Neutral Citation Number: [2018] EWHC 900 (Comm)
Case No: Claim No. CL-2017-000453

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

Royal Courts of Justice
Strand, London, WC2A 2LL
23 April 2018

Before:

SIR ROSS CRANSTON

Between:

ENGELHART CTP (US) LLC	**Claimant**
- and -	
LLOYD'S SYNDICATE 1221 FOR THE 2014 YEAR OF ACCOUNT & 6 OTHERS	**Defendant**

DOMINIC KENDRICK QC (instructed by Reed Smith) for the Claimant
LUKE PARSONS QC and BEN GARDNER (instructed by Kennedys) for the Defendants
Hearing date: 27 March 2018

HTML VERSION OF JUDGMENT

Sir Ross Cranston:

Introduction

1. This is a construction summons under Part 8 of the Civil Procedure Rules regarding a cargo insurance policy dated 1 December 2014 of a type described as "Marine Cargo and Storage Insurance" ("the

policy"). The policy is between the claimant assured and the defendant insurers. It operates on an open cover basis in relation to a range of commodities, including certain metals. The claimant claimed under the policy when containers were found not to contain the copper ingots it had traded, only slag of nominal value. For the purposes of the case it is assumed that no copper was ever shipped and that the claimant in good faith has paid for and taken up fraudulent bills of lading and other shipping documents.

2. The claimant, Engelhart CTP (US) LLC, is part of a large trading group. It previously traded under the name BTG Pactual Commodities (US) LLC, but for the purposes of the case these entities have been treated as interchangeable. The defendant insurers are members of Lloyd's of London. They agreed in their due proportions to insure the claimant on the terms and conditions of the policy. They have refused the claim. The claimant has settled its claim with other of the insurers who wrote the cover, including the leader.

3. In summary the claimant's case is that when properly construed its loss falls within the policy since it provides All Risks cover of the very broadest kind. The defendants' case is that none of its clauses provide cover for losses resulting from the acceptance of fraudulent documents for a non-existent cargo.

Agreed facts

4. For the purposes of this construction summons, the parties have agreed certain facts. These are as follows.

5. On 11 August 2015 the claimant bought 7,000 mt of copper ingots on cif China terms from World Gold International Ltd ("World Gold"). That day the claimant also sold 7,000 mt of copper ingots on cif China terms to receivers in China, Shing Fu (HK) Metal Co Ltd ("Shing Fu"). On 21 September 2015, both contracts were amended to increase the quantity to 9,000 mt.

6. The first shipment of 7,000 mt of copper ingots was shipped and delivered to Shing Fu without incident.

7. In accordance with the terms of a sale contract between the claimant and World Gold, between 16 and 24 September 2015 packing lists, quality certificates and bills of lading were issued in respect of a cargo of a further 1,967.898 mt of copper ingots, said to be shipped in 102 containers from New York. The packing lists and quality certificates appear to have been produced by the shipper, Asia Global Renewable Energy Corp.

8. When the containers said to contain the copper ingots arrived in Hong Kong for transhipment to China during November and December 2015, some were found to be leaking. A representative of Shing Fu notified the claimant around 24 November 2015. All the containers were opened in the presence of cargo surveyors. No copper ingots were in fact shipped in the containers and no such cargo ever existed. The containers only ever contained slag of nominal commercial value. The bills of lading, packing lists and quality certificates were therefore fraudulent. The claimant was unaware of the fraud at the time of shipment.

9. The claimant paid World Gold for the cargo of 1,967.898 mt over three instalments in late September 2015. Shing Fu refused to pay.

10. The claimant submitted a claim to the underwriters of the policy, including the defendants, for the loss of the cargo and insured expenses, but this has been refused.

The insurance policy

11. The policy is of a type described as "Marine Cargo and Storage Insurance". The period is open cover for a year beginning 1 December 2015. Any means of conveyance, whether by land, pipelines, water and air, is covered. The interest clause provides as follows:

> "On goods and/or merchandise and/or cargo and/or interest of all descriptions, that being the property of the Assured and/or for which they are responsible ... including but not limited to Grain and oil Seeds, Soyabeans, Sugar and Ethanol, Metals, power and Gas Oil ... all whilst in transit and/or in store elsewhere anywhere in the World."

12. The policy states a Basis of Valuation and Loss Settlement, which is the purchase or sales price or cost of replacement, and which is to apply unless more broadly specified in the commodity specific insuring conditions.

13. Conditions are then spelt out. The first of the operative conditions refers to Institute Cargo clauses:

> "(a) 'All Risks' in accordance with the Institute Cargo Clauses (A) CL 382 (1.1.09) ... and/or American Institute Cargo Clauses (Sept. 1, 1965) 32B-10 but with Clause No. 3 amended to read as follows: 'Against all risks of physical loss of or damage to the subject-matter insured from any external cause' ..."

14. There is a clause for claims before declaration: insurance for transit and storage risk will be effected at the condition normally applied for goods of the same nature as those damaged, and failing any precedent "the usual conditions and the most favourable will apply". As to guaranteed outturn extensions, these are to be 150 percent of the tariff "all risks" rates and/or as might be further agreed by the slip leader. As a supplementary condition, the policy states:

> "This insurance contract is subject to the above conditions and the commodity specific insuring conditions but it is understood and agreed that in all cases, the most favourable conditions will benefit the Assured notwithstanding what is mentioned on the insurance certificate and/or insurance declaration."

15. There are ten sections setting out specific insuring conditions for the commodities insured including oil products, coffee, sugar, metals and vegetable oils. These commodity specific conditions begin:

> "This insurance is subject to the above Operative Conditions and where applicable the below commodity section insuring conditions. It is noted and agreed that unless otherwise declared to the contrary, the broadest coverage shall apply."

16. Section 5 of these conditions deal with metals. It provides, in part:

> "As per operative conditions but also extended at the sole option of the Assured to include leakage and/or shortage and/or difference in weight and/or difference in volume as is appropriate howsoever arising.
>
> Claims for leakage and/or shortage and/or difference in weight and/or difference in volume as is appropriate shall be assessed by a comparison of shipped and delivered weights or shipped and delivered volumes ... as evidenced by an independent recognised surveyor which shall be binding on and accepted by Underwriters and the Assured for all purposes."

17. The provision for the decisions of independent persons being binding on the insurers is echoed in other of the commodity specific insuring conditions.

18. The policy contains a number of general conditions applicable to all interests insured under it. War and strike risks are subject to their treatment in various Institute clauses. Risks include malicious damage, vandalism, sabotage and piracy. As well, the risk of theft also includes conversion. All warehouse receipts and warrants are accepted as conclusive proof of the existence of the insured interest and of actual quantities and qualities. Goods purchased on terms whereby the insured is not responsible for insurance are covered in accordance with the operative conditions, the insurers being subrogated to the insured's rights. In no case is the insurance to contribute to double insurance. The insurable interest clause reads, in part:

"Notwithstanding that the terms of purchase may provide that the responsibility of the Sellers and/or their Insurer shall cease at any point during transit it is agreed that cover hereunder shall operate for the whole transit per policy operative conditions…Where, by agreement with the Suppliers, the Assured accepts responsibility for the goods ex Suppliers' premises, cover commences when the goods leave such premises or at such time at which Assured takes a financial interest in the goods, whichever is the earlier."

19. There are three clauses of particular relevance to this case, the concealed damage clause, the container clause and the fraudulent documents clause. These provide as far as relevant:

"Concealed Damage Clause

It is agreed that any loss or damage discovered on removal the final packing shall be deemed to have occurred during the transit insured hereunder (and irrespective of attachment of Assured's interest) and shall be paid for accordingly unless proof conclusive to the contrary be established, it being understood that any containers, cases and / or packages showing signs of damage are to be opened as soon as practicable.

Container Clause

Notwithstanding anything contained herein to the contrary where Cargo, insured hereunder, is carried in Containers, it is agreed, as between the Assured and Insurers, that the seaworthiness and/or cargoworthiness of the Container is hereby admitted.

It is agreed that this Insurance contract is also to pay for shortage of contents (meaning thereby the difference between the number of packages as per shippers and/or suppliers invoice and/or packing list loaded or alleged to have been laden in the container and/or trailer and/or vehicle load and the count of packages removed therefrom by the Assured and / or their agent at time of container emptying) notwithstanding that seals may appear intact, and/or any other loss and/or damage including but not limited to cargo and/or container sweat howsoever arising.

…

Fraudulent Documents

This insurance contract covers physical loss of or damage to goods and/or merchandise insured hereunder through the acceptance by the Assured and/or Shippers of fraudulent documents of title, including but not limited to Bill(s) of Lading and/or Shipping Receipt(s) and/or Messenger Receipt(s) and/or shipping documents and/or Warehouse Receipts and/or other document(s) of title.

This insurance contract is also to cover physical loss of or damage to goods insured caused by utilisation of legitimate Bill(s) of lading and/or other documents of title without the authorisation and/or consent of the Assured or their Agents and/or Shippers."

20. A "duration of cover" clause provides that the policy includes the risks of loading prior to despatch and unloading after arrival, and to insured interests already in store at inception where loss or damage is subsequently discovered unless proved that it occurred previously. A "pre-shipment certificates" clause provides that the insurers will accept these as conclusive evidence if issued by recognised supervision companies.

21. As mentioned the first of the operative conditions in the policy incorporates Institute Cargo Clauses (A). That provides cover for all risks of loss of or damage to the subject-matter insured, as do the other operative condition in sub-clause (a). However, there are exclusions in Institute Cargo Clauses (A), including in clauses 6 and 7 for war, civil war, piracy, and strikes and riots. The transit clause, clause 8.1, provides that the insurance applies from the time the subject matter is first moved in the warehouse or storage place named in the contract of insurance for the purpose of immediate loading for the commencement of transit. It then continues throughout transit. It terminates, inter alia, on

completion of unloading at the final warehouse or place of storage at the destination named in the insurance, or on expiry of 60 days after completion of discharge overside from the vessel at the final port of discharge, whichever shall first occur.

Legal principles

22. The legal principles governing the construction of contracts are well known. They are contained in a number of Supreme Court decisions including *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900 , para 21, per Lord Clarke of Stone-cum-Ebony JSC; *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619 , para 15, per Lord Neuberger of Abbotsbury PSC They were neatly summarized by Lord Hodge (with whom Lords Mance, Sumption and Toulson agreed) in *Impact Funding Solutions Ltd v Barrington Support Services Ltd (formerly Lawyers At Work Ltd)* [2016] UKSC 57; [2017] AC 73, a case where a professional liability insurance policy had to be interpreted: the court looks to the meaning of the relevant words in their documentary, factual and commercial context: [6]. In that case Lord Toulson added, with the agreement of other judges, that a term of an insurance contract must be construed in the context of the agreement as a whole and with regard to its overall purpose: [35].

23. There are three English authorities of particular relevance to the interpretation of the policy at issue in this case. The first chronologically is *Fuerst Day Lawson Ltd v Orion Insurance Co Ltd* [1980] 1 Lloyd's Rep. 656, where there was an all risks policy covering a cargo of oil drums with a warehouse to warehouse clause. The claimant had purchased on a c&f basis. On discharge the drums were discovered to contain water. The insurer denied liability. It contended that on the facts the drums had never contained anything other than water, with a slight trace of oil to prevent suspicion in the event of leakage. Even if the water had been substituted for oil it could only have happened before the drums had been shipped. Mocatta J held that the claimant had not established that the oil had ever started its transit from the seller's warehouse.

24. *Glencore v Alpina* [2003] EWHC 2792 (Comm); [2004] 1 Lloyd's Rep 111 involved a claim by a company producing and trading commodities under insurance on an open cover basis against all risks of loss, damage and transit. The claim was for the loss suffered through the misappropriation of large quantities of the company's oil. One basis on which the insurer declined the claim was non-disclosure. Moore-Bick J held that the broad nature of the open cover meant that the insurer had a good appreciation of the range of circumstances affecting the risks insured and that the company was only required to disclose matters falling outside the broad range of risks. Moore-Bick J said:

> "[11]...Over the years the policy wording developed ...but the underlying philosophy throughout was to procure a broad and flexible contract providing cover against all risks of loss and damage to oil in which Glencore acquired an interest wherever it was situated. As the insurers were aware, Glencore's involvement in the purchase and sale of crude oil and products was solely as a trader....
>
> [12] As might be expected in these circumstances the contract was worded in very broad terms."

25. An insurer, Moore-Bick J added, asked by a successful commodity trader to provide open cover for goods must be taken to know that it will take advantage of market opportunities and be innovative in the way it does business: [34]. Later in the judgment, Moore-Bick J said that it was important to bear in mind that the insurance was against physical loss and damage, not against conduct that constituted conversion in law: [207].

26. *Coven SpA v Hong Kong Chinese Insurance Co* [1999] Lloyd's Rep IR 565 was a claim under a Marine Cargo Policy when there was a shortage in a cargo of broad beans. The judge held that this was attributable to measurement error at Xingang where it was loaded. The policy covered all risks, including shortage in weight but subject to an excess of one percent of the whole shipment. It was common ground that the phrase "covering all risks" in the policy was shorthand for all risks of loss or damage to the subject matter insured. On appeal counsel for the claimant accepted that the all risks part of the insurance could not apply since there had been no loss or damage to the beans.

27. As to the shortage of weight part of the policy Clarke LJ held that, construed in the context of the policy as a whole, that could not cover a measurement error when there was no physical loss of beans which did not exist. With a marine cargo policy insuring against loss, damage, liability or expense, that result would be surprising. Pointers supporting that conclusion, he said, were that the risk involved would be nothing like the ordinary insurance risks of something untoward happening to the goods on the voyage, and that insurers would be most unlikely to agree to insure such a risk, certainly not as an adjunct to a straightforward cargo insurance. Clarke LJ said (at p. 569):

> "When construed in their context, the words were not, in my opinion, intended to provide cover for a measurement error in circumstances where there is no loss of the cargo. In short, they were not intended to provide cover against paper losses which it is conceived would not ordinarily be covered in a policy of this kind."

28. Clarke LJ added that it would be possible to insure against measurement error, but in a marine cargo policy it would need clear words: "[T]here must be physical loss of existing beans and not a paper loss of non-existent beans": at p. 569. Lord Woolf MR and Henry LJ agreed.

29. *Arnould on Marine Insurance*, 18th ed (by J. Gilman QC, R. Merkin, C. Blanchard QC & M. Templeman QC, 2013), at §23-72, footnote 490, cites *Coven* and *Fuerst* for the proposition that all risks policies apply only to physical loss of or damage to the goods. In the first supplement to the 11 edition of *Colinvaux's Law of Insurance*, Professor Merkin states the policies on property do not extend to paper losses unless they extend to loss of profits or other business interruption losses. They do not cover goods which never existed, and the position is the same where a seller has fraudulently shipped goods of a description entirely different from those specified in the contract of sale: para. 11-007.

30. In the second edition of *Marine Cargo Insurance*, 2015, Mr John Dunt states the physical loss rule, and that a marine cargo policy could extend to financial losses if clear words are used. In that regard he refers to a decision of Judge Vincent L. Broderick, in the US District Court for the Southern District of New York, *Chemical Bank v Affiliated FM Insurance Company* 815 F. Supp. 115 (SDNY 1993). There banks claimed against London insurers under a marine open cargo policy when fraudulent documents concerning non-existent coffee shipments had been the basis for their extensions of credit. The policy covered all shipments within it scope and all lawful goods including coffee. The fraudulent bills of lading condition read:

> "This policy covers loss or damage occasioned through the acceptance by the Assured and/or their agents or shippers of fraudulent Bills of Lading and/or shipping receipts and/or messenger receipts."

31. The judge accepted that this type of policy was basically intended to provide coverage against damages caused by loss of goods but that did not render the fraudulent bills of lading clause ineffective. The insurers were denied summary judgment. The judge referred in a footnote to the risk posed by fraudulent bills of lading being obviously known to the insurance industry. He also quoted from a 1983 circular issued by an advisory committee to Lloyd's Syndicates and member companies of the Institute of London Underwriters (a Joint Cargo Committee Memorandum), headed "Fraudulent Bills of Lading". It read:

> "The practice is potentially very dangerous and one which is strongly deprecated by the Joint Cargo Committee. It could have the effect of committing Underwriters to financial losses unrelated to any maritime perils and where no cargo of any nature exists. Underwriters are strongly recommended not to agree to include this undesirable form in any contract. In addition any amendments of this nature should be agreed by all underwriters on the contract."

32. That was an independent ground for denying summary judgment, the judge said, since if the memorandum had been received and considered by the insurers that might support an inference that the advice was intentionally disregarded and the opposite result intended.

33. A subsequent US decision is *Centennial Insurance Company v Lithotech Sales LLC*, 187 F Supp. 2d 214 (DNJ 2001). That involved a marine open cargo policy, where the insured alleged that the wrong printing press had arrived from the Indonesian seller. Separately the insured was being sued by its sub-buyer for failure to deliver to it the correct press. The judge held that the all risks clause did not apply, since it insured against all risks of physical loss or damage from any external cause and there was no evidence that the proper press ever existed and was substituted for the one which arrived. Nor did the fraudulent bills of lading clause apply. It covered "loss of or damage to the property insured" occasioned through the acceptance of fraudulent bills of lading or shipping receipts. The judge held that it limited coverage to direct losses to the insured property. *Chemical Bank v Affiliated FM Insurance Company* was distinguished, since the fraudulent bills of lading clause in the instant case had the limiting language that the scope of coverage was confined to loss to the actual press shipped.

The claimant's case

34. For the claimant Mr Kendrick QC contended that the policy when properly construed covered physical loss claims where an insured has been defrauded into taking up documents of title for non-existent goods. He advanced his case on interpretation of the policy at a number of levels. First, he referred to the commercial matrix of All Risks policies. In his submission, the policy in this case went well beyond what he described as a standard, entry level All Risks policy, the type of policy at issue in *Coven SpA v Hong Kong Chinese Insurance Co* [1999] Lloyd's Rep IR 565, where if goods never existed there is no cover. Nor was it simply what he termed a guaranteed outturn policy, with an extension to cover the type of measurement error which arose in that case. Rather it was an All Risks policy, the broadest of the broad, with a range of special clauses to extend and widen cover, along the lines described by Moore-Bick LJ in *Glencore v Alpina* [2003] EWHC 2792 (Comm); [2004] 1 Lloyd's Rep 111. Mr Kendrick submitted that in this form of large, open cover there is an element of insurers taking the rough with the smooth. Insurers offer very wide terms to cover losses which are fortuitous, in this way looking to make a significant underwriting profit from the very substantial premiums generated, while in return the commodity trader for its part looks for the very widest terms available. Mr Kendrick highlighted that in *Glencore* Moore-Bick LJ had noted how insurers know that those like the claimant need to take advantage of new opportunities, and with them the risks.

35. With that as background, Mr Kendrick turned to the policy as a whole, emphasising the breadth of the provisions. It was open cover under which the claimant declared all cargoes and interests and the insurers took all insurances attaching in the twelve-month period. Mr Kendrick then referred to a range of clauses in the policy to demonstrate its breath. As to the operative conditions, there was the width of the "claim before declaration" clause. The 150 percent tariff for guaranteed outturn extensions suggested that the type of loss contemplated by the agreed facts was covered. The policy expressly provided that the insured had the benefit of the most favourable conditions. The commodity specific conditions began with an express clause that the broadest coverage should apply. Diverse commodities and worldwide sendings and storage were insured. The commodity specific conditions were especially favourable to the insured – those for oil, sugar and metals were illustrative - not least because sometimes the insured could chose the outturn figures most beneficial, and the insurers were bound by the conclusions of independent surveyors on matters like shipped quantities. Warehouse receipts were also binding on the insurers. Definitions were widely drawn, as with those for "interest" and "insurable interest" (for example, extending to the point where the insured has only a financial interest in goods).

36. Read against this background of very broad extensions, Mr Kendrick contended that the crucial, specific clauses, when properly construed, covered the losses posed in this case. First, there was the Container clause. It was an additional obligation ("also") to cover shortages. The second paragraph recognized the common situation, that containers are generally sealed, and that the ship's agent or master will not break the seals but (as in this case) record on the bills of lading what they are said to contain. Thus the insurer is bound to pay for the difference between what the packing list states for the containers and what is removed from them at outturn, "notwithstanding that the seals may appear intact". In other words, that included paying for a loss where no cargo was shipped. In Mr Kendrick's submission "shortage" did not have its ordinary meaning (as in *The George S* [1987] 2 Lloyd's Rep 69), but in this context was to be interpreted as covering both a partial shortage and a shortage of 100 percent. The words in the brackets in the clause gave "shortage" an extended meaning. In particular the phrase "alleged to have been laden in the container", as an addition to what has been loaded, indicated

that cases of paper losses and fictitious goods are included. This interpretation was strengthened, he contended, by the contrast with the Concealed Damage clause, immediately preceding the Container clause, which covers actual loss or damage on unpacking.

37. Mr Kendrick submitted that the Container clause is not confined to "packages". That term appears in brackets, and is subsidiary to the obligation to pay for a shortage in contents. Further, the clause refers to the number of packages "as per shipper's invoice" or the "packing list loaded", so that the packing list defines what counts as a package for the cargo loaded. Here it enumerates the contents by giving the net weight of the ingots in each container. Accordingly the net weight performs the same function in each container as the number of packages for other commodities and is to be treated as the relevant number for ascertaining a shortage. Finally, Mr Kendrick submitted, any other interpretation would emasculate the clause in the case of metals, since in some cases these are sensibly shipped in containers rather than in bulk. In all, the right purposive and commercial interpretation in context is that the clause is concerned with a shortage of contents, as ascertained from the units used in the packing list to enumerate the contents of a container.

38. The second key clause on Mr Kendrick's case was the Fraudulent Documents clause. He submitted that the very title of the clause was indicative that where the loss to the trader occurs through the acceptance of fraudulent documents, in the absence of any goods, the trader is entitled to claim for their loss and say that the policy covers a physical loss of goods. It has suffered such a loss, when it has paid for documents of title containing fraudulent statements, inserted by the shipper, but on outturn receives no goods. Albeit that it cannot claim on the policy for economic or other losses, for example, for failure to deliver on a back to back sale, or on a contract it has entered for storage, in this case there has been a "physical loss of goods" "through the acceptance by the Assured of fraudulent documents of title". In support Mr Kendrick invoked the interpretation of the fraudulent documents clause in *Chemical Bank v Affiliated FM Insurance Company* 815 F. Supp. 115 (SDNY 1993) and highlighted the court's reliance on, and the substance of, the Joint Cargo Committee Memorandum. He distinguished *Centennial Insurance Company v Lithotech Sales LLC* 187 F Supp 2d 214 (DNJ 2001), since that was a case of economic loss, where the insured was being sued by its sub-buyer for failure to deliver the correct printing press.

Discussion

39. Notwithstanding Mr Kendrick's great experience and learning in this field, I see the commercial context for the interpretation of this policy as somewhat different from him. In my view the authorities require that one starts from the purpose of all risks marine cargo insurance, which is to cover loss of or damage to property. Mr Kendrick contended that in this case on the agreed facts there was a physical loss of goods. I cannot accept that what occurred can be characterized in this way. On the agreed facts, no copper was ever shipped, in other words, there never was any cargo of copper ingots. Consequently, there was no cargo to be physically lost or, for that matter, damaged. Something must exist to be physically lost. There was no difference between what was loaded and what was discharged, or under Section 5 of the policy, the metals specific conditions, a difference in the shipped and delivered weights or volume. I accept the insurers' submission that the claimant's alleged losses were economic losses due to the acceptance of fraudulent documents in the expectation that they covered physical goods. When the short measure beans were never shipped in *Coven SpA v Hong Kong Insurance Co* [1999] Lloyd's Rep. IR 564, the Court of Appeal held that it was a paper loss resulting from a measurement error at Xingang, not a physical loss within the policy. That distinction was made explicitly by Clarke LJ in the passage from his judgment quoted earlier, that there had to be a physical loss of existing beans and not a paper loss of non-existent beans.

40. Since an All Risks marine cargo policy is generally construed as covering only losses flowing from physical loss or damage to goods, there must be clear words indicating a broader intention. That was the approach of Clarke LJ in *Coven SpA v Hong Kong Insurance Co* [1999] Lloyd's Rep. IR 564: with a policy entitled "Marine Cargo Policy", which on its face stated that the insurers agree to insure against loss, damage, liability or expense, one is essentially concerned with insuring physical loss of goods. It would be surprising (his Lordship accepted) if it covered, as in that case, a measurement error. The same approach was adopted by Tomlinson J in *Outokumpu Stainless Ltd v Axa Global Risks (UK) Ltd* [2007] EWHC 2555 (Comm); [2008] 1 Lloyd's Rep. IR 147, albeit that the policy there was

not for marine cargo, but covered all risks material damage and business interruption: see esp. [26]. The leading text books in the area, referred to earlier, cite *Fuerst Day Lawson Ltd v Orion Insurance Co Ltd* [1980] 1 Lloyd's Rep. 656 and *Coven SpA v Hong Kong Insurance Co*, as authority for the proposition that, in the absence of specific provision, all risks marine cover generally does not extend to paper losses. *Glencore v Alpina* [2003] EWHC 2792 (Comm); [2004] 1 Lloyd's Rep 111 does not assist the claimant. That case was not a case of paper losses; it was a case where the oil had been stolen. Although Moore-Bick J stated that all risks cover of the type before him was intended to be broad and flexible, he accepted it provided against loss and damage to oil, i.e. physical loss to goods: [11], [207].

41. Thus the commercial context of the construction exercise is that the presumption with an All risks marine cargo policy is to insure for physical losses. Can one derive a wider purpose, as Mr Kendrick sought to, from the policy as a whole? There are significant extensions of cover under the policy beyond what is contained in Mr Kendrick's standard, entry level All risks policy. Providing for the binding effect of the decisions of independent surveyors about quantity, for example, would preclude the insurers from contending that there has not been a physical loss. But against that, clauses like the Interest Clause, covering goods in storage as well as transit, are suggestive of physical goods. So is the basis of valuation clause, which is the price or cost of replacement. The amendment to the American Institute Cargo Clauses in Operative Condition (a) refers to physical loss of or damage to the subject matter. I gather no assistance one way or the other from the 150 percent tariff for guaranteed outturn extensions. As to the warehouse receipts provision, it seems consistent with cover for physical losses only: even if those receipts may be wrong as to actual quantity, the insurers are liable for the loss of goods in the warehouse. Given its place in the policy, I am inclined to accept the insurers' interpretation of the words "the broadest coverage shall apply" in the opening clause to the commodity specific insuring conditions viz., the words mean that the broader of the operative conditions and the commodity specific conditions apply. Undoubtedly, as Mr Kendrick contended, the bespoke conditions of this policy expand all risks coverage very broadly. In my view, however, the policy as a whole does not displace the presumption so that it should cover the loss on the assumed facts in this case.

42. Thus one turns to the specific clauses, the Container clause and the Fraudulent Documents clause. The first difficulty for the claimant with the Container Clause is the words outside the brackets - that the policy "is also to pay for shortage of contents…notwithstanding that seals may appear intact". I fail to see that the word "also" can bear the weight Mr Kendrick suggested; on my reading it is simply acknowledging that there is a first paragraph to the clause, which as he explained is designed to prevent the insurers from asserting that there was no insured loss because a loss to cargo was inevitable given the state of a particular container. Next, "shortage of contents": that would ordinarily mean a difference between the quantity of goods shipped and that delivered. Mr Kendrick submitted that it had an extended meaning in the clause, not its ordinary meaning. I do not derive any assistance in that regard from the clause, "notwithstanding that seals may appear intact". This means that even though the seals appear to be intact it is still open to the insured to establish under the clause that there is a shortage, in other words, that a physical loss has occurred. My view it that "shortage" in the clause has its ordinary meaning and cannot cover a situation where there were no goods in the first place.

43. With the words within the brackets, Mr Kendrick accepted that although definitional they were subsidiary to those outside the brackets. Either way I cannot see that the phrase "alleged to have been laden in the container" indicates that cases of paper losses and fictitious goods are included. An immediate difficulty to permitting recovery for differences between what is loaded according to the documents (as opposed to what is actually loaded), and what is discharged, is the need to identify which documents prevail in the case of discrepancies. There is also the relationship with the Concealed Damage clause, which on Mr Kendrick's interpretation of the Container clause would appear to be redundant in allowing the insurers to avoid cover by proving that loss occurred before shipment. A further difficulty is that there are no "packages" in this case. It seems to me that that term should be given its ordinary meaning when, had the intention been to cover quantity generally, the clause could have said that. As to Mr Kendrick's submission that any interpretation other than his would emasculate the metals clause, it is not for me to second-guess what the commercial consequences of an interpretation of the clause might be on the basis of the assumed facts alone.

44. As to the Fraudulent Documents Clause, there is the insuperable difficulty as explained earlier, that it expressly provides for cover a "physical" loss of goods through acceptance of fraudulent documents of title. That differs from the counterpart clause in *Chemical Bank v Affiliated FM Insurance Company*, 815 F. Supp. 115 (SDNY 1993), where the policy covered "loss or damage" occasioned through the acceptance of fraudulent shipping documents. The clause in the present policy is akin to that in the subsequent case, *Centennial Insurance Company v Lithotech Sales LLC*, 187 F Supp 2d 214 (DNJ 2001). As the judge effectively held in the latter, the insertion of the word "physical" cannot be brushed aside. I have already said that in my view there cannot be a physical loss when nothing existed in the first place. Physical loss of or damage to goods are plain words, and should be given their natural meaning. Nothing in the factual matrix can lead to their encompassing economic loss resulting from the acceptance of fraudulent bills of lading in respect of a non-existent cargo.

45. While this policy is very much broader than the Institute's all risks policy, it does not in my judgment extend to situations where on the assumed facts no cargo of copper ingots ever existed. The loss flowing from the acceptance of fraudulent documents of title in relation to them is not covered by the policy. If the parties had intended to cover loss of this character, they would have appreciated the need for clear words before a policy covering physical losses can be read to cover as well non-physical losses.

Conclusion

46. For the reasons given, the claimant is not entitled to the declaration sought.
