In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION
2018 No: 149

BETWEEN:

SIRIUSPOINT LIMITED
(a company incorporated in Bermuda)

Plaintiff

And

~~**(1) ALLIED WORLD ASSURANCE COMPANY (EUROPE) DAC (a company incorporated in Ireland)**~~

(2) ENDURANCE WORLDWIDE INSURANCE LIMITED (a company incorporated in England and Wales)

(3) LIBERTY CORPORATE CAPITAL (TWO) LIMITED (a company incorporated in England and Wales; as the sole underwriting member of Pioneer Syndicate 1980 at Lloyd's for the 2019 year of account)

(4) FLECTAT 2 LIMITED
(a company incorporated in England and Wales; as the sole underwriting member of AmTrust /Canopius Syndicate 1861 at Lloyd's for the 2019 year of account)

(5) MARKEL CAPITAL LIMITED
(a company incorporated in England and Wales; as the sole underwriting member of Markel Syndicate 3000 at Lloyd's for the 2019 year of account)

(6) MUNICH RE CAPITAL LIMITED
(a company incorporated in England and Wales; as the sole underwriting member of Munich Re Syndicate 457 at Lloyd's for the 2019 year of account)

(7) CANOPIUS CORPORATE CAPITAL LIMITED
(a company incorporated in England and Wales; on its own behalf, and for and on behalf of all other members of Canopius Syndicate 4444 at Lloyd's for the 2019 year of account)

(8) GREAT LAKES INSURANCE SE
(a company incorporated in Germany)

(9) LIBERTY CORPORATE CAPITAL LIMITED
(a company incorporated in England and Wales; as the sole underwriting member of Liberty Syndicate 4472 at Lloyd's for the 2019 year of account, on its own behalf, and for and on behalf of the members of all syndicates participating in AON Client Treaty Consortium 9554 at Lloyd's for the 2019 year of account)

(10) ARCH MANAGING AGENCY LIMITED
(a company incorporated in England and Wales; for and on behalf of the members of Barbarian Syndicate 1955 at Lloyd's for the 2019 year of account)

(11) ASTA MANAGING AGENCY LIMITED
(a company incorporated in England and Wales; for and on behalf of Everest Syndicate 2786 at Lloyd's for the 2019 year of account)

(12) IRONSHORE CC (THREE) LIMITED
(a company incorporated in England and Wales; as the sole underwriting member of Pembroke Everest Syndicate 4000 at Lloyd's for the 2019 year of account)

~~**(13) XL SPECIALTY INSURANCE COMPANY**~~
~~**(a company incorporated in Delaware, United States)**~~

(14) HARDY UNDERWRITING LIMITED
(a company incorporated in England and Wales; as the sole underwriting member of CAN Hardy Syndicate 0382 at Lloyd's for the 2019 year of account)

(15) STARR SYNDICATE LIMITED
(a company incorporated in England and Wales; as the sole underwriting member of CV Starr Syndicate 1919 at Lloyd's for the 2019 year of account)

Defendants

RULING

Dates of Hearing:	30 April 2024
Date of Ruling:	16 May 2024
Counsel for the Plaintiff:	Mr. Delroy Duncan KC and Mr. Ryan Hawthorne (Trott & Duncan Limited)
Counsel for the Defendants:	Mr. Changez Khan and Ms. Katie Tornari (Marshall Diel & Myers Limited)

RSC Order 24 – Plaintiff's applications for specific discovery and a further and better list of documents –Whether the Plaintiff's request for specific discovery of Metadata for all documents disclosed by the Defendants satisfies the test of "relevancy" or whether a request for all Metadata is to be treated as a standard component of disclosure in document-heavy, complex commercial litigation- Relevant legal principles

RULING of Shade Subair Williams J

Introduction:

1. This is the first interlocutory ruling in this matter. The applications filed in the Court are as follows:

   (i) The Plaintiff's summons of 5 June 2023 for trial directions;

   (ii) The Plaintiff's Notice of 13 July 2023 for an Order compelling the Defendants to submit a further and better list of documents and to re-transmit all of the documents previously disclosed in their original format so as to enable the Plaintiff to be provided with specific discovery of the full metadata related to those documents; and

   (iii) The Defendants' summons of 14 July 2023 for specific discovery.

2. The Plaintiff's summons is supported by affidavit evidence from its US attorney, Mr. Adam Farra, of Gilbert LLP, in Washington DC. All thirteen of the Defendants relied on opposing affidavit evidence sworn by Mr. Dmitriy Gelfand, an associate of New York law firm Robinson & Cole, LLP in respect of the Plaintiff's applications for a further and better list of documents and specific discovery. In relation to the Defendants' application for specific discovery, an affidavit from Ms. Erica Kerstein of the same New York law firm was filed.

3. The only disputed application for adjudication by this Court is on 1. (ii) above, the parties having reached agreement on 1. (i) and (iii) above.

4. Having had the benefit of particularly thorough and skillful arguments from Counsel on both sides, I now provide my decision with these written reasons.

Factual Background:

5. The Plaintiff, a public company operating as an insurance provider, is the product of the 2021 merger between Sirius International Insurance Group Ltd ("Sirius") and Yoga Merger Sub Limited which was a wholly owned subsidiary of Third Point Reinsurance Limited ("Third Point Re").

6. Prior to this merger, the Directors of Sirius carried out actions and/or activities which are said to have arguably constituted a breach of their fiduciary and common law duties. It is also said that this resulted in Sirius' credit rating being downgraded along with its share price at a 17% drop. What followed in 2020 was the threat of litigation from a group of Sirius' shareholders known as the "Cornerstone Investors". This Court was made to understand that those investors enjoyed certain entitlements under a "Certificate of Designation", one of which purportedly

obliged Sirius to repurchase the shares of the Cornerstone Investors in the event that Sirius was to undergo a change of control. So amongst its claims against Sirius, the Cornerstone Investors threatened litigation in respect of their right to have their shares repurchased (for $30.44 per share totaling $362,000,000) in light of the then pending 2021 merger. Additionally, the Cornerstone Investors reportedly alleged their entitlement to a redemption price at a calculation unaffected by the 17% share devaluation.

7. Motivated by the need to avoid any encumbrance to the then pending 2021 merger, Sirius settled with the Cornerstone Investors pursuant to two agreements. One of those agreements was termed the "Memorialization Agreement". Sirius and Third Point Re were party to the Memorialization Agreement which, as this Court was informed, ratified Third Point Re's authority as the future parent company to enter into a settlement agreement with the aggrieved shareholders. The second of the agreements was the "Transaction Agreement" which was the settlement which resolved the threat of litigation against Sirius and its Board of Directors in consideration for approximately $60,000,000. The Transaction Agreement was executed between Third Point Re and the Cornerstone Investors.

8. The facts which directly give way to the anticipated trial issues in this case call for the construction of numerous agreements governing Sirius' purchase of various insurance policies from the Defendant companies. On the Plaintiff's case, it is entitled to coverage indemnifying Sirius against the "claims" made and settled by the Cornerstone Investors.

The Disputed Issues

The Plaintiff's Application for a Further and Better List

9. Mr. Duncan KC argued that the Defendants' List of Documents is, on its face, not only inadequate but flawed. He submitted that Counsel for the Defendants was in no position to give any assurance to this Court that all of the documents which fall within the meaning of "possession, custody and power" and which "relate to the matters in question" for the purpose of that which is required under RSC O. 24/1 were disclosed in the Defendants' List of Documents.

10. Advocating for a more customized approach to document-heavy commercial cases, Mr. Duncan KC pointed to his client's List of Documents where it is stated that the Plaintiff undertook "*a reasonable and proportionate search in a responsible and conscientious manner*" for the documents required for disclosure, whereupon a Schedule of the details of that search was referenced. This, Mr. Duncan KC stated, is to be contrasted against the bold assertions of the Defendants that they provided a complete list of every relevant document.

11. There is no dispute between the parties that the intention and effect of the language employed by the Defendants in their List of Documents was to convey that they have indeed provided a complete list of every document disclosable under RSC O. 24/1. However, the Plaintiff contends that this could not possibly be so, in reality. Mr. Duncan KC flagged that the documentary material disclosed by all thirteen Defendants in aggregate is flimsy in contrast to the volume of documents listed by the Plaintiff alone. Mr. Khan on the other hand argued that it was only logical that the Plaintiff would have the lion share of documents given the relevant facts and issues to be tried. To that end, the Defendants maintain that they have produced a list of all of the existing and relevant documents subject to the discovery rule. This is supported by the sworn statement of Mr. Gelfand. On that basis, Mr. Khan argued that it would be unfair for this Court to reject Mr. Gelfand's factual assertion in circumstances where the Plaintiff did not even seek to have him cross-examined on the witness stand.

12. In Mr. Gelfand's affidavit evidence, he referred to the Defendants' production of "claim files" and "underwriting files" :

    "*…all fourteen Defendants undertook an extensive search for potentially relevant documents and counsel for the Defendants performed a careful review of everything that was provided. To the extent relevant and non-privileged, the Defendants have already produced their "claim files" and "underwriting files". The remaining documents sought by the Plaintiff are either privileged or have no relevance to the claims or defenses in this Action, or otherwise do not exist*."

13. The evidence before me is that each Defendant was asked to produce electronic copies of documents from its "claim file" and "underwriting file" "*to the extent such a file was kept in the ordinary course of business*".

14. However, Mr. Duncan KC queried the sufficiency of the documents included in the claim files and underwriting files. In his written submissions, Mr. Duncan KC highlighted that the Court had no way of knowing how fully these files were compiled or maintained. He stated [20(1)]:

    "*… For a case of this magnitude, a keyword search over, for example, the email inbox and personal working folders of the primary personnel working on the Sirius file would be both responsible and proportionate, absent a good explanation to the contrary. Such a search is also important in circumstances where no explanation is given for how the "claim file" or underwriting file" were maintained in the ordinary course of business. If those files were not well maintained, as they well may not have been, documents may have been missed*."

15. Inviting me to swiftly dismiss these concerns, Mr. Khan called this Court's attention to a footnote where Mr. Gelfand clarified that the Defendants were directed that the requested "claim files" would contain "*all claim notes, correspondence, including emails and letters, notices, policy, pleadings and any other written material relating to the handling of the Sirius International Claim*." In reference to what was meant by an "underwriting file", Mr. Gelfand deposed that the Defendant Insurers were told that this applied to "*the file that contains documents compiled by underwriters to determine whether to underwrite the Sirius International Risk and on what terms, including correspondence, notes, the insured's application, policy drafts, policy, binder warranties, information relating to the insured's business, etc*."

16. Referring to the Defendants who provided electronic copies of both a "claim file" and an "underwriting file" (whether directly or by their jointly operated syndicates), Mr. Khan pointed to this evidence to undermine Mr. Duncan KC's complaint that the Defendants were delinquent in explaining why the email inbox and personal working folders of the primary claim handlers were not collected and keyword searched.

17. Committed to his overarching submissions, Mr. Duncan KC spotlighted the following Defendants who maintained neither a "claim file" nor an "underwriting file":

    (i) Endurance Worldwide Insurance Limited ("Endurance (D2)");
    (ii) Munich Re Capital Limited ("Munich Re (D6)");
    (iii) Canopius Corporate Capital Limited ("Canopius (D7)");
    (iv) Great Lakes Insurance SE ("Great Lakes (D8)");
    (v) Ironshore CC (Three) Limited ("Ironshore (D12)") and
    (vi) Starr Syndicate Limited ("Starr (D15)").

18. The documents provided by Endurance (D2), Canopius (D7) and Ironshore (D12) were obtained by the performance of a document-search in accordance with search terms identified in Schedule 1 exhibited under Mr. Gelfand's evidence. Canopius (D7) used two different systems in maintaining its electronic files. One of those systems did not permit the use of date parameters. Consequently, the search results initially obtained are said to have been "*too unwieldly to meaningfully review*". According to Mr. Gelfand, this is the reason why the Schedule 1 document-search method was used.

19. The Plaintiff took real issue with the Schedule 1 search-word approach. Mr. Duncan KC argued that it was unacceptable for these Defendants to withhold an explanation as to what data repositories were searched as the Plaintiff is otherwise in the dark about the breadth of documents searched. Without yielding, Mr. Khan maintained that the Schedule provided by

Mr. Gelfand was probative of both a broad and thorough search for all documents liable for disclosure.

20. Munich Re (D6) and Great Lakes (D8) are in a somewhat different position. Their coverage of Sirius was underwritten by Pioneer Underwriting Limited ("PUL"). Mr. Gelfand deposed that Munich Re (D6) and Great Lakes (D8) did not maintain independent "claim files" or "underwriting files" prior to these proceedings. In lieu, these Defendants provided electronic copies of PUL's "claim file" and "underwriting file".

21. ASTA Managing Agency Limited ("ASTA (D11)") did not underwrite Sirius' risk. ASTA (D11) is named as a Defendant on behalf of Everest Syndicate 2786 ("Everest Syndicate") which participated in Sirius' risk as part of the Barbican Financial & Professional Lines Consortium 9562 ("Barbican"). Mr. Gelfand deposed that Everest Syndicate confirmed that it did not maintain an "underwriting file" as its capacity was underwritten by Barbican. However, Everest Syndicate did produce a "claim file" on behalf of ASTA (D11).

22. Marking out what he considered to be the appropriate document-production approach, Mr. Duncan KC commended Starr (D15) who uniquely proceeded by conducting broader searches of their own electronic files.

The Plaintiff's Application for Specific Discovery of Metadata

23. The Plaintiff seeks specific discovery of the full scope of metadata for all of the Defendants' disclosed documents. While accepting that the Rules of the Supreme Court do not specifically require the disclosure of metadata, Mr. Duncan KC encouraged this Court to take guidance from the Civil Procedure Rules 1998 for England & Wales ("CPR") and to endorse the disclosure of metadata as a standard practice in document-heavy and complex commercial litigation.

24. Mr. Khan, on the other hand, disagreed that the disclosure of metadata ought to feature in the standard disclosure process. He criticized the belatedness of the Plaintiff's request for metadata and pointed to no more than three previous local cases where metadata had been disclosed. Mr. Khan also noted that in the absence of any reported Rulings it was to be inferred that the exchange of metadata information was non-contentious in those previous cases. Drawing a parallel line between the disputed factual issues in those cases, Mr. Khan submitted that the exchange of metadata is necessarily proportionate when the provenance or authenticity of any particular document(s) is in issue. No such issue arises in this case, Mr. Khan pointed out.

25. In reply, Mr. Duncan emphasized that the point at which the creation or modification of any particular document became an issue in those previous cases is unknown. He argued that these

contentious spots may very well arise for the first time post-disclosure since a party may not likely know to take issue with the authenticity of a document until after receipt of the metadata information.

Decision and Reasons

General Disclosure Obligations in Document-Heavy Complex Commercial Litigation

26. RSC Order 24/1 prescribes the procedural rule for mutual discovery of documents. It states:

> "
>
> *1 (1) After the close of pleadings in an action begun by writ there shall, subject to and in accordance with the provisions of this Order, be discovery by the parties to the action of the documents which are or have been in their possession, custody or power relating to matters in question in the action.*
>
> *(2) Nothing in this Order shall be taken as preventing the parties to an action agreeing to dispense with or limit the discovery of documents which they would otherwise be required to make to each other.*"

27. In an earlier Ruling of this Court in *Athene Holding v Siddiqui et al* No. 149 of 2018 [21] I summarized the Court's general approach to resolving disputed issues relating to discovery as follows:

> "*As a matter of legal procedure, discovery obligations in writ actions attach only to documents which are or have been in the "possession, custody or power" (otherwise termed "PCP") of a party insofar as those documents "relate to the matters in question". That is to say, so long as such PCP documents are relevant to the disputed issues, there may be an obligation to make them discoverable. I say 'may' as the Court would also have to undergo an exercise of judicial discretion before making an order for discovery, once the PCP threshold and the relevance test has been met.*"

28. This approach is not reserved for only a genre or tier of cases. It is a principle of broad application, subject, of course, to agreed modifications between the parties.

29. Innovatively, Mr. Duncan KC called for a seemingly customized application of RSC O. 24/1 for document heavy and complex commercial cases such as the present one. He submitted that in these kinds of cases, it is only realistic for Counsel to verify that "*a reasonable and proportionate search"* was undertaken "*in a responsible and conscientious manner*".

30. The approach commended by Mr. Duncan KC forms part of standard practice in England & Wales. Part 31.7 of the CPR provides:

> "…
> *(1) When giving standard disclosure, a party is required to make a reasonable search for documents falling within rule 31.6(b) or (c).*
>
> *(2) The factors relevant in deciding the reasonableness of a search include the following-*
> *(a) the number of documents involved;*
> *(b) the nature and complexity of the proceedings;*
> *(c) the ease and expense of retrieval of any particular document; and*
> *(d) the significance of any document which is likely to be located during the search*
>
> *(3) Where a party has not searched for a category or class of document on the grounds that to do so would be unreasonable, he must state this in his disclosure statement and identify the category or class of document.*"

31. In the commentary under "*a reasonable search*" at Part 31.7.1, it is said that the above factors reflect some of the particular objectives stated in rule 1.1(2) of the Overriding Objective, from which RSC Order 1A was lifted. (See also 31BPD.8).

32. That said, while these modern provisions of the CPR are compatible with RSC Order 1A, the wording and meaning of RSC O. 24/1 cannot be unilaterally discarded. Disclosure amounting to anything less than <u>all</u> relevant documents which are or have been in a party's possession, custody or power relating to matters in question in the action is tantamount to a limited application of the Rule. Notwithstanding, to the extent that the "reasonable search" exercise required by Part 31.7 can be applied in local practice as a reasonable search for <u>all</u> relevant PCP documents, I see no meaningful conflict between these provisions. However, where a party seeks to have this customized wording used in its List of Documents, an early discussion between the parties is key.

Whether Meta Data should be a standardized part of the Disclosure of Electronic Documents

33. Metadata (or meta-information) provides explanatory information about a document which is not evident or visible on the face of the document. It is otherwise termed 'data about data'.

34. Metadata is defined in the Practice Direction for Part 31 of the CPR as follows:

"*"Metadata" means data about data. In the case of an electronic document, metadata is typically embedded information about the document which is not readily accessible once the native electronic document has been converted into an electronic image or paper document. It may include (for example) the date and time of creation or modification of a word-processing file, or the author and the date and time of sending an e-mail. Metadata may be created automatically by a computer system or manually by a user*."

35. The metadata sought in this case would provide descriptive tracking information about the history of the Defendants' documents. Contextually speaking, this would include instructive details about the creation and modification of the documents, its author and its location. Metadata is also useful as a document-management tool, particularly in aid of compiling documents in a chronological fashion in respect of the creation of those documents.

36. Counsel for both sides pointed to provisions in the CPR to support their respective stances on the need for the exchange of metadata in this case and as a matter of general practice for the disclosure of electronic documents in cases of this magnitude.

37. The disclosure of Metadata is expressly provided for under 31BPD.10. However, it is necessary to examine the surrounding provisions in order to fully grasp this supplemental protocol to the CPR.

38. Part 31 in Section A of the CPR applies to "Disclosure and Inspection of Documents". This is followed by a supplementary Practice Direction on the Disclosure of Electronic Documents. The purpose for the Practice Direction is stated at 31BPD.1:

"*…to encourage and assist the parties to reach agreement in relation to the disclosure of Electronic Documents in a proportionate and cost-effective manner*."

39. Under 31BPD.2 the general principles applicable to the practice of disclosure of electronic documents are outlined as follows:

"*6. When considering disclosure of Electronic Documents, the parties and their legal representatives should bear in mind the following general principles-*

(1) Electronic Documents should be managed efficiently in order to minimize the cost incurred;

(2) technology should be used in order to ensure that document management activities are undertaken efficiently and effectively;

(3) Disclosure should be given in a manner which gives effect to the overriding objective;

(4) Electronic documents should generally be made available for inspection in a form which allows the party receiving the documents the same ability to access, search, review and display the documents as the party giving disclosure; and

(5) disclosure of Electronic Documents which are of no relevance to the proceedings may place an excessive burden in time and cost on the party to whom disclosure is given.

40. In England & Wales, parties to civil litigation, particularly in document-heavy and complex cases, are required to engage in discussions about the use of technology in the management of electronic documents prior to the first Case Management Conference.

41. Under 31BPD.4 it is recognized that in some cases it will be appropriate for the parties to begin their discussions before the commencement of proceedings. It is expressly stated that discussions should include [9]:

"…

(1) The categories of Electronic Documents within the parties' control, the computer systems, electronic devices and media on which any relevant documents may be held, storage systems and document retention policies;

(2) The scope of the reasonable search for Electronic Documents required by rule 31.7;

(3) The tools and techniques (if any) which should be considered to reduce the burden and cost of disclosure of Electronic Documents, including-

(a) Limiting disclosure of documents or certain categories of documents to particular date ranges, to particular custodians of documents, or to particular types of documents;

(b) The use of agreed Keyword Searches;

(c) The use of agreed software tools;

(d) The methods to be used to identify duplicate documents;

(e) The use of Data Sampling;

(f) The methods to be used to identify privileged documents and other non-disclosable documents…..

(g) The use of a staged approach to the disclosure of Electronic Documents

(4) The preservation of Electronic Documents, with a view to preventing loss of such documents before the trial;

(5) The exchange of data relating to Electronic Documents in an agreed electronic format using agreed fields;

(6) The formats in which Electronic Documents are to be provided on inspection and the methods to be used;

(7) The basis of charging for or sharing the cost of the provision of Electronic Documents…

(8) Whether it would be appropriate to use the services of a neutral electronic repository for storage of Electronic Documents."

42. Practice Direction 31BPD.10 on "Disclosure of Metadata" is to be read in a manner consistent with the guidance provided under 31BPD.1-31BPD.4. Paragraph 28 of that Practice Direction reads:

"*Disclosure of Metadata*
28. Where copies of disclosed documents are provided in Native Format in accordance with paragraph 33 below, some Metadata will be disclosed with each document. A party requesting disclosure of additional Metadata or forensic image copies of disclosed documents (for example in relation to a dispute concerning authenticity) must demonstrate that the relevance and materiality of the requested Metadata justify the cost and burden of producing the Metadata.

29. Parties using document management or litigation support systems should be alert to the possibility that Metadata or other useful information relating to documents may not be stored with the documents."

43. There is a clear push under Paragraph 28 for parties to avoid the unnecessary destruction of embedded descriptive metadata when transmitting electronic documents for disclosure. This can be achieved by the transmitting party's use of the "Native Format" of the document(s). Mr. Duncan KC relied on paragraph 33 of 31BPD.13 where it states the requirement for electronic documents to be provided in their Native Format, so to preserve the metadata relating to the

date of creation of each document. This protocol, read as a whole, implicitly recognizes the existence of distinct types of metadata, some of which are not accessible by the mere receipt of a document in its original version. In such cases, the relevance and materiality of the additional metadata must be demonstrated in order to justify the consequential cost and burden of obtaining it.

44. Paragraph 32 encourages parties to co-operate at an early stage about the format in which electronic documents will be provided on inspection. It is expressly envisaged that in cases of difficulty or disagreement, the matter should be referred to the Court to resolve by case management directions. So, Practice Direction 31BPD.13 reinforces the need for engaging in early party to party discussions about the format of electronic documents to be disclosed, as is promoted by 31BPD.4. Where the inability to agree is clear between the parties, at the early stage of the proceedings, presumably prior to the commencement of discovery, then until otherwise agreed or ordered by the Court, the metadata divulging the date of creation of the document should be preserved.

45. In this case, some metadata was preserved with the transmission of the documents sent to the Plaintiff. It is apparent that the Plaintiff's pursuit of additional metadata, (whether structural metadata, administrative metadata or metadata of a hybrid or other type) is for the advantage of securing it as a document-management tool. Mr. Duncan KC pointed out that the Plaintiff, unlike all but one of the Defendants (Starr (D15)), disclosed enough metadata to enable the Defendants to collate their documents with the coveted ease. This, he argued, is a relevant factor under the Overriding Objective, particularly where it speaks to ensuring that parties are on an equal footing.

46. This Court is also duty-bound to take steps to ensure that expense is saved and that cases are dealt with proportionate to the money involved, the importance of the case, the complexity of the issues and with regard to the financial position of each party. Of great relevance is the Court's duty to manage cases, which entails identifying issues at an early stage.

47. In the context of discovery, it was open to the Plaintiff to avail itself of RSC. O24/4 which permits an application to be made for the Court to determine a contentious issue prior to the discovery stage. Simply put, there is merit in the Defendant's complaint that the Plaintiff ought to have raised the issue relating to the transmission format of the electronic documents prior to the parties' commencement of the disclosure process. RSC. O24/4 provides:

"***24/4 Order for determination of issue, etc. before discovery***
4 (1) Where on an application for an order under rule 2 or 3 it appears to the Court that any issue or question in the cause or matter should be determined before any discovery of

documents is made by the parties, the Court may order that that issue or question be determined first."

48. In this case, notice is taken that the parties' Lists of Documents was exchanged on or about 15 May 2023. The Plaintiff subsequently filed a summons for trial directions but took no issue with the Defendants' List of Documents or the format of the electronic documents disclosed. Indeed, as pointed out by Mr. Khan, the first hint of a complaint about the document format used and insufficient metadata was made as an after-thought in the course of party to party correspondence of 12 January 2024 from Trott & Duncan Limited. Undoubtedly, this is a relevant factor for the exercise of my discretionary powers.

49. It is also significant to note that no issues for trial arise on the authenticity of any of the Defendants' documents. I am unable accept Mr. Duncan KC's argument that the possibility of an issue on this point warrants the Court's direction for the Defendants' documents to be retransmitted with the costs and burden of the full metadata intact. Plainly, from a case management perspective, time and costs would be wasted if these proceedings were to be backtracked by a recall on the Defendants' disclosure, in order to give the Plaintiff a second bite at the cherry when all opportunity for the early identification of this issue has now long passed.

50. RSC O.24/7 empowers the Court to make an order for specific discovery, so long as it complies with the requirement under Rule 8 that the Court must be satisfied that the order for specific discovery is "…*necessary either for disposing fairly of the cause or matter or for saving costs*".

51. RSC O.24/8 provides:

24/8 Discovery to be ordered only if necessary

8 On the hearing of an application for an order under rule 3 or 7 the Court, if satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, may dismiss or, as the case may be, adjourn the application and shall in any case refuse to make such an order if and so far as it is of the opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs."

52. So, in the end, I am bound to find, having regard to RSC. O.24/8, that it is neither necessary for the fairness of the trial nor for the saving of costs to direct the Defendants to re-engage in the discovery process for the purpose of retrieving metadata (if even possible).

53. I would only add that Mr. Khan openly agreed that the electronic documents disclosed to the Plaintiff would be re-categorized or marked so as to allow the Plaintiff to correlate between the documents and the particular Defendant to which they relate. So, the document-

management issues raised by Mr. Duncan KC were mitigated to some real degree during the hearing of these applications.

Whether it is evident, judging from the volume of documents listed by the Defendants, that the Defendants failed in their disclosure obligations

54. This part applies to the Plaintiff's invitation to the Court to draw inferences from the gross volume gap between the Plaintiff's disclosed documents and that of the Defendants. It is said that the documents disclosed by the Defendants collectively amount to approximately 25,000 pages while the documents transmitted by the Plaintiff totaled some 90,000 pages.

55. From a gloss of the factual background to this case, it seems to me that the main documents for disclosure by the Defendants are those which are relevant to the disputed issue of liability for coverage. Unlike the Defendants' discovery obligations, the Plaintiff's List of Documents would necessarily include documents relevant to the acts of its directors and officers which allegedly gave rise to the settlement agreement(s). The Plaintiff's documents would also disclose the conflict which it had with the Cornerstone Investors shareholders in which litigation was threatened and settled. This would include documentation on what was described as a change of control over the Plaintiff and its drop in share value. By way of contrast, the relevant documents required for disclosure by the Defendants is not likely to go far beyond the documents relevant to the policies issued and the documents which will serve as an aid to the proper construction of those policies. So, it is unsurprising to this Court that the Plaintiff would have PCP over a significantly greater percentage of the total pool of documents for mutual discovery.

56. Even in a case, such as this, involving complex commercial litigation, the question for the Court is ironically simple. Does it appear that the Defendants have failed to list relevant documents in their possession, custody or power? As I see it, there is no reasonable basis to conclude that the Defendants have been delinquent in this regard on account of the volume of documentation disclosed.

Whether the disclosure of "Claim Files" and "Underwriting Files" is sufficient

57. Munich Re (D6)'s and Great Lakes (D8)'s coverage of Sirius was underwritten by PUL. The evidence before this Court is that they produced the electronic copies of PUL's "claim file" and "underwriting file" since those Defendants did not keep their own "claim files" or "underwriting files". A "claim file" and an "underwriting file" was also produced by eight other Defendants (D1, D3, D4, D5, D9, D10, D13 and D14).

58. This Court is satisfied that the production of both the "claim file" and an "underwriting file" leaves no room for an appearance of missing documents or classes of documents. There is good evidence before this Court that the Defendants were instructed to include in their "claim files" all claim notes, correspondence, emails, letters, notices, policy, pleadings and any other written material relating to the handling of the Plaintiff. Equally, I find no reason to query the sufficiency of the "underwriting files" on the strength of Mr. Gelfand's evidence that those files were also to include, *inter alia*, correspondence, notes, the insured's application, policy drafts, policy binder, warranties, information relating to the insured's business etc. The Plaintiff's complaint that the Defendants did not divulge any sufficient detail about how these files were maintained is unfounded in the absence of any cogent evidence to contradict Mr. Gelfand's verifications.

59. For these reasons, I find that there are no grounds for directing a further and better list of documents from the Defendants who produced both the "claim file" and an "underwriting file".

60. ASTA Managing Agency Limited ("ASTA (D11)") did not underwrite Sirius' risk. ASTA (D11) is named as a Defendant on behalf of Everest Syndicate 2786 ("Everest Syndicate") which participated in Sirius' risk as part of the Barbican Financial & Professional Lines Consortium 9562 ("Barbican"). Mr. Gelfand deposed that Everest Syndicate confirmed that it did not maintain an "underwriting file" as its capacity was underwritten by Barbican. However, Everest Syndicate did produce a "claim file" on behalf of ASTA (D11). In these circumstances, on the evidence before me, I cannot conclude that ASTA (D11) has withheld any relevant documents within its possession, custody or power.

Whether the Defendants' search of documents not held in a "Claim File" or an "Underwriting File" gives rise to an appearance of a failure to comply with RSC O. 24/1

61. The complaint made by the Plaintiff appears to be borne out of a review of CPR 31 (31BPD.9) where the reasonableness of keyword searches of electronic documents is accepted as a matter of standard practice. There is, however, a qualification warning against the use of simple keyword searches which may result in either the failure to find important documents required for disclosure or, conversely, excessive quantities of irrelevant documents.

62. In the present case, Mr. Khan evinced the thoroughness of the search method used by Endurance (D2), Canopius (D7) and Ironshore (D12). This was carried out in reliance on the search terms listed in Schedule 1 to Mr. Gelfand's evidence. Mr. Khan pointed out that 29 of the search terms expressly named the Defendants' Brokers, Counsel, and up to 23 Claim Handlers for the relevant period. Mr. Khan also flagged the first two search terms listed in the said Schedule 1 confirmed the performance of a search according to the policy number without

any qualification and another search according to the claim number within 25 words of the term "Sirius".

63. In my judgment, these are reasonable search terms in the context of this case. I am further set in my view having taken notice that the Plaintiff does not maintain or specify any description or class of missing documents.

64. From a case management perspective, it is also relevant to the exercise of this Court's discretionary powers to examine the procedural background to the Plaintiff's complaints. Mr. Khan carefully outlined the history and development of the Plaintiff's application for specific discovery. Mr. Khan pointed out that prior to the parties' exchange of documents, in April 2023 short communications were made between the parties about the then proposed format of the Lists of Documents. Mr. Khan emphasized that the subject of a customized approach to discovery was never broached, much less the subject of a particular format for the exchange of electronic documents.

65. Discovery Lists were exchanged on or about 15 May 2023. At that stage, no issues of contention arose on the discovery made. On 5th June 2023 the Plaintiff filed a summons for trial directions. Again, Mr. Khan stressed that no mention or complaint was made about the Lists of Documents exchanged. Implicitly, the Plaintiff had no concerns given its proposal for the exchange of witness statements as the next step forward.

66. The turning point appears to have come about when the Defendants raised a separate issue in view of their own application for specific discovery. On 13 July 2023, through the First Affidavit of Mr. Adam Farra, the Plaintiff queried the non-disclosure of a document called "Key Event Protocol" ("KEP") and three additional categories of documents, namely (i) claim files; (ii) communications with reinsurers and (iii) drafting history. Mr. Gelfand addressed these concerns in his First Affidavit. Instead of filing reply affidavit evidence, the Plaintiff, by letter dated 8 September 2023, withdrew its requests for specific discovery "*save for its request for communications between the Insurers and any re-insurers concerning the claim*." Subsequently, on 28 February 2024, the Plaintiff retreated from its then only remaining claim for specific discovery of additional documents.

67. This background supports the Defendants' firm objections in more than one way. Firstly, the Plaintiff is calling for the Defendants to restart the discovery process by employing search terms, some of which already feature in the Defendants' Schedule 1, in order to locate unspecified missing documents or unspecified classes of missing documents. Secondly, the Plaintiff's call for the Defendants to return to the discovery drawing board comes after the close of any reasonable period within which an issue could have been taken.

68. For these reasons, I find that the Plaintiff's application for an Order of a Further and Better List of Documents is unfounded.

Conclusion

69. The applications made on the Plaintiff's Notice of 13 July 2023 are refused.

70. This Court's approval of the proposed trial directions annexed to the Plaintiff's summons of 5 June 2023, as subsequently modified and agreed between the parties, is confirmed.

71. The Defendants' summons of 14 July 2023 for specific discovery was compromised, the parties having reached an agreement prior to the start of the hearing.

72. An order that Costs be in the Action as agreed between the parties is confirmed.

Dated this 16th day of May 2024

THE HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT