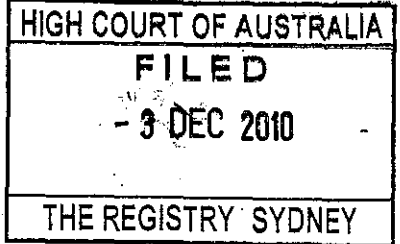


IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY
ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES,
COURT OF APPEAL

No S110/2010 & S219/2010



10

BETWEEN:

WESTPORT INSURANCE CORPORATION
(ABN 48 072 715 738)

First Applicant/Appellant

XL RE LIMITED
(ABN 54 094 352 048)

Fourth Applicant/Appellant

ASSETINSURE PTY LIMITED
(ABN 65 066 463 803)

Second Applicant/Appellant

SCOR SWITZERLAND LTD
(ABN 92 098 315 176)

Fifth Applicant/Appellant

20

**MUNICH REINSURANCE COMPANY OF
AUSTRALASIA LIMITED**
(ABN 51 004 804 013)

Third Applicant/Appellant

- and -

GORDIAN RUNOFF LIMITED
(ABN 11 052 179 647)

Respondent

30

APPLICANTS/APPELLANTS' CHRONOLOGY

Part I:

I certify that this chronology is in a form suitable for publication on the internet.

40

Part II:

Introduction

This proceeding arose from a dispute between the applicants/appellants (the *Reinsurers*) and the respondent (*Gordian*) as to whether certain excess of loss

50

Date of document: 3 December 2010

Filed on behalf of: the appellants/applicants

Allens Arthur Robinson
Lawyers
Deutsche Bank Place
Corner Hunter and Phillip Streets
Sydney NSW 2000

DX 105 Sydney
Tel +61 2 9230 4000
Fax +61 2 9230 5333
Ref MCQS:PZKS:20-468-1663
Contact Name: Michael Quinlan

pzks A0116087832v3 204681663

60

reinsurance treaties (the **Reinsurance Treaties**) apply to a Directors & Officers (D&O) liability run off policy written by Gordian for FAI Insurance Limited (**FAI**) (the **FAI Policy**).

10

The Reinsurance Treaties were written over three layers by the Reinsurers and The Copenhagen Reinsurance Company Limited (ABN 99 070 671 948) (**Copenhagen Re**), which has since withdrawn from the proceeding, as follows:

20

30

40

Layer	Reinsurers
\$10 million in excess of \$10 million reinsurance layer (\$10m xs \$10m layer)	First applicant/appellant 40%
	Second applicant/appellant 30%
	Third applicant/appellant 15%
	Fourth applicant/appellant 15%
\$5 million in excess of \$5 million reinsurance layer (\$5m xs \$5m layer)	First applicant/appellant 40%
	Second applicant/appellant 30%
	Copenhagen Re 20%
	Fifth applicant/appellant 10%
\$3 million in excess of \$2 million reinsurance layer (\$3m xs \$2m layer)	First applicant/appellant 40%
	Second applicant/appellant 30%
	Copenhagen Re 20%
	Fifth applicant/appellant 10%

The \$10m xs \$10m layer replaced an earlier \$10 million in excess of \$10 million excess of loss reinsurance treaty written in part by the first and second applicants/appellants for Gordian (the **Expiring Treaty**).

50

Set out below are the principal events relevant to the writing of the Expiring Treaty, the FAI Policy, the \$10m xs \$10m layer and the \$5m xs \$5m and \$3m xs \$2m layers, and subsequent events leading to the litigation.

60

The writing of the Expiring Treaty

10

20

30

No	Date	Event	Appeal Book Reference
1.	31.12.97	Ms Margot Rathbone (nee Beyersdorf) of the first applicant/appellant faxed a placing slip for the Expiring Treaty to Mr Rob Porter of Fleming Insurance Brokers Limited (then reinsurance brokers for Gordian). The placing slip had been stamped by the first and second Reinsurers among others. The Expiring Treaty incepted on 1 January 1998 and was to expire on 31 December 1998.	AB1:399
2.	28.10.98	Ms Rathbone signed the treaty wording for the Expiring Treaty on behalf of the first applicant/appellant.	AB1:465

The writing of the FAI Policy

40

50

No	Date	Event	Appeal Book Reference
3.	23.09.98	Mr Rodney Adler of FAI notified the Australian Stock Exchange that the Adler family had sold 45 million FAI shares to HIH Winterthur International Holdings Limited (<i>HIH</i>) with a view to HIH acquiring all of the share capital of FAI.	AB1:452 Award [3] (AB1:3)
4.	28.10.98	Mr Ewen McKay of FAI wrote to Mr James Walker of Aon Professional Services (<i>Aon</i>) asking him, in light of the likely takeover of FAI by HIH, to investigate the options available to the Board of Directors of FAI for	AB1:483

60

10

20

30

40

50

		ongoing D&O liability run off cover, including the option of a multi-year deal.	
5.	30.10.98	Ms Karen Ware of Aon wrote to Mr Malcolm Fletcher of Gordian asking him for preliminary comments following FAI's proposed sale and their D&O liability insurance being placed into run-off.	AB1:489 Award [4] (AB1:3)
6.	04.11.98	Mr Walker of Aon wrote to Mr McKay of FAI, stating: "...we have had initial discussions with the current underwriter who had agreed in principle that a "run-off" program for a five year period can be negotiated."	AB1:491
7.	12.11.98, 13.11.98	Correspondence passed between Mr Walker of Aon and Mr Fletcher of Gordian in relation to a proposed 5-year D&O liability run off cover to be written by Gordian for FAI.	AB1:493, AB1:498
8.	19.11.98	Mr Fletcher of Gordian faxed to Mr Walker of Aon two proposed placing slips – one for 5-year D&O liability run off policy and one for an annual D&O liability run off policy for 5 years.	AB2:501
9.	11.12.98	Mr McKay of FAI wrote to Mr Walker of Aon, stating: "...I can advise that you are instructed to proceed with the placement of Option 1 (i.e. 5 year policy with current insurers)."	AB2:508
10.	14.12.98	Mr Walker of Aon sent a copy of Mr McKay's fax to Mr Fletcher of Gordian.	AB2:506 Award [7] (AB1:4)
11.	23.12.98	Mr Walker of Aon wrote to Mr Fletcher of Gordian in relation to a proposed 7-year D&O	AB2:564 Award [8]

60

10

		liability run off cover to be written by Gordian for FAI.	(AB1:4)
12.	23.12.98	Mr Fletcher of Gordian faxed to Mr Walker of Aon a placing slip stamped on behalf of Gordian for the FAI Policy, which was to be for a 7-year period.	AB2:567 Award [8] (AB1:4)
13.	23.02.00	The policy wording for the FAI Policy was signed on behalf of Gordian. The FAI Policy inceptioned on 31 May 1999 and was to expire on 31 May 2006.	AB2:917

20

The writing of the \$10m xs \$10m layer

30

No	Date	Event	Appeal/Book Reference
14.	15.12.98	Mr Fletcher of Gordian wrote to Mr Peter Harmer of Aon Re Worldwide (<i>Aon Re</i>) in relation to the renewal of the Expiring Treaty.	AB2:511 Award [22] (AB1:5)
15.	19.12.98	Ms Rathbone of the first applicant/appellant had a discussion with Mr Giles Fox of Aon Re in relation to the renewal of the Expiring Treaty.	AB2:544
16.	21.12.98	Mr Fox of Aon Re faxed a copy of Mr Fletcher's letter of 15 December 1998 to Ms Rathbone of the first applicant/appellant.	AB2:548 Award [25] (AB1:6)
17.	21.12.98	Ms Rathbone of the first applicant/appellant had a discussion with Mr Peter Backe-Hansen of the first applicant/appellant in relation to the renewal of the Expiring Treaty.	AB2:552
18.	22.12.98	Ms Rathbone faxed a quote for the renewal of	AB2:554

40

50

10

20

30

40

50

60

		the Expiring Treaty to Mr Fox of Aon Re. The quote stated: "Original contracts: Up to three years is acceptable. PINA clause to be amended ... Look forward to receiving slip for our signature."	Award [26] (AB1:6)
19.	22.12.98	Mr Fox of Aon Re wrote to Mr Fletcher of Gordian attaching a draft slip.	AB2:556 Award [27] (AB1:6)
20.	23.12.98	The first applicant/appellant stamped a placing slip for the \$10m xs \$10m layer along with a copy of Mr Fletcher's letter of 15 December 1998. The \$10m xs \$10m layer incepted 1 January 1999 and was to expire on 31 March 2000.	AB2:571 Award [28] (AB1:6)
21.	23.12.98	The second applicant/appellant stamped a placing slip for the \$10m xs \$10m layer along with a copy of Mr Fletcher's letter of 15 December 1998 and Ms Rathbone's letter of 22 December 1998.	AB2:571 Award [28] (AB1:6)
22.	23.12.98, 31.12.98	The third applicant/appellant and on 31 December 1998 the fourth applicant/appellant stamped the placing slip for the \$10m xs \$10m layer along with a copy of Mr Fletcher's letter of 15 December 1998.	AB2:617 Award [28] (AB1:6)
23.	14.01.99	Aon Re sent a cover note to Mr Fletcher of Gordian in relation to the \$10m xs \$10m layer.	AB2:663 Award [30] (AB1:6)
24.	10.02.99	Mr Fletcher of Gordian wrote to Mr Fox of Aon Re, stating: "I note that there is no limitations	AB2:749 Award [34]

10

		concerning the period of insurance policies issued by GIO and ask that you confirm that we will be covered for policies that are issued for terms in excess of 12 months..."	(AB1:7)
25.	15.02.99	Mr Fox of Aon Re wrote to Mr Fletcher of Gordian, stating: "...I confirm reinsurers have noted and agreed to your request ... with regard your need to write original policy periods of 2 or 3 years..."	AB2:751 Award [35] (AB1:7)
26.	16.02.99	In an internal memorandum Mr Fletcher of Gordian stated: "Treaty coverage is as expiring except that we now have protection for long term policies up to 3 years..."	AB2:753 Award [36] (AB1:7)
27.	18.02.99	Mr Fletcher of Gordian wrote to Mr Fox of Aon Re, stating: "...if we issue a policy for a 2 or 3 year period ... but at the end of the first year, we are asked to "roll forward" the term for another year so as to preserve the concept of a 2 or 3 year period, what cover do we have under the current treaty for the "roll forward" period?"	AB2:755 Award [37] (AB1:7)
28.	19.04.99	Mr Fox of Aon Re wrote to Mr Fletcher of Gordian, stating: "...I can confirm that your treaties provide reinsurance to cover original policy periods of up to three years."	AB2:757 Award [38] (AB1:7)

20

30

40

50

The writing of the \$5m xs \$5m and \$3m xs \$2m layers

No	Date	Event	Appeal Book Reference
29.	01.06.99	Correspondence passed between Mr Peter	AB2:766,

60

10

	04.06.99 21.06.99	Burtenshaw of Gordian (who had replaced Mr Fletcher) and Mr Paul Clarke and Mr Michael Ward of Benfield Grieg (Australia) Pty Limited (Benfield) in relation to the possibility of expanding Gordian's excess of loss reinsurance coverage.	AB2:771, AB2:776	
20	30.	29.06.99	Mr Backe-Hansen of the first applicant/appellant had a discussion with Mr Clarke and Mr Ward of Benfield in relation to the possibility of the first applicant/appellant providing excess of loss reinsurance coverage to Gordian below the existing \$10m xs \$10m layer.	AB2:785 Award [47] (AB1:8)
30	31.	05.07.99	Mr Backe-Hansen of the first applicant/appellant sent a quote to Mr Ward of Benfield for a number of proposed layers of reinsurance for Gordian below the existing \$10m xs \$10m layer.	AB2:801 Award [48] (AB1:8)
40	32.	16.08.99	Placing slips for 80% of the \$5m xs \$5m and \$3m xs \$2m layers were stamped on behalf of the first, second and fifth applicants/appellants. The \$5m xs \$5m and \$3m xs \$2m layers incepted on 1 January 1999 and were to expire on 31 March 2000.	AB2:840-853 Award [49] (AB1:8)
50	33.	21.09.99	Benfield sent cover notes to Gordian in relation to the \$3m xs \$2m and \$5m xs \$5m layers.	AB2:860, AB2:867
	34.	23.12.99	Mr Ward of Benfield wrote to Mr Backe-Hansen of the first applicant/appellant in	AB2:874 Award [54]

10

		relation to a concern raised by Gordian with the exclusion list under the \$5m xs \$5m and \$3m xs \$2m layers.	(AB1:9)
35.	01.03.00	Placing slips for the remaining 20% of the \$5m xs \$5m and \$3m xs \$2m layers were stamped on behalf of Copenhagen Re.	AB2:992 Award [58] (AB1:9)
36.	02.03.00	Benfield sent revised cover notes to Gordian in relation to the \$5m xs \$5m and \$3m xs \$2m layers.	AB2:999 Award [58] (AB1:9)

20

Subsequent events

No	Date	Event	Appeal Book Reference
37.	23.02.01	Gordian is notified of circumstances that may give rise to a claim under the FAI D&O policy	AB3:1042 Award [59] (AB1:9)
38.	14.11.01	Letter from Ms Lisette Douglas of the fourth applicant/appellant to Mr Derek Elwell of Aon Re requesting an amendment to the draft treaty wording for the \$10m xs \$10m layer to clarify its scope of cover	AB3:1072 Award [61] (AB1:10)
39.	20.11.01	Letter from Mr Elwell of Aon Re to Mr Robert Hedges of Gordian in relation to the requested amendment to the terms of the \$10m xs \$10m layer	AB3:1076 Award [61]- [62] (AB1:10-11)
40.	12.12.01	Reinsurers through their solicitors write to Aon Re and Benfield requesting the same amendment to the terms of all of the Reinsurance Treaties to clarify their scope of	AB3:1081, AB3:1083 Award [63]

30

40

50

10

		cover	(AB1:11)
41.	12.12.01	Email from Mr Elwell of Aon Re to the Reinsurers' solicitors in relation to the requested amendment to the terms of the \$10m xs \$10m layer	AB3:1086-1087 Award [64] (AB1:11)
42.	17.12.01	Letters from Mr Elwell of Aon Re to the Reinsurers enclosing treaty wording for the \$10m xs \$10m layer containing the requested amendment	AB3:1088-1093 Award [66] (AB1:11-12)
43.	26.02.02-20.03.02	Reinsurers sign the treaty wording as amended and return it to Aon Re	AB3:1095, AB3:1122, AB3:1129 Award [67] (AB1:12)
44.	22.03.02	Letter from Mr Elwell of Aon Re to Mr Hedges of Gordian enclosing the treaty wording signed by the Reinsurers	AB3:1130 Award [68] (AB1:12)

20

30

Procedural history

40

No	Date	Event	Appeal Book Reference
45.	15.10.04	Arbitration commences by service of Gordian's points of claim	-
46.	02.02.07	Gordian seeks to amend its points of claim to include reliance on section 18B of the <i>Insurance Act 1902</i> (NSW)	-
47.	21.11.07	Interim arbitration hearing to determine Gordian's application to amend its points of	-

50

60

		claim to include reliance on section 18B of the <i>Insurance Act 1902</i> (NSW)		
10	48.	26.11.07	Mr Tony Fitzgerald AC QC hands down interim award in relation to Gordian's application to amend its points of claim to include reliance on section 18B of the <i>Insurance Act 1902</i> (NSW)	-
	49.	14.07.08	Hearing before arbitrators commences	AB3:1132
20	50.	22.07.08	Hearing before arbitrators concludes	AB4:1557
	51.	10.10.08	Award handed down by arbitrators	AB1:1
	52.	07.11.08	Reinsurers seek leave to appeal from the arbitrators' award by filing Commercial List Statement	AB1:26
30	53.	21.11.08, 12.12.08	Directions hearings before Bergin J in relation to the concurrent hearing of the Reinsurers' application for leave to appeal from the arbitrators' award and the appeal itself	-
	54.	01.04.09	Hearing before Einstein J commences	-
40	55.	01.04.09	Judgment of Einstein J on concurrent hearing of the application for leave to appeal and the appeal itself (revised 02.04.09)	AB4:1679
	56.	03.04.09	Hearing before Einstein J concludes	-
	57.	08.04.09	Judgment of Einstein J	AB4:1684
50	58.	29.04.09	Gordian seeks leave to appeal from Einstein J's judgment by filing a Summons Seeking Leave to Appeal	AB4:1727
	59.	27.05.09	Reinsurers seek leave to cross-appeal from Einstein J's judgment by filing a Summons	AB4:1747

pzks A0116087832v3 204681663

10

20

30


40

50

60

		Seeking Leave to Cross-Appeal	
60.	04.11.09	Copenhagen Re withdraws from the proceeding	-
61.	04.11.09	Hearing before the Court of Appeal commences	AB4:1800
62.	05.11.09	Hearing before the Court of Appeal concludes	AB4:1916
63.	01.04.10	Judgment of Spigelman J, Allsop P and Macfarlan JA	AB4:1917
64.	30.04.10	Reinsurers file amended application for special leave to appeal	AB5:2020
65.	03.09.10	Hearing before Gummow, Heydon and Kiefel JJ of the application for special leave to appeal to the High Court of Australia	-
66.	20.09.10	Orders of the High Court of Australia granting special leave to appeal and referring certain grounds to the Full Court made	AB5:2242
67.	25.09.10	Reinsurers file Notice of Appeal	AB5:2246
68.	07.10.10	Gordian files Notice of Contention	AB5:2251

Dated: 3 December 2010



Michael Quinlan
 Solicitor for the appellant
 Telephone: +61 2 9230 4000
 Facsimile: +61 2 9230 5333
 Email: Michael.Quinlan@aar.com.au