IN THE DUBAI INTERNATIONAL FINANCIAL CENTRE COURTS

IN THE COURT OF FIRST INSTANCE

BETWEEN

UNION INSURANCE COMPANY PJSC

Claimant

and

INTERNATIONAL PRECIOUS METALS REFINERS LLC

Defendant

ORDER WITH REASONS OF H.E. JUSTICE SHAMLAN AL SAWALEHI

UPON the Part 7 Claim Form issued on 29 September 2022 (the "Claim")

AND UPON the Defendant's Application No. CFI-064-2022/1 dated 31 October 2022 contesting the jurisdiction of the DIFC Court's (the "Jurisdiction Challenge")

AND UPON the Amended Claim Form issued on 2 January 2023

AND UPON the Defendant's Application No. CFI-064-2022/3 dated 12 January 2023 to stay the Claim until the publication of the Court of Appeal judgment in Al Buhaira National Insurance Company v Horizon Energy LLC CFI-098-2021 (the "Stay Application")

AND UPON the Order with Reasons of Justice Wayne Martin issued on 15 September 2023 dismissing the Jurisdiction Challenge and the Stay Application

AND UPON the Defendant filing an Appeal Notice on 6 October 2023 seeking permission to appeal the Order (the "PTA Application"), which was fully pleaded on 15 October 2024

AND UPON the Order of Chief Justice Wayne Martin to strike out the PTA Application dated 21 October 2024

AND UPON the Case Management Order of H.E. Justice Maha Al Mheiri dated 15 January 2025

AND UPON the Claimant's Application No. CFI-064-2022/13 seeking permission to adduce and rely on expert evidence dated 24 January 2025 (the "Claimant's Expert Application")

AND UPON the Defendant's Application No. CFI-064-2022/15 seeking permission to adduce and rely on expert evidence dated 10 February 2025 (the "Defendant's Expert Application") (together the "Expert Applications")

IT IS HEREBY ORDERED THAT:

1. Both Expert Applications are granted.

2. Costs shall be costs in the case.

Issued By:
Hayley Norton
Assistant Registrar
Date of issue: 20 March 2025
At: 8am

SCHEDULE OF REASONS

1. Two Applications have been brought before me to be determined on the papers. In the interest of saving time and Court resources, I will address both in the same Order as they relate to the same issue but have been filed as separate applications.

The Claimant's Expert Application

2. This application was filed by the Claimant on 24 January 2025 seeking permission for an order to be granted to allow the Claimant to adduce and rely on:

(a) Underwriting expert evidence regarding the issue of materiality.

(b) Forensic accountancy expert evidence regarding the stock records and volume of gold.

(c) Metals refinery expert evidence regarding the refinery process and the Defendant's operations.

3. Granting expert evidence is restricted to the conditions in RDC 31.12, which dictates that expert evidence should only be what is reasonably required to resolve the dispute.

4. The Claimant supports its application through the twelfth witness statement of Mark Edward Beswetherick, in which the following statements are made:

(a) The identity of the Underwriting Expert is to be confirmed, but the intended experts for Forensic Accountancy and Metals Refinery are to be Mr Clive Burrows (Baker Tilly) and Mr Michael Mooiman (Argo Advisors International).

(b) The purpose of engaging an Underwriting Expert is to assess the materiality of the alleged misrepresentations/non-disclosures in accordance with whether the Defendant was in breach of Clause 6 of the Policy, whereby there is an alleged concealment and/or misrepresentation of material fact or circumstance. It is the Claimant's position that the Defendant failed to disclose that the Defendant's Managing Director had been charged with an offence of dishonesty in Abu Dhabi (forgery), which was a material matter within the scope of Clause 6. The Defendant denies this breach as its position is that disclosing the offence is outside the scope of Clause 6 as the offence, charge and conviction were not relevant to the cover and underwriting risk. Therefore, the Underwriting Expert will be tasked with giving an opinion on whether this misrepresentation was material to the risk.

(c) Further on the Underwriting Expert Evidence, the Claimant alleged that the Defendant made a claim under the Policy knowing it to be fraudulent, which renders the claim void. In the alternative, the Claimant pleads that the Defendant is at least in breach of its duty of good faith, which is also grounds to void the Policy. This is denied by the Defendant. The Underwriting Expert would also be required to opine on whether the fraud or breach of good faith would be material enough to render the Policy void.

(d) The necessity of the Underwriting Expert Evidence was agreed in principle with the Defendant during the Case Management Conference on 5 December 2024.

(e) On Forensic Accounting, it is the Claimant's position that the Defendant carried the burden to prove its alleged loss - the Claimant does not accept the quantities claimed by the Defendant. Therefore, a forensic accountant's expertise is required to conduct a reconciliation of the Defendant's stock records at the time of the incident. Further, the expert would be required to opine on the general conditions of the Policy ("Attachment and Termination of Risk") as the Defendant failed to provide any receipts that the relevant metal has been delivered by Brinks and so the cover did not attach in respect of the gold said to have been lost. The Defendant denies this. Accordingly, the delivery receipts and whether the general condition of the Policy was fulfilled is in dispute, for which expert evidence is needed to reach a resolution. Mr Clive Burrows is the chosen expert as he has been involved in the matter since 2022 as an independent expert investigating the claim.

(f) On Metals Refinery, there is a dispute as to the compliance of the due diligence of the Defendant within the scope of the Policy, specifically in relation to the quantity of gold solution which was allegedly within the Gold Solutions Tank, the inadequacy of the design of the Gold Solutions Tank, the inadequately sealed sewer drain positions directly below it, and the use of a forklift to move the waste solution tank with no for extensions or metal chocks. Additionally, the Claimant submits that the Defendant changed the refinery process, increasing the risk of occurrence of an incident. The proposed expert, Mr Mooiman, has also been involved as an independent expert in the claim since 2022.

(g) On 9 January 2024, in response to the Claimant's letter dated 31 December 2024, the Defendant agreed that a forensics and metals refinery expert is reasonably required.

(h) Finally, Mr Beswetherick explains that the Claimant would suffer prejudice if permission is not granted, as the issues at hand cannot be answered by the factual witnesses. The expert evidence will be limited to the points in the application.

5. In these circumstances, I find it perfectly reasonable to seek reliance on expert evidence as the form of the issues in dispute are beyond the Court's natural understanding; expert reports are necessary for the resolution of the dispute. Therefore, I see no reason to deny the application nor restrict the expert fields any further.

6. However, for reasons explained in paragraph 14 of this Order, I will deny permission for the Claimant to engage Mr Mooiman and Mr Burrows as experts in this matter.

The Defendant's Expert Application

7. This application was filed by the Defendant on 10 February 2025 seeking an order to grant the parties permission to adduce and rely on the following expert evidence, with the identities of the experts yet to be determined:

(a) Underwriting expert

(b) Forensic accountancy expert

(b) Forensic accountancy expert

8. Granting expert evidence is restricted to the conditions in RDC 31.12, which dictates that expert evidence should only be what is reasonably required to resolve the dispute.

9. As per the Case Management Conference on 5 December 2024, the Defendant acknowledges that the Claimant intends to rely on expert evidence beyond what the Defendant deems to be necessary; that being, reports relating to issues beyond the underwriting of the risk and issuance of the Policy. Nonetheless, the Defendant notes that it does not object to the Claimant's request to appoint a forensic accounting expert and meta refinery expert on the condition that it is permitted to respond to the Claimant's expert findings with its own expert findings.

10. In her eleventh witness statement, Dr Asma set out the following justifications for the requested expert evidence:

(a) Underwriting Expert:

(i) The Defendant's position is that the litigation subject matter primarily required the appointment of an underwriting expert only, to explain whether any misrepresentation by the Defendant was material to the risk (which the Defendant denies); whether any fraudulent act provides grounds for the underwriter to void the Policy (again, denied by the Defendant); and whether any breach of the Defendant's duty voids the Policy (the Defendant denies that it was in breach of its duty of good faith).

(ii) The Claimant has made a similar application (CFI-064-2022/13) supported by the twelfth witness statement of Mark Edward Beswetherick dated 24 January 2025, seeking reliance on expert evidence in the same field. If granted, then the Defendant would have to rely on expert evidence of the same disciplines to be able to respond.

(b) Forensic Accounting

(i) The Defendant rejects the Claimant's proposed reliance on Mr Clive Burrows for the forensic accounting report as Mr Burrows is not an independent expert. The basis for this assessment is that, as per paragraph 38 of Mr Beswetherick's witness statement, the same expert was appointed in the concurrent proceedings in the Sharjah Courts, and so any subsequent report would be influenced by the Sharjah Court proceedings.

(ii) The proceedings in the Sharjah Courts have been judicially settled by the rulings issued in Appeal No. 357/2024 and 385/2024.

(iii) Any continued benefit to the Defendant from Mr Burrows' appointment is therefore prejudicial to the Claimant.

(iv) Nonetheless, subject to the Defendant engaging a different expert, the Claimant seeks permission to rely on its own expert in response.

(c) Metal Refinery

(i) Part of the dispute in the Sharjah Civil Courts regard the quantity of gold solution within the Gold Solutions Tank at the time of the incident, the inadequacy of the design of the Gold Solutions Tank to store liquid gold, the adequacy of the sealed sewer drain below the Gold Solutions Tank, and the use of a forklift to move the waste solution tank with no fork extensions or metal chocks. As these matters have been definitively adjudicated in the Sharjah Courts, and the fact that the Claimant intends to essentially recycle the report of Dr Michael Mooiman who was not an independent expert on the matter and who produced a report more than a year after the date of the insured incident, the Defendant objects to the Claimant's request to rely on any of Dr Mooiman's reports and to continue to benefit from his appointment.

11. While the Defendant rejects the Claimant's reliance on Mr Burrows' and Dr Mooiman's reports, it does not reject reliance on expert evidence as a whole. Instead, the Defendant seeks permission to rely on its own experts if the Claimant is permitted to do so, and to restrict evidence to the above fields as the matters concerning the occurrence of the incidental event, the insurance coverage, the surrounding circumstances and the technical procedures undertaken have already been judicially settled in the Sharjah Courts.

12. The Defendant also submits that rejection of the application will result in the Defendant suffering significant prejudice as the Claimant has already engaged a forensic accountant and gold refinery expert and relied on the expert evidence in support of its pleadings, which the Defendant has not been able to do. Additionally, the Defendant would not be able to defend its case without the support of expert evidence.

13. In these circumstances, I find it perfectly reasonable to seek reliance on expert evidence as the form of the issues in dispute are beyond the Court's natural understanding; expert reports are necessary for the resolution of the dispute. Therefore, I see no reason to deny the application nor restrict the expert fields any further.

14. I will grant the Defendant's Expert Application, in that the Defendant has permission to engage its own independent experts on the matters of Underwriting, Forensic Accounting and Metal Refinement subject to the conditions set out in RDC Part 31. I also accept that it would be contrary to the rules surrounding expert evidence and the overriding objective to permit the Claimant to rely on the reports of Mr Burrows and Dr Mooiman; new experts will have to be engaged, subject to RDC Part 31.

Conclusion

15. Both Expert Applications are granted.

16. Costs shall be costs in the case.