Neutral Citation Number: [2020] EWHC 2530 (Comm)

Case No: CL-2020-000427

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

By Skype for Business
Date: 24/09/2020

Before :

MR JUSTICE JACOBS

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Between :

(1) CATLIN SYNDICATE LIMITED (AS THE SOLE MEMBER OF LLOYDS SYNDICATE 2003 FOR THE 2015 YEAR OF ACCOUNT); **(2) ALLIANZ GLOBAL CORPORATE & SPECIALTY SE;** **(3) BRIT SYNDICATES LIMITED (IN A REPRESENTATIVE CAPACITY FOR THOSE MEMBERS OF LLOYDS SYNDICATE 2987 FOR THE 2015 YEAR OF ACCOUNT);** **(4) MARKEL CAPITAL LIMITED (AS THE SOLE MEMBER OF LLOYDS SYNDICATE 3000 FOR THE 2015 YEAR OF ACCOUNT);** **(5) LIBERTY MANAGING AGENCY LIMITED (IN A REPRESENTATIVE CAPACITY FOR THOSE MEMBERS OF LLOYDS SYNDICATE 4472 OF THE 2015 YEAR OF ACCOUNT AND ALSO PIONEER UNDERWRITING USPI CONSORTIUM PUS 9980);** **(6) NAVIGATORS UNDERWRITING AGENCY LIMITED (IN REPRESENTATIVE CAPACITY FOR THOSE MEMBERS OF LLOYDS SYNDICATE 1221 FOR THE 2015 YEAR OF ACCOUNT);** **(7) ASPEN UNDERWRITING LIMITED (AS THE SOLE MEMBER OF LLOYDS SYNDICATE 4711 FOR THE 2015 YEAR OF ACCOUNT);** **(8) STARR SYNDICATE LIMITED (AS THE SOLE MEMBER OF LLOYDS SYNDICATE CVS 1919 FOR THE 2015 YEAR OF ACCOUNT);** **(9) ANTARES MANAGING AGENCY LIMITED (IN A REPRESENTATIVE CAPACITY FOR THOSE MEMBERS OF**	**Claimants**

LLOYDS SYNDICATE 1274 FOR THE 2015 YEAR OF ACCOUNT);
(10) CHUBB UNDERWRITING AGENCIES LIMITED (IN A REPRESENTATIVE CAPACITY FOR THOSE MEMBERS OF LLOYDS SYNDICATE 2488, THE SUCCESSOR OF LLOYDS SYNDICATE 1882 FOR THE 2015 YEAR OF ACCOUNT)

- and -

(1) AMEC FOSTER WHEELER USA CORPORATION **Defendants**
(2) AMEC FOSTER WHEELER LIMITED

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Mr. Mark Cannon QC and Mr. Iain Quirk (instructed by **Clyde & Co LLP**) for the **Claimants**
Mr. Roger Stewart QC, Mr. George Spalton and Mr. Mark Cullen (instructed by **Pinsent Masons LLP**) for the **Defendants**

Hearing dates: 18 September 2020

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Judgment Approved by the court for handing down

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Covid-19 Protocol: This Judgment was handed down remotely by circulation to the parties' representatives by email and released to Bailii. The date and time for hand-down is deemed to be 10.30am on 24 September 2020.

Mr Justice Jacobs :

1. On Friday 18 September 2020, I heard an application by the Claimants for the continuation of an anti-suit injunction which I had originally granted following a without notice application made on 7 July 2020. Following conclusion of argument, I informed the parties that my decision was that the injunction should continue, and that it should include mandatory provisions requiring the Defendants to withdraw the proceedings in New Jersey which had been commenced in breach of an exclusive jurisdiction agreement in the relevant insurance contract between the parties. These are the reasons for that decision.

A: Factual background

2. The Claimants (referred to herein either as "the Claimants" or "the insurers") are insurers who subscribed to an excess policy of insurance ("the First Excess Policy") pursuant to which certain liabilities of the Defendants were insured. The First Excess Policy contained an express clause which provided for the application of English law and jurisdiction. This clause was set out, in identical terms, in the slip subscribed by the insurers as well as in a "Certificate of Insurance" subsequently produced by the brokers, JLT Specialty Ltd. The clause was as follows:

> **Choice of Law and Jurisdiction:** This insurance shall be governed by and construed in accordance with the law of England and Wales. Each party agrees to submit to the exclusive jurisdiction of any competent Court within England and Wales. Any dispute or claim arising out of or in connection with this insurance, its formation or existence or the breach, termination or validity thereof shall be settled in accordance with the law of England and Wales.

3. From around August 2019, the parties engaged in correspondence regarding coverage under the First Excess Policy in relation to defence costs incurred by the Defendants in respect of a very substantial piece of litigation pending in Harris County, Texas. The claim in those Texan proceedings was made by Enterprise Operating LLC ("Enterprise") against the Defendants. The claim related to the construction of a propane dehydrogenation facility at Enterprise's refinery in Mont Belvieu, Texas. In that litigation, Enterprise claims approximately US$ 1.4 billion in losses as a result of the Defendants' alleged conduct, and Enterprise seeks from the Defendants actual and punitive damages equal to or exceeding that sum. The correspondence was conducted on the insurers' side by its legal representatives in London, Clyde & Co LLP ("Clydes") in London (Mr. Richard Moody of that firm). On the Defendants' side, there was correspondence both from individuals within their organisation and also from their legal advisers, McCarter & English, LLP ("McCarter") in Newark, New Jersey (Mr. Anthony Bartell of that firm).

4. The Enterprise claim had been commenced in 2016, and significant sums were expended thereafter by the Defendants on defence costs. However, prior to around August 2019, the coverage provided under the First Excess Policy was not directly engaged. This was because the First Excess Policy provided coverage (of US$ 40 million) above an attachment point of, in effect, US$ 27.5 million. This attachment

point reflected a self-insured retention of US$ 7.5 million, and a layer of coverage of US$ 20 million above that. The US$ 20 million coverage layer was provided by three insurers under a policy which was sometimes referred to in the documentation and submissions as the "Master Policy" or the "Primary Policy". I shall refer to it as the "Primary Policy".

5. The Primary Policy contained an English law and jurisdiction agreement which was in materially identical terms to that contained in the First Excess Policy, although (unlike the First Excess Policy) it also contained an express provision for arbitration. The subscribing insurers to the Primary Policy were Allianz Global Corporate & Speciality SE, Zurich Insurance PLC (UK branch) and XL Group Insurance. Except for Allianz Corporate & Specialty SE, the subscribing insurers to the First Excess (i.e. the Claimants herein) were different.

6. In addition to the Primary Policy, there was a further "Local Policy" issued in New Jersey, and underwritten by Zurich American Insurance Company, which had a degree of interaction with the Primary Policy. The effect of this interaction is material to the issues which arise on the present application, as further discussed in Section C below. For the purposes of understanding the factual background, however, it is sufficient to note that until August 2019, the Defendants were able to look to the underlying insurance provided by the Primary Policy, or the Local Policy, for payment of their defence costs once the US$ 7.5 million self-insured retention had been paid.

7. By September 2019, the Defendants had contended that, as a result of the significant cost of defending the Enterprise action, the full amount of their self-insured retention had been paid, as had the full US$ 20 million of underlying insurance: underlying insurers had paid this, without the need for any litigation, but under a reservation of rights. The Defendants therefore requested reimbursement of defence costs from the insurers under the First Excess Policy. That request resulted in a lengthy letter from Clydes setting out their position as to the principles which applied to the claim. Clydes requested the Defendants (via the brokers) to provide further information. The conclusion of the letter was that the insurers neither refused nor consented to an indemnity, but instead asked for answers to questions raised in the letter in order to consider how the policy should respond.

8. On 2 October 2019, McCarter responded in a letter which was said to incorporate advice from Mr. Roger Stewart QC (who appeared for the Defendants at the hearing) on English law, although the Defendants did not concede the application of English law to any disputed issues between the parties. The letter explained why, on the Defendants' case, the insurers were liable to pay the defence costs. At the forefront of that argument was a policy provision which was in the Primary Policy and (as is undisputed) incorporated into the First Excess Policy. This is in the following terms:

> "Subject to the overall Limit of Indemnity specified in the Schedule, Insurers will pay costs and expenses incurred with the consent (not to be unreasonably withheld or delayed) of the insurers in the investigation or defence or settlement of any allegation or matter or claim which is or may become the subject of indemnity".

9. McCarter's letter concluded by asserting that the insurers' conduct violated both "(a) their express Policy obligation not unreasonably to delay the payment of covered and potentially covered defence costs, and (b) their obligations, implied by law, to act in good faith toward their policyholders". It requested confirmation that the insurers under the First Excess Policy would commence paying the Defendants' defence costs arising from the Enterprise action. Such confirmation was not, however, forthcoming.

10. On 20 January 2020, Mr. Langan, who has made a number of witness statements for the purposes of the hearing, wrote to Clydes. Mr. Langan works for Foster Wheeler Inc., and his title is "Managing Counsel – Complex Litigation". In his letter, he provided Clydes with certain materials which had previously been requested, and he said that "AFW" (i.e. both Defendants) continued to "believe that your clients have acted improperly and in bad faith in conditioning defence cost reimbursement on a contractually and legal-unsupported allocation-of-defence-cost argument and on the provision of information and documents obviously sought for the purpose of developing a coverage defense rather than for the purpose of defending the Enterprise Litigation". The letter asserted that the Defendants believed that they had fully responded to the insurers' "improper" demands for information, and that the insurers had "more than enough information to make a decision on the course they want to take". The letter enclosed a position paper on payment of defence costs.

11. Mr. Moody of Clydes responded on 25 March 2020. The letter asked various questions. These were principally directed towards potential issues of non-disclosure. As matters have developed, however, the insurers have not to date sought to avoid the First Excess Policy. The central issue between the parties developed in the correspondence, and the evidence for the present application, therefore concerns the extent of coverage for defence costs – although, somewhat belatedly, insurers have raised a related argument concerning the Defendants' alleged failure to seek their prior consent to the defence costs for which coverage is now sought.

12. The nature of the coverage issues can be seen from the paragraphs at the end of the letter, where Clydes addressed the issue of defence costs.

> [6] On the assumption that satisfactory responses to the questions above can be given, however, First Excess Insurers will now provide their response to the request for an indemnity for defence costs. "
>
> [7] First, insurers make the following general comments:
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> (a) Firstly, they would accept as a general principle that, while there is no basis on which an insurer would be obliged to indemnify defence costs which relate solely to the aspects of the underlying litigation which would not appear to fall to the Master Policy / Excess Layer, common costs which properly relate to the defence of both insured and uninsured exposures would be properly indemnifiable;
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> (b) Secondly, however, that not all costs of the litigation would be treated as common costs. Not all of the claims would appear

> to fall within the scope of cover and not all would attach to the 2015/16 notifications. It does not follow, as appears to be suggested by your letter, that because Amec or Wood must defend all counts and because some of the claims which Enterprise make might (if proven) appear to fall to the policy, when others do not, that all of the defence costs fall to the policy. Nor have you properly understood the issues raised in paragraphs 13, 16 (and possibly 20(b) and 21) of our letter dated 3 September. You are, nevertheless, correct in the more general observation that our clients consider that some of the claims, if proven, would fall for cover; and
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> (c) Thirdly, and in the context of the above comment, it would therefore be helpful to have your further explanation of the claims and heads of loss which Enterprise is bringing because these are poorly set out, if set out at all, within the Amended Petition. If Enterprise has not otherwise explained its claims, can further and better particulars not be requested? In the meantime, please could Amec/Wood share with us their own understanding of the claims, which they must surely have undertaken. In the absence of any further explanation from you of this point or any attempt to address the matters raised in our letter of 3 September last year, our insurer clients will make an assessment which will be informed by their own understanding of the claims and what parts of the underlying litigation could and would not fall to the policy.

13. This response was, as it presently seems to me, consistent with the correct legal approach to the recoverability of defence costs under English law in circumstances where costs are incurred in the defence of both covered and uncovered claims: see e.g. *New Zealand Forest Products Ltd. v New Zealand Insurance Co Ltd.* [1997] 1 WLR 1237. Clydes therefore recognised that "common costs which properly relate to the defence of both insured and uninsured exposures would be properly indemnifiable". The issue raised in this letter, and in Clydes' earlier letter of 3 September 2019, was therefore essentially a factual one; i.e. whether some or all of the costs claimed were in fact to be regarded as "common costs" (or indeed costs exclusively referable to actual or potentially covered claims). It was therefore similar to the factual issue which the Privy Council described in *New Zealand Forest Products* at page 1246. Factual questions would arise potentially in relation to each of the various invoices which formed the subject-matter of the Defendants' claim. Each would need to be resolved in the context of the particular claim which Enterprise had brought, as to which Clydes' letter sought further information.

14. On 8 April 2020, Mr. Langan responded to the points made, drawing attention to the fact that US$ 13 million of defence costs had been paid, and saying that the First Excess insurers were under "an immediate obligation to pay the outstanding Defence Costs". He asserted that the failure to do so was causing irreparable harm to the Defendants, and that this was "likely" the intention of the insurers. Immediate confirmation was sought that payment would be made.

15. There was no further material correspondence (or at least none that I was shown at the hearing) prior to the commencement of the proceedings which the insurers now seek to restrain. The immediate confirmation sought on 8 April 2020 was not forthcoming.

16. On 1 July 2020, without giving any prior notice to the insurers or Clydes (who had been corresponding with the Defendants for over two years at this stage), the Defendants commenced proceedings in New Jersey claiming relief under the First Excess Policy ("the New Jersey proceedings"). On 2 July 2020, the Honorable Michael F. O'Neill, a judge in the Hunterdon County Superior Court in New Jersey ("the New Jersey court") made an order in favour of the Defendants, without prior notice to the insurers. This order required the insurers to "show cause" why the New Jersey court should not issue a preliminary injunction which would require the insurers (i) immediately to pay the Defendants (the plaintiffs in the US proceedings) the full amount of past defence costs in the sum of $ 12.1 million, and (ii) immediately to pay underlying defence counsel directly for all ongoing and future reasonable costs and expenses incurred in defending the Enterprise action. The New Jersey court also ordered immediate relief pending the show cause hearing for the issuance of the preliminary injunction. This required the insurers immediately to pay defence counsel's outstanding invoices in the amount of US$ 3.1 million, and immediately to pay underlying defence counsel "directly for all ongoing and future reasonable costs and expenses incurred in defending" the underlying action.

17. The application for the injunction was supported by a 34-page brief signed by Mr. Bartell of McCarter. The case for payment of defence costs was advanced exclusively on the basis of New Jersey law, and in particular the principles relating to the duty to defend which apply to insurance policies governed by the law of that state. The court's attention was not drawn to the existence of the clause in the First Excess Policy which provided for English law and jurisdiction. There was no discussion of English law in the brief, and the cases referred to in the table of authorities were exclusively US cases.

18. There was some debate in the evidence before me as to whether, in making the application in the way that they did, the Defendants attorneys violated New Jersey custom and practice. The evidence of Mr. Koepff, a partner in Clyde & Co. US LLP ("Clydes US") was that Mr. Bartell had failed to do what he would have been expected to do. In particular, Mr. Bartell had failed to put Clydes London on notice of the application; failed to notify all known counsel that he was seeking immediate relief, and failed to provide the moving papers; and failed to draw the attention of the New Jersey court to the existence of the English law and jurisdiction clause in the First Excess Policy. Mr. Bartell disputed this line of argument, indicating in particular that there is no duty of full and frank disclosure in New Jersey which is equivalent or similar to that which applies when without notice applications are made in English proceedings.

19. It is not necessary for me to resolve this area of dispute between Mr. Koepff and Mr. Bartell in order to determine the issues which arise on the present application. It is well-known that the courts in England and the United States have different procedures, and that different professional standards apply to lawyers in those jurisdictions. It is undesirable for an English judge to embark upon the respective merits of the procedures in different countries, and I do not propose to do so here.

20. However, I think it right to record that I do not accept Mr. Stewart's submission that the procedures in New Jersey for obtaining prompt monetary relief from insurers, such as that obtained in the present case, "knock" comparable English procedures into a "cocked hat". Mr. Stewart's submission recognised that, in England, the Defendants would not have been able to adopt an equivalent process to that which enabled them to obtain relief in New Jersey: an application, similar to that made in New Jersey, could not have been made in England. This is because of the principle to which Mr. Stewart drew my attention, in the context of his own argument that the insurers' anti-suit application should not have been made without notice. The principle, as stated in *National Commercial Bank of Jamaica v Olint Corpn Ltd.* [2009] UKPC 16, para [13], is that a judge should not entertain an application for an injunction of which no notice has been given unless either giving notice would enable the defendant to take steps to defeat the purpose of the injunction or there has been literally no time to give notice before the injunction is required to prevent the threatened wrongful act.

21. An additional reason why the equivalent process could not have been adopted in England is, of course, the importance which is attached by English courts to the need to make full and frank disclosure on a without notice application. Hence, it would have been obviously impermissible in England to apply without notice for an injunction without drawing the court's attention to a relevant written jurisdiction agreement. Given Mr. Stewart's reliance on both of these principles in order to challenge the anti-suit injunction obtained by insurers, there was some irony in his submission that New Jersey procedures in the present context knocked English procedures into a cocked hat.

22. Irony apart, I do not myself consider that English Commercial Court procedures are inadequate to enable an insured, in an appropriate case, to obtain effective and speedy relief in circumstances where an insurer is wrongly refusing to meet its obligations to pay defence costs in respect of underlying litigation. Procedures exist for applying for summary judgment under CPR Part 24 and obtaining an interim payment under CPR Part 25 in circumstances where the court is satisfied that, if the claim went to trial, the claimant would obtain judgment for a substantial sum of money. Mr. Stewart drew my attention to the decision of Thomas J. in *Poole Harbour Yacht Club Marina Ltd. v Excess Marine Insurance Ltd.* [2001] Lloyd's Rep IR 580, where a successful application was made for an interim payment in respect of defence costs in an insurance context. Furthermore, if sufficiently urgent, the Commercial Court will order an expedited hearing, and will make time available – ahead of when a case would otherwise be listed – so that an urgent application can be heard. Although unusual in the context of insurance claims, an application could also be made for a mandatory injunction, and again the Commercial Court would make time available for such a hearing. Indeed, the present hearing – of the inter partes application for an anti-suit injunction and the Defendants' cross-application for a mandatory injunction – has been allocated 2 full days of court time (including one day pre-reading) and has come on with reasonable speed, bearing in mind that time was required for the parties to prepare and exchange further evidence and submissions. This is in addition to the time that was allocated for the original return date hearing.

23. To revert to the chronology, the New Jersey proceedings resulted in the Claimants applying for an anti-suit injunction as a matter of urgency. No notice of the anti-suit

application was given to the Defendants. The application was made on 8 July 2020 and was supported by a witness statement of Mr. Moody of Clydes and a skeleton argument prepared by counsel. I heard the application on the morning of 9 July 2020, when submissions were made by Mr. Scorey QC who then appeared for the insurers. I considered, for reasons which I gave in a brief judgment, that this was an appropriate case for the grant of the relief sought by the insurers. I said that I was satisfied to a high degree of probability that there was a relevant jurisdiction agreement, and that I could see no reason why the injunction should not be granted; and indeed that there was every reason to grant it.

24. The reason why no notice of the application was given was, as the insurers submitted in their skeleton argument on the without notice application, that there was a "high risk" that the Defendants would seek equivalent and opposite anti-suit relief in the New Jersey court designed to stymie the present proceedings. English case-law contains examples of cases where, in the context of competing proceedings in the United States, such equivalent and opposite anti-suit relief had been granted: for a recent such case, see *Hiscox Dedicated Corporate Member Ltd Syndicate 33 At Lloyd's Starr Managing Agents Ltd (t/a Syndicate CVS 1919) v Weyerhaeuser Company* [2019] EWHC 2671 (Comm).

25. The Defendants contend that there was no such high risk in the present case. This was because of the "very restrictive approach" taken by the courts in New Jersey to the grant of anti-suit relief. This contrasted with the position in some US states, such as the relevant state in the *Hiscox* case. This is a central argument advanced by the Defendants as to why there was a lack of full and frank disclosure on the without notice application, and it is convenient to deal with that argument here.

26. I do not consider that the existence of the risk was overstated or misrepresented by the insurers on the without notice application. It was common ground that the New Jersey court had power to grant an anti-suit injunction. In the decision of the US Court of Appeals, Third Circuit in *General Electric Company v Deutz AG* 270 F.3d 144, the court described the competing approaches within different circuits to the grant of anti-suit injunctions, and said:

> "By contrast, the Second, Sixth and District of Columbia Circuits use a more restrictive approach, rarely permitting injunctions against foreign proceedings. These courts approve enjoining foreign parallel proceedings only to protect jurisdiction or an important public policy. Vexatiousness and inconvenience to the parties carry far less weight".

27. The reference in that passage to the protection of jurisdiction would clearly include a case such as the present; i.e. where the jurisdiction of the New Jersey court would be threatened by proceedings elsewhere, namely the present English proceedings for anti-suit relief brought by the insurers.

28. That this is so is clear from one of the cases cited in General Electric in support of the proposition quoted above: the decision of US Court of Appeals, District of Columbia Circuit, in *Laker Airways v Sabena, Belgian Wd. Airlines* 731 F.2d 909. In that case, the court said that injunctions were most often necessary to protect the jurisdiction of

the enjoining court or to prevent the litigant's evasion of the important public policies of the forum. It went on to consider, separately, each category in turn. Under the heading "Protection of Jurisdiction", the court said:

> "Courts have a duty to protect their legitimately conferred jurisdiction to the extent necessary to provide full justice to litigants. Thus, when the action of a litigant in another forum threatens to paralyze the jurisdiction of the court, the court may consider the effectiveness and propriety of issuing an injunction against the litigant's participation in the foreign proceedings. (page 927)
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> …
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> When the availability of an action in the domestic courts is necessary to a full and fair adjudication of the plaintiff's claims a court should preserve that forum. Thus, where the foreign proceeding is not following a parallel track but attempts to carve out exclusive jurisdiction over concurrent actions, an injunction may be necessary to avoid the possibility of losing validly invoked jurisdiction." (page 929-930)

The court went on to uphold the injunction granted by the lower court in that case on the grounds that the relevant proceedings which were enjoined were English proceedings "solely designed to rob the court of its jurisdiction".

29. There is therefore no doubt, in my view, that the New Jersey court not only had power to grant an anti-suit injunction, but that this was a paradigm case in which that power could properly be invoked in order to protect its own jurisdiction, notwithstanding the restrictive approach generally taken to anti-suit injunctions in courts on the Third Circuit or the DC Circuit. I reject Mr. Stewart's argument that the *Laker Airways* case simply concerned public policy relating to antitrust (i.e. the importance of preserving competition). The need to protect an important public policy is, as both of these cases show, an <u>additional</u> ground on which anti-suit injunctive relief can be granted; i.e. additional to the ground of protection of jurisdiction. But this is not the only ground, and it was not the only basis for relief in the Sabena case itself.

30. Reverting again to the chronology: the order for an anti-suit injunction, made on 9 July 2020, provided for a return date in the following week, on Friday 17 July 2020. The order also gave permission to the Claimants to serve the First Defendant out of the jurisdiction, and also to serve by alternative means. Paragraph 15 provided that if either of the Defendants wished to defend the claim, it must acknowledge service within 22 days of being served with the Claim Form. Neither of the Defendants has acknowledged service of the proceedings within the time limit. Their position, in substance, is that the jurisdiction of the English court is disputed and that it is the New Jersey court which has jurisdiction in relation to their claims.

31. When the case came back (again before me) on the return date, directions were given for the service of further evidence and submissions, and a hearing was fixed for the week of 14 September, despite the potential unavailability of Mr. Scorey QC. The injunction granted on 9 July was continued pending the hearing, and the parties agreed that the New Jersey proceedings would be stayed pending the final decision of the English court in respect of the anti-suit injunction claim. A consent order was to be lodged with the New Jersey Court which so provided.

32. The parties subsequently exchanged evidence and submissions, and the hearing took place on Friday 18 September by Skype. Oral submissions were made by Mr. Cannon QC for the insurers and Mr. Stewart QC for the Defendants. There were some technical problems with the internet connection at Mr. Cannon's home, and in the event most of his submissions were (without objection or any difficulty) made by telephone.

B: Anti-suit injunctions: legal principles

33. The relevant principles, in relation to the grant of anti-suit relief were recently summarised by Cockerill J. in *Times Trading Corporation v National Bank of Fujairah (Dubai Branch)* [2020] EWHC 1078 (Comm) at paragraph [38]. Those principles were stated in the context of an arbitration agreement, but they are equally applicable to an exclusive jurisdiction clause.

> i) The Court has the power to grant an interim injunction " in all cases in which it appears to the court to be just and convenient to do so ": section 37(1) of the Senior Courts Act 1981 ("SCA 1981"). "Any such order may be made either unconditionally or on such terms and conditions as the court thinks just": section 37(2).
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> ii) The touchstone is what the ends of justice require: *Emmott v Michael Wilson & Partners Ltd [2018]* 1 Lloyd's Rep 299 at [36] per Sir Terence Etherton MR.
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> iii) The Court has jurisdiction under section 37(1) of the Senior Courts Act 1981 to restrain foreign proceedings when brought or threatened to be brought in breach of a binding agreement to refer disputes to arbitration: *Ust-Kamenogorsk Hydropower Plant JSC v AES Kamenogorsk Hydropower Plant LLP [2013]* 1 WLR 1889 (SC).
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> iv) The jurisdiction to grant an anti-suit injunction must be exercised with caution: *Société Nationale Industrielle Aérospatiale v Lee Kui Jak [1987]* UKPC 12, [1987] AC 871 , 892E per Lord Goff.
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> v) As to the meaning of "caution" in this context, it has been described thus in *The "Angelic Grace" [1995]* 1 Lloyd's Rep 87 at 92:1 per Leggatt LJ: " The exercise of caution does not

> involve that the Court refrains from taking the action sought, but merely that it does not do so except with circumspection. "
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> vi) The Claimant must therefore demonstrate such a negative right not to be sued. The standard of proof is "a high degree of probability that there is an arbitration agreement which governs the dispute in question": Emmott at [39]. The test of high degree of probability is one of long standing and boasts an impeccable pedigree going back to Colman J in *Bankers Trust Co v PT Mayora Indah (unreported) 20 January 1999 and American International Specialty Lines Insurance Co v Abbott Laboratories [2003]* 1 Lloyd's Rep 267 and has been recently affirmed on the high authority of Christopher Clarke LJ in *Ecobank v Tanoh [2016]* 1 WLR 2231 at 2250.
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> vii) The Court will ordinarily exercise its discretion to restrain the pursuit of proceedings brought in breach of an arbitration clause unless the Defendant can show strong reasons to refuse the relief*: The Angelic Grace [1995]* 1 Lloyd's Rep 87; *The Jay Bola [1997]* 2 Lloyd's Rep 279 (CA) at page 286 per Hobhouse LJ.
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> viii) The Defendant bears the burden of proving that there are strong reasons to refuse the relief*: Donohue v Armco Inc [2002]* 1 All ER 749 at [24]-[25] per Lord Bingham.'

34. Initially, there appeared to be no dispute that these were the applicable principles. However, in the course of his oral submissions, Mr. Stewart challenged the correctness of the proposition that there need to be strong reasons to refuse the relief. He submitted that the ordinary principles as to the grant of injunctions, as set out in cases such as *National Commercial Bank of Jamaica v Olint Corpn Ltd.* should apply. This involved consideration of the adequacy of damages and the balance of convenience, and did not require strong reasons.

35. I do not accept this submission. The need for strong reasons has been identified in a number of decisions of the Court of Appeal. In addition to those cited by Cockerill J, the Court of Appeal identified this need in *The Epsilon Rosa* [2003] EWCA Civ 509: see paragraph [48] in the judgment of Tuckey LJ, with which the other judges agreed. I should follow these decisions, and I was shown no authority which cast doubt upon them.

36. I also consider that the approach is right. As Mr. Stewart submitted (in the context of the Defendants' cross-application for a mandatory injunction), the starting point is that the court will ordinarily act to protect the integrity of a contractual bargain reached between the parties. This is, in my view, one reason why "strong reasons" are and should be required once the court is satisfied, to a high degree of probability, that there is a valid English jurisdiction clause to which the parties have agreed. Another reason is that where proceedings are started, in breach of contract, in a different jurisdiction to that which the parties have agreed, this will almost inevitably cause irremediable prejudice to the opposing party which cannot be satisfactorily

compensated by damages. That party will be put to the expense, which can be considerable, of litigating a case, often over a lengthy period of time, in the different jurisdiction. There is always a serious risk that the result of the litigation will be different from that which would have resulted if the proceedings had been started in the correct forum, particularly so when – as is often the case and is the case here – the other forum is invited to apply a different law to that which would have been applied in the agreed forum. Even if the "incorrect" forum were to be invited to apply correct law, it will often nevertheless be prejudicial to a party for this to happen in a case where the contractually agreed law and forum are the same. This is because it can reasonably be expected that the contractually agreed forum (i.e. England in the present case) will apply the contractually agreed law (English law in the present case) more reliably than the incorrect forum.

C: Application of legal principles

C1: The existence of an exclusive jurisdiction agreement

37. The initial important question, on which the parties made opposing submissions, is whether the insurers had established, to a high degree of probability, that there is an exclusive jurisdiction agreement (for English jurisdiction) which governs the dispute in question.

38. I consider that the answer to that question is straightforward and obvious. There is no dispute that the slip signed by the insurers, and the Certificate subsequently issued by the brokers, contained the terms of the contract between the parties. Both the slip and the Certificate contained a clear written agreement which provides for English law and the exclusive jurisdiction of the English court. That clause is plainly applicable to the dispute between the parties as to the recoverability of defence costs: there is no realistic argument that the dispute for some reason falls outside the scope of the clause, and this was not a point taken by the Defendants.

39. In my view, given that there is an agreed express clause in the relevant contract, the Claimants' case has been established to the requisite degree of probability. Indeed, I regard the contrary case as quite unarguable.

40. The Defendants' argument was not that the English law and jurisdiction agreement should be interpreted in a particular way, but rather that it could and should be ignored; because it was, in effect, eviscerated on the true construction of other contractual provisions. I regard this argument as untenable. Applying ordinary English law principles to the construction of the contract, there is no basis for disapplying an express contractual provision. If there is a clearly expressed and unambiguous choice of law and jurisdiction set out in an express term, as here, there is no legitimate process of construction under English law, by reference to provisions which do not address that issue in such clear terms, which can lead to the evisceration of such a term. Rather, the other contractual provisions must be read consistently with the clear express term.

41. I consider that this is sufficient to dispose of the Defendants' argument, but I will nevertheless address it in more detail. The Defendants' argument on this issue started with Condition 7 of the First Excess Policy. This provided as follows:

> "Except as otherwise provided herein this Certificate is subject to the same terms, exclusions, conditions and definitions as the Certificate of the Primary Insurers. No amendment to the Certificate of the Primary Insurers during the period of this Certificate in respect of which the Primary Insurers require an additional premium or a deductible shall be effective in extending the scope of this Certificate until agreed in writing by the Insurers."

42. The argument then focused on the terms of the "Certificate of the Primary Insurers". This Certificate set out the terms of the Primary Policy (sometimes referred to as the "Master Policy"); i.e. the underlying policy which provided cover of US$ 20 million in excess of a self-insured retention of US$ 7.5 million. This Primary Policy also contained an English law and jurisdiction agreement, which was in identical terms to that contained in the First Excess Policy. This would, ordinarily, lead to the conclusion (which in my view is the correct conclusion) that both the Primary Policy and the First Excess Policy were both subject to English law and jurisdiction.

43. However, the Defendants contended that this was not the case, on a true construction of the terms of the Primary Policy. In particular, it was contended that Memorandum 34 in the Primary Policy produced a different result. I consider that the Defendants' analysis of Memorandum 34, described in more detail below, is unsound and does not withstand scrutiny. But in any event, the argument in my view leads nowhere in terms of the analysis of the terms of the First Excess Policy. Even if the Defendants could, via their analysis of Memorandum 34, reach the destination that the Primary Policy did not contain an English law or jurisdiction clause, or that it was subject to New Jersey law, this is of no assistance to them. Assuming, for present purposes, that this destination were reached under the Primary Policy, the opening words of Condition 7 of the First Excess Policy ("Except as otherwise provided herein …") would, on their ordinary construction, be effective to ensure that the express English law and jurisdiction clause in the First Excess Policy prevailed.

44. In my view, however, Memorandum 34 of the Primary Policy does not even enable the Defendants to reach the destination at which they seek to arrive. That provision is in the following terms:

> MEMORANDUM 34 - International Program Policies Interlocking Clause
>
> This Certificate is part of an international program. This program arrangement is a compilation of different policies called **International Program Policies** (defined below) which all have one common goal, to cover the Insureds of these **International Program Policies** worldwide on terms, conditions and limitations agreed to by the Insured in the **Master Policy**.
>
> Therefore the Insured of the **Master Policy** (on behalf of all Insureds and of these **International Program Policies**) has agreed to special clauses regarding terms, conditions,

> limitations, limits and deductible in the **International Program Policies** with the Insurers of the **International Program Policies**, considering the overall intent of this insurance program. Therefore all these **International Program Policies** must be read in this context.
>
> **International Program Policies** shall mean, collectively:
>
> (1) the **Master Policy**; and
>
> (2) all **Local Policies**.
>
> **Interpretation of clause – Local Policies**
>
> For the avoidance of doubt the scope of coverage under the **Local Policies** (as interpreted under their applicable laws) is deemed to be at least as wide as that under the **Master Policy** (as interpreted under its applicable law), unless the coverage under the **Local Policies** has been specifically limited or restricted by endorsement. As agreed by Insurers the scope of coverage under the **Local Policies** may be broader than that under the **Master Policy** (as interpreted under its applicable law.) This has no effect on those policies' excesses, deductibles, sublimits or limits of indemnity.
>
> **Interpretation of clause – Master Policy**
>
> The **Master Policy** provides coverage (as interpreted under its applicable laws) where conditions and limits of the **Master Policy** are broader than the **Local Policies**, if legally permissible.
>
> (Bold text in the original)

45. The Defendants rely upon the wording under the heading “Interpretation of clause – Local Policies”. They say (correctly) that a “Local Policy” was issued in this case. This was a policy issued by Zurich American Insurance Company headed Architects and Engineers Professional Liability Policy. It was issued to AMEC USA Holdings Inc. as Named Insured in New Jersey. Its limit of liability was US$ 20 million in excess of a self-insured retention set out in Endorsement 26 to that policy, and which in essence provided for a retention of US$ 7.5 million. That Local Policy therefore reflected the terms of the Primary Policy. These two policies therefore sat alongside each other.

46. This particular Local Policy issued in New Jersey was one of a number of local policies which the Primary Policy contemplated: Memorandum 34 thus refers to “Local Policies” in the plural. Endorsement 1 of the Primary Policy indicated that such local policies would be issued via local offices of Zurich Insurance (UK) in the following countries: Azerbaijan, China, Canada, India, Indonesia, Malaysia, Japan, United Arab Emirates, United States.

47. The relevant Local Policy issued in New Jersey did not have an English law or jurisdiction agreement: it was silent as to both law and jurisdiction. In that respect, therefore, there was a difference between the relevant Local Policy and the Primary Policy.

48. Having established the existence of this Local Policy, the Defendants then contended that the effect of Memorandum 34 was that if the Local Policy provides broader coverage for a particular claim, then it and not the Primary (or Master) Policy applies to the claim. They argued that, in the present case, the Local Policy is silent on the choice of law and jurisdiction, thereby affording the parties a broader choice of where to commence a claim by comparison with the Master Policy. This meant that, under the terms of the Primary Policy, the Defendants could take the benefit of the Local Policy in the present case pursuant to the "interlocking clause" in Memorandum 34; i.e. to take advantage of the absence of any choice of law or jurisdiction agreement in the Local Policy. This advantage then fed through to the First Excess Policy because of Condition 7 thereof: i.e. the provision of the First Excess Policy which provided that it was subject to the same terms as the Master Policy. It followed that the present coverage dispute is properly governed by the terms of the Local Policy. Given that the Local Policy provides cover in the US, the only sensible construction is that US law applies (and in particular NJ law); and in terms of jurisdiction, there is no reason why the Defendants should not be entitled to bring their claim in the New Jersey courts.

49. I reject these arguments. Memorandum 34 does not in my view make any alteration to the jurisdiction (or arbitration) clauses in the Primary Policy, nor as to the applicable law of the Primary Policy. There is no contractual language which does so. Furthermore, the words "the **Master Policy** (as interpreted under its applicable law)", which appear twice in the penultimate paragraph of Memorandum 34 (and again, in substance, in the final paragraph) make it clear that the applicable law of the Primary (i.e. Master) Policy is unaffected by the provisions of Memorandum 34. The applicable law of that Primary Policy remains English law, as expressly stated. Memorandum 34 thus makes clear that the applicable laws of the policies (i.e. the Primary Policy and any particular Local Policy) are separate, and that these policies are to be interpreted in accordance with their own laws (and not the other's). A natural consequence is that there is no reason, given the express agreement of English law in the Primary Policy, why the English jurisdiction clause (or indeed the arbitration clause) would be altered. There is nothing Memorandum 34 which, in my view, effects any such alteration to the relevant provisions of the Primary Policy.

50. The insurers therefore submitted, correctly, in my view that Memorandum 34 has nothing to do with the law and jurisdiction clauses of the Primary Policy, still less the First Excess Policy.

51. In fact, as its wording makes clear, Memorandum 34 relates to the "scope of coverage". Its effect is that the coverage under the Local Policies shall be no less (though it may be broader) than the Primary Policy. It does not, as I have said, purport to effect any change to the law and jurisdiction clauses of the policies. What it provides is that (i) the coverage under the Local Policies is deemed to be at least as wide as that under the Primary Policy (though it recognises that the Local Policies may be broader than the Primary Policy); and (ii) the Primary Policy provides coverage where the Primary Policy conditions and limits are broader than the Local

Policies. It is therefore possible to have coverage under the Local Policies which is wider than the coverage provided under the Primary Policy, but not narrower. As Mr. Cannon correctly submitted, none of that changes any term of the Primary Policy: its terms and conditions remained the same.

52. Since there is nothing in Memorandum 34 which effects a change to the express choice of English law and jurisdiction (and arbitration) in the Primary Policy, there is no basis for the argument that there was an "upstream" change to the equivalent clauses in the First Excess Policy. Nor is there any language which purports to effect any such further upstream change to the express choice of English law and jurisdiction in the First Excess Policy. Whilst it is fair to say that the Local Policy issued in New Jersey stood alongside the Primary Policy, there is no local policy which stands alongside the First Excess Policy. Where, therefore, there is a local policy which has been issued, the insured has the potential benefit of the terms of both the local policy and the Primary Policy. But where there is a claim under the First Excess Policy, there is no local policy which stands alongside it and which provides such a benefit.

53. Mr. Stewart, in his closing submissions, sought to derive assistance from Clause 1 of the First Excess Policy. This provides:

> Liability to pay under this Certificate shall not attach unless and until the Insurers of the Underlying Certificate(s) shall have paid or have admitted liability or have been held liable to pay, the full amount of their indemnity inclusive of costs and expenses

He also referred to Clause 3, which provides:

> If, by reason of the payment of any claim or claims or legal costs and expenses by the Insurers of the Underlying Certificate(s) during the Period of Insurance, the amount of indemnity provided by such Underlying Certificate(s) is:-
>
> (a) Partially reduced, then this Certificate shall apply in excess of the reduced amount of the Underlying Certificate(s) for the remainder of the Period of Insurance;
>
> (b) Totally exhausted, then this Certificate shall continue in force as Underlying Certificate until expiry hereof.

54. In my judgment, neither clause assists the argument that the express jurisdiction and applicable law clause in the First Excess Policy are in some way eviscerated by Memorandum 34 or otherwise. Clause 1 is a provision which is not unusual in excess policies. It is potentially disadvantageous to an insured, where there is a settlement at less than policy limits with the underlying insurer; since it can be argued by the excess insurer that full payment of the underlying policy is required before the excess policy can respond. The full impact of Clause 1 may, perhaps, be mitigated by Clause 3, which concerns the circumstances in which the First Excess Policy can, colloquially, "drop down". But I do not need to discuss these provisions (which were

not referred to in the Defendants' lengthy skeleton argument) in detail, because in my view they have no bearing on the present issue.

55. Ultimately, I return to two straightforward points. First, there is an express English law and jurisdiction clause in the First Excess Policy. Those express terms should be applied, in accordance with their ordinary meaning. There is nothing which, by some process of migration via the Local Policy and the Primary Policy, has the effect of destroying the clear contractual agreement. Secondly, even if (contrary to my views) the Primary Policy were in some way altered by the terms of the Local Policy, so that its jurisdiction (or arbitration) and applicable law provisions were altered, this would have no impact on the terms of the First Excess Policy; not least because of the opening words of Clause 7 ("Except as otherwise provided herein") which maintain the primacy of the express terms of the First Excess Policy where they differ from the terms of the Primary Policy.

C2: Court or arbitration?

56. I will briefly address the question of whether the dispute under the First Excess Policy is subject to the jurisdiction of the English courts or subject to arbitration. The insurers' primary case, as presented at both the without notice hearing and the 18 September inter partes hearing, was that the First Excess Policy provided for English court jurisdiction. English arbitration was their alternative case. The Defendants' case, in the event that I rejected their principal argument as set out above, was that the agreement was for arbitration. They did not dispute the insurers' proposition that this would be arbitration in England.

57. Mr. Cannon submitted that, for the purposes of the anti-suit relief sought, it was not necessary to come to a final view on the question of whether the parties' agreement in the First Excess Policy was for the English court or English arbitration. Either way, the anti-suit relief in relation to the New Jersey proceedings would be appropriate. Mr. Stewart did not dispute this proposition.

58. Although I do not finally decide this point, I am very strongly inclined to the view (which I expressed at the without notice hearing) that the arbitration clause in the Primary Policy was not incorporated into the First Excess Policy. Accordingly, the insurers' primary case is correct.

59. The relevant incorporating words are those set out in Clause 7:

> "Except as otherwise provided herein this Certificate is subject to the same terms, exclusions, conditions and definitions as the Certificate of the Primary Insurers".

60. These words contain no clear reference to the arbitration agreement in the underlying policy. In the absence of clear incorporating words, the usual principle is that an arbitration clause is not incorporated: see e.g. *Habas Sinai v Sometal* [2010] EWHC 29 (Comm) per Christopher Clarke J at [13] and [52].

61. I do not consider that the two decisions of Robin Knowles J., referred to by Mr. Scorey at the without notice hearing and relied upon by Mr. Stewart for the

Defendants, have any application to the present wording. The wording in those cases, *Catlin Syndicate Ltd & Ors v Weyerhaeuser Company* [2018] EWHC 3609 (Comm) and *Hiscox Dedicated Corporate Member Ltd Syndicate 33 At Lloyd's Starr Managing Agents Ltd (t/a Syndicate CVS 1919) v Weyerhaeuser Company* [2019] EWHC 2671 (Comm), contained an express reference which the judge considered to be sufficiently specific to incorporate the arbitration provision. The relevant policies provided that the "Choice of Law and Jurisdiction" was "as per Lead Underlying Policy". There is, however no equivalent, specific, wording in the present case.

62. Accordingly, when considering the remaining arguments on behalf of the Defendants, I shall proceed on the basis that the relevant choice is between the parties' agreement as to the jurisdiction of the English court (rather than arbitration) and the New Jersey proceedings.

C3: Strong reasons to refuse the relief sought?

63. In the Defendants' written argument, there was no clear submission that – if there was a valid jurisdiction agreement – there were strong reasons as to why it should not be enforced. The two arguments advanced in opposition to the anti-suit injunction concerned (i) full and frank disclosure, and (ii) the issue, already discussed, concerning the alleged inapplicability of the express jurisdiction agreement contained in the First Excess Policy.

64. In the course of his oral submissions, however, Mr. Stewart submitted that there were strong reasons for declining to enforce the jurisdiction agreement in the present case. The argument sought to elevate some of the points advanced as non-disclosures into strong reasons why the jurisdiction agreement should not be enforced.

65. The central theme of this submission was that the injunction did not simply prevent the Defendants from suing in New Jersey. It also had, and was intended to have, the effect of preventing the immediate payment (ordered in Judge O'Neill's order of 1 July) of the US$ 3.1 million which had been ordered to be paid, as well as the requirement to continue to pay ongoing costs. The anti-suit injunction therefore altered the existing position which resulted from the New Jersey Order for US$ 3.1 million. This was an inappropriate result, in circumstances where, as the Defendants contended, the First Excess Policy clearly obliged the insurers – whether under New Jersey law or under English law – to pay the defence costs which had been incurred. Even assuming the applicability of English law, this was a case where the insurers had sat back and done nothing. It was plain on the evidence that the costs vastly exceeded the US $3.1 million. In those circumstances, the insurers should not be allowed the benefit of the jurisdiction clause. Or, at least, if they were to be allowed its benefit, it should be on terms that they should be required to pay the costs, past and future, which were the defence costs subject of the order in New Jersey.

66. The argument that there was a very strong, indeed unanswerable, claim for payment of the defence costs was at the heart of Mr. Stewart's submissions, and (as it seemed to me) was relied upon in different contexts: as strong reasons not to enforce the agreed jurisdiction clause; as a non-disclosure, on the basis that the insurers should have addressed the merits of the Defendants' arguments under English law (and indeed New Jersey law) in much greater detail than was done at the without notice

hearing; and as the basis for an argument that any continuation of the anti-suit injunction should be on terms that the insurers paid the past and ongoing costs.

67. On whatever basis the argument is advanced, I reject it. At the present stage, however, I need consider only the question of whether there are strong reasons not to enforce the parties' contractual bargain for English jurisdiction. The consequence of the argument, if accepted, is that the Defendants would be free to pursue proceedings in New Jersey. Such proceedings would then be determined by a court which would, at least if the Defendants' case is accepted, apply New Jersey law to the dispute between the parties. This is, of course, a different applicable law to that which – applying English law as the agreed applicable law of the First Excess Policy – should be applied. The result is, therefore, not only that the insurers would be forced to litigate in a jurisdiction contrary to that which was agreed, but that the issues between the parties will or at least might be decided by the application of a different applicable law to that which was agreed. I do not consider that the alleged strength of the Defendants' case under New Jersey law provides any justification for this result, or that it could possibly provide strong reasons not to enforce the jurisdiction clause by granting anti-suit relief. Indeed, the fact that the Defendants are seeking the application in New Jersey of a law contrary to that agreed between the parties provides a very strong reason indeed why the injunction should be granted, in order to protect the integrity of the parties' bargain.

68. Nor does it make any difference to this analysis whether, as Mr. Stewart sought to persuade me, the Defendants have a very strong or even unanswerable case under English law. This cannot in my view provide any justification, let alone strong reasons, for permitting the Defendants to continue the present proceedings in New Jersey where they are advancing their case under New Jersey law, and intend to continue to do so. If there is, indeed, a strong or unanswerable claim under English law, then that claim should be advanced in England, which is the jurisdiction to which the parties agreed. As I have indicated, if the case is really unanswerable or is of sufficient strength, there are pre-trial remedies available from the English court which will recognise the strength of that case.

69. Nor do I consider that the fact that the Defendants have obtained an order from the New Jersey court provides a strong reason for allowing the case to continue there. That order was made without notice to the insurers and without informing the New Jersey court of the English law and jurisdiction clause in the First Excess Policy. It was an order made as the result of the application, at the behest of the Defendants, of New Jersey law. I see no reason why the Defendants should be permitted to retain the advantage derived from proceedings taken in breach of the parties' agreement as to jurisdiction.

70. This was a point made (in the context of the grant of mandatory injunctions) by HHJ McGonigal sitting in the High Court in paragraph [42] – [43] of his judgment in *Comet Group PLC v Unika Computer SA* [2004] I. L. Pr 1:

> 42. … In my view courts should preserve the value of exclusive jurisdiction clauses and uphold the autonomy of the parties not merely by preventing future breaches by a restraining

> injunction but also by taking appropriate steps to remove any advantage gained by the party in breach.
>
> 43. One of the cases where an interlocutory mandatory injunction is appropriate is to remove a benefit obtained by a defendant stealing a march on the claimant.

In support of the latter proposition, the judge cited *Van Joel v Hornsey* [1895] 2 Ch 774.

71. I consider that HHJ McGonigal's analysis is sound, and readily applicable to the benefit obtained by the Defendants as a result of starting proceedings in New Jersey. This analysis is not undermined by the decision of the Court of Appeal in *The Epsilon Rose* [2003] EWCA Civ 938, on which the Defendants relied in support of their argument that they should be allowed to retain the benefit of the order made by Judge O'Neill and that this was a strong reason not to grant an anti-suit injunction. In *The Epsilon Rose*, the Court of Appeal was concerned with an anti-suit injunction, obtained by shipowners, in aid of a claim subject to English arbitration. The anti-suit injunction restrained the cargo owner from continuing proceedings in Poland. One possible consequence of the injunction was that the cargo owner might lose the benefit of security which had previously been obtained for its cargo claim, after the vessel had been arrested in Portugal. There was no suggestion in the case that the arrest in Portugal, which had apparently been simply in order to obtain security, was a breach of the arbitration agreement. The reason that the security might be lost was that the cargo owner had not commenced the (contractually agreed) English arbitration proceedings within 60 days of the order made by the Portuguese court. The Court of Appeal accepted that the loss of security could amount to a strong reason for not granting an injunction. But the court held that it did not do so in that case because the cargo owners had brought things on themselves. Had they made proper enquiries, they could and should have started arbitration proceedings in time and if so "this whole dispute would have been resolved ages ago".

72. This case, in my view, provides no assistance to the Defendants in the present context. First, this was not a case where the cargo owners were seeking to retain security which had been granted in consequence of proceedings taken in breach of the arbitration agreement. The proceedings in breach of the arbitration agreement were in Poland. The proceedings where security had been obtained were in Portugal, and it was not alleged that such proceedings had been in breach of the arbitration agreement. Secondly, the Defendants in the present case have not obtained security which they will potentially lose as a result of the anti-suit injunction: they have not obtained any security at all. They stand to lose the benefit of an order for payment of certain costs. That is not the same as security. It is an order for payment of money, and the Defendants can seek pre-trial relief for such payment of money in due course in England, as discussed in the following paragraph.

73. In any event, even leaving aside the fact that the New Jersey order represents the fruits of action taken in breach of the parties' agreement, I see no reason why the loss of the New Jersey order provides a strong reason for declining to enforce the parties' jurisdiction agreement. The Defendants have potential remedies of summary judgment or interim payment available in England, and they can make an application

for such remedies if so advised. Mr. Stewart submitted that this would take time, and he referred me to evidence in the New Jersey proceedings as to the cash-flow and related harm being suffered in consequence of the insurers' failure to pay defence costs hitherto. However, it seems to me that (as in the *Epsilon Rose*) the Defendants only have themselves to blame. They could have started proceedings in England in the last quarter of 2019 for the summary or other remedies which they now contend are, or should be available, in support of their claim. Even if the commencement of proceedings at that time might have been premature, on the basis that the Defendants were seeking to discuss matters with Clydes on behalf of the insurers, proceedings could have been started in early 2020. By that time, as described above, Mr. Langan was accusing the insurers of acting improperly and in bad faith. By April, that allegation had been ratcheted up further: the insurers were accused of intentionally causing the Defendants irreparable harm. Had proceedings been started in England in early 2020, applications for summary judgment or interim payment could have been determined by now, even without expedition.

74. I have not hitherto expressed any views as to the strength of the Defendants' case under English law. The fact is that the Defendants have chosen not to sue in England, even though there has been ample time to do so since it first became apparent in October 2019 that the insurers were not promptly paying the defence costs sought. They have instead sued in New Jersey under New Jersey law, making no reference to the English law and jurisdiction agreement, and without therefore advancing a case in New Jersey that English law would produce the same result as New Jersey law. These matters, together with the Defendants' decision not to acknowledge service of the present proceedings, all tend to suggest that a claim under English law may not be quite as straightforward as indicated in Mr. Stewart's submissions. But whatever the strength or otherwise of the Defendants' case, I do not consider that it provides a strong reason for declining to enforce the parties' jurisdiction agreement.

75. I do not consider it necessary to discuss the strength of the Defendants' case under English law in order to resolve the key issues which arise on the application. I also consider it undesirable to do so, in circumstances where there may (if the Defendants decide to accept the jurisdiction of the English courts) be applications under CPR Part 24 and/or Part 25 in due course. It suffices to say that I can see that an application under CPR Part 25 might possibly succeed, just as it did in the *Poole Harbour* case, bearing in mind that: (i) the insurers accept that there would be a liability for defence costs relating to the defence of those parts of Enterprise's claim which are potentially covered, and (ii) the Defendants may perhaps be able to prove – to the requisite standard – that all or the majority of the defence costs cannot be said to be exclusively referable to claims which are uncovered. Ultimately, the success of the application will of course depend upon the judge's assessment of the strength of the evidence, and the points which are ultimately relied upon by the insurers.

76. I do not consider, however, that such arguments as to the strength of the case under English law can or should be resolved within the context of the present application. This is for the simple reason that the existence of a strong argument under English law cannot justify the continuation by the Defendants of proceedings in New Jersey with the avowed intention of seeking the resolution of the parties' dispute under New Jersey law. It is therefore unsurprising that I was shown no authority in which the

court's decision, as to whether or not to enforce a jurisdiction or arbitration agreement, depended upon an evaluation of the merits of the claim that a party would be required to bring in England (if the jurisdiction or arbitration agreement were to be enforced), in circumstances where that party had declined to bring such proceedings and was seeking to litigate elsewhere. I also consider it inherently undesirable for an application to enforce a jurisdiction or arbitration agreement by an anti-suit injunction to be transformed into a quasi-hearing of an application for summary judgment or an interim payment which the enjoined party, who seeks to sue elsewhere and under a different applicable law, has not actually made. The straightforward position is that the court should consider whether there are strong reasons not to enforce the jurisdiction agreement. If not, then the injunction should be granted and the enjoined party can then bring proper applications, in accordance with the CPR, for summary judgment or an interim payment.

77. Accordingly, I consider that there are no strong reasons not to enforce the parties' bargain in this case. Subject, therefore, to the issues of full and frank disclosure, this is an appropriate case to continue the injunction previously granted and to grant mandatory relief (as to which, see: *Mobile Telecommunications Co Ltd v HRH Prince Hussam Bin Saudi Bin Abdulaziz Al Saud* [2018] EWHC 1469 (Comm), at [19])

D: Full and frank disclosure

D1: Legal principles

78. The duty of full and frank disclosure that without notice applications imply was summarised by Lawrence Collins J. *in Konamaneni v Rolls Royce Industrial Power (India) Ltd [2002]* 1 WLR 1269, at [180] as follows:

> "On an application without notice the duty of the applicant is to make a full and fair disclosure of all the material facts, i.e. those which it is material (in the objective sense) for the judge to know in dealing with the application as made: materiality is to be decided by the court and not by the assessment of the applicant or his legal advisers; the duty is a strict one and includes not merely material facts known to the applicant but also additional facts which he would have known if he had made proper enquiries: *Brink's Mat Ltd v Elcombe [1988]* 1 WLR 1350 ,1356-1357. But an applicant does not have a duty to disclose points against him which have not been raised by the other side and in respect of which there is no reason to anticipate that the other side would raise such points if it were present."

79. Materiality therefore depends in every case on the nature of the application and the matters relevant to be known by the judge when hearing it: see Toulson J in *MRG (Japan) Ltd v Engelhard Metals Japan Ltd [2003]* EWHC 3418 (Comm), at [25].

80. If the duty is found to have been breached, the Court retains a discretion to continue or re-grant the order if it is just to do so. This is most likely to be exercised if the non-

disclosure is non-culpable. Thus, in *OJSC ANK Yugraneft v Sibir Energy [2008]* EWHC 2614 (Ch), Christopher Clarke J. said at [106]:

> "As with all discretionary considerations, much depends on the facts…The stronger the case for the order sought and the less serious or culpable the non-disclosure, the more likely it is that the court may be persuaded to continue or re-grant the order originally obtained. In complicated cases it may be just to allow some margin of error. It is often easier to spot what should have been disclosed in retrospect, and after argument from those alleging non-disclosure, than it was at the time when the question of disclosure first arose."

D2: Application to the facts

81. The Defendants rely upon six failures to disclose material facts on the without notice application. I have to some extent dealt with them, in other contexts, in earlier passages in my judgment. I consider that there is no substance in any of the points raised.

82. *(1) New Jersey anti-suit injunction*. The Defendants contend that the insurers should have given notice of the application for the anti-suit injunction, because it was wrong for the insurers to contend that there was a high risk or a real risk that the Defendants would seek further injunctive relief. This was because the granting of such relief would not be consistent with the restrictive approach to anti-suit injunctions taken by New Jersey courts, and would likely be viewed as a serious breach of international comity.

83. I reject this argument for the reasons given in paragraphs [26] – [29] above. The argument is unsustainable in the light of the principles set out in the *General Electric* and *Laker Airways* cases.

84. A related allegation of non-disclosure concerned a statement made by Mr. Moody in support of the application; viz, that McCarters were known to be aggressive litigators, who would if they saw fit be prepared to seek further without notice injunctive relief. I do not see how this statement can form the basis of an allegation of non-disclosure, separate from the foregoing argument concerning the risk of anti-suit relief. I did not understand Mr. Stewart to contend that it did.

85. In so far as this point was advanced as a separate allegation of non-disclosure, I reject it. Mr. Koepff (who was the source of Mr. Moody's statement in that regard) had a reasonable factual basis for this description, based upon his prior experience as well as the way in which the 2 July order had been obtained without prior notice and without reference to the English law and jurisdiction clause. It may be that there is disagreement as to whether McCarter is known to be an aggressive litigation firm – although it is not entirely clear that Mr. Bartell dislikes that description. But even if there is a factual disagreement as to whether or not McCarter warrants this description, it is not a disagreement which can be elevated into an allegation of non-disclosure. It is simply a factual dispute, which cannot and need not be resolved.

86. In any event, the important question on the without notice application concerned risk of anti-suit relief being granted in New Jersey. The case-law supports the availability of relief. In circumstances where McCarter had already obtained a powerful order from the New Jersey court, they could reasonably have been expected to obtain a further powerful order if given notice of the intended application in England.

87. *(2) The merits of the Defendants' case on the insurers' duty to defence and failure to pay defence costs.* The Defendants make a variety of points in this context, the substance of which is that the application should have addressed the merits of the Defendants' claim for reimbursement of defence costs in far greater detail both as a matter of New Jersey law and English law. They should also have explained that the Defendants were alleging that the insurers were acting in bad faith in the stance that they were taking in the correspondence.

88. I agree with the insurers that these matters were not relevant or material to the without notice application.

89. The question before the court on that application was, principally, whether the policies were subject to the jurisdiction of the English court. No complaint is made as to an unfair presentation of the Defendants' arguments in that regard. I expressed the same view in my judgment as I have now reached, after more detailed consideration, as set out in Section C above.

90. The next question was whether there were, applying the principles in *Times Trading*, strong reasons not to grant the injunction sought. I said that I saw no reason why the injunction should not be granted, and that it "seems to me there is every reason to grant it". I was shown some of the correspondence between the parties, and in particular the letter dated 20 January from Mr. Langan. It was apparent from the materials that there was a coverage dispute between the parties. The nature of that dispute, and the precise arguments being advanced by each party in support of their respective positions, was not in my view material to the application. Had Mr. Scorey QC embarked upon the process of explaining in more detail the parties' respective arguments on the merits, I would have been puzzled as to why this was appropriate and would likely have stopped him from doing so.

91. For reasons explained in Section C3 above, I do not consider that the merits of the Defendants' potential arguments in England could provide a strong reason why they should be permitted to continue in New Jersey, where a different applicable law was being relied upon (as was explained at the without notice application). Accordingly, there was no reason for the Defendants to have explored the merits of the parties' respective arguments under English law.

92. I have also explained in Section C3 that the strength of the Defendants' arguments under New Jersey law could equally not provide a strong reason. Indeed, the very fact that the Defendants were seeking to sue in New Jersey, under a law which was not the applicable law, provided a strong reason for granting the injunction. I should add that it was obvious from the materials which I was shown, and from the order made by Judge O'Neill, that the Defendants had a strong case under New Jersey law.

93. The fact that the Defendants were asserting that the insurers had acted in bad faith was also, in my view, immaterial to the application. If the merits of the parties arguments on the coverage issues under both New Jersey law and English law were immaterial to the application (as I have concluded), then I fail to see why an allegation that the insurers were acting in bad faith in the points that they were taking is material. In any event, if that allegation of bad faith were to be made, it was an allegation which should be made (and made good) in the parties' agreed forum. The fact that an allegation of bad faith was being made could not provide a strong reason for permitting the proceedings to continue in New Jersey.

94. *(3) Inconsistency between Insurers' stance as to jurisdiction and arbitration in England and Wales and in the United States.* This point requires a little explanation. Mr. Scorey QC explained at the without notice hearing that it was his clients' intention to remove the New Jersey State court proceedings (before Judge O'Neill) to the New Jersey Federal Court under the Federal Arbitration Act. In order to do so, the insurers would need to rely upon the arbitration provision in the Primary Policy. Mr. Scorey said that this might later be said to be inconsistent with their primary case (as argued before me) that the First Excess Policy was subject to English (court) jurisdiction, not arbitration.

95. The Defendants argue that the Claimants should have clearly told the court that: (i) they were not relying on the arbitration agreement in the alternative in the US; (ii) the Claimants could not remove the action to the Federal Court under the Federal Arbitration Act unless they contended that there was a valid and binding arbitration agreement which governed the dispute; and (iii) insurers' stance <u>was</u> inconsistent in the United States and in England and Wales. It was therefore not sufficient for the Claimants to say that they needed to rely on the arbitration agreement in the US and this may "later to be said to be inconsistent*"*.

96. I do not see how this point can be said to amount to a non-disclosure. Mr. Scorey told me clearly what his clients' intentions were. I did not consider then (and still do not consider now) that it had any effect on the decision to grant an anti-suit injunction. That injunction was justified on the basis of the Claimants' primary case; i.e. that there was an English (court) jurisdiction agreement, and no strong reason not to enforce it. The injunction was equally justifiable on the basis of the Claimants' alternative case based on arbitration. The stance which the Claimants were proposing to take in relation to removal in the United States did not therefore affect the English law analysis, and in any event the stance was explained. Whether or not it was permissible, under New Jersey law and practice, to take that stance (in circumstances where arbitration was only their alternative case) is not an issue which I needed or need to resolve, then or now.

97. *(4) Removal of the New Jersey proceedings to the Federal Court and expiry of the order.* The Defendants allege that the Claimants failed to draw the Court's attention to the fact that once the New Jersey Court granted an injunction which was removed to the New Jersey Federal Court, that order remained in effect but would expire automatically no later than 14 days after removal unless the Defendants moved to continue it, potentially giving rise to considerable prejudice to the Defendants.

98. I do not accept this argument. The transcript records Mr. Scorey saying:

> "if we issued the remand this afternoon on the basis of the arbitration clause, then the case is removed from the State Court and, as I understand it, the orders will then fall away and it will go before the Federal Court. So, we are de facto, if we pursue that route, going to obtain relief from the New Jersey court order by dint of the remand."

99. The position was therefore explained, including the consequence of the removal from the State Court.

100. *(5) Risk of the Defendants losing the benefit of the New Jersey order.* The Defendants contend that Insurers failed to draw to the Court's attention the authorities concerning the risks to the Defendants of losing the benefit of the New Jersey relief and the fact that such a risk militates against granting anti-suit relief. They referred to the decision in *The Epsilon Rosa,* and the Court of Appeal's statement that the loss of security in foreign proceedings "could amount to a strong reason for not granting an [anti-suit] injunction".

101. I have already addressed the decision in *The Epsilon Rosa,* which is of no assistance to the Defendants. In any event, as the insurers submitted, it was obvious that if the anti-suit injunction was granted, the Defendants would lose the benefit of the New Jersey order. That was the essence of the application, because that order had been obtained in breach of the English jurisdiction clause.

102. *(6) Consequences of delay.* The Defendants contend that the court's attention was not drawn specifically to the serious consequences to the Defendants of delay in the payment of defence costs, as it should have been, and in particular to the evidence of Mr Collis which had been filed in support of the application in New Jersey.

103. I do not accept that this was material to the application. For reasons already given, I agree with the Claimants that issues related to the underlying coverage dispute between the parties, including the purported consequences of the delay in payment of defence costs, were of no relevance and remain of no relevance to the proper grant of an anti-suit injunction to prevent the Defendants from breaching the exclusive jurisdiction clause in the First Excess Policy.

<u>D3: Discretion</u>

104. Had I considered that there was any substance to any of the non-disclosure arguments, I would nevertheless have continued the injunction. The reason is straightforward. This is a case where the Claimants have a contractual right to be sued in England, not New Jersey, and there are no strong reasons to permit the continuation of the proceedings in New Jersey. I would not have regarded any of the alleged non-disclosures as being sufficiently culpable to warrant depriving the Claimants of their contractual entitlement.

105. In the course of his oral submissions, Mr. Stewart submitted (whilst maintaining all of the non-disclosures alleged) that his principal arguments were the first two which are

set out above. Focusing particularly on those, I would not have come to the conclusion that there was any culpable non-disclosure.

106. In relation to the first argument, it is on any view a reasonable reading of the *General Electric* decision, when read together with the *Laker Airways* case, that anti-suit relief could have been granted by a New Jersey court. Indeed, in my view it is the only reasonable reading.

107. In relation to the second argument, which principally concerned the strength of the Defendants' case under English law: I do not consider that it would reasonably have occurred to the insurers that the Defendants would seek to argue that the strength of their case under English law somehow justified the continuation of the New Jersey proceedings, where English law was not being relied upon and had not even been mentioned to the judge. A party is not guilty of culpable non-disclosure because he fails to anticipate every argument that an imaginative counsel might subsequently make; particularly when the argument has, as in this case, no merit in terms of providing a strong reason for not granting anti-suit relief.

E: Continuation of the injunction on terms

108. Mr. Stewart submitted that, if the injunction were to be continued, it should be continued on terms that the insurers meet (what the Defendants contend to be) their obligations to pay the defence costs. This case was advanced, originally, on two alternative bases; (i) as part of the general exercise of discretion in the grant of any injunction, and (ii) because a mandatory injunction should be granted.

109. The latter argument gave rise to questions as to the basis on which this court could or should grant mandatory injunctive relief to the Defendants, who had neither issued a claim form seeking such relief nor acknowledged service of the proceedings commenced by the insurers, but rather had declined to accept the jurisdiction of the English court. Recognising these difficulties, Mr. Stewart accepted that if he did not succeed in his argument based on the general exercise of discretion, his argument on mandatory injunction did not take matters any further.

110. I accept that the court does have a general discretion to grant an anti-suit injunction on terms, and that this could include an order for payment of defence costs. I consider it inappropriate to make such an order in this case. On the one side, the grounds for obtaining anti-suit relief have, for the reasons given, been made out by the Insurers. On the other side, the Defendants have (wrongly in my view) maintained, and continue to maintain that this court has no jurisdiction, but wish to continue proceedings in New Jersey. This is not a promising start for the exercise of a discretion in their favour. More generally, however, I consider that if the merits of the case are to be investigated, so as to require prompt payment to the Defendants, that should be done as part of a properly formulated application (by a party who acknowledges jurisdiction) for summary judgment or an interim payment. If there is any real urgency, an application should be made for expedition. It is in my view no answer that such an application may take some time: the Defendants could, as I have said, have made such an application months ago when the parties' dispute clearly emerged in correspondence. Indeed, the Defendants could have spent the time and money since July 2020, when the anti-suit injunction was granted, formulating the

application rather than taking a series of bad points in opposition to the anti-suit injunction. If there is a sufficiently strong case for summary judgment or an interim payment, the Defendants will receive payment. If there is no sufficiently strong case, then I do not presently consider that there is any reason– in litigation involving large corporations – to benefit the Defendants' cash flow at the expense of that of the Claimants.

F: Conclusion

111. I will therefore continue the existing injunction, and will grant a mandatory injunction. I dismiss the cross-applications made by the Defendants. I will hear counsel as to the appropriate form of order and matters consequential on this judgment.