



Case No: 2002 Folio No1270

Neutral Citation No: [2003] EWHC 1706 (Comm)

**IN THE HIGH COURT OF JUSTICE**  
**QUEENS BENCH DIVISION**  
**COMMERCIAL COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 14 July 2003

**Before :**

**THE HONOURABLE MR JUSTICE DAVID STEEL**

-----  
**Between :**

**NAVIGATORS INSURANCE COMPANY and Ors**

**Claimant**

**- and -**

**ATLANTIC METHANOL PRODUCTION COMPANY LLC**

**Defendant**

-----  
**ALEX LAYTON QC AND PAUL REED** (instructed by **KENNEDYS**) for the Claimant  
**DAVID MACKIE QC** (instructed by **ALLEN & OVERY**) for the Defendant

Hearing dates : 27.6.03  
-----

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....  
The Honourable Mr Justice David Steel

**Mr Justice David Steel :**

1. This is an application by the Defendants to set aside an order of this court made on the 17<sup>th</sup> January 2003 permitting service of the proceedings on the Defendants in Texas and the Cayman Islands.
2. The Claimants are underwriters. In these proceedings they seek declaratory relief in respect of their alleged avoidance of, or lack of liability under, a project insurance policy pursuant to which the Defendants, amongst others, were insured in respect of their interest in the construction of a methanol plant in Equatorial Guinea, West Africa.
3. The dispute follows notification of a claim said to have arisen from a shutdown of the plant on the 22<sup>nd</sup> March 2002 quantified in the sum of US \$9,394,426.34. Underwriters contend that they have avoided certain extensions to the policy by reason of non-disclosure or misrepresentation and that, in any event, the claim does not fall within the terms of the cover.
4. The burden is accordingly upon the Claimant: -
  - i) to show a good arguable case that the claim falls within CPR 6.20, and
  - ii) to show a serious a serious issue to be tried, and
  - iii) to show that England is clearly the appropriate forum for the trial.
5. As regards the categories of claim in which service out is permissible in principle, there is no controversy. The policy is expressly governed by English law and thus falls within CPR part 6.20 (5) (c). However, the Defendants dispute that there is a serious issue to be tried and also that England is the appropriate forum.

**The background**

6. Ampco is incorporated in the Cayman Islands but has its headquarters in Texas. It is now a subsidiary of Marathon Oil Company and Noble Energy, both of which have their principal place of business in Texas. Ampco was formed to build and operate the methanol plant. To that end, Ampco entered into a turnkey agreement for the construction of the plant in May 1998 with United Engineers International Inc (UEII). UEII is a Pennsylvania Corporation with offices in Texas.
7. The governing law of the construction contract is New York law. That contract made provision for assessing progress under the contract in terms of mechanical completion, first industrial production, substantial completion, final completion and so on. These

terms were defined in some detail. The agreement also required Ampco to obtain the insurance cover in issue in these proceedings, covering both material damage and delayed completion caused by such damage. Those insured under the policy included Ampco, UEII, Marathon Oil and Noble Energy.

8. The lead insurer was Navigators, a New York Corporation with offices in Texas. The slip was scratched in October 1998. The policy wording was agreed in February 2000. Section 2 of the cover provided for material damage and Section 3 for loss of revenue. The bulk of the claim is made under Section 3 which provided cover in respect of loss of anticipated revenue in the event that physical damage caused an interference with construction, testing or commissioning leading to a delay in the Scheduled Completion date.
9. The period of cover for Sections 2 and 3 was the same, namely from the 1<sup>st</sup> June 1998 for 35 months until substantial completion as defined in the turnkey contract. For the purposes of Section 2, “contract completion” was anticipated “at 20<sup>th</sup> May 2001 inclusive of 2 months testing and commissioning or automatic extensions at agreed upon rates”. For the purposes of Section 3, the “anticipated date of the commencement of business is 20<sup>th</sup> May 2001, or any revised date agreed by Underwriters”.
10. The exclusions from Section 2 included: -
  - “11. Refractory Lining Clause. Excluding loss of or damage to refractory linings/brickwork as from the time of the first application of heat except when arising out of loss or damage to other Insured Property for which the Insured is indemnified by this Insurance.”
11. Section 3 contained a definition of “commercial operation” as being “Methanol Production following Substantial Completion”, although no cover was furnished during such “commercial operation” – only during the initial period leading up to the “commencement of business”.
12. The general conditions applicable to both sections included the following provisions: -
  - “13. Change in Degree of Risk. The Insured shall endeavour to notify Underwriters as soon as reasonably practical in writing of any material change in the original risk or changes in the insured interests...
  16. Observance of Conditions. The due observation and fulfilment of the terms and conditions of this Insurance by the Insured in so far as they relate to anything to be done or complied with by the Insured shall be a condition precedent to any liability...”

13. A series of endorsements were scratched by the underwriters extending the period of cover. Endorsement No.18 dated the 21<sup>st</sup> May 2001 read as follows:-

“It is hereby noted and agreed that the construction period is extended for 92 days from the 20 May 2001 to the 20 August 2001. This is to be followed by 24 months maintenance period...”

14. Concurrently with scratching this endorsement, underwriters also scratched three other items. Firstly, an e-mail from producing brokers to the placing brokers which reads: -

“While there has been some production of methanol at the plant, there is still a rather extensive punch list of items that must be worked through to achieve Substantial Completion. The last report indicated they were approximately 83 days behind schedule...”

15. They also scratched Change Order No.8 which provided a revised definition of Substantial Completion under the turnkey contract. In the result, Substantial Completion was defined to mean that the following inter alia had occurred;

- a) the facility has achieved mechanical completion
- b) the facility has achieved first industrial production
- c) the contractor has completed the performance guarantee test...
- d) the methanol production is equal to or greater than 95% of the guaranteed methanol production...
- i) the owner and contractor have agreed in writing on the punch list”

16. The third item was a report from an industry journal dated 21<sup>st</sup> May 2001. This read as follows: -

“The Atlantic Methanol Production Company plant has began initial production of commercial grade methanol... When operating at full capacity the facility will develop over 100 million cubic feet per day of stranded gas production from the Alba block, north of Bioko, to produce 2500 metric tons or more of methanol a day for commercial markets. The Ampco plant is continuing its start-up testing to verify contracted performance guarantees. “This week we have demonstrated capability to sustain production runs of at least 2250 litres per day, said ... CMS ... In the next few weeks Ampco expects to

produce enough methanol to schedule its first lifting by the end of May.””

17. Endorsement No 22 was scratched on and after the 24<sup>th</sup> August 2001 this read: -

“It is hereby noted and agreed that the construction period is extended for 30 days from the 20 of August 2001 to the 20 September 2001. The commercial operation date is anticipated to be 21 September 2001. This is to be the start of 12 months operating “(PAR/BI)” cover and 24 months maintenance period...”

18. Attached was a note of a telephone conversation between the brokers which reported that all testing on the Ampco site had been completed but “the client would not accept the plant for Commercial Production as there are 4/5 punch list items outstanding. There will be no further testing to the plant”.

19. Endorsement 23 was in like terms – with an extension of the construction period to November 2001. Attached was an e-mail between the brokers advising that substantial completion would not be achieved by the 20<sup>th</sup> September: -

“The only remaining problem is with the emissions criteria for liquid effluents...”

20. Further endorsements followed associated with further delays to Substantial Completion encompassing the date on which the damage which has given rise to the present claim occurred.

21. Notice of the shutdown was given to Underwriters on the 12<sup>th</sup> April 2002. The claim letter explained that the shutdown, which occurred prior to Substantial Completion, “followed what appeared to be sagging in the convection steam generator coils of the F201 Steam Reformer and cracks in the intermediate tube support plates”.

22. In a letter dated the 4<sup>th</sup> September 2002, Ampco provided further details of the claim. This explained as follows: -

“Substantial completion did not occur in December 2001 because performance guarantee testing had not been completed pursuant to sub-paragraph (c) of the definition, emissions testing was not complete pursuant to sub paragraph (f) and the Substantial Completion Punch List had not been agreed to pursuant to sub paragraph (i). Nor on December 31, 2001 was there an outstanding Notice of Substantial Completion as required by paragraph 11.5 of the Turnkey Agreement.

On January the 18 2002 UEII and Ampco reached agreement on a Punch List that was acceptable for use for Substantial

Completion. During this same period, UEII passed the required emissions testing. On March 19, 2002 UEII submitted the test results required by sub-paragraph (c) of the substantial completion definition also submitted its Notice of Substantial Completion pursuant to paragraph 11.5 of the turnkey Agreement thereby giving Ampco fifteen days to accept or deny the request for substantial completion.

Ampco timely denied the request for Substantial Completion on April 2, 2002 based on the F-201 reformer problems...”

23. Ampco’s letter went on to identify its understanding that the primary dispute between it and underwriters was the application of the aggregate deductible given the existence of an earlier claim. But the reaction of the Claimants, as contained in a letter from their solicitors Messrs Kennedy’s dated 5th December 2002, was to different effect. This purported to avoid the extensions to the policy period from the 20<sup>th</sup> August onwards on the grounds that such extensions were procured by: -

1. The misrepresentation in each endorsement that commercial operations at the plant had not begun. In fact the plant began commercial operations on or shortly after the 1 May 2001 and continued in commercial operations through to and beyond the 20 August 2001

2. Non-disclosure of such commercial operations which were facts material to a prudent Underwriter’s consideration of the risk.”

24. The letter also went on to reject part of the Section 2 claim on the grounds that loss or damage to refractory linings was expressly excluded by exclusion 11 and to assert that the Section 3 claim was not covered because, given that the plant had been in “commercial operation”, there had been, by definition, no interference with construction, erection or commissioning.

25. The very next day the Claim Form was issued, annexed to which were the Particulars of Claim which had already been prepared, it would appear, in November. The pleaded case on non-disclosure and misrepresentation is set out in Paragraphs 15-17 of the Particulars of Claim. The focus is on the allegation that “commercial production” commenced shortly after the 1<sup>st</sup> May 2001 and that this was not disclosed. Alternatively, the endorsements as presented, in asserting that “commercial operation” was not anticipated to start until a later date, misrepresented the situation. The plea in paragraph 18 raised the two other points referred to in the previous paragraph. All these matters were said to be material to the risk.

26. In due course, the Claimants sought leave to serve this claim form out of the jurisdiction. The statement in support of the application exhibited the policy wording

and referred to the existence of the English law clause. It also exhibited the claim letter of the 4<sup>th</sup> September (but it would appear without its appendices).

27. So far as the merits and the appropriate forum were concerned, the affidavit simply added as follows: -

“7. The Claimants have now issued proceedings seeking declaratory relief as to the Claimants’ liability (if any) under the Policy. Consideration was given to issuing Part 8 proceedings to determine the true construction of the Policy. I believe, however, that the present proceedings may well give rise to substantial disputes of fact (namely whether the Defendants misrepresented or withheld information regarding the status of the plant) and it would therefore have been inappropriate to use the Part 8 procedure.”

28. Leave was granted by this court on the 20<sup>th</sup> December for service in Texas. This was enlarged on the 17<sup>th</sup> January 2003 to allow service of the Cayman Islands as well. In the meantime the Defendants had issued proceedings in Oklahoma and served the Underwriters. The underwriters successfully challenged those proceedings on forum non conveniens and other grounds. By order of the District Court of Oklahoma County dated the 27<sup>th</sup> February the action was dismissed. The order expressly stated: “The court has not made a determination as to the appropriate jurisdiction or forum or refiling”.

29. This outcome prompted the Defendants, together with Marathon and Noble Energy, to issue proceedings in Harris County, Texas on the 17<sup>th</sup> March 2003. In due course, UEII intervened in those proceedings to assert its own claim against the underwriters. Once again the insurers applied for dismissal on forum non conveniens grounds on the 17<sup>th</sup> April 2003. This time they were unsuccessful. Their motions were denied on the 7<sup>th</sup> May 2003. The parties were ordered to arrange a “status conference” once this court’s ruling on jurisdiction was made. I apprehend that underwriters might seek to reargue the motion in the event that this court refused the present application. That apart, in accordance with the Docket Control Order made by the judge in Texas, discovery is underway, in preparation for a trial in March 2004.

30. The Defendant’s application in these proceedings was accompanied by a statement of the President of Ampco, William Spence, dealing with various matters relevant to the appropriate forum and, in particular, to the location of witnesses on the issues in fact as he perceived them to be, namely the operational status of the plant on various dates and whether the delays in start-up resulted from the failure of ceramic fibre blankets.

31. By way of introduction to this topic, the statement said:-

“24 Since the Claimants were aware that the Plant was producing commercial grade methanol in May 2001 I have assumed that their argument for misrepresentation is based on

some criteria other than the commencement of commercial production of methanol. It is unclear upon what evidence they will seek to rely in order to support the claim. I have therefore set out below the personnel who may be able to give evidence as to all aspects of construction and development of the Plant and its commercial operation.”

32. The Claimants’ evidence in reply was served only a few days before the hearing. The statement, which was made by the solicitor with conduct of the proceedings, purported to identify the issues at paragraphs 15 and following. Notably these did little more than repeat the content of the particulars of claim.

### Serious issue

33. Have the claimants established a serious issue to be tried? In other words has the claim for avoidance or a declaration for non-liability on other grounds, a reasonable prospect of success? The defendants say not.
34. I confess that as a matter of first impression, the allegations of non-disclosure and misrepresentation are not easy to follow. The Claimant’s place emphasis on the content of the endorsements. These are expressed in terms of: -
- i) an extension to the construction period from the 20<sup>th</sup> May 2001, and
  - ii) an anticipated date for commercial operations from which operating and a maintenance cover would run.
35. As the Claimants themselves contend in Paragraph 7 of the Particulars of Claim, the initial period of cover was to run to Substantial Completion anticipated on the 20<sup>th</sup> May. The endorsements at first glance appear to extend this period, giving a revised date for Substantial Completion (a view strongly supported by the accompanying documents). Thus, if this analysis be right, the reference to “commercial operation” was in effect to identify the date of substantial completion (i.e. the end of the construction phase).
36. But the commencement of “commercial production” must necessarily be a different matter since Substantial Completion can only be achieved after:-
- a) mechanical completion
  - b) first industrial production

- c) performance guaranteed satisfaction
  - d) production of 95% guaranteed production, and
  - e) guaranteed methanol quality.
37. Furthermore, the only other reference in the policy to “commercial production” is production post Substantial Completion. Thus it is, without more, difficult to see how disclosure of “commercial production” could be material. Alternatively, if it were, how there was a shortfall in disclosure having regard to the attachments to the endorsements.
38. The statement in support of the application to serve the proceedings out was, to put it mildly, not very revealing as to the nature of the case, let alone in giving support for it (nor, I would add, does it summarise the considerations for allowing service out save by reference to the English law clause). If compliant with CPR 6 and the content of Appendix 15 of the Commercial Court Guide, it was a close run thing.
39. As already observed the Claimants’ evidence for the inter partes hearing in response to the Defendant’s statement added little on this topic. It made little attempt to grapple with the points raised by Mr Spence in his statement as to the nature of the Claimants’ case. Its only contribution is to add confusion by suggesting that the endorsements gave dates for “commercial production” when in fact they referred to “commercial operation”.
40. Having read the skeleton argument of the Claimant’s prior to the hearing, I remained in considerable confusion as to the nature and potential merit of the issues raised. I fear I remained in some difficulty on the alleged issues of misrepresentation and non-disclosure even after the oral submissions of Mr Layton QC. on the Claimants behalf. He referred in particular to an annexure to the 4<sup>th</sup> September letter (although it is notable, as I have already pointed out, that it may not have been even exhibited to the statement in support of the application for leave to serve out). Schedule 5 gave an analysis of daily production from April 2001 onwards. He pointed out the production was in the region of 2500 litres/tonnes for the bulk of the time up to March 2002. But I have difficulty in following why this gives rise to serious issues of non-disclosure or misrepresentation.
41. Equally so far as exclusion 11 is concerned, Mr Layton QC. referred to Schedule 9-A and a small claim based on materials supplied by Thermal Ceramics. It is obscure why this gave rise to a serious argument that the claim or part of it is thereby excluded.
42. The third issue is whether there was no delay to Substantial Completion because of the damage (providing a defence to the Section 3 claim). But this seems to raise the

very same point, namely whether, if the plant was in commercial operation, by definition there could not have been a delay to Substantial Completion.

43. That all said, I note that no suggestion was raised in the Ampco's briefs in the proceedings in Oklahoma and Texas that there was no arguable defence to their claim. Nor, it is clear, have I seen the entirety of the correspondence between the parties since the shut-down. Furthermore, I recognise the possible ambiguities in the various phrases used to describe the degree of completion of, and production at, the plant. Given my conclusions hereafter on the question of forum conveniens, I will say no more than, as presented in the English proceedings, the arguable strength of the underwriters' defence is borderline.

### Forum conveniens

44. In considering whether it is appropriate to subject a party outside the jurisdiction to proceedings within it, the nature of the relief that is sought can be a material consideration. It is notable that the Claimants are in effect seeking a declaration of non liability: -

“While negative declarations can perform the positive role, they are unusual remedy in so far as they reverse the more usual roles of the parties. The natural defendant becomes the claimant and visa versa. This can result in procedural complications and possible injustice to an unwilling defendant. This in itself justifies caution in extending the circumstances where negative declarations are granted, but, subject to the exercise of appropriate circumspection, there should be no reluctance to their being granted when it is useful so to do”: **Messier – Dowty Limited against Sabena S.A.** No 2 [2000] 1 WLR 2040 at 2051 per Lord Woolf M.R.

45. The Claimants do not identify the basis of the utility in seeking a negative declaration, save perhaps the fact that the disputes concern an English law contract which, it is suggested, should be construed by an English court. This aspect indeed was almost the sole focus of the Claimants' submission on forum conveniens. The difficulty about the submission is that there are no substantive issues in English law that appear to arise: -

(1) The primary issues are issues of fact, e.g.

- What was the scale of production at the plant at the time of the endorsements?
- What was the state of completion of the plant at those times?
- Did the endorsements misrepresent that state of affairs?

- Where those representations relied upon?
  - Were they material?
  - What losses were sustained?
  - What was the cause of that loss?
- (2) There are possible issues of construction such as the meaning of “substantial completion”, “contract completion”, “contract period” “commencement of business”, “commercial operation”, “commercial production” etcetera. But these are straight forward points of linguistic analysis on which it is not suggested that Texas courts would have any difficulty (or indeed any different approach). Furthermore, given the overlap between the policy and the turnkey agreement, it is not English law but New York law which is the more pertinent.
46. The Claimants relied heavily on a passage from a judgment of Lord Justice Bingham in **Du Pont De Nemours v Agnew** [1987] 2 Lloyd’ Reps 585 at p.594: -
- “There is, however, one factor... which is in my judgment heavily in favour of the English forum. Du Pont and Endo’s policies were, as I have held, governed by English Law. They are accordingly entitled to such indemnity as on a proper construction of the policies of English law affords them; no more of course, but certainly no less. This Court is necessarily better placed than any other to rule on that question.
47. But it is important to bear in mind the context in which that observation was made. The issue was one of the scope of English public policy in inhibiting a right of indemnity. This was not a matter that was “capable of fair resolution in any foreign court however distinguished and well instructed”. But no such novel, complex and undecided issues of English law arise in the present case.
48. Equally I do not accept the further submission (if I understood it correctly) that merely because the parties had chosen English law, there was an implicit expectation and intention that any disputes should be tried in England. In cases such as the present, as the editors of **Dicey and Morris “The Conflict of Laws” 13<sup>th</sup> edition** comment: -
- “If the legal issues are straightforward, or if the competing fora have domestic laws which are substantially similar, the governing law will be a factor of little significance.”
49. I should add that the Claimants appeared to suggest that any issues of English law would be determined by a jury in Texas and that this was obviously less satisfactory

than a determination by a judge in England. But I accept the unchallenged evidence of Mr Shipley, counsel for the Defendants in the Texas proceedings, that any issue of law would be a matter for the trial judge not the jury.

50. The position as regards witnesses is predictably diverse. On the primary issues of fact most of the witnesses (and the documents) are in Equatorial Guinea, and the United States (principally in Texas). On the other hand, the Claimants will have at least one expert witness in London. Many of the Claimants' witnesses in fact are in England but they are principally concerned with the secondary issues of inducement and materiality. On balance, the centre of gravity of witness convenience is, in my judgment, outside this jurisdiction and in probably in Texas. Certainly it is not an aspect which supports England as being distinctly the more convenient forum than Texas.
51. This leads to the last consideration namely the progress of the Texas proceedings. I appreciate that Texas was not Ampco's first choice. The rationale for plumping for Oklahoma remains obscure. I also appreciate that the Texas proceedings were not commenced until after the issuance and service of these proceedings.
52. But the fact remains that: -
  - i) The Texas proceedings have reached the stage of discovery: indeed the deposition of Navigators Insurance is scheduled for the 14<sup>th</sup> July 2003.
  - ii) Both Marathon and Noble Energy are co-claimants and UEII are interveners.
  - iii) There is no issue that Texas has jurisdiction and is an appropriate venue.
  - iv) The application to dismiss or stay the Texas proceedings on forum non-conveniens grounds has been denied. Although the point might be re-argued in the event that this court were to retain jurisdiction, I do not understand that that decision denying the motions has been appealed.
  - v) Case management orders have been made making provision for such matters as expert evidence and mediation leading up to a trial in March 2004, a date significantly earlier than that on which any trial in England would be likely to take place.
53. It is not suggested by the Claimants that concurrent proceedings are appropriate. Indeed to my mind, the usual risk involved with multiplicity of proceedings (the risk of enhanced cost and inconsistent decisions), taken with the progress already made in Texas, provides very substantial support for the Defendant's application.

**Conclusion**

54. In my judgment, the interests of the parties and the ends of justice are best secured (assuming that there is a triable issue) by setting aside service of these proceedings.