in order to consider whether or not they should be stayed.

The Reinsurer's Position

34. The Reinsurer says that its Strike-Out application turns on a simple, but fundamental, point; namely it is both hopeless and abusive for the Insurer to contend that that the Reinsurance is subject to UAE law when it is plainly subject to English law.

35. The contention is hopeless, it is said, because it is inconsistent with the documents:

(a) There is little or no link with the UAE. While the Nephi is based in the UAE the actual ship-owning company is based in Liberia;

(b) While the Insurer is based in Sharjah, the Reinsurer is based in Bahrain and is a syndicate of 190 companies from jurisdictions throughout the Middle East reinsuring war risks on a worldwide basis across the entire Arab region by reference to the Institute War and Strike Clauses. It is therefore inherently unlikely that the Reinsurer would have intended the Reinsurance Contract to be governed by UAE law;

(c) The Underlying Policy was subject to English Law; and

(d) While (unlike the Underlying Policy) the reinsurance Cover Note (which is written in the English language) did not contain an express choice of law, under "TRADING AREA" it referred to "WORLDWIDE SUBJECT TO LONDON MARKET WAR RISK TRADING WARRANTIES AND CURRENT EXCLUSIONS DATED 08.12.2011" and under "COVER" it referred to "INSTITUTE WAR & STRIKES CLAUSES HULL TIME DATED 1/11/95 (CL. 281)" which expressly incorporates The Institute Time Clauses-Hulls 1/11/95. Both London Market wordings are expressly stated to be "subject to English law and practice".

36. It is said that the assertion that the Reinsurance Contract is governed by UAE Law is not only wrong but it is also abusive of the Insurer to make or pursue that allegation because:

(a) When resisting the Insured's challenge to the jurisdiction of the DIFC Courts, the Insurer asserted that a factor to be taken into account by the Court was that the Underlying Policies were governed by English law incorporating a number of standard London marine market clauses and were back-to-back with the Insurer's reinsurance which was also governed by English law. In the event the Court did not have regard to the assertion concerning the law governing the reinsurance as it was not something that would have been known by the Insured and therefore could not have influenced its intentions;

(b) In answer, the Insurer says that the assertion was made in error. However, the Reinsurer points out that it emanated from Leading Counsel's written submissions and suggests that it is unlikely that it was a mistake; and

(c) In contrast to the position as between Insured and Insurer, the Insurer knew that the Reinsurance retroceded to the London Market.

37. The Reinsurer notes that the significance of the application of English law is that it is settled law that an insurer is not entitled to recover any of its legal costs or defence costs relating to the underlying insurance from its reinsurer, absent express terms clearly providing for such reinsurance coverage in the reinsurance contract - which are not present in the instant case. See *Scottish Metropolitan Assurance Co Ltd v Groom* (1924) 19 Ll L Rep 131, 20 Ll L Rep 44; *Insurance Co of Africa v SCOR (UK) Reinsurance Co Ltd* [1985] 1 Lloyd's Rep 312; *Baker v Black Sea & Baltic General Insurance Co Ltd* [1998] 1 WLR 312; and *Wasa International Insurance Company Ltd. v Lexington Insurance Co* [2007] EWHC 896 (Comm).

The Insurer's Position

38. The Insurer submits that the Reinsurer's position is flawed because:

(a) In the absence of any application for immediate judgment on the governing law of the Reinsurance Contract, the governing law remains an issue for trial. It suggests that the Reinsurer has not sought to strike out paragraphs 10, 11 and 12 of the Particulars of Claim in which the Insurer pleads that the applicable law is the Federal laws of the UAE;

(b) The Reinsurance Contract is not contained in a single document; and there is a dispute as to its terms. There are issues between the parties as to (i) what documents evidence the Reinsurance Contract and (ii) what are the terms of the Reinsurance Contract. In order to resolve these issues, the Court will have to hear oral evidence from those involved in negotiating and agreeing it;

(c) The Insurer has a realistic prospect of establishing that UAE Federal law is the applicable law of the Reinsurance Contract. The Insurer relies on Article 8 of DIFC Law No. 3 of 2004, the Law on the Application of Civil and Commercial Laws in the DIFC ("Article 8 of Law 3/2004") as providing a hierarchy for determining the applicable law (see the judgment of the DIFC Court of Appeal in *The Industrial Group Limited v Abdelazim EL Shikh EL Fadil Hamid* [2022] DIFC CA 005 and CA 006 at paragraph [127]). It is the Insurer's position that UAE Federal law was agreed between all relevant persons concerned in the matter (Article 8(2)(c) of Law 3/2004) in that the parties agreed that the courts of the UAE would have exclusive jurisdiction over any dispute arising out of the Reinsurance Contract connoting an implied choice of UAE Federal Law. This, says the Insurer, requires a factual investigation including as to the negotiations that took place between the parties to the Reinsurance Contract (see Aikens J in *Dornoch Ltd & ors v The Mauritius Union Assurance Company Ltd & ors* [2005] EWHC 1887 (Comm) at paragraph [60]);

(d) Alternatively, the Federal Laws of the UAE are most closely related to the facts of, and persons concerned in, the matter (Article 8(2)(d) of Law 3/2004). In order to consider to what place the facts and persons concerned in the matter are most closely related, it will be necessary to hear evidence. There is no basis for contending that Reinsurance Contract is most closely related to England:

(i) the parties are based in the UAE (in the case of the Insurer) and Bahrain (in the case of the Reinsurer, although its members are from all over the Middle East),

(ii) the Reinsurance Contract was concluded by representatives of the parties who were based in these respective countries,

(iii) the risk reinsured under the Reinsurance Contract is vessels owned by Nephi, an entity incorporated in the UAE. Those vessels are: 3 tugboats flagged in the UAE, 4 crew boats flagged in the UAE, 3 pleasure boats flagged in the UAE, 3 tankers flagged in Liberia, a tanker flagged in Palau and a tanker flagged in Panama;

(e) None of the matters relied on by the Reinsurer to establish that English law governs the Reinsurance Contract is conclusive:

(i) The Cover Note is not the Reinsurance Contract. It was signed three years before the conclusion of the Reinsurance Contract and only evidences some of its terms,

(ii) The language of a contract does not indicate a choice of law. It is common for contracts governed by UAE law to be written in English;

(iii) There are no specific reinsurance market wordings in the Reinsurance Contract; the market wordings are incorporated into the Underlying Policy;

(iv) The reference to London law and practice in the market clauses incorporated into the Underlying Policy does not, of itself, point to an express choice of English law in the Reinsurance Contract;

(v) The Reinsurer was unaware of the governing law of the Underlying Policy;

(vi) In any event, in *Forsikringsakfieselskapet Vesta v Butcher* [1989] AC 852 at page 896, Lord Griffiths said that the terms of a contract of reinsurance define the risk the reinsurer will accept, the terms of a contract of insurance will contain terms inappropriate to a contract of reinsurance as it addresses different subject matter. In *Gan Insurance Co Ltd & Others v Tai Ping Insurance Co Ltd* [1999] 1 IRLR 472, page 479 the English Court of Appeal followed Vesta v Butcher in finding that even if insurance and reinsurance polices were back-to-back it did not mean they were subject to same governing law. In *AIG Europe SA v QBE International Insurance Limited* [2001] 2 Lloyd's Rep 268 at paragraph [26] the English Commercial Court recognised that even if there are general words in the reinsurance contract incorporating the terms and conditions of the underlying policy it does not necessarily follow that clauses ancillary to the substance of the contract (for example jurisdiction clauses) are agreed;

(f) Even if English law applies, the Insurer claims that it has a realistic prospect of showing that it is entitled to be indemnified against its legal and defence costs. The authorities cited at paragraph 37 above do not establish that, as a matter of English law, legal costs and expenses are irrecoverable; they establish, applying the English law test for the implication of a term, that a term to the effect that an insurer can recover costs and expenses may be implied on the basis of custom or market practice. In Baker at page 984E, Lord Lloyd of Berwick emphasized the necessity to establish trade practice by evidence. In Wasa at paragraph [56] it was held that it is necessary to show an express provision or "universal market practice" to the effect that reinsurance contracts provide cover for expenses incurred by the reinsured in defending claims. In the present case, the Insurer contends for both. Whether or not there is a universal market practice in the UAE will have to be established by expert evidence;

(g) There has been and is no abuse of process in the Insurer contending that UAE law governs the Reinsurance Contract. The Insurer claims that the allegation is hopeless as -

(i) There is a disconnect between the alleged abuse and the strike out application: the application is made to strike out the claim for a declaration and an indemnity for legal/defence costs. However, the alleged abuse is in claiming that UAE Federal law governs, which, as set out above, is not the subject of the strike out;

(ii) the assertion in evidence submitted by the Insurer on the jurisdiction challenge brought by Nephi in this Court that the Reinsurance Contract was governed by English law was not relied upon by Justice Roger Giles in reaching his conclusion on jurisdiction;

(iii) the assertion was made in error;

(iv) the Reinsurer is not prejudiced or otherwise adversely affected by either the original assertion or the correction of the position;

(v) there is nothing abusive about a change in position and it often occurs as parties become more familiar with the facts and circumstances of a dispute. It is right that courts decide cases on the correct basis, including by reference to the correct system of law;

(vi) The Reinsurer has made no attempt to identify anything which is abusive about the claim for the recovery of costs and expenses incurred in bringing and defending proceedings involving the underlying Insured;

(vii) Even if it were necessary to exercise a discretion whether or not to strike out the claim -

(i) the argument as to entitlement to legal/defence costs would still have to be had and evidence of market practice would need to be heard,

(ii) if the strike out were to succeed the Insurer would be denied a legitimate right to recover expenses incurred by it from the Reinsurer, and

(iii) it would be disproportionate to prevent the Insurer from advancing its case that UAE Federal law governs, particularly in the absence of any identified prejudice to the Reinsurer.

Discussion

39. The sections of the Particulars of Claim sought to be struck out are paragraphs 10 to 11, the final clause of paragraph 25, and paragraph 26, as well as paragraph (2) of the Prayer:

"(1) Paragraph 10:

Further, on the proper construction of the clause headed "Jurisdiction" the parties explicitly agreed that the governing law of the Reinsurance Contract is the Federal laws of the UAE. Accordingly, the Reinsurance Contract, being commercial in nature, is subject to Federal Law No. 18 of 1993 (the Commercial Code).

(2) Paragraph 11:

To the extent that there is no express term, the juridical hierarchy provided in Article 2 of Federal Law No. 18 of 1993 (the Commercial Code) is applied to the interpretation of the Reinsurance Contract. In consequence, it is an implied term of the Reinsurance Contract that the Defendant shall pay all reasonable costs of the Claimant incurred in defending claims brought against it by the Insured and/or taking such action as is reasonably necessary to limit or avert its potential liability to the Insured, it being a custom or practice in the UAE that such costs are payable by a reinsurer, particularly in circumstances where the reinsurer has agreed - as the Defendant has in this case - to reinsure 100% of the risk.

(3) Final clause of paragraph 25:

> together with all costs and expenses incurred by it in claims brought by or against the Insured under the Underlying Policy.

(4) Paragraph 26:

> Further, the steps taken by the Claimant in:
>
> a. commencing the DIFC Proceedings, pursuing the same and making applications in them,
>
> b. responding to the Complaint, and
>
> c. defending the Sharjah Proceedings,
>
> were and are all reasonable steps taken for the purpose of averting or minimising loss under the Reinsurance Contract. Accordingly, pursuant to clause 11 and/or 22 of the Cl.280 as incorporated into Cl.281 and therefore the Reinsurance Contract, alternatively pursuant to the term implied as set out in paragraph 11 herein, the Defendant is liable to indemnify the Claimant in respect of the same.

(5) Paragraph (2) of the Prayer:

> A declaration that it is entitled to be immediately indemnified against all costs and expenses incurred in proceedings brought by or against the Insured in respect of the Underlying Policy; and an indemnity in respect of the same.."

40. In its written submissions (paragraph 32) the Insurer contends that the Reinsurer has not sought to strike out paragraphs 10, 11 and 12 of the Particulars of Claim. In fact, the Reinsurer *does* seek to strike out paragraphs 10 and 11. It is correct that the Reinsurer does not seek to strike out paragraph 12 that alleges -

> "Further, pursuant to Article 378 of UAE Federal Law No. 26 of 1981 (the Maritime Code), following the occurrence of an insured peril, the Defendant is responsible for any costs incurred in averting or limiting the loss."

but paragraph 12 would only be of relevance if UAE law applied to the Reinsurance Contract.

41. The Court readily assumes this is an error rather than an attempt to mislead but it does mean that the suggestion based upon it, namely that the strike out application has a fatal flaw itself, fails in *limine*.

42. It is important to identify clearly the bases on which the strike out application is made. It is made under RDC 4.15 and RDC 4.16(1) and/or RDC 14.16(2) which provide as follows:

> "4.15
>
> In Rules 4.16 to 4.24, reference to a statement of case includes reference to part of a statement of case.
>
> 4.16
>
> The Court may strike out a statement of case if it appears to the Court:
>
> (1) that the statement of case discloses no reasonable grounds for bringing or defending the claim;
>
> (2) that the statement of case is an abuse of the Court's process or is otherwise likely to obstruct the just disposal of the proceedings;."

43. In *Nancy v Narcissa* (cited at paragraph 25 above) I had occasion to consider the relationship between RDC 4.16(1) and immediate judgment under RDC Part 24:

> "35. If the application is made under RDC 4.16, a pleading will be considered deficient if it merely asserts a legal conclusion without setting out the facts relied upon to support that conclusion (for example that a party was acting as an agent: see *Firstrand Property Holding (Middle East) Limited v Damac Park Towers* [2014] CFI 030, at [26] per Justice Roger Giles) or the pleaded facts cannot as a matter of law support the conclusion.
>
> 36. It seems to me that where RDC 4.16 is the basis of an application, good practice requires that the applicant identifies with precision the words within the pleading sought to be struck out and the precise respects in which it is alleged that those words(assuming the factual allegations to be true) fail to disclose reasonable grounds for bringing (i.e. an arguable cause of action) or defending the claim (i.e. the facts pleaded do not amount to a defence in law).
>
> 37. Even if the pleading does set out the facts relied upon and those facts, if established, would disclose an arguable cause of action or grounds of defence, while it may not be struck out under RDC 4.16, the party on whose behalf the pleading is served may still be vulnerable to immediate judgment under Part 24 on the basis that there is no real prospect of establishing those facts at trial.
>
> 38. If the application under Part 24 is on the basis that the claim is bad in law then, as Justice Giles stated, the same principles should apply irrespective of which provision under which the application is made. On the other hand, if the application is made under Part 24 on the basis that the claim is not made out on the evidence or unsupported by the evidence, different considerations must apply from those applicable to RDC 4.16 as, under the latter, the pleaded facts are assumed to be correct."

44. Those observations become relevant to the present case because the Insurer submits that in the absence of any application for immediate judgment on the governing law of the Reinsurance Contract, the governing law remains an issue for trial. Perhaps recognising some force in the

argument, the Reinsurer suggested in oral reply submissions that I might treat its application as an application for immediate judgment. While the Insurer does go on to claim that it has a realistic prospect of establishing that UAE law is the applicable law of the Reinsurance Contract, I do not think that it would be right be allow such a change in direction where the objection to the pleading would be that it is not made out on the evidence rather than being bad in law on its face because of the *"different considerations"* discussed in the passage above.

45. The current application falls to be considered under two heads:

(a) Assuming the facts pleaded in the Particulars of Claim to be true, do the paragraphs of the Particulars of Claim identified by the Reinsurer set out reasonable grounds for asserting that UAE law is the governing law of the Reinsurance Contract; alternatively

(b) Is it an abuse of the Court's process for the Insurer to assert that UAE law is the governing law of the Reinsurance Contract.

46. As to the first head, as noted above, the identification of the applicable law will be determined according to DIFC law. Paragraph 10 of the Particulars Claim alleges that as a matter of the proper construction of the clause headed *"JURISDICTION"* in the Cover Note the parties expressly agreed to UAE law as the governing law. The parties agree that the Cover Note evidences the terms of the Reinsurance Contract.

47. DIFC law allows a wide range of evidence to be admitted in aid of the interpretation of contracts, including the preliminary negotiations between the parties, practices which the parties have established between themselves, the conduct of the parties subsequent to the conclusion of the contract, the nature and purpose of the contract, the meaning commonly given to terms and expressions in the trade concerned and usages (Article 51, Contract Law (DIFC Law No. 6 of 2004)). No facts are pleaded in support of the construction contended for at paragraph 10 above and beyond express agreement to *"JURISDICTION"* being *"UNITED ARAB EMIRATES"* which the Insurer submits means that the parties agreed that the courts of the UAE would have exclusive jurisdiction over any dispute arising out of the Reinsurance Contract, connoting an implied choice of UAE Federal Law. The argument is based on Article 8(2)(c) of Law 3/2004 which provides that absent regulatory content or express provision of DIFC law, the rights and liabilities between persons in a commercial matter are to be determined by the laws of a jurisdiction as agreed between all the relevant persons concerned in the matter.

48. The problem with that argument is that it does not connote an implied exclusive choice of UAE Federal Law. The problem is demonstrated by the preceding paragraph of the Particulars of Claim. Paragraph 9 pleads:

> "Pursuant to the terms of the Reinsurance Contract and, in particular, the clause headed "Jurisdiction", the parties agreed that the courts of the United Arab Emirates would have exclusive jurisdiction over any dispute. By Article 5(A)(2) of the Judicial Authority Law (Dubai Law No. 12 of 2004) this confers jurisdiction on the DIFC Court of First Instance."

49. Article 5(A)(2) of the Judicial Authority Law provides that the DIFC Court of First Instance may hear and determine any commercial claim where the parties agree in writing to file such claim provided that such agreement is made pursuant to specific, clear and express provisions. The Insurer's position must be (which the Reinsurer does not challenge) that reference to the UAE in the Cover Note includes all the courts of the UAE including those of the DIFC. If the parties have clearly and expressly agreed to confer jurisdiction on the DIFC Courts, why should the DIFC not be regarded as the *"jurisdiction as agreed between all the relevant persons"* within the meaning of Article 8(2)(c) of Law 3/2004? That would make DIFC law the applicable of the Reinsurance Contract.

50. The Insurer seeks to circumvent this difficulty by suggesting that, while it is possible to confer non-exclusive jurisdiction on the DIFC Courts, there can only be one governing law; and a choice of UAE jurisdiction between parties who have no connection to the DIFC or the ADGM indicates a choice of UAE Federal Law. Implicit in that argument is an admission that a choice of UAE jurisdiction could just as easily connote a choice of DIFC or ADGM law, but it is said one must look at the connections with the parties.

51. This is clearly an invocation of Article 8(2)(d) of Law 3/2004 which allows the Court to apply the laws of a jurisdiction that appears most closely related to the persons concerned in the matter. Assuming that *"the persons concerned in the matter"* is not limited to the parties, it right to say that the Insurer and one of the Insured are UAE entities, but the other insured (being the shipowner) is Liberian and the Reinsurer is Bahraini. Thus, not only is the position unclear or at best neutral or balanced, but it is also not the basis for the application of UAE law pleaded in paragraph 10 of the Particulars Claim.

52. Under DIFC practice a pleading will be considered deficient if it merely asserts a legal conclusion without setting out the facts relied upon to support that conclusion (*Nancy v Narcissa* at paragraph [35]). Paragraph 10 of the Particulars of Claim merely asserts that on the proper construction of the clause headed *"JURISDICTION"* the parties explicitly agreed that the governing law of the Reinsurance Contract is the Federal laws of the UAE. No supporting facts are pleaded either under Article 51 of the Contract Law or under Article 8(2) of Law 3/2004. Reliance must be placed on facts falling within those articles as it seems to me unarguable that, without more, the mere inclusion of the words "JURISDICTION: UNITED ARAB EMIRATES" in a document said to evidence the terms of a contract amounts to an express agreement that UAE Federal Law is the governing law of the contract, since at most their inclusion would indicate that several different governing laws might apply without identifying which one.

53. In my judgment, paragraph 10 of the Particulars of Claim is deficient and must be struck out.

54. If paragraph 10 of the Particulars of Claim is to be struck out it must follow that the first sentence of paragraph 11 is also struck out.

55. As to the remainder of paragraph 11 of the Particulars Claim, it alleges an implied term of the Reinsurance Contract that the Reinsurer shall pay all reasonable costs of the Insurer incurred in defending claims brought against it by the Insured, being a custom or practice in the UAE that such costs are payable by a reinsurer. I am satisfied that the Insurer has demonstrated that such a proposition is properly arguable under English law and therefore cannot be struck out. The final part of paragraph 25 of the Particulars Claim and paragraph (2) of the Prayer cannot be struck out for the same reason.

56. Paragraph 26 of the Particulars Claim is problematical in two respects. It pleads that the Reinsurer is liable to indemnify the Insurer in respect of all reasonable steps taken for the purpose of averting or minimising loss under the Reinsurance Contract pursuant to Clause 11 and/or 22 of the

CI.280 as incorporated into CI.281 and therefore the Reinsurance Contract. The first respect is that the Insurer has argued before me that *"there are no specific reinsurance market wordings in the Reinsurance Contract"* (paragraph 41 of its written submissions). The second respect is that if the Particulars of Claim take precedence and the market wordings form part of the Reinsurance Contract they expressly state that they are subject to English law and practice inconsistently with the Insurer's case that UAE law applies.

57. The pleading and submissions are confusing. While I will not go as so far as to say that it is an abusive of process nevertheless the confusion obstructs the just disposal of the proceedings and therefore the words *"clause 11 and/or 22 of the Cl.280 as incorporated into Cl.281 and therefore the Reinsurance Contract, alternatively pursuant to"* should be struck out of paragraph 26 under RDC 4.16(2).

58. As the Reinsurer accepted in argument, it is open to the Insurer to replead its case. Should it choose to do so, no doubt it will have regard to Article 51 of the Contract Law and Articles 8(2)(c) and (d) of Law 3/2004. I will include in my Order permission to amend.

59. While it is not necessary in the light of my findings to consider whether the allegation that UAE Federal law applies is an abuse of process, if the Insurer decides to replead the allegation the issue will arise and it is therefore appropriate that I address it now in order to save time and costs.

60. The Insurer draws the attention of the Court to the judgment of HE Deputy Chief Justice Ali Al Madhani in First Middle East Distribution DMCC v Orange Chameleon [2022] CFI 066 at paragraph [53]:

> "There is no concise definition of the phrase "abuse of process" in the RDC nor Part 3 of the CPR. However, the English High Court in *Attorney General v Barker* [2000] EWHC 453 (Admin) described abuse of process as "using that process for a purpose or in a way significantly different from its ordinary and proper use". In Asturion Foundation v Alibrahim [2019] EWHC 274 (Ch), the Court established a two-limb test when assessing strike out applications founded on the notion of abuse of process. The first limb involves the court's determination of whether the claimant's conduct was an abuse of process. The second limb is, if such conduct was an abuse of process, the court has to exercise its discretion as to whether or not to strike out the claim. It is at that second stage that the usual balancing exercise and in particular consideration of proportionality, becomes relevant."

61. The Reinsurer agrees that the categories of abuse of process may cover a wide range of circumstances. In the present case it suggests that it is an abuse of process for a party to advance two inconsistent cases on the same issue in reliance on the words of Sir Nicolas Brown-Wilkinson VC in *Express Newspapers plc v News UK Ltd* [1990] 1 WLR 1320, at pages 1329:

> "There is a principle of law of general application that it is not possible to approbate and reprobate. That means you are not allowed to blow hot and cold in the attitude that you adopt. A man cannot adopt two inconsistent attitudes towards another: he must elect between them and, having elected to adopt one stance, cannot thereafter be permitted to go back and adopt an inconsistent stance."

62. I have some reservations about this so-called principle. In the Express case the plaintiff had obtained summary judgment against the first defendant on the basis that there could be no arguable defence in law to the claim but resisted the first defendant's application for summary judgment on its counterclaim brought on the same legal basis and on legally identical facts. Perhaps because the facts, though identical, were unrelated there was no consideration of res judicata or other forms of estoppel. Nevertheless, the plaintiff was arguing against a position that it had established by a judgment. In the first case it contended successfully that a particular custom did not exist, in the second it sought to rely on that custom. In my view the decision on *"approbation and reprobation"* is best understood to have affected the credibility of the case based on the custom rather than cutting across and blurring the established principles governing the forms of estoppel in some undefined way.

63. Even if there were such a free-standing principle, the present case is quite different from the *Express case*. The assertion before Justice Giles was not one of legal principle nor was it incorporated in a judgment. It was an assertion of fact or mixed fact and law (if the governing law term is said to be implied or arises by operation of law). Either way it is open to a party to revise its position unless it is estopped by *rem judicatam* or in some other way from so doing. The credibility of such a volte face is of course another matter.

64. In the circumstances, I do not consider it *"using that process for a purpose or in a way* significantly different *from its ordinary and proper use"* for a party simply to change its position before judgment during the course of proceedings or associated proceedings. It may not be very attractive but it is not an abuse of process.

THE STAY APPLICATION

65. The Reinsurer contends that there should be a stay or an adjournment of the proceedings in whole or in part until after judgment in the Underlying DIFC Proceedings. The stay would be granted under the power in RDC 4.2(6) to stay the whole or part of any proceedings either generally or until a specified date. The adjournment would be the further adjournment of the CMC (see paragraph 31 above) under RDC 4.2(2).

66. The Reinsurer says that, so far as the stay is concerned, the question for the Court is whether it is in the interests of justice for a case management stay to be granted (see *Athena Capital Fund v Holy See* [2022] EWCA Civ 1051, per Males LJ at paragraph [59]). The Insurer points to the decision of the Court of Appeal in *IGPL v Standard Chartered Bank* [2015] CA 004 (19 November 2015) which followed the English authorities (in particular *Reichold Norway ASA v Goldman Sachs International* [2000] 1 WLR 173) in holding that a stay on the grounds of case management considerations will be granted only in *"rare and compelling cases"*. In oral argument the differences between the parties narrowed and there appeared to be agreement that there had to be good grounds for the Court to exercise its discretion to depart from the principle that in circumstances which are not provided for by statute or rules of court a party (subject to irrelevant exceptions) is entitled to untrammelled access to the Courts (see *Abraham & or v Thompson & ors* [1997] 4 All ER 3622; *Abraaj Investment Management Limited (in liquidation) & ors v Kes Power Limited* [2024] EWHC 41). Further, in the context of the present case, it is not submitted that different criteria should apply whether the proceedings are stayed or adjourned.

67. The Reinsurer suggests that the Court should have regard to the following matters in its discretion when deciding whether or not to grant a stay or adjournment in the context of parallel proceedings:

(a) the way the various sets of proceedings have come about;

(b) the procedural progress, status, and timing, of the various sets of proceedings;

(c) the extent to which a party has itself delayed in commencing, or progressing, the second (or third) set of proceedings;

(d) the benefits of avoiding unnecessary duplication, unnecessary expense, and any unnecessary waste of resources, both for the parties to the proceedings, and for the Court itself;

(e) the benefits of waiting for disclosure of evidence, or a judgment, in the earlier sets of proceedings, before proceeding with the current set of proceedings;

(f) the extent to which issues in the various sets of proceedings may overlap, and the extent of the risk of inconsistent, or conflicting, judgments or decisions;

(g) the nature of the remedies sought in the current proceedings (including, for example, if the remedies are merely declaratory, abstract, contingent, or prospective in nature, or currently incapable of being pleaded with full particularity); and

(h) the relative prejudice to each of the parties associated with granting a stay or an adjournment, or not doing so.

I accept that these may be amongst some (but are by no means all) of the matters the Court may take into consideration in exercising its unfettered discretion.

68. The Insurer says that reinsurance disputes do not constitute a special class and the normal principles apply (see *Amlin Corporate Member Limited & ors v Oriental Assurance Corporation ("Princess of Stars"*) [2012] EWCA Civ 1341). I do not think that it is contended to the contrary.

69. The Reinsurer submits that the Insurer's claims on proper analysis are clearly contingent in substance, and certainly to a material extent, on the final and binding determination of the Underlying DIFC Proceedings and/or the Sharjah Proceedings relating to certain alleged claims made with respect to the underlying Insurance Contract, which are scheduled to be tried in September 2024.

70. This is a rather ambivalent submission. In fact, on the basis of the analysis at paragraph 32 above the majority of the issues in these proceedings arise irrespective of whether the Insurer's claim for an indemnity is against the costs of addressing the Insured's claim or the claim itself. It appears that only those issues at paragraphs 32(9) above and 32(10) above are contingent to a material extent on determination of the Underlying DIFC Proceedings.

71. It is accepted that the quantum of the indemnity under either claim will not be ascertained until determination of the underlying proceedings. The DIFC proceedings are due to be heard shortly in September 2024. The Sharjah Proceedings are currently stayed in favour of the DIFC proceedings. It is not known whether or not they will be dismissed once the DIFC Proceedings have been determined. The fact of the stay may indicate that is likely to be the case but the speculative nature of any assessment of the Sharjah Proceedings militates against its inclusion in the exercise of the Court's discretion.

72. The Reinsurer suggest that:

(a) If the Insurer is successful in the Underlying DIFC Proceedings then the contingent claims fall away, whether entirely or very substantially. This is true but the claims for the Insurer's own costs will remain to be addressed;

(b) the Underlying DIFC Proceedings are nearly at the point of a trial in September 2024, and it will be much clearer with the benefit of that trial and with the benefit of the DIFC Court's judgment whether the underlying insurance claim has any merit, and what the evidence, and the facts, may actually be with respect to the circumstances of that underlying insurance claim. This is true and is a matter of timing;

(c) it is only if a final and binding judgment of a court of competent jurisdiction is entered against the Insurer in favour of the underlying Insured that it might have any potential liability to the Insurer. The Reinsurer's position is noted but the issue arises whether or not there is judgment against the Insurer as it affects the claim for the Insurer's costs of defence;

(d) if it is established in the Underlying DIFC Proceedings that the underlying insurance contract is void then it follows that the Reinsurance Contract is also void (or voidable) and/or there can be no coverage under the Reinsurance Contract. Again, the issue arises whether or not there is judgment against the Insurer;

(e) the Insurer has not attempted to particularise the quantum of its claims under the Reinsurance Contract. It is true that neither the claim for indemnity against the Insured's claim nor the Insurer's costs of defence can be finally ascertained until after judgment in the Underlying DIFC Proceedings. This is again a matter of timing; and

(f) a stay of these proceedings would be consistent with, and is to some extent supported by, the fact that the Sharjah Court Proceedings have also been stayed pending the determination of the Underlying DIFC Proceedings (albeit they appear to have been stayed for different reasons). I consider that this point is irrelevant.

73. The Reinsurer goes on to address timing in context of the balance of prejudice, the avoidance of unnecessary duplication and expense, (if different) the waste of resources, the narrowing of issues and the risk of inconsistent, or conflicting judgments or decisions.

74. I agree that timing is key in the resolution of what I consider to be a rather simple and mundane case management issue. Assuming the Underlying DIFC Proceedings are heard in September 2024, based on the mutual understanding of the parties, it is likely that the Insurer will prevail. The possibility of the Insured even obtaining permission to appeal would appear to be low. I disregard the Sharjah Proceedings for the reasons stated at paragraph 71 above. It therefore follows that by (say) mid-October 2024 the result of the underlying proceedings will be known.

75. As noted at paragraph 31 above, the Insurer proposed a procedural timetable leading to trial no earlier than 8 weeks after 6 February 2025, i.e. 3 April 2025. Given that pleadings have closed there is no reason why the experienced legal teams on both sides should not be able to agree a procedural timetable beginning with standard production of documents to be supplemented by any further documents that are either produced in the run up to, or during, the underlying trial, or thereafter by way of judgment. As presently advised, the supplementary documents may only be relevant to quantum, as most if not all of the issues identified at paragraph 32 above may be resolved on the basis of documents already in the possession of the parties.

76. There appears to me to be ample time to allow preparations for an effective trial of these proceedings some 7 months after the date of the resolution of the Underlying DIFC Proceedings. In the event that turns out not to be the case, the situation could be reviewed at that stage but I do not consider that a sufficient basis has been made out to stay or adjourn these proceedings at this stage.

77. I agree with the Insurer that this is *"a run-of-mill"* reinsurance case. There are no special features that justify delay. Notwithstanding the Reinsurer's submission there is a risk of conflicting judgments or decisions - certainly there is none within these Courts. Again, it can only be speculation, but if for some reason the stay of the Sharjah Proceedings were lifted, it cannot be known if a conflicting judgment would be given or that such a judgment (allowing for the appeals as of right under UAE civil procedure) would antedate any decision in this case. It is therefore not profitable to anticipate the course of the Sharjah Proceedings or to speculate on uncertain contingences (See Konkola Copper Mines Plc v Coromin Ltd [2006] EWCA Civ 5, per Rix LJ at paragraph [66]).

78. I shall direct the parties to agree directions in the light of what I have said above and in the event of difficulties they may have liberty to apply to the Court with the matter reserved to me.

COSTS

79. Both parties have enjoyed some success although neither is unqualified. Part of the Particulars of Claim will be struck out with the possibility of repleading the claim that UAE Federal law is the governing law of the Reinsurance Contract. I decline to stay or adjourn the proceedings, but the parties must agree, or the Court will make, directions which permit the production of any further relevant materials arising out of the trial of the Underlying DIFC Proceedings.

80. In those circumstances, the fairest costs order is that the costs of the Application will be costs in the case.

CONCLUSION

81. I order the following:

(a) The following shall be struck out from the Particulars of Claim:

(i) paragraph 10;

(ii) the first sentence of paragraph 11;

(iii) the words "clause 11 and/or 22 of the Cl.280 as incorporated into Cl.281 and therefore the Reinsurance Contract, alternatively pursuant to" in paragraph 26;

(b) The Claimant shall have permission (if so advised) to amend the Particulars of Claim to replead its case that the Federal laws of the UAE are the governing laws of the Reinsurance Contract no later than 14 days following the date of this Order;

(c) The Application to stay or adjourn these proceedings in whole or in part is dismissed;

(d) The parties are directed to agree directions leading to trial of these proceedings in or about April 2025 with liberty to apply to the Court (reserved to me) in default of agreement; and

(e) The costs of the Application shall be costs in the case.

82. Finally, I should like to thank specialist Leading Counsel on both sides for their helpful submissions.