

CA on appeal from QBD (Moore Bick J) before Potter LJ; Carnwath LJ; Mr Justice Lawrence Collins. 6th March 2003.

Lord Justice Potter:

1. This is an appeal by CX Reinsurance Company Limited, formerly CNA Reinsurance Company Limited ("CNA"), from an order of Mr Justice Moore-Bick dated 17 May 2002, whereby he dismissed with costs CNA's application pursuant to s.9 of the Arbitration Act 1996 for a stay of proceedings issued in the Commercial Court by Sun Life Assurance Company of Canada ("Sun Life"). The proceedings concern a 10% quota share reinsurance treaty entered into in 1998/1999, under which Sun Life agreed to reinsure 10% of personal accident risks underwritten on behalf of CNA pursuant to a management and administration agreement between CNA and IGI Underwriting Ltd ("IGI") and IOA Global Limited ("IOA Global"). By the Particulars of Claim, Sun Life contend that they are entitled to avoid and/or to rescind the treaty ab initio by reason of material misrepresentations and/or the non-disclosure of material circumstances at the time of presentation.
2. The judge dismissed the application, holding that no arbitration agreement had been concluded between the parties and that the agreement relied on by CNA was thus 'null and void' within the meaning, and for the purposes, of s.9(4) of the 1996 Act.

S.9 of the Arbitration Act 1996

3. S.9 of the 1996 Act provides:

"(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counter-claim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.

...

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

The Factual Background

4. Before Moore-Bick J, it was not in dispute between the parties that a contract of reinsurance had been agreed between them. The issue was whether there was included in the contract an arbitration clause or agreement included in treaty terms which were the subject of negotiations between the parties but never signed. As the judge observed at paragraph 2 of his judgment: *"This is an unusual case in some respects, in particular, because, although no slip or treaty wording was ever signed by both parties, it is common ground, at least for the purposes of this application, that there was a contract between them and that that contract incepted from 1 January 1999."*
5. That position came about in this way.
6. In 1988, under a Participation Agreement made in the United States, Sun Life became a member of a US-based reinsurance Pool formed and managed by IOA Re specialising in Accident and Health Reinsurance. Sun Life thereby delegated wide powers to IOA Re to accept business and settle claims on its behalf. CCC, the parent company of CNA, was also a Pool member. At that time, Mr Kent Nickerson, a valuation actuary, worked for Sun Life in their Reinsurance Department, as did Miss Sue Benson who reported to him. In 1995, Mr Nickerson left Sun Life to open the IOA Re Office in Toronto and Miss Benson became the Vice-President of Sun Life's Accident and Health Reinsurance Department. In 1996, the Pool began to do business in London through IOA Re.
7. In May 1998, Mr Nickerson transferred to IOA Global Ltd (a sister company of IOA Re) as its General Manager in London. At that time, CNA were parties to a Management and Administration Agreement dated 27 April 1997, succeeded by a further such agreement made in identical terms on 17 August 1998 ("the M & A Agreement"), whereby CNA delegated the underwriting and marketing of their UK Accident and Health Reinsurance to IGI Indemnity Agencies Ltd ("IGI") under the supervision of IOA Global.
8. IGI were by then writing accident and health reinsurance business on behalf of CNA under the M&A Agreement. They had also started to write personal accident business which appeared to be profitable. Sun Life were already involved in that business by virtue of their participation in the Pool. In July 1998, Mr Nickerson (with the manager of IOA Global), was in the process of developing a new medical account on which no business had yet been written but in which he wished to interest Sun Life. He met Miss Benson and discussed a possible participation on the proposed quota share reinsurance of the medical book. Mr Nickerson offered Miss Benson a 40% line, noting that it would generate small premium volume. He also proposed a 10% line on a personal accident quota share from CNA which he described in his statement as "the stronger selling point of the package of medical and PA business I was proposing" and which Miss Benson described as something to "sweeten" the deal.
9. Mr Nickerson had authority to negotiate both treaties on behalf of CNA Re, as did Miss Benson for Sun Life.
10. The course of dealing between them can best be summarised by quotation of the facts as set out in the judgment of Moore-Bick J at paragraphs 5-13 as follows (the wording in square brackets being my own additions):
"5 On 20 July 1998 [Mr Nickerson] wrote to Miss Benson enclosing a slip for medical reinsurance. That set out in some detail the terms on which it was proposed that the treaty should be written. Amongst other things it specifically provided that the business should be governed by the management and administration agreement between IGI, IOA and CNA. It is clear from the material before me that that management agreement was intended to underpin both this cession and the cession of the personal accident business as well.

- 6 Apparently in September 1998, Mr Nickerson met Miss Benson again at a conference when they discussed the [personal accident] business further. In the course of her discussion she expressed her enthusiasm for taking this business. I infer, although this is not specifically stated, that there must have been some further discussion of the detailed nature of the business between them on that occasion since that would only be natural.
[Miss Benson was accompanied in those discussions by Ms O'Sullivan, a Sun Life underwriter responsible for medical accident business and who, in late 1998, assumed responsibility for the day to day management of medical and personal accident business on the IGI account.]
- 7 In any event, on 2 October 1998 Mr Nickerson drafted treaty wordings for the medical and personal accident covers each of which included an arbitration clause. Neither of them was sent to Sun Life at the time pending approval by CNA.
- 8 On 14 October 1998 Mr Nickerson contacted Miss Benson by e-mail enclosing another copy of the slip to which I have just referred in relation to the medical business and a copy of the management agreement to which that slip referred. He also invited her to sign the slip for the medical business as soon as possible because some of the business was already being written. He stated, however, that they could hold off from signing a slip in relation to the personal accident insurance which did not become effective until 1 January of the following year because he expected to have a treaty wording done by that time. In that e-mail he again made the point that the wordings for both contracts was simple because they referred to the management agreement [which was attached]. That seems to me to provide further support for the conclusion that it was the management agreement which essentially underpinned the terms upon which this ... business was to be done. Indeed one can see from the terms of the draft treaty produced in respect of the personal accident business that it is extremely brief and relies to a substantial extent on the existence of the management agreement.
- 9 On 29 October Mr Nickerson saw Miss Benson again in Toronto. On that occasion she signed the medical slip. Nothing further happened in relation to the personal accident business, however, until the end of March 1999, when a copy of a treaty, signed by CNA [with the date of signature inserted as 25 February 1995], was sent to the claimants for their review and signature if it commended itself to them.
11. The letter of 22 March enclosing the Treaty concluded: "All copies have been signed by CNA Re. After your review, assuming the words are acceptable. Please sign both copies, retain one copy for your record and return the other for delivery to CNA Re"
12. The Treaty which was headed "Retrocession Agreement" and stated to be made between CNA ("the Company") and Sun Life ("the Reinsurer") was in short form and ran as follows:
"Whereas the Company has accepted 100% of the liability for reinsurance assumed through an Accident and Health Management and Administration Agreement (hereinafter called "the Original Agreement"), a copy of which is attached hereto and forms an integral part of this agreement, and
Whereas it is the intention of the parties that the Company shall be relieved of 10% of 100% of the liability attaching to them from the aforementioned Original Agreement, except liability arising out of international medical reinsurance written as such.
Now, therefore, it is agreed as follows –
- ARTICLE 1
Retrocession
1. The Reinsurer shall relieve the Company of 10% part of 100% of all liability attaching to the Company in respect of the Company's commitment under the Original Agreement, excluding international medical reinsurance written as such.
 2. The Reinsurer shall, likewise, receive the same proportion (i.e. 10% part of 100%) of all remuneration and payments due to the Company in respect of the Company's commitment under the Original Agreement, excluding those in respect of international medical reinsurance written as such.
 3. Balances due from the Company to the Reinsurer will be payable by IGI Underwriting Agencies Ltd (hereinafter called "IGI") and balances due to the Company from the Reinsurer will be payable to IGI.
- ARTICLE 2
ORIGINAL TERMS
This Agreement is subject to the same terms and conditions as contained in the Original Agreement and the Reinsurer shall follow all loss settlements made by the Company thereunder.
- ARTICLE 3
TERM AND CANCELLATION
This Agreement shall commence on 1st January 1999 and end on 31st December 1999 both days inclusive. This contract shall remain continuously in force until cancelled on any April 1, by either party giving (120) an hundred and twenty days prior written notice.
- ARTICLE 4
RETROCESSION COMMISSION
The Reinsurer shall allow the Company an additional commission of 1½% as contained in the Original Agreement to be charged on the premium ceded to the Reinsurer.
- ...
- ARTICLE 7

ARBITRATION

As a condition precedent to any right of action hereunder, any dispute or difference between the Company and the Reinsurer relating to the interpretation or performance of this Contract, including its formation or validity, or any transaction under this Contract, whether arising before or after termination, shall be submitted to arbitration.

...

[The detail of the Arbitration procedure was then set out at length.]

...

The arbitration shall take place in Chicago, Illinois unless otherwise mutually agreed between the Company and the Reinsurer."

13. I return to the judgment of Moore-Bick J for the events which followed:
 - 10 On 7 April, there was a meeting in Toronto between Mr Nickerson and Miss Benson during the course of which they discussed [the personal accident] business. Although there is a slight difference in emphasis between the recollections of Miss Benson and Mr Nickerson, it is apparent from what they say about that meeting and the conversation that took place between them that Miss Benson indicated that she was happy with the draft wording, save for a couple of points which needed further clarification. She asked Mr Nickerson to discuss those points with one of the underwriters, Miss O'Sullivan. In due course he did that.
 11. The two points in question related to a change in the date of the cancellation clause of the treaty and the inclusion of what is called an 'access to records clause' enabling the reinsurer to have access to the reinsured's records. In the course of his discussion with Miss O'Sullivan, Mr Nickerson agreed in principle to change the date for the cancellation clause and agreed to the inclusion of an access to records clause. But on that occasion no particular wording was discussed. Those meetings on 7 April concluded without any treaty wording being signed. The matter was left on the basis that the wording in relation to the two matters to which I have just referred would be finalised in due course.
 12. On 9 June 1999 Mr Nickerson sent an e-mail to Miss O'Sullivan with a proposed wording in response to her request for an access to records clause. It is unnecessary for me to recite it in detail. It is sufficient to say that he set out in that e-mail a form of wording which ... he was offering to incorporate into an addendum to the original treaty wording. On the same day Miss O'Sullivan responded. Her response was to set out an alternative form of inspection of records clause, but to follow it by saying that his clause seemed fine so he could choose how to take the matter forward.
 13. About a week later, on 16 June, Mr Nickerson sent a further e-mail to Miss O'Sullivan attaching a document described as Addendum No 1 to the original [draft] reinsurance treaty. That Addendum contained two clauses: a new form of cancellation clause which was to replace article 3 of the original draft; and an additional article 7, dealing with inspection and access to records. [Both clauses were in the form agreed. The inspection of records clause being in the same terms as that which Ms O'Sullivan said seemed fine.] It is, perhaps, of importance to note that the addendum was worded in a formal way and contemplated signature by both CNA and Sun Life Assurance of Canada."
14. The judge found (see further below) that the wordings for the Treaty and the Addendum had been agreed. However, neither the draft Treaty nor the Addendum was ever signed by Sun Life. In her witness statement Miss Benson stated that, although Treaty wordings would come in to her, she would in the ordinary way send them directly to an underwriter, in this case Miss O'Sullivan to review the wording and ask for any changes thought to be appropriate, following which the wordings would come to Miss Benson for review and final approval. She stated that a wording/treaty in her department could only be agreed by the signature of herself and another Vice-President. Underwriters such as Miss O'Sullivan did not have authority to agree or sign such wording. Although Miss O'Sullivan passed the revised Treaty and Addendum wording to Miss Benson for review, Miss Benson failed to attend to the matter and did not carry out that review before leaving Sun Life. She stated: "Had I done so, I believe I would have queried the Arbitration Clause. My normal expectation would be for both the site of the Arbitration and Jurisdiction Clause to reflect the domicile of the company from whom Sun Life was accepting the business, which in this case, since CNA Re was an English company, would be an arbitration in England governed by English law. I did not at any time negotiate, sign or agree the PA Wording."
15. As for CNA, Mr Nickerson stated that having dealt with the two points raised by Miss O'Sullivan in the draft Addendum forwarded in June 1999, because the terms had apparently been agreed by Miss O'Sullivan, he did not feel there was urgent need to take the matter further. He left the Addendum to Mr Downing at CNA for him to apply his signature. However, shortly thereafter, Mr Downing similarly left CNA without ever having done so and his successor, who was not authorised to sign it, overlooked getting it signed in the course of a heavy workload. Matters remained in that state until a notice of cancellation of the Treaty was issued by Ms O'Sullivan on 27 September 1999 (see paragraph 17 below).
16. In relation to the question of authority, Mr Nickerson said in his Supplemental Statement that he was aware, during his time at Sun Life, that there was an internal requirement for wordings to be "formally signed off" by two signatories such as Miss Benson and another Vice-President. However, he stated: "Whatever the internal arrangements within Sun Life for the authorisation and signing of wordings, it was my clear understanding that all underwriters dealing with counterparties to transactions were authorised to communicate Sun Life's decisions ... accordingly, when I was negotiating the words with Jeanette O'Sullivan, I assumed that she was representing, and was

authorised to represent, a position which had been agreed in accordance with whatever procedures Sun Life had in place at the time."

He also stated:

"... whatever went on internally within Sun Life, the position expressed to me, first by Sue Benson in referring me to Jeanette O'Sullivan, and then by Ms O'Sullivan herself, was that the internal procedures had been gone through, and there were only two points Sun Life wanted to raise on the wording. Otherwise, the wording was agreed. I believe (and still believe) that Jeanette O'Sullivan was fully authorised to communicate those decisions to me ...

My understanding was that the signing of the wording would be nothing more than the formalisation of the agreement that had been reached. By indicating to me that the only points of discussion on the wording were those that she raised with me, I understood Ms O'Sullivan to be confirming to me that the wording had gone through the full review process and that the balance of the clauses were agreed by Sun Life."

17. On 27 September 1999 Miss O'Sullivan sent two faxes to Mr Nickerson, one referring to the Personal Accident Quota Share Treaty and the other to the International Medical Quota Share Treaty purporting to give notice of cancellation on the basis that the records of Sun Life showed that the treaties were each subject to a 90-day notice of cancellation. A subsequent message demonstrates that there was confusion in the records between the two treaties and that, at the time the faxes were sent it was wrongly understood that there was a signed slip providing for such period of notice in respect of the personal accident insurance, which of course there was not. In this respect, the judge said: "It seems to me that the giving of a notice of cancellation on 27th September takes the matter no further either. There is no evidence that CNA conducted itself in any different manner as a result of any statement that one might spell out of that notice of cancellation to the effect that the Treaty was considered to be binding. Indeed, Mr Matovu in his submissions treated it as no more than another example of Miss O'Sullivan's indicating that she considered the Treaty to be binding so that its significance derided (sic) the extent of her authority to bind the company."

The Judgment of Moore-Bick J

18. Before the judge it was submitted for CNA that agreement on the Treaty wording had been reached. It was accepted that Miss Benson, although substantially satisfied with the Treaty wording recognised that there were two points which needed to be clarified, referring Mr Nickerson to Ms O'Sullivan to reach agreement, and that, as a result of the exchanges between Mr Nickerson and Ms O'Sullivan in June there was final agreement on the terms of the original Treaty and the Addendum, so that the parties became bound in those terms despite the absence of signature by the parties. It was submitted that there was nothing in the parties' negotiations to suggest that signature of the treaty was a pre-condition to the parties becoming bound. However, the judge was of a contrary view.
19. In this respect he noted that there had been discussions between Mr Nickerson and Miss Benson during which it was made clear that the business would be conducted in accordance with the M&A Agreement, a copy of which had been made available to her. It was on this basis that the parties were content to accept that a contract had come into existence between them before the discussions which occurred on 7 April.
20. So far as those discussions were concerned he held that it was plain that on 7 April there was negotiation about the contract wording which was inconclusive and it was plain that no-one at Sun Life was content to be bound by the terms of the Treaty as it then stood, even if modified by altering the date and the cancellation clause. The need for an access to records clause was recognised and there was nothing in the evidence to suggest that Sun Life were willing to be bound by the Treaty as it stood on that date. He further expressed himself satisfied that both parties contemplated that in due course a form of wording would be signed to indicate their formal assent to the wording of the treaty and their willingness to become bound by it.
21. The judge acknowledged that, in subsequent negotiations with Miss O'Sullivan, it appeared that an agreed form of wording had been reached. However, he was satisfied that she did not enjoy the authority to reach final agreement on the matter and that, in any event, the parties contemplated that the Treaty wording would not become binding short of signature. His reasoning was as follows:

"17 One can see from the Treaty wording itself that it is in the nature of a formal document. It was signed formally by CNA and provided for a signature on the part of Sun Life ...

18 It is quite clear, in my judgment, that Miss Benson was not herself willing to assent to the terms of the original Treaty wording on 7 April because she specifically referred the matter to Miss O'Sullivan for further discussions in relation to the two points to which I have already referred. The question then is whether Miss O'Sullivan was given actual authority to enter into a binding agreement with CNA on such terms as she could negotiate with Mr Nickerson, either on 7 April or subsequently, or whether she was in some way held out as having authority to take that step, or, perhaps, whether she was held out as having authority to communicate a decision on the part of someone more senior in the administration of Sun Life of agreement to those terms.

19 In my judgment it is impossible on the evidence before me to reach the conclusion that Miss O'Sullivan was given actual authority to bind the company to a form of wording which was yet to be agreed. The negotiations were conducted principally between Mr Nickerson and Miss Benson. The documents themselves contemplated formal signature on the part of both parties. I am quite satisfied that the instructions given to Miss O'Sullivan were to negotiate, as far as possible, a form of wording which she would herself regard as satisfactory with a view to that being incorporated into a formal document at a later stage for signature by those who would ordinarily take that step.

20 *This is not a case, it seems to me, in which Miss O'Sullivan was given authority to bind the company to a form of wording which she alone would agree, nor does it seem to me that the evidence supports the conclusion that she was being held out as having authority to take such a decision or to communicate such a decision on the part of some other person. The reason I say that is principally because these parties were negotiating on the basis that these were formal documents which would require a signature in order to indicate the companies' assent on both sides.*

...

22 *The subsequent negotiations, although they resulted in an agreed form of wording, do not seem to me to have reached the point at which Sun Life clearly acknowledged its assent to become bound by those terms including the addendum. Again, the reason for that is that the addendum itself contemplated formal execution and that seems to me to be quite inconsistent with the suggestion that Miss O'Sullivan was or was understood to be authorised to indicate some informal assent on the part of more senior members of the Sun Life management. [emphasis added]*

...

24 *... This is a case, as I have already observed, in which the parties were negotiating to produce a formal signed document. I do not see any grounds for concluding that a person in Miss O'Sullivan's position would ordinarily have authority in those particular circumstances to bind the company in an informal manner and I am quite satisfied that she was not held out as having authority to communicate an informal decision of that kind by anyone else."*

22. The judge then dealt with an argument that it was clear that the parties had conducted reinsurance business on the basis of the terms of the Treaty in a way which indicated that they did regard themselves as bound by its terms. He rejected that argument. He stated:

"27...The fact that both parties accept that there was an agreement between them, which preceded the production of the Treaty terms, makes it important to ask the question whether the way in which the business was conducted was clearly referable only to the terms of the Treaty. If it was as consistent with the terms previously agreed between the parties as with the terms of the Treaty, then that conduct is equivocal and does not point clearly to a decision by the parties to adopt the Treaty terms."

23. The judge went on to say that there was very little evidence of the manner in which the parties conducted their business. While it appeared that there had been some accounting in relation to premium, he said there was no basis on which he could determine that such accounting was referable to the Treaty terms rather than the terms agreed under the M&A Agreement. In those circumstances the judge held that no binding arbitration agreement had been brought into existence through the medium of the draft Treaty and the application therefore fell to be dismissed.

The Submissions of the Appellant

24. Mr Ruttle QC for CNA submits that the judge was right to hold that the negotiations commencing with Miss Benson and continuing with Miss O'Sullivan resulted in agreement upon a form of wording for the Treaty/Addendum (see paragraph 22 of his judgment), but was wrong to hold in those circumstances that the terms did not have binding force until formal signature of the document. He submits that there was no good reason to hold that a formal signature was required upon the Treaty/Addendum before its terms became effective. The judge treated the position of the parties as having reached an agreement "subject to contract" although they had not so stipulated and neither the nature of the contract, the relationship of the parties, nor the circumstances of the case demanded such an interpretation. Mr Ruttle submits that the true point to be decided was whether the parties were truly "ad idem" and had so indicated to each other, rather than an investigation of the authority of Miss O'Sullivan, who was the person treated by Miss Benson, and held out by her to Mr Nickerson, to be the person with whom he should reach agreement on the two outstanding points in the wording of the treaty. On that basis, the judge should have found for Sun Life.
25. In a little more detail, the lines of Mr Ruttle's argument are as follows. He rightly points out that, as a matter of principle, there is no particular level of formality prescribed for a reinsurance agreement to come into effect. Indeed, it is the pleaded case for Sun Life, that a quota share agreement for the personal accident business was reached *without* any slip or formal wording being signed, simply as a result of oral conversations between Miss Benson and Mr Nickerson in late October 1998. On the application before the judge, the parties were simply content to accept (without precision) that it had come into existence (whether orally or by conduct) in relation to reinsurance effective as from 1 January 1999 prior to the discussions on 7 April. Mr Ruttle accepts and submits that, until wording for the Treaty was produced and agreed upon, the precise terms of the treaty agreement, reached simply by reference to the M&A Agreement (see the email of 14 October 1988) would have been uncertain, given that the Agreement was in form and effect a management agreement and not a slip or treaty.
26. Those uncertainties were intended to be clarified by the terms of the draft Treaty (signed on behalf of CNA) which was forwarded for agreement to Sun Life in a form which included the arbitration clause. Thereafter, Miss Benson having indicated that she was happy with the draft wording subject only to two points (neither of which related to the arbitration clause see paragraph 10 of the judgment), and having requested Mr Nickerson to discuss these with Miss O'Sullivan (ibid), agreement was reached in those discussions (as the judge found), the agreed wording being inserted in the Addendum to the draft Treaty subsequently forwarded (see paragraph 22 of the judgment). Mr Ruttle submits that, having so decided, the judge was wrong to conclude that the signature of the parties was a precondition to their being bound by the terms of the draft Treaty as supplemented by the

Addendum. He accepts that the terms of those documents, and the parties themselves, contemplated that they would be signed, which never in fact occurred. However, he submits that in such a case, a crucial question arises, namely whether such signature was a precondition to *final* agreement between the parties as to the terms of the reinsurance or whether, agreement having been reached, it would be no more than confirmation of the terms agreed with a view to avoiding dispute thereafter. Mr Ruttle complains that the judge never approached the matter in this way and never really addressed the latter question. He simply concluded that, because signature was contemplated, it was a precondition to a binding agreement and only by that means could Sun Life be taken to have acknowledged its assent (see paragraph 22 of the judgment).

27. Mr Ruttle submits that to hold as the judge did yields an uncommercial result against the background of reinsurance practice, as well as the original intention of the parties that, in the absence of a signed slip, Treaty terms would be agreed prior to inception. Mr Ruttle points out that the slip signed in respect of the medical insurance set out the terms agreed for that reinsurance and included in particular a specific and typical provision for overriding commission to be paid by the reinsurer as well as the usual provision that the reinsurer must follow the fortunes of the reinsured. Neither of those provisions could be spelt out of the M&A Agreement which did not itself define the reinsurance or the terms on which it was granted. Nor did it provide for the period of accounting e.g. quarterly or half yearly. These were important matters on which agreement was plainly required and which was in fact reached by those negotiating the terms of the Treaty after inception of the reinsurance.
28. So far as the question of Ms O'Sullivan's authority is concerned, Mr Ruttle submits that, whatever the position internally within Sun Life, the matter falls to be decided upon the basis of Ms O'Sullivan's ostensible authority to reach agreement upon the terms of the Treaty. In this respect he does not challenge the broad finding of the judge that she lacked actual authority to bind Sun Life herself, but submits that, so far as Mr Nickerson was concerned, she had ostensible or delegated authority to reach and/or communicate agreement upon those terms as a result of Ms Benson's indication to him that he should discuss with Ms O'Sullivan the only two aspects of the draft Treaty with which she had not herself expressed agreement. In that respect, Mr Ruttle relies upon the statements of Mr Nickerson set out at paragraph 15 above and the decision of the Court of Appeal in *First Energy (UK) Ltd v Hungarian International Bank Ltd* [1993] 2 Lloyd's Rep 194.

The Respondent's Submissions

29. Mr Kealey QC for CNA reiterates and supports the reasoning of the judge which he says was justified upon the state of the evidence before him. He makes a further submission in that respect, pursuant to a respondent's notice. It is that the judge should have had regard to the fact that Mr Nickerson had worked for Sun Life between 1978 and 1995, and accepted that he knew there was an internal requirement at Sun Life for wordings to be formally signed by two signatories from a list of authorised persons (see paragraph 16 above). That was consistent with the evidence of Miss Benson and Ms O'Sullivan (see paragraph 14 above). Also with the terms of the final paragraph of Mr Nickerson's letter enclosing the draft Treaty (see paragraph 11 above). He submits that Mr Nickerson's statement that "the signing [of] the wording would be nothing more than a formalisation of the agreement that had been reached" and the contention for CNA that the signatures were required, not as a precondition for agreement but merely as confirmation of what had been agreed at the end of the negotiating process, sits ill with the fact that Mr Nickerson himself obtained CNA's signature on the draft treaty wording before sending it to Sun Life and with his knowledge that only authorised persons both in Sun Life and at CNA were permitted to sign Treaty wordings. Mr Kealey submits that such requirements would be a nonsense unless the purpose of the signatures (and the signatures alone) was to indicate the parties' unconditional assent to be bound by the terms of the Treaty/Addendum.
30. Finally, Mr Healy submits that the judge did not rely, though he could and should have relied, on the fact that CNA as well as Sun Life never signed the Addendum, Mr Nickerson giving the explanation already mentioned at paragraph 15 above.

Discussion

31. This was indeed an unusual case, as the judge observed, because, whereas the parties were agreed that there was a contract of reinsurance between them which incepted from 1 January 1999, it was without any slip or written treaty ever having been signed, despite the intention of the parties that it should have been. As stated by Hobhouse J in *The Zephyr* 1984 1 Lloyd's LR 58 at 69 rlc: "*It is of course conceptually possible to make a contract which is partly oral and partly written but that is not the practice of the market.*"
32. The case is further unusual because, in the insurance and reinsurance market the focus of concern is usually upon the terms agreed and the necessity for signature at the outset when the insurance contract is made (usually by slip), rather than in relation to any subsequent *additional* treaty terms which are regarded as a relative formality. In this case, it is plain that Mr Nickerson and Miss Benson were authorised to agree the original, partly oral and partly written, contract for reinsurance and yet it is submitted for CNA that Miss Benson and/or Ms O'Sullivan, to whom Miss Benson referred Mr Nickerson to discuss the two outstanding points, were not endowed with ostensible authority to reach and/or bind the parties to such additional terms unless they were contained in a signed treaty.
33. However, first to consider the question of authority is to put the cart before the horse, the latter being the finding of the judge that the parties were throughout "negotiating on the basis that [the draft Treaty/Addendum] were formal documents which would require a signature in order to indicate the company's assent on both sides" (see paragraph 20 of the judgment).

34. That was plainly a finding of fact as to the common intention of the parties, depending as it did, not simply upon the proper construction of documents and correspondence, but upon the evidence before the judge as contained in the parties' witness statements. For the judge to find as he did was indeed equivalent to a finding that the negotiations were "subject to [written] contract", but that observation does not in itself demonstrate that the judge was wrong to make such a finding. I readily accept, as Mr Ruttle submits, that, without express use of that phrase, it is a conclusion which a court should generally be slow to draw in a commercial context. However, in the field of insurance, and as a matter of principle divorced from context, such a conclusion may more readily be arrived at in respect of a policy or formal treaty. *"The policy is the formal contractual document issued to the assured and unequivocally contains the terms of the contract."* : per *Hobhouse J in The Zephyr* (above).
35. I add in parenthesis that a contract of marine insurance is of course inadmissible in evidence unless contained in a policy signed by the insurer. That instance apart, however, because in the usual case the contract of (re)insurance will be contained in a slip setting out the essential terms, it is necessary for a formal policy to be issued if those binding terms are to be altered or augmented.
36. Here, of course, no slip had been signed. Nonetheless, as the judge pointed out, the parties felt able to do, and were doing, business on the basis that the terms of the M&A Agreement were sufficient to regulate their mutual obligations. That being so, if new and/or different terms were to be introduced, it was necessary to apply orthodox rules of contract to the question whether or not a binding agreement as to those terms was reached.
37. In relation to the judge's finding of fact as to the common intention of the parties, I can find no fault with his reasoning. Nor do I think for one moment that he failed to appreciate the distinction which was clearly argued before him between a situation where the intention of the parties was that signature of the Treaty/Addendum should be a pre-condition to final and binding agreement and one which was to be immediately binding but confirmed or superseded by a subsequent signed Treaty. Where, as here, on the face of the documents and correspondence, the parties contemplate that, before being bound, they will execute a written contract the terms of which require careful negotiation, there is a distinction to be drawn between a party who indicates his agreement to the wording to be contained in the contract and his assent to be bound by the contract itself once drawn up and executed: see *New England Reinsurance Corporation v Messoghios Insurance Co* [1992] 2 Lloyd's LR 251 at 255. That is the distinction which the judge correctly bore in mind and upon which he concentrated in his judgment.
38. The fact is that, on the basis of the evidence before him, the parties always anticipated and intended that agreement would be reached upon the wording of the Treaty/Addendum at their level of negotiation, with a view to its being promptly submitted to the authorised signatories within Sun Life and at CNA Re. He was correct to hold that, as at 7 April, while indicating that she was happy with all but two points, Miss Benson was not willing to assent to the original Treaty wording and referred Mr Nickerson to Ms O'Sullivan 'for further discussions' but did nothing to indicate that in those circumstances Ms O'Sullivan, in conducting such discussions, would enjoy any authority to bind Sun Life to the terms of any wording agreed prior to, or without the necessity for, the signing of any redrafted form of Treaty/Addendum which might result. Again, there was nothing in the discussions between her and Mr Nickerson which amounted to more than agreement of the wording and an invitation to him to 'choose how to take the matter forward' (see paragraph 12 of judgment). He did this by forwarding the Addendum (unsigned by CNA) to Ms O'Sullivan in a form which plainly contemplated final signature by both CNA and Sun Life at a time and in a situation when it is not suggested that he thought Ms O'Sullivan had authority herself to sign. He passed a copy of the Addendum both to CNA and Sun Life for signature by the appropriate persons authorised to sign but himself failed to pursue or chase up the matter with either.
39. The judge's finding that both sides negotiated with the common understanding that formal signature of the Agreement was required before the parties became bound effectively outflanked the possibility of reliance by CNA upon the decision in *First Energy v Hungarian International Bank* in which a manager, who, lacking actual authority to authorise and offer a particular loan facility to the plaintiff, nonetheless did so by sending him a letter of offer which he accepted. In that case the court held that, albeit the manager lacked actual authority to make the loan and that no other person in the bank had held him out as having such authority, by reason of his very position he was a person who would ordinarily have authority to communicate the decision of more senior members of the bank who were authorised to make and/or approve such a loan and that the plaintiff was accordingly entitled to rely upon the offer which he had received.
40. In this case, it seems plain that the contents of Mr Nickerson's Supplemental Statement (see paragraph 15 above) were directed to the rationale of the *First Energy* decision. However, his statement was no more than an assertion that he believed Ms O'Sullivan had authority to indicate that the wording of the Treaty/Addendum was now agreed by Sun Life. It did not amount to an assertion that he had been told, or that he believed, that the requirement for a formal contract signed by the parties was being waived. In so far as his statement may have been open to such an interpretation, it was contrary to the evidence of Miss Benson and Miss O'Sullivan, it was belied by Mr Nickerson's own behaviour in seeking to obtain the signature of CNA and it is clear that the judge rejected it, no doubt for the reasons advanced by Mr Kealey (see paragraphs 29 and 30 above). It cannot be said that the judge was wrong to do so.
41. In his submissions in reply before us, Mr Ruttle frankly conceded that, if the judge was justified in holding that the parties had negotiated throughout on the basis that a formal signed Agreement was a pre-condition to the

parties becoming bound by its terms, then that was the end of the appeal. I therefore turn only briefly to one additional matter canvassed.

42. It was an important part of Mr Ruttle's submissions as to the commercial 'unreality' of the judge's decision that, if the terms contained in the Treaty/Addendum were not binding, then certain important terms, normally the subject of agreement at the 'slip' stage, would remain in the air. That was of course the case. However, the judge had a difficulty in this regard. When referring to the question whether or not, despite the non-execution of the Treaty/Addendum, the parties had apparently acted on the basis that the terms contained in it were binding, he said this:

"27. ...The fact that both parties accept that there was an agreement between them, which preceded the production of the Treaty terms, makes it important to ask the question whether the way in which the business was conducted was clearly referable only to the terms of the Treaty. If it was as consistent with the terms previously agreed between the parties as with the terms of the Treaty, then that conduct is equivocal and does not point clearly to a decision by the parties to adopt the Treaty terms.

28. The difficulty I have in this case is that the evidence of the manner in which the parties conducted their basis is very slim indeed. Essentially it comes down simply to the statement about accounting for premium. That in itself seems to me to take the matter very little further, because there is no basis upon which I can determine upon the evidence before me that the manner in which premium was accounted for was referable to the Treaty terms rather than to the terms previously agreed. Indeed I suspect the position is to the contrary given the importance that was attached to the management agreement as underpinning the business and the very abbreviated terms in which the Treaty was drafted."

43. I pause only to add that by reason of additional evidence placed before us without objection upon this appeal, the judge's suspicion appears to have been correct, in that it is now apparent that the premium bordereaux sent by IGI to Sun Life in respect of premiums settled to Sun Life through IGI contained no deduction of ceding commission from the premium paid to Sun Life despite the provision for such commission in Article 4 of the draft Treaty.
44. While as a broad proposition one would normally expect to see specific agreement prior to inception upon a 'follow the settlements' clause and upon the period of accounting, it is in practice unlikely in quota share arrangements of this kind that the omission of either will give rise to problems prior to execution of a formal treaty and, in any event, this is far from being a 'normal' case (see paragraphs 31 and 32 above).
45. It seems to me, as it seemed to the judge, that the proof of the pudding was in the eating, in the sense that the parties had been content to proceed on the basis that they were willing to be bound by an agreement to reinsure, the terms of which were sufficiently ascertainable from the very detailed M&A Agreement and that, when belatedly negotiating the relatively few additional terms contained in the Treaty/Addendum, they anticipated that they would not be bound until those documents were formally executed. As the judge went on to hold, there was simply no evidence that, in reliance upon the terms contained in the Treaty/Addendum they ever conducted their business in any different manner than they had formerly,.

Conclusion

46. For the reasons above, I would dismiss this appeal.

Lord Justice Carnwath:

47. I agree.

Mr Justice Lawrence Collins:

48. I also agree.

Order: Appeal dismissed, the appellant to pay the respondent's costs of the appeal forthwith, such costs to be assessed if not agreed. (Order does not form part of the approved judgment)

Mr S Ruttle QC and Mr H Matovu (instructed by C M S Cameron McKenna) for the appellant
Mr G Kealey QC and Mr J Khurshid (instructed by Clifford Chance) for the respondent