

Neutral Citation Number: [2006] EWHC 1345 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand
London

Fri 9th June 2006

BEFORE HIS HONOUR JUDGE MACKIE QC

BETWEEN:

HEATH LAMBERT LIMITED Claimant

-and-

(1) SOCIEDAD DE CORRETAJE DE SEGUROS (2) BANESCO SEGUROS CA Defendants

Mr Daniel Jowell instructed by Cozen O'Connor appeared for the Claimant

Mr Richard Millett QC instructed by LeBoeuf, Lamb, Greene & Macrae appeared for the

Second Defendant

JUDGMENT

1. This judgment decides the question of lien left over from the hearing on 27 March 2006. I then gave judgment in default against the First Defendant, gave the Claimant permission to discontinue against the Second Defendant and made a costs order against the First Defendant in effect sharing the risk between the other two parties. At the end of the hearing an apparently new issue of election arose so I allowed each party to send me a short note about this.
2. I now decide:-
 - a) The Claimant's application for reverse summary judgment in respect of the Second Defendant's counterclaim.
 - b) The Claimant's claim for a declaration that it is entitled to exercise in lien over the insurance proceeds.
 - c) The Second Defendant's application for summary judgment on its counterclaim against the Claimant.

Background

3. I do not repeat the background facts which are set out in the judgments of the Court of Appeal and Mr Jonathan Hirst QC. The facts relevant to the question of lien which I have to decide are more limited and not in serious dispute.
4. The Claimant ("Heath Lambert") is a London market insurance and reinsurance broker. Both the First Defendant ("Scort"), an insurance broker, and the Second Defendant Banesco, an insurance company, are from Venezuela. INC is a Venezuelan dredging company that owns a fleet of vessels. In 1996, INC used Scort to place insurance for its fleet with Banesco. Scort acted as broker for INC in obtaining direct insurance for INC with Banesco which was, in turn, reinsured in the London market under marine facultative reinsurance covering hull and machinery risks. Heath Lambert was the

placing broker for Banesco's reinsurance. Scort was also involved in obtaining reinsurance for Banesco in the London market.

5. Originally the Defendants disputed whether Scort's involvement was as the producing broker for Banesco (as Banesco said), or as a facilitator for INC, with Banesco using Heath Lambert directly as its placing broker (as Scort said). If Scort was merely a facilitator and Heath Lambert was the direct agent of Banesco then Heath Lambert must look to Banesco for reimbursement of premium: If Scort was Banesco's agent and producing broker and Heath Lambert was the sub-agent and placing broker then, Heath Lambert must look to Scort for reimbursement of premium (with Scort then entitled to seek over against Banesco) .It was common ground that at least one of the Defendants was liable to reimburse Heath Lambert for the premiums.
6. Heath Lambert as instructed placed the reinsurance contracts in the London market with a number of Lloyd's syndicates and market companies. The reinsurance was placed by means of various extensions and additions to cover. Heath Lambert paid the premiums to the reinsurers (or came under a liability to pay such premiums) but neither Defendant reimbursed it.
7. On 23 July 2002, Heath Lambert sued in this Court to recover the premiums of US\$ 526,090.40 plus interest. The Particulars of Claim are pleaded in the alternative and seek the unpaid premium either from Scort on the grounds that it was the producing broker for the reinsurance and must reimburse Heath Lambert acting as a sub-agent placing broker, or from Banesco, on the grounds that Heath Lambert was acting directly as Banesco's broker. Each Defendant claimed that the other was liable.
8. Issues came before Mr Jonathan Hirst QC in September 2003 and before the Court of Appeal in June 2004 with which I am not concerned except to the extent that the amount claimed by the Claimant was reduced to \$261,632.81 for a limitation reason . Costs which the Defendants were ordered to pay to the Claimant remain unpaid.

9. There were subsequent Part 20 steps and amendment to the pleadings. In particular in December 2004 Banesco sought in its counterclaim recovery of some \$325,000 collected by Heath Lambert in September 2002 from London reinsurers for a particular average claim sustained by an INC dredger the Carabobo. Banesco claim payment of the sum or the right to set it off against what if anything it owes to Heath Lambert.
10. On 7 December 2004 Scott disappeared from the scene and their solicitors came off the record.
11. On 13 July 2005, Heath Lambert served a defence to Banesco's counterclaim asserting a particular lien over the loss proceeds \$325,000 under section 53 (2) of the Marine Insurance Act 1906 for the premiums which it seeks in the action.
12. The Defence to counterclaim also raises a claim for unjust enrichment in the event that Banesco is paid the loss proceeds.
13. Heath Lambert asserts its right to a lien over the loss proceeds. Banesco disputes both the existence of that lien and, if it is wrong about that, the extent of the rights afforded by it.

Submissions of the Claimant

14. Mr Jowell points out that section 52(2) of the Marine Insurance Act gives the broker "*as against the assured, a lien upon the policy for the amount of the premium and its charges in respect of effecting the policy*".
15. He also relies upon 2 passages from Arnould, the Law of Marine Insurance, 16th Edition as follows:-
 - a) "*the agent who effects a policy for his principal and advances the premium or becomes responsible for it, and retains the policy in his hands, has a lien upon it for his commission and the premium until the same are paid to him or he is supplied with funds for the payment, whether his immediate employer is the*

assured himself or an intermediate agent, and in the latter case whether the intermediate agency was known or not known to the sub-agent claiming the lien”

b) *“Where the broker is authorised to collect losses or returns of premiums his right to retain the sum for which he has a lien out of moneys received by him under the policy has been expressly recognised and seems clearly established”.*

16. Heath Lambert's position is that this is a straightforward matter. The law permits and justice requires that it retain the proceeds to secure the unpaid premium.

Banesco's submissions

17. Arguments put forward in the witness statement of Mr Cleary are refined in the skeleton argument of Mr Millett QC which raises 3 points.
18. First it is submitted that any lien is limited to the amount of Heath Lambert's claim to the premium. That is plainly right. With the operation of interest the amount by which the loss proceeds exceed the premium is \$11,911.34
19. Secondly Mr Millett QC submits that the circumstances in this case were special and that as a result the lien never attached to the loss proceeds. He says that Heath Lambert was authorised to collect and to account directly to Banesco, not to Scort, it would be wrong and inconsistent with its collection authority for Heath Lambert to treat the loss proceeds as otherwise due to Scort, and attracting a lien, when the claimant is obliged to account to Banesco As Heath Lambert collected the loss proceeds as agent for Banesco it has no lien in respect of the claim for premium against Scort.
20. In the circumstances the parties implicitly “otherwise agree”d under section 53(2) that the lien would not attach.

21. Thirdly Banesco claims that any lien arises under statute and is “for the amount of the premium” providing, in a broad sense, security for the clients personal liability to indemnify the broker. That liability is part of the cause of action which merges in the judgment once it is obtained. Citing Paragraph 44-17 of the current edition of Phipson and Spencer Bower Mr Millett submits that the judgment extinguishes all rights arising from the cause of action, including a lien. He relies on Republic of India and another v India Steamship Co [1998] AC 878 and in particular on a passage in the speech of Lord Steyn beginning at 911. This passage, however, like the case as a whole, does not concern a lien. Anticipating the argument that if the submission were right it would remove the security at the very point it was most required, Banesco points to the limited rights granted by a lien and the fact that it is not a security in the strict sense.
22. Banesco also says that by entering its interim judgment against Scott, Heath Lambert has abandoned its claim against Banesco and cannot maintain the lien as against it. The authorities relied upon by Heath Lambert do not cover the unusual situation such as this where a broker has elected to release the assured.

Decision of the Court

23. In answer to Banesco’s submission Mr Jowell relied essentially on 2 cases.
24. In *Fisher v Smith* (1878) 4 App Cas 1 (HL) 1 the House of Lords was concerned with another situation involving an intermediary analogous to this case and upheld the lien. As Cairns, LC put it:-
25. *“Now, my Lords, as to the question whether this is a case in which lien originally would arise in the Respondent, I think there can be no doubt. He is the person who effected the policies of insurance, he either paid the premiums or became liable for the premiums, and his was the labour and the care through which the insurances were effected. According to the well-known rule of law he would be entitled, by common law, for his labour and care and his money expended, to a lien, in the nature of holding*

possession of the policies, and he would be entitled to that lien against every person, - against the owner of the goods for whose benefit the policies were effected, and against any intermediaries who might have intervened between the owner of the goods and himself. That appears to me to be the ordinary and well-known rule of law, and I do not think it was seriously disputed at your Lordships' Bar". The point is made at 11 to 12 in equally forceful and clear terms in the Speech of Lord O'Hagan.

26. In Eide Limited v Lowndes Lambert [1998] 3WLR 643, Phillips LJ, with whom Waller LJ and Chadwick LJ agreed, decided an appeal which, in his words, raised important questions as to the nature and extent of the lien granted to an insurance broker by section 53(2). In a part of his judgment entitled "lien on the policy" Phillips LJ took the simple phrase "lien on the policy" in the section to do no more *than "describe an equally simple and well established type of security, namely the right to retain position of physical property until a debt has been discharged"* As Mr Millett points out he does go on to suggest that the phrase cannot properly be treated as shorthand to embrace both a physical and necessary lien and also a right to annex and set off the proceeds under the policy. However the judgment makes it clear that a broker who has a lien over the policy has a commensurate right to retain claims proceeds collected under it in so far as necessary to satisfy the debt secured by the lien.

As modern works, for example, Arnould, make clear the proposition that a broker has a lien for premium and commission whether or not there is an intermediary in the chain, remains the law and is fatal to Banesco's submissions that the particular facts of this case either remove the lien or include some agreement to dispense with it. There is nothing to suggest that the Claimant was party to such an agreement or would be willing to surrender the right to a lien.

27. In Eide Phillips LJ expressly approves these passages in Arnould and decides that the first instance judge in that case failed “*to recognise that a broker who has a lien over a policy of marine insurance is normally entitled when he collects under the policy, to apply the proceeds collected in discharge of the debt that was protected by the lien.*”
28. This guidance seems to me also to undermine Banesco’s submissions that the lien merges in the judgment. As I have pointed out discussion in Republic of India was in the context of competing considerations affecting actions in personam and in Rem and, as I see it ,is of little assistance, in evaluating the status of a lien. The origins of the common law lien (which in the context of Marine Insurance became a matter of statute) were explained by Diplock LJ in Tappenden v Artus to QB [1962] 185 at 194-195. That discussion leads to the conclusion that a common law lien which arose independently of the law of contract, although not enforceable by action, affords a defence to an action for recovery of the goods by a person who, but for the lien, will be entitled to immediate possession. The position is the same with a statutory lien and with the proceeds of the policy as much as with the physical policy document .As Eide points out the precise basis for this may be unclear but the right is not..
29. (In the case of In re Aikin’s Estate, reported in volume 1 of the Irish Reports for 1894 at 225, Monroe J, held that a solicitor does not lose his retaining lien by suing his client and obtaining judgment for his costs but did not explain the reasons for his view .Although I have reached my decision without seeking to evaluate the precedential value of Aikin, of which there was some discussion at the hearing, the judge’s observation that there was no authority or reason to support the suggestion that a solicitor who pursues remedies by action loses his right to retain title deeds appears to apply equally today.)

30. It is accordingly clear that Heath Lambert has a lien over the proceeds of the policy both as against Banesco and any other intermediary, whether or not Banesco are under a direct obligation to pay the premium. That lien may be maintained until the premium is paid or the claim is in some other way satisfied. The rights provided by a lien are limited, as every practising solicitor comes to learn, but they are available to the Claimant. In my judgment the lien asserted by the Claimants should be upheld for these reasons and because such an approach seems to me consistent with that set out in Eide and with justice. It would be obviously unfair for Heath Lambert to be required to hand over the proceeds of the claim under a policy without being able to reimburse themselves for unpaid premiums.
31. Heath Lambert have suggested a defence of unjust enrichment to the counterclaim but have not seriously argued it or begun to meet the objections put forward by Mr Millett in Paragraphs 27 and 28 of his skeleton argument.

Further point raised at hearing by Banesco

32. The dispute about lien arises when Banesco seeks summary judgment on its counterclaim and Heath Lambert seeks reverse summary judgment on the same issue.
33. Mr Millett contends that the brokers lien is a suspensory right and provides no security right, a submission which Heath Lambert rejects. In practice however Heath Lambert while indicating that it may seek to set off has not done so. Thus the current position is that the lien has a suspensory affect.
34. Banesco contends that Heath Lambert cannot have both a judgment for the full amount against Scort while retaining a lien a proposition which I have rejected. Banesco however points out the potential unfairness in dismissing its counterclaim since this might allow Heath Lambert both to enforce judgement against Scort and to enforce its lien.

35. Mr Jowell's note suggests difficulties which would arise for Heath Lambert if placed in the unfair position of having a judgment against them in favour of Banesco for the loss proceeds. Mr Millett suggests that the solution is to give Banesco judgment for the claim proceeds on terms that it holds these to the order of the court pending satisfaction by Heath Lambert of its judgment as against Scort. Mr Jowell's proposal is that the counterclaim be dismissed with the Claimant undertaking that if in the future it recovers sums due to it in unpaid premium then it will, on reasonable notice, notify Banesco and pay out accordingly.
36. In my judgment a more satisfactory solution, which will recognise the legitimate concerns of both sides, is to adopt the fall back proposal of Mr Jowell which is that there be a stay of the counterclaim under CPR Rule 3.1.2(f) and I invite the parties to produce a draft order accordingly
37. I shall be grateful if the parties will at the same time let me have a short note of what they seek and why at the resumed hearing of this application.

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