Neutral Citation Number: [2021] EWHC 2567 (Comm)

Case No: CL-2021-000454, CL-2021-000484, CL-2021-000456

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 24/09/2021

Before:

MR JUSTICE JACOBS

- -

BETWEEN: **CL-2021-000454**

(1) AIG EUROPE SA (formerly AIG Europe Ltd)
(2) ALLIANZ GLOBAL CORPORATE & SPECIALTY SE
(3) HAMILTON INSURANCE DAC (formerly Ironshore Europe Ltd)
(4) LIBERTY MUTUAL INSURANCE EUROPE SE
(formerly Liberty Mutual Insurance Europe Ltd)
(5) MARKEL INTERNATIONAL INSURANCE COMPANY LIMITED
(formerly Markel Europe Plc and Markel International Ireland)
(6) QBE UK LIMITED
(7) XL INSURANCE COMPANY SE
(8) ZURICH INSURANCE PLC **Claimants/ Applicants**

- and -

(1) JOHN WOOD GROUP PLC
(2) WOOD GROUP CANADA, INC. **Defendants/ Respondents**

AND
BETWEEN: **CL-2021-000484**

CHUBB EUROPEAN GROUP SE **Claimant /Applicant**

- and -

(1) JOHN WOOD GROUP PLC
(2) WOOD GROUP CANADA, INC. **Defendants /Respondents**

AND IN THE MATTER OF
THE ARBITRATION ACT 1996
AND AN ARBITRATION APPLICATION

BETWEEN: **CL-2021-000456**

ALLIED WORLD ASSURANCE COMPANY (EUROPE) DAC
(formerly Allied World Assurance Company (Europe) Ltd) **Claimant /Applicant**

- and -

(1) JOHN WOOD GROUP PLC
(2) WOOD GROUP CANADA, INC. **Defendants /Respondents**

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David Scorey QC and **Jeremy Brier** (instructed by **Clyde & Co LLP**) for the **Claimants/Applicants** in **CL-2021-000454** and **CL-2021-000456**
Ben Quiney QC and **Nicola Atkins (**instructed by **DAC Beachcroft)** for the **Claimants/Applicants**
In **CL-2021-000484**
Roger Stewart QC and **Saaman Pourghadiri** (instructed by **Bennett Jones LLP**) for the **Defendants/Respondents**

Hearing dates: 15th September 2021
- -

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.

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MR JUSTICE JACOBS

Mr Justice Jacobs:

A: Introduction

1. The Claimants, in three separate but related proceedings, are various insurers who seek to continue, on the return date, anti-suit injunctions which were granted on a without notice basis in August 2021. The injunctions relate to proceedings commenced by the Second Defendant against the Claimants in February 2021 in the Court of Queen's Bench of Alberta.

2. The policies issued by the Claimant insurers comprise a programme of excess liability insurance placed in the London market. The Defendants potentially require resort to that cover in relation to underlying proceedings which have been commenced, also in the Court of Queen's Bench of Alberta, by Nexen Energy ULC ("Nexen") in relation to the failure of a pipeline which resulted in the leak of 5,000 cubic metres of bitumen into the environment. Nexen claims against a number of contractors, including a company called Sunstone Projects Ltd ("Sunstone") which is alleged to be the predecessor in interest of the Second Defendant. Sunstone is alleged to have been negligent in the engineering, procurement, design and construction supervision work it performed for Nexen in relation to a pipeline system in Alberta.

3. The Alberta proceedings against the Claimant insurers are at a very early stage. At the time when the Claimants obtained anti-suit relief, they had not yet been served on the Claimants. The Defendants have said that they were protective for limitation purposes.

4. The basis of the application for anti-suit relief is, in the case of all the Claimants apart from Allied World Assurance Company (Europe) DAC ("AWAC") in Claim CL-2021-000456, exclusive jurisdiction clauses in the relevant policies which provide for English jurisdiction. The Defendants' principal argument, in opposition to the application, is that none of the policies, on their true construction, contain effective exclusive jurisdiction clauses.

5. In relation to AWAC, the basis of the application for anti-suit relief is an arbitration agreement in the two policies to which it subscribed. These were the policies referred to at the hearing as the "Second Excess" and "Third Excess". Those policies were also subscribed by other insurers, but AWAC is the only insurer who agreed an arbitration provision. There is no dispute that those policies do contain valid and effective arbitration agreements which provide for English arbitration. The Defendants argue, however, that no anti-suit injunction should be granted as a matter of discretion, because it would result in a multiplicity of proceedings.

6. In addition to these arguments, the Defendants contend that the injunctions should not be maintained because there was material non-disclosure by the various Claimants on the without notice applications.

B: Procedural background and the evidence served by the parties

7. The matter first came before the Commercial Court on 2 August 2021, in relation to proceedings which had been commenced by the Claimant insurers under the three higher layer policies in the excess programme. Those insurers are represented by Clyde & Co LLP ("Clydes"). Proceedings were subsequently commenced by a further insurer

(Chubb European Group SE) represented by DAC Beachcroft LLP. Where it is necessary to distinguish between the various Claimants, I shall refer to the "(Clyde) Claimants" and to "Chubb".

8. The proceedings brought by the (Clyde) Claimants concerned three policies, described in more detail below, which were referred to (and which are referred to in this judgment) as the "First Excess", the "Second Excess" and the "Third Excess". Two Claim Forms had been issued by the (Clyde) Claimants on 29 July 2021 in which anti-suit and related relief was claimed in respect of these policies. One Claim Form was an Arbitration Claim Form issued by AWAC. The other was a standard Claim Form, reflecting the fact that there was no relevant arbitration agreement, and that those insurers sought to establish the jurisdiction of the English court.

9. On 2 August 2021, the (Clyde) Claimants issued an application notice for injunctive relief, and sought an urgent hearing. The reasons for the urgency were set out, in a separate box on the first page of the skeleton argument of counsel, as follows:

> **"URGENCY and EX PARTE:** This matter was originally considered urgent but not urgent enough for vacation business, as set out in the Witness Statement of Neil Beresford. However, at approximately 5.54pm on Friday 30 July, www.law360.co.uk published an article (see **Annex B)** referring to the claim which the Claimants have brought against the Defendants (see p.3/7 of Annex B). The matter is now *highly urgent* on the basis that the Defendants will have been alerted to the fact that the claim has been issued against them and inevitably will consider that anti-suit injunctive relief is being sought by the Claimants. Accordingly, matters could be progressed in the Courts of Alberta by the Second Defendant at any time and progressed with speed – including seeking an anti-anti-suit injunction or TRO (see below). The law.com article is not referred to in the Witness Statement of Neil Beresford as the statement was signed prior to the article being published. Accordingly, the witness statement understates the urgency of the application. The application is *ex parte* for the reasons set out at paragraphs 6-20 of Beresford **[5/019-024]** and the fact that if Wood Group had notice of the applications they could obtain an anti-anti suit injunction in Alberta, or suchlike."

10. The evidence in support of the application was contained, as indicated in the text above, in a witness statement of Mr Neil Beresford, a partner in Clydes. The argument in support of the application was presented before me by Mr John Lockey QC on behalf of the Claimants in a hearing which lasted approximately 2 hours. I gave a brief judgment which explained my reasons for granting the application. In summary, I considered that, on the basis of the materials submitted by the Claimants, the claim for an anti-suit injunction in relation to the First and Third Excess, and AWAC's claim in relation to the arbitration agreement contained in its policies, were straightforward. I considered that the claim under the Second Excess was less straightforward, but was ultimately persuaded that it was appropriate to grant the relief.

11. The grant of these injunctions then led to a further application by Chubb. Chubb was the insurer under the first policy in the excess programme. I shall refer to this policy as the "Global Umbrella". Chubb had not been party to the proceedings commenced by the (Clyde) Claimants under the three layers which sat above the Global Umbrella. Chubb made an urgent application to Cockerill J on 16 August 2021. The urgency arose from the fact that the other excess insurers had obtained the injunction on 2 August, the effect of which was to alert the Defendants to the existence of a significant jurisdictional challenge (by way of English proceedings) to the Alberta proceedings. Chubb therefore said that it was at risk, unless urgent relief was granted, of an anti-anti-suit injunction in Canada. The application was supported by a witness statement of Mr Christopher Wilkes, a partner at DAC Beachcroft. Cockerill J granted the injunctions sought.

12. Each of the injunctions provided for a return date which in due course became 15 September 2021. They also provided for various ancillary orders relating to service, but it is not necessary to describe those in detail.

13. In the period between the grant of the injunctions and the return date, further evidence was served by the parties. This evidence comprised two further witness statements from Mr Beresford; a second witness statement of Mr Wilkes; and two statements of Pamela Vidal on behalf of the Defendants. Ms Vidal is Managing Counsel for the Defendants through Wood Group USA Inc. Her work involves litigation, insurance, management of insurance counsel and legal matters for Wood affiliated entities.

14. One issue which was addressed in this evidence was the potential availability in Alberta of the anti-anti-suit relief, which the August 2021 applications to the English court had been designed to forestall.

15. The Defendants exhibited a statement from an independent Canadian expert, Perry R Mack QC. That statement referred in particular to a decision of the Canadian Supreme Court in *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)* [1993] 1 SCR 897 ("Amchem"). At the heart of the Defendants' non-disclosure case was the proposition that this case was not, but should have been, drawn to the attention of the court on the without notice applications. Mr Mack's view was that the Second Defendant would "in theory" have been able to apply to the Alberta court in order to restrain the English anti-suit proceedings, but that it was unlikely that this application would have been successful. This was because such an application would not have been compliant with what he described as the "Amchem prerequisite" of first seeking relief from the English court.

16. Mr Mack QC's conclusions in that regard were, in material parts, challenged in a statement served by Scott J Hammel QC and Debra Curcio Lister of Miller Thompson LLP. They were independent Canadian lawyers instructed by Clydes to address Mr Mack's statement. Their conclusion was that there was a reasonable chance that an Alberta Court would have granted the Second Defendant an anti-anti-suit injunction, had it applied for same. The possibility of this having occurred was not remote or improbable.

17. In their statement, Mr Hammel/ Ms Lister acknowledged that they were not aware of any reported Alberta decisions addressing anti-anti-suit injunctions. But they referred to a decision of a superior court in British Columbia where the applicants had obtained an ex parte order from the British Columbia court temporarily enjoining the respondent

(TCML) from proceeding with an injunction application in Washington State USA. The decision is not reported as such, but is referred to in one of the reports of subsequent proceedings which culminated in *Teck Cominco Metals Ltd v Lloyd's Underwriters* 2009 SCC 11 affirming prior decisions.

18. Mr Mack QC served a brief responsive statement relating to this case, making the points that there was no record of the decision or the grounds on which it was granted, and also that the relevant order was set aside by agreement between the parties within 3 days of its being granted.

19. Simultaneously with the service of this evidence, the Defendants' lawyers (Bennett Jones LLP) engaged in correspondence with Clydes relating to the question of the evidence given to the court – as to Alberta law, and the prospect of an anti-anti-suit injunction – by Mr Beresford in his first statement. In that statement, Mr Beresford had said as follows:

> "14. Without waiving privilege, I am advised by John Nicholl, an attorney in Clyde & Co LLP's Toronto, Canada office and Heather Sanderson, a barrister and solicitor at Sanderson Law in Calgary, Alberta, Canada, that the Second Defendant would be able to apply for a court order to restrain English anti-suit proceedings by taking the following steps in Alberta:
>
> a. The Second Defendant could bring an application before the Court of Queen's Bench of Alberta within its pending coverage action, or as a separate originating application, seeking:
>
> i. an order for service of the coverage action outside Canada, if this has not already been obtained;
>
> ii. a declaration that Alberta is the appropriate forum to determine the coverage dispute; and
>
> iii. an "anti-anti-suit" injunction restraining the Claimants from continuing with the anti-suit injunction proceedings in London or with any other court and/or arbitration proceedings in the UK relating to the Second Defendant.
>
> b. The Second Defendant can pursue each of these applications in the Court of Queen's Bench of Alberta, Canada, on an ex parte basis and can seek an interim anti-anti-suit injunction or temporary restraining order ("TRO") against the Claimants' proceedings in the English courts pending the outcome of a hearing on the merits. These requests for relief could be made in a single "omnibus" application requesting a single order in response to each request for relief; or, each request for relief could be pursued through separate applications. It is more likely than not that the Second Defendant would opt for an application for an omnibus order.

c. The Second Defendant could also obtain a binding, permanent injunction, which would require a hearing before a Court of Queen's Bench Judge. However, that hearing can only be requested after the following steps have occurred: (1) service on the Claimants of the application and all supporting affidavits; (2) all cross-examinations on the affidavits has occurred and the transcripts have been obtained; (3) the applicant has filed and served its written argument and the transcripts of its cross-examination of the respondents on their affidavits; (4) the Respondents have filed and then served their written arguments and the transcripts of their cross-examination of the Applicant's affidavit or affidavits; and (5) the Applicant has filed and served its rebuttal argument.

d. Even if these steps are executed expeditiously, due to the backlog in the Alberta courts caused by COVID-19, the hearing might not occur until late 2021 or early 2022. As such, I am advised that the Second Defendant is likely to prefer to proceed with its application on a without notice / ex parte basis, as an ex parte application can be submitted in writing electronically with a significantly shorter turnaround time.

15. Simply put, if the Defendants become aware of the Claimants' applications prior to the Claimants having the protection of an anti-suit injunction in place, there is good reason to consider that the Second Defendant would bring one of the applications outlined above.

16. By attempting to show a real and substantial connection to Alberta in Paragraph 54 of its Statement of Claim (see Exhibit [NB1/185]), the Second Defendant has indicated that it is aware of the potential for a jurisdictional challenge and prefers the jurisdiction of the Alberta courts. The Second Defendant is represented by Bennett Jones LLP, who are experienced, competent legal counsel in Canada and are therefore capable of advising and assisting the Second Defendant to pursue an anti-anti-suit injunction application.

17. If the Second Defendant brought one of the applications set out above, there is a real risk that the Court of Queen's Bench of Alberta would grant the Second Defendant's application, especially if it proceeded initially on a without notice basis, which would deprive the Claimants of an opportunity to be heard.

18. In those circumstances, the Claimants would effectively be precluded from enforcing the jurisdiction and/or arbitration provisions in the Policies. The Claimants would then be forced to file an application on notice in the Court of Queen's Bench of Alberta (which involves the same costly and time-consuming steps set out in Paragraph 14 above) for an order reversing the

> temporary anti-anti-suit injunction obtained without notice, even though the Claimants and Defendants have agreed, as a matter of binding contract law, to have disputes relating to the Policies determined by arbitration in London and/or the English Courts. Further, if the Claimants are forced to proceed on this basis, there is a real risk that, even if their application is successful, they would be unable to recover all their costs.
>
> 19. In light of the above, there are good reasons for the Claimants to seek this application in this Court on an urgent and ex parte basis. The urgency arises from the fact that the Second Defendant could serve its Statement of Claim at any time and must serve within 12 months. Whilst I cannot say that it will happen "tomorrow" or indeed on any particular day, it will happen at some point and probably in the near future. The Claimants cannot wait for service to have occurred before applying for these injunctions, because it is likely that at that point the Second Defendant will also seek one of the applications outlined above. Alternatively, if it becomes apparent to the Second Defendant that the Claimants will be objecting to the jurisdiction of the courts of Alberta, a fact which the Claimants would be obliged to set out in short order following service of the Statement of Claim, it would then be a risky race to see whether these applications could be obtained before the Second Defendant obtains a TRO or suchlike. Therefore it is important to proceed swiftly such that the Claimants can protect their contractual rights, namely the exclusive jurisdiction clauses and the arbitration clause (in the case of AWAC)."

20. This correspondence, which advanced arguments that there had been a waiver of privilege in the advice referred to in those paragraphs, culminated in the disclosure by Mr Beresford of a three-page memo sent by Mr John Nicholl to Mr Brier of counsel on 26 July 2021. This was 2 days before the proceedings were started, and 7 days before the application for the anti-suit injunction was made. The memo ("the Nicholl memo") was copied to, amongst others, Mr Beresford and also Heather Sanderson of Sanderson Law. Sanderson Law is a law firm separate from Clydes. In his 3rd statement, Mr Beresford explained that this advice had been prepared by Mr Nicholl in collaboration with Ms Sanderson, and contained her input.

21. The advice in the Nicholl memo stated that it was "procedurally open" to the Second Defendant, if served with or notified of the UK anti-suit injunction application, to bring a without notice application before the Alberta Court of Queen's Bench and obtain a TRO [Temporary Restraining Order] or anti-anti-suit injunction. It continued:

> "While we believe the merits strongly favour a UK court assuming jurisdiction over this matter, and we intend to dispute WGC's arguments in favour of a TRO or anti-anti-suit injunction if pursued, it is certainly within the realm of possibility that an application by WGC [the Second Defendant] would be granted, especially if it proceeds initially on a without notice basis (which deprives the insurers of an opportunity to be heard). If an interim

> TRO or anti-anti-suit injunction were to be granted without notice, the insurers would then be obliged to attempt to overturn the decision. In the meantime the TRO or anti-anti-suit injunction would remain in force."

22. The advice then discussed the procedural options available to the Second Defendant, and the timing. The concluding paragraph of the advice was as follows:

> "In summary, the timing differential between a without notice application and a contested hearing on permanent injunctive relief creates the risk that, if WGC is able to convince the court at a without notice hearing to grant an interim TRO or anti-anti-suit injunction, many months will then pass before the insurers have the opportunity to reverse the *ex parte* decision. In the meantime, the interim relief will remain in force".

23. In the course of his submissions on non-disclosure, Mr Stewart QC sought to develop arguments based on the proposition that there had been a waiver of privilege in Mr Beresford's original witness statement, and a collateral waiver of related documents when the Nicholl memo was disclosed. No application had been made, or was made at the hearing, for further disclosure and it was therefore neither necessary nor appropriate for me to determine the validity of the arguments which were advanced in that regard. I shall return to this line of argument in Section I below.

24. At the hearing on the return date, submissions were made on behalf of the (Clyde) Claimants by Mr Scorey QC, and by Mr Quiney QC on behalf of Chubb. Mr Stewart QC made submissions for the Defendants. All counsel had previously served appropriately focused skeleton arguments.

C: The insurance programme

The overall programme

25. A pictorial representation of the Defendants' "insurance tower" was attached to the (Clyde) Claimants' skeleton argument. There was no material dispute about it, or as to the terms of the policies subscribed by the various Claimants. I will describe it, in so far as necessary, from the "bottom up". Although the claim made in the Alberta proceedings refers to both the 2014/2015 and 2015/2016 policy years, it was common ground that, as far as relevant for present purposes, there was no material distinction between them. The description below relates to the coverage for the 2015/2016 year, which presently appears more appropriate given the date when the Nexen claim was made.

26. The Claimants allege that, at the bottom of the "tower", there was a self-insured retention of US$ 2 million. There is a dispute as to the existence of this retention, but it is not relevant to the issues which arise on the present application.

27. Between the (alleged) self-insured retention, and the excess programme subscribed by the present Claimants (comprising, in sequence, the Global Umbrella and then the First, Second and Third Excess policies – to which I will refer collectively as "the 4 excess policies"), were a very large number of "underlying" policies. Each of the 4 excess

policies contained an identical schedule of these underlying policies headed: "List of Underlying Policies". This was followed by the following text:

> "The below represents John Wood Group PLC and subsidiary and affiliated policies which require the JWG excess liability programme to sit over and above. In addition to the below the excess programme would look to respond to the contingent facility coverages for any other JWG policy taken out globally… The current global policies have been declared in the below but these may alter depending o[n] the remarketing of the primary casualty layer."

28. These underlying policies, collectively, were referenced in the wording of each of the four excess policies. Thus, in the Global Umbrella written by Chubb, the "Limit of Liability" was expressed to be US$ 15m each and every occurrence and US$ 45m in the aggregate "In Excess of various Underlying limits as follows". The schedule, comprising approximately 70 policies, then followed. The Global Umbrella then contained a further reference to this schedule (on page 8 of 30) in the following terms:

UNDERLYING INSURER(S):	Primary:	
	Insurance Company:	ACE INA Insurance
	Policy Number:	CSZ G27175314 003
	Insured:	John Wood Group
	Limit:	USD 2,000,000 per Occurrence
	And as per schedule of underlyers shown herein	

29. The Global Umbrella contained a further reference in the Definitions section (page 27 of 30) in the following terms:

Applicable Underlying Policy / Policies	1. Applicable Underlying Policy / Policies means
	1.1 the Primary Policies, and
	1.2 any Underlying Excess Policies
	As specified in the Schedule

30. The First Excess (at page 2 of 30) contained similar provisions to those described in paragraph 28 above, but modified to reflect the fact that the First Excess sat above the Global Umbrella.

31. Thus, the Limit of Liability provision was in the following terms:

> "Difference between GBP 25,000,000 each and every occurrence and in the aggregate for the 2015 and 2016 policy periods due to expire 30th January 2017 always subject to the Anniversary Review Criteria and either

> a) USD 15,000,000 each and every occurrence and USD 45,000,000 in the aggregate for the 2015 and 2016 policy periods due to expire 30 January 2017 and
>
> Excess of Various Underlying Limits as described hereunder or
>
> b) GBP 10,000,000 each and every occurrence in respect of UK Employers' Liability Offshore as described the underlying policy schedule
>
> (No excess UK and Eire Onshore Employers Liability coverage is provided under this wording)"

32. Similarly, the "Underlying Insurer(s)" (page 8 of 30) was in the following terms:

Primary:	
Insurance Company:	ACE INA Insurance
Policy Number:	CSZ G27175314 003
Insured:	John Wood Group
Limit:	USD 2,000,000 per Occurrence
Umbrella:	
Insurance Company:	ACE European Group Ltd
Policy No:	47UKC19173
Insured:	John Wood Group Plc
Limit:	USD 15,000,000 each and every occurrence and USD 45,000,000 in the aggregate

And as per schedule of underlyers shown herein

33. The schedule of approximately 70 policies then followed.

34. The Second Excess contained materially identical provisions, save that it reflected the fact that it sat above the First Excess. Thus, the Underlying Insurer(s) referred to:

Primary:	
Insurance Company:	ACE INA Insurance
Policy Number:	CSZ G27175314 003
Insured:	John Wood Group
Limit:	USD 2,000,000 per Occurrence
Umbrella Excess:	
Insurance Company:	ACE European Group Ltd
Policy No:	47UKC19173
Insured:	John Wood Group Plc
Limit:	USD 15,000,000 each and every occurrence and USD 45,000,000 in the aggregate

1st Excess CSL layer:

Insurance Company:	QBE Insurance Europe Ltd
Policy No:	009159012015
Insured:	John Wood Group Plc
Limit:	Difference between GBP 25,000,000 and underlyers each and every occurrence and in the aggregate

And as per schedule of underlyers shown herein

35. Similarly, the Third Excess (on page 9 of 31) added the Second Excess layer to the list of policies identified against "Underlying Insurer(s)".

36. It will be apparent from the above description that each of the excess policies identified one particular policy, against the words "Underlying Insurer(s)", under the heading "Primary". This was policy CSZ G27175314 003 issued by ACE INA Insurance. This policy was referred to by the parties (and is referred to herein) as the "Global CGL". It provided, amongst other things, "Commercial General Liability Coverage" (hence the expression "CGL"), as well as employee benefits coverage and contingent auto liability coverage. It was not truly "Global", in that its coverage excluded the United States of America. However, it was "Global" in the sense that it covered liabilities arising in the rest of the world. The Global CGL was signed by two officers of Ace American Insurance Company, described in the policy (and referred to herein) as "Ace USA". There is nothing to indicate that, as Mr Stewart at one stage tentatively suggested in argument, the policy was issued in London. It appears, as Mr Scorey submitted, to have been a policy issued in the USA by a USA insurance company. The Named Insured under the Global CGL was John Wood Group PLC.

The jurisdiction and applicable law provisions of the various policies

37. It was common ground that the Global CGL issued by Ace USA contained no express clause concerning either applicable law or jurisdiction.

38. Apart from three policies (including the Global CGL itself), the documents before the court did not include the terms of the various policies listed on the schedule of underlyers. Aside from the Global CGL, the two other policies which were before the court were: (i) a policy, also issued by Ace USA, covering liabilities in the USA (and hence referred to as the US CGL Policy), and (ii) a policy issued by Syndicate 2623/623 at Lloyd's, known as the Beazley policy, issued to Mustang Engineering Holdings Inc. In the end, however, none of the parties' submissions suggested that the precise terms of any of these other policies were of significance to their respective arguments on the present application. The existence of a wide variety of policies, issued by different insurers to different insureds, as set out on the schedule contained in the four excess policies, did however play some part in the argument on behalf of the (Clyde) Claimants. The Global CGL Policy was, however, important to the argument of all parties, in particular the Defendants.

39. In contrast to the Global CGL Policy, the four excess policies did contain applicable law and/or jurisdiction clauses. The material terms were not identical across each of the policies, but there were similarities between them (in particular in relation to the First and Third Excess).

40. All four policies contained the following clause against the side-heading: "Choice of Law and Jurisdiction":

> "Any dispute concerning the interpretation of the terms, Conditions, Limitations, Exceptions and/or Exclusions of the policy are understood and agreed by both the Insured and the Insurers to be subject to the same law and the same jurisdiction as the primary policy. Each party agrees to submit to the jurisdiction of any court of competent jurisdiction within said territory and to comply with all requirements necessary to give such court jurisdiction. All matters arising hereunder shall be determined in accordance with the law and practice of such court."

The Defendants referred to this clause as the "Primary Policy Jurisdiction Clause", reflecting the fact that it referred to the "primary policy". I shall abbreviate this to "PPJC".

41. In the Global Umbrella policy, the PPJC (at page 8 of 30) followed immediately after the "Underlying Insurer(s)" clause already described. In the First Excess, these two clauses again followed each other (at pages 8 and 12 of 30), but were separated by the schedule which contained the List of Underlying Policies. The position under the Second Excess was similar to the First Excess, except that there was an additional "Joint Venture Listing" which separated the Underlying Insurer(s) clause (page 9 of 26) and the PPJC. In addition, there was a handwritten notation against the PPJC which provided: "Allied World does not follow this clause. Allied World Endorsement # 1 to apply". The Third Excess was materially the same as the Second Excess, including the handwritten notation relating to Allied World.

42. In addition, each of the four excess policies contained further clauses which addressed the question of applicable law or jurisdiction, or both.

43. In the Global Umbrella, the relevant clause was Clause 11 at page 26 of 30. It provided as follows:

Choice of Law	11. This Policy of insurance shall be governed by and construed in accordance with the laws of England and Wales, or Scotland (in respect of any policies issued in Scotland), and except in the case of Scottish policies the Commercial Court of the Queen's Bench Division High Court of Justice Strand London WC2A 2LL shall have jurisdiction in respect of any dispute under this Policy.

44. In the First Excess, the relevant clause was Clause 12 at page 29 of 30. It provided as follows:

> "The proper law of the Policy shall be English law and the Courts of England shall have exclusive jurisdiction in all disputes connected with this Policy."

45. In the Second Excess, the relevant clause did not specifically address jurisdiction, but did address applicable law. Clause 4.10 (on page 4 of 14) was in the following terms:

> "Any phrase or word in this Policy and the Schedule will be interpreted in accordance with the law of England. The Policy and the Schedule shall be read together as one contract and any word or expression to which a specific meaning has been attached in any part of this Policy shall bear such specific meaning wherever it may appear."

46. The part of the Second Excess, containing the 14 pages where Clause 4.10 was to be found on page 4, followed earlier contract provisions which ran to 23 pages including the signing page.

47. In the Third Excess, the terms of the clause were materially identical to the First Excess. The clause, again Clause 12, was set out on page 7 of 17 (using the notations at the top of the page). These 17 pages followed earlier contract provisions which ran to 24 pages including the signing page.

The overall shape of the policies

48. Having described the material clauses, I will now describe the overall shape of the 4 policies in which these clauses were contained. It was, however, common ground that – as the Defendants submitted in their skeleton – the policies must, if possible, be construed as a whole.

49. Each of the 4 policies began with a number of pages which started with the heading "Risk Details". The background to the form of these policies is described in Merkin: *Colinvaux's Law of Insurance* 12th Edition paragraphs 1-082 – 1-094. In summary, the position is that prior to reforms resulting from steps taken between 2004-2007, the typical procedure in Lloyd's and the London market was for the broker to prepare a "slip" which contained brief details of the risk and its terms. Formal policy wording would be prepared at a later stage. On occasion, and particularly at the reinsurance level, the parties might agree that no formal policy was to be issued, in which case the slip was referred to as a "slip policy". However, in many cases there was no policy wording in existence at the time when the contract came into effect (ie when the slip was signed), which *Merkin* describes as one of the "weaknesses in the system".

50. Following intermediate reforms, the insurance regulator (the FSA) challenged the London market to find a solution to the problem of inadequate documentation. This resulted in the formation of two working groups in the London market. This included the Subscription Market Reform Group, whose work is relevant to policies such as those in the present case. Codes of Practice were later issued. This work resulted in the "Market Reform Contract", which is now the standardised form of agreement used in the London market. There is no longer any reference to the "slip". Instead, as Merkin describes:

> "… when a risk is presented by the broker to the market, the presentation consists of an introductory section setting out the most important details of the risk (which more or less corresponds to the old slip) but attached to this document is a

> "schedule" which sets out the terms of the policy. The effect therefore is that all of the documents are prepared up-front, and when the underwriters scratch the documents the contract is in its entire form."

51. A Market Reform Contract must contain the details set out in the published guidance. It consists of a series of sections, including Risk details. The Risk details include, for example, the unique market reference, the type of policy, the interest insured, the monetary limits and the choice of law and jurisdiction.

52. The Global Umbrella policy, issued by Chubb, accordingly began with the "Risk Details" on "Page 1 of 30". The Underlying Insurer(s) and PPJC provisions were on page 8 of 30. Chubb's stamp was on page 22 of 30. At page 24 of 30 began 7 pages of standard terms and conditions. These included clause 11, which was the "Choice of Law" clause already described. Each page of the 30 was stamped by Chubb. Some further pages followed, but it is not necessary to describe these in detail.

53. The other policies followed a broadly similar format. The Risk Details for the First Excess began on page 1 of 30 – although I note that the 30 pages in fact comprised 32 pages, with the final one being "page 32 of 30". The Risk Details continued until page 13 of 30. These details included the Underlying Insurer(s) and PPJC provisions, already described, on pages 8 and 12. The insurers' signatures or scratches were on pages 21-22 of 30. There then followed, beginning on page 23, certain standard terms and conditions. These included Clause 12, the exclusive jurisdiction clause, on page 29 of 30.

54. The Second Excess had the insurers' scratches on pages 22 and 23 of 26 (there were in fact only 24 pages). There then followed a number of pages, which included standard terms and conditions of Liberty International Underwriters. These included the applicable law provision in clause 4.10 already described.

55. The Third Excess was materially similar but not identical to the First Excess. The standard terms and conditions began with separate numbering (in the top right hand corner); so that the relevant Clause 12 was on page 7 of 17.

56. Thus, the shape of the four excess policies was broadly similar, with Risk Details at the start of the policy terms, and standard terms and conditions towards the end.

57. There was no dispute that, in relation to each of the four excess policies, the standard terms and conditions did form part of the contracts which had been agreed between the parties. They are, therefore, contractual clauses. An important issue on the application is how the applicable law/ jurisdiction clauses forming part of the standard conditions are to be construed in the context of potentially conflicting clauses (specifically, the PPJC) contained in the earlier Risk Details section of the policies. That construction issue must, on the present application, be construed applying ordinary principles of English law. Neither side argued for the application of a different system of law in determining the issues of construction which the parties' written and oral arguments addressed.

D: Legal principles relating to anti-suit injunctions

58. It was common ground that the applicable legal principles concerning the grant of anti-suit injunctions are as summarised in *Catlin Syndicate Ltd v AMEC Foster Wheeler USA Corp* [2020] EWHC 2530 (Comm) at [33]. The following principles apply equally to arbitration and jurisdiction clauses:

(a) 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.

(b) 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": s.37(1) of the Senior Courts Act 1981. Further, "Any such order may be made either unconditionally or on such terms and conditions as the court thinks just": s.37(2).

(c) The Court has jurisdiction under s.37(1) 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).

(d) 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.

(e) 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."

(f) 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.

(g) 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.

(h) 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.

E: AWAC

59. The Defendants accepted that there were binding arbitration agreements with AWAC in the Second and Third Excess policies. They argued that injunctive relief in support of those clauses should be refused because the consequence would be a multiplicity of proceedings against the various insurers. Mr Stewart accepted that this argument would not be sustainable, or at least would be more difficult, in the event that the applications of all the insurers succeeded. This was presumably on the basis that the entirety of the litigation against the Claimants would then be taking place in London.

60. I reject the argument that injunctive relief should not be granted. In principle, the arbitration agreements with AWAC should be enforced, by the grant of anti-suit relief, unless there are strong reasons not to do so. The fact that the Defendants wish to bring proceedings against other insurers, and that such proceedings must be court proceedings (because there are no arbitration agreements with those insurers), does not provide a strong reason why AWAC should be required to participate in Canadian court proceedings despite a binding English arbitration agreement. Indeed, multiplicity of proceedings was inherent in the agreements reached when the various insurers subscribed to the Second and Third Excess, with only one insurer (AWAC) specifically agreeing an arbitration clause, but with the others not doing so.

61. Accordingly, AWAC is entitled to appropriate anti-suit relief.

F: The Global Umbrella

62. Chubb submitted that clause 11 (paragraph [43] above) was an exclusive jurisdiction clause in favour of the Commercial Court in London. That argument was supported by the (Clyde) Claimants, whose argument was in certain respects – critically so in the case of the Second Excess insurers – based upon clause 11 in the Global Umbrella.

63. The Defendants made essentially three submissions, which it is convenient to address in the following sequence.

64. First, the Global Umbrella was a policy "issued in Scotland", and therefore clause 11 was inapplicable to the Global Umbrella. The Commercial Court in London did not therefore have exclusive jurisdiction, because this was a Scottish policy.

65. Secondly, if that was wrong, the clause should be construed as a non-exclusive jurisdiction clause: in effect, the clause gave the parties the option of proceeding in the Commercial Court, but it did not require them to do so. It was therefore permissible for the Defendants to proceed in Canada.

66. Thirdly, and in any event, clause 11 did not displace the PPJC contained in the earlier "Risk details" section of the Global Umbrella. As a "typed" clause, rather than a clause contained within standard terms, the PPJC should prevail. The Defendants submitted that this jurisdiction clause imported what they described as a "permissive approach" to jurisdiction under the Global Umbrella, and indeed in the other excess layers which contained an identical PPJC. Even if the PPJC was not given primacy over clause 11, the latter should be read consistently with the permissive approach. The result was that clause 11 should be construed as non-exclusive.

67. The first two arguments were specific to the terms of the Global Umbrella. The third argument, in particular that the PPJC should prevail over the jurisdiction clauses which appeared in the later standard terms of the policies, was a critical argument advanced by the Defendants in relation to the other excess policies as well.

Issued in Scotland

68. The evidence of Mr Wilkes, in his second statement on behalf of Chubb, was that all the negotiations in relation to the Global Umbrella were conducted, on behalf of the insured, by the brokers Marsh Ltd in London. The underwriters employed by Chubb (at that time Ace European Group Ltd) were also all based in or operating in premises from London. Evidence to similar effect was contained in other evidence from Mr Wilkes and Mr Beresford.

69. This evidence was not disputed by Ms Vidal, whose first statement addressed the question of whether the Global Umbrella was a Scottish policy. She drew attention, however, to the fact that the policy was "issued to an identified Scottish insured with a Scottish address and registered office". In that context, she referred to the Risk Details section of the Global Umbrella. This provided, against the word "Insured":

> "John Wood Group PLC and Subsidiary Companies and Joint Ventures as declared to Insurers"

70. Her evidence was that John Wood Group PLC was a company registered in Scotland. The "Principal Address" identified in the Risk Details section of the Global Umbrella was an address in Aberdeen for "Wood Group PSN Ltd".

71. It was common ground that the question of whether the Global Umbrella was a "Scottish" policy, within the meaning of clause 11, depended upon whether the policy was "issued in Scotland". I accept the submission of Mr Quiney on behalf of Chubb, viz: that the natural meaning of the phrase "issued in" is that the thing in question should be created in a geographical location, and that that is where it would ordinarily be described as issued. In the context of an insurance policy, the act of issuing a policy is carried out by the insurer, and therefore the expression would direct attention to the location of the office which is the origin of the policy document provided to the insured. The policy in the present case was negotiated in London with London underwriters by London brokers. The contracts with each underwriter were concluded when the policy documentation was scratched, in London, by each underwriter. It was at that point that the policy should be regarded as having been "issued". The policy was therefore not issued in Scotland.

72. This conclusion is not affected by the fact that the policy was, as Ms Vidal says, issued "to" John Wood Group PLC, which is a Scottish company. Clause 11 requires identification of the place where the policy was issued, not the place of business or registered office of the company to which it was issued. Furthermore, the policy was not simply issued to John Wood Group PLC. It was also issued to the large number of insureds identified, in addition to John Wood Group PLC, against the word "Insured" in the policy.

Exclusive or non-exclusive agreement for English jurisdiction?

73. At this stage, I shall address the Defendants' argument that the true construction of clause 11 is that it is a non-exclusive agreement for the jurisdiction of the Commercial Court in London, irrespective of the impact (if any) of the PPJC.

74. The question whether a clause is to be construed as exclusive or non-exclusive is fundamentally a question of construction of the parties' bargain. The authorities show that it is not necessary to use the words "exclusive jurisdiction". This would amount to an inappropriate surrender to formalism: see *Joseph: Jurisdiction and Arbitration Agreements and their Enforcement* para 4.11.

75. *Joseph* then states in para 4.12 that:

> "Where parties agree to submit disputes to an identified court or submit disputes to the jurisdiction of such a court then, as a matter of construction, an English court is likely to conclude that an exclusive jurisdiction agreement has been effected."

I consider that this proposition is borne out by the authorities to which I was referred. For the reasons which follow, I consider that it is applicable to clause 11 of the Global Umbrella.

76. The opening sentence of clause 11 makes it clear that (except for Scottish policies) the policy "shall be governed by and construed in accordance with the laws of England and Wales". It is therefore clear that English law was mandatory, not optional. The parties were therefore using the word "shall", albeit in the context of the words "shall be governed by and construed", as connoting something that was mandatory. There is no reason to think that a different, optional, connotation should be given to the words which provide that the Commercial Court "shall have jurisdiction in respect of any dispute under this Policy". The natural construction of these words is that any dispute, whatever it is, shall be resolved by the chosen court.

77. Furthermore, the choice of English law in conjunction with the reference to English jurisdiction is itself a powerful factor in favour of construing the choice of English jurisdiction as exclusive: see *Generali Italia SpA v Pelagic Fisheries Corp* [2020] EWHC 1228 (Comm), para [92] (Foxton J).

78. The conclusion that clause 11 is to be construed as conferring exclusive jurisdiction is also supported by some of the considerations that led the Court of Appeal, in *Compania Sud Americana de Vapores SA v Hin-Pro International Logistics Ltd* [2015] EWCA Civ 401, to conclude that the clause in that case was an exclusive jurisdiction clause. The court was there concerned with a clause in a bill of lading. The first sentence provided that: "This Bill of Lading and any claim or dispute arising hereunder shall be subject to English law and the jurisdiction of the English High Court of Justice in London". The court's judgment was given by Christopher Clarke LJ.

79. At paragraph [61], he said that there were imperative and directory words relating to the applicable law, and "prima facie, the same should be so in relation to jurisdiction". He then said that the relevant clause was "transitive in the sense that the parties agree to submit all disputes to the English court, rather than submitting themselves to its

jurisdiction". Both of these considerations are in my view applicable to the clause 11, albeit that some cases have questioned the importance of categorising clauses as transitive or intransitive: see eg *BNP Paribas v Anchorage Capital* [2013] EWHC 3073, paras [84] – [91].

80. The more general discussion in paragraphs [63], [64] and [66] is, however, very pertinent to the argument, in the present case, that clause 11 should be construed as non-exclusive. Christopher Clarke LJ said:

> "[63] Second, whilst I accept (i) that a non-exclusive English jurisdiction clause is not worthless or otiose even when there is express provision for English law, and (ii) that there can, generally speaking, be only one law governing the contract but that there can be more than one court having jurisdiction over disputes, the natural commercial purpose of a clause such as the present is to stipulate (a) what law will govern; and (b) which court will be the court having jurisdiction over any dispute. If "shall be subject to" makes English law mandatory (as it does) the parties must, as it seems to me – as it did to Staughton LJ - be taken to have intended (absent any convincing reason to the contrary) that the same should apply to English jurisdiction. I do not think that the reasonable commercial man would understand the purpose of the clause to be confined to a submission to English jurisdiction, if invoked, or to an underscoring of the convenience of litigation here.
>
> [64] In a case such as the present, there is only limited benefit in specifying England as an optional jurisdiction without any obligation on either party to litigate here. The number of courts that might have jurisdiction over a dispute between the bill of lading holder and the owners is at least as large as the range of countries in which (in this and other cases) cargo may be loaded, transhipped, or discharged, and might include the country where the bill of lading contract was made or that of the ship's flag. Some of these countries are likely not to apply English Law, despite clause 23, if their jurisdiction is invoked. Some might apply it in an idiosyncratic way. Which court a claimant might select could not, itself, be predicted with any certainty. In those circumstances it makes little commercial sense to add England as an optional additional court, but without any obligation on either party to litigate there; and there was every reason to think, as the judge did, that when the parties were agreed that claims and disputes should be determined by the English High Court, by necessary inference they were agreeing that they should not be determined elsewhere. That would make good commercial sense.
>
> …
>
> [66] Third, there is obvious sense in making both English law and English jurisdiction mandatory. Whilst foreign courts may

> (but will not necessarily) apply English law if that is what the parties have agreed, England is the best forum for the application of its own law."

81. These considerations are in my view equally applicable in the present context, and militate strongly against interpreting clause 11 as non-exclusive. It is true that the range of potential courts, in the context of an insurance dispute, would not at first sight be as wide as the range in the context of bills of lading. However, the Defendants themselves argue that the impact of the PPJC is to open up a very large range of courts that might potentially have jurisdiction. This is because, as described below, the Defendants argue for "permissive" jurisdiction which would enable proceedings to be brought under the Global Umbrella (and the higher layers) wherever jurisdiction under the primary policy could be established; and, on the Defendants' case, such jurisdiction would depend upon where the underlying claim happened to be made.

82. Finally, if the agreement for Commercial Court jurisdiction in clause 11 is to be regarded as non-exclusive, it gives rise to the question: why did the parties need to include in that clause a specific exception for Scottish policies? The obvious reason for that exception was to carve out Scottish policies from the exclusivity provisions, so that the parties were not required to litigate Scottish policies in the Commercial Court but could go to another court where jurisdiction could be established. However, the effect of the Defendants' argument is that, because the clause was non-exclusive, the parties had this right in any event. On that basis, the exclusion of Scottish policies had no, or at least no significant, effect.

83. Accordingly, I reject the Defendants' argument that clause 11 is a non-exclusive jurisdiction agreement.

Primacy of the PPJC?

84. The Defendants' primary case was that clause 11 in the standard terms should, in effect, be disregarded because it conflicted with the PPJC which appeared not only in the Global Umbrella, but in the other three excess policies. The PPJC referred to the "primary policy". The Defendants submitted that this was, and could only be, a reference to the Global CGL policy; ie the policy covering non-US liabilities issued by Ace USA.

85. It was common ground that the Global CGL policy did not contain any clause which identified either the applicable law of that policy, or any jurisdiction to which disputes thereunder should be referred. The Claimants therefore argued that the clause did not provide any assistance to the Defendants in seeking to displace clause 11, since there was no alternative law or forum identified by the parties which could be given primacy over English law and the jurisdiction of the Commercial Court.

86. The Defendants' riposte to this argument was that the court should not approach the construction of the PPJC on the assumption that the parties were seeking to agree a law and jurisdiction which could be identified with certainty. This was to adopt the "certainty" approach for which the insurers sought to contend, and which they needed to establish. It follows that it was not necessary to search for a specific jurisdiction or applicable law clause in the primary policy. The Defendants submitted that the PPJC showed that the parties were not contemplating certainty at all. The Global CGL policy

did not specify either law or jurisdiction, because the parties to that contract contemplated the prospect that a variety of courts might have jurisdiction to determine any dispute between them. This was unsurprising, given that the Global CGL policy (as well as its counterpart, the US CGL policy) covered risks in multiple legal jurisdictions. The Defendants contended that the absence of a particular unified jurisdiction clause at the primary layer indicated that the parties intended there to be a "permissive" approach to the Global Umbrella, and indeed the higher layers.

87. In his oral submissions, Mr Stewart explained this permissive approach in relation to jurisdiction. There were, he submitted, a number of different jurisdictions which might assume jurisdiction. This depended upon where the liability of any particular insured arose. This flowed from the nature of the risks being covered, which were casualty risks covering various insureds operating across the world. Jurisdiction would arise where an insured could be sued. There was no injustice in this approach, and the parties' bargain to that effect should not be disregarded. He also submitted that it was commercially coherent and sensible for jurisdiction in an insurance tower to follow jurisdiction in the primary policy which is first called upon in the case of loss. This was because the tower follows the same coverage, scope and exceptions as the primary policy. As such, it was likely that any dispute over coverage would require the involvement of the primary insurer, or be concerned with issues relating to that primary cover. It was not commercially sensible for an insurance tower to require the insured to pursue the same coverage dispute across multiple jurisdictions. Such a result should be avoided unless the words of the relevant contracts mean that such a result is unavoidable.

88. When asked about the Defendants' case as to the applicable law of the primary policy, he suggested at one stage that – applying English principles under the Rome Convention – the applicable law of the Global CGL policy would be determined in England to be English law, on the basis that the policy was placed in London. In his reply submissions, Mr Scorey pointed out (and I agree) that there was no evidence that the Global CGL policy had been issued in London, and that it was an American form of policy issued by a US insurer. In any event, even if an English court would apply English law, Mr. Stewart accepted, however, that the applicable law applied to the primary policy might differ depending upon the jurisdiction where the relevant proceedings took place. This was because each jurisdiction would apply its own conflict rules as to applicable law.

89. The Claimants argued that clause 11 was a clear contractual agreement which was not displaced by the PPJC. The essential argument was encapsulated by Mr Quiney's description of clause 11 as the "safe harbour of certainty", as opposed to the "turbulent seas" into which the parties were placed by the Defendants' argument.

90. For the reasons which follow, I accept the Claimants' argument that clause 11 is a clear contractual provision which binds the parties, and that it is not displaced by the PPJC.

91. The starting point is that clause 11 is, as was common ground, part of the policy subscribed by Chubb. Applying ordinary principles of English law, it formed part of the terms to which the parties had agreed. That clause is in clear terms, certainly as to applicable law and (in my view, for reasons given above) as to exclusive jurisdiction.

92. In contrast, the PPJC seeks to incorporate terms as to jurisdiction and applicable law which – if the PPJC is to be taken as referring to the Global CGL– do not exist within

that policy. There is, quite simply, no jurisdiction clause, whether exclusive or non-exclusive, in the Global CGL.

93. I accept Mr Stewart's argument that the "primary policy" referred to in the Global Umbrella is best construed as a reference to the Global CGL policy. That is the policy identified as "Primary" in the Underlying Insurer(s) clause which immediately precedes the PPJC in the Global Umbrella. Whilst the Underlying Insurer(s) clause has the word "Primary" with a capital letter, and the PPJC has that word with a small letter, I do not think that this can be regarded as a distinction of any substance. Given that the parties have identified a particular policy as "Primary" in an adjacent clause, it seems natural to have regard to that particular policy when construing the same word in the PPJC.

94. Indeed, Mr Quiney's skeleton argument for Chubb submitted (in paragraph 32) that the "primary policy" for the purposes of the PPJC was indeed the Global CGL policy. Mr Scorey sought to persuade the court that the "primary" policy, in the context of the PPJC in the First, Second and Third Excess policies, was a reference to the Global Umbrella. This was a critical argument in relation to Second Excess. However, this was not an argument which could sensibly be advanced in the context of the Global Umbrella itself, where (as Mr Stewart submitted) the PPJC was clearly intending to refer to a policy other than itself.

95. Since there is no relevant jurisdiction, or indeed applicable law, provision in the primary policy, I do not consider that there is anything which can or should be construed as displacing the clear terms of clause 11. I consider that this approach is consistent with, and analogous to, that taken when incorporated clauses are inconsistent with the express terms of the incorporating document. This is described in the following terms in *Lewison: The Interpretation of Contracts* 7th edition, paragraph 3.83:

> "The terms of the clauses which are incorporated into the parties' contract may not always be entirely appropriate to the contract into which they are incorporated. The proper approach to interpreting an incorporated document was laid down by the House of Lords in *Thomas (TW) & Co Ltd v Portsea Steamship Co Ltd*, and by the Court of Appeal in *Hamilton & Co v Mackie & Sons*. In the latter case, Lord Esher MR took the approach of reading in the whole terms of the incorporated document, and then treating any term which was inconsistent with the incorporating document as insensible and to be disregarded. In the former case, Lord Gorell and Lord Robson approached the matter from the standpoint of reading in so much of the incorporated document as is not inconsistent with the subject-matter of the incorporating document. The two approaches may differ slightly but they usually achieve the same result. The process was described by Buckley LJ in *Modern Buildings Wales Ltd v Limmer and Trinidad Ltd* as follows:
>
> > "Where parties by an agreement import the terms of some other document as part of their agreement those terms must be imported in their entirety, in my judgment, but subject to this: that if any of the imported terms in any way conflicts with the expressly agreed

> terms, the latter must prevail over what would otherwise be imported." "

96. I do not accept Mr Stewart's argument that it is inappropriate to approach the PPJC by assuming that the parties were seeking certainty, or to identify a single governing law or jurisdiction. The "permissive" approach which he advocated would, as it seems to me, lead to the conclusion that there was no single applicable law in accordance with which disputes under the Global Umbrella were to be determined. The argument posits that jurisdiction under the primary policy, and hence pursuant to the PPJC, might be established in numerous different jurisdictions, depending upon where the underlying claim was made. This might lead to the application of a number of different applicable laws, depending upon how many claims were made, the place where they were made, and the extent to which they fed through into a claim under the Global Umbrella. These various potential applicable laws could not be identified at the time when the Global Umbrella was concluded.

97. In my view, this is not consistent with the express terms of the PPJC. The final sentence ("All matters arising hereunder shall be determined in accordance with the law and practice of such court") indicates that the parties had in mind a single applicable law to govern disputes under the Global Umbrella. They were not agreeing to the application of a series of different laws. Generally speaking, as a matter of English law, there can be only one law governing the contract: see *Compania Sud Americana v Hin-Pro* (above) para [11]. Nor is the argument consonant with commercial common-sense in the context of an insurance policy, which would ordinarily be expected to have a single, not multiple, applicable laws. Indeed, the argument has the practical effect of rendering the Global Umbrella subject to a floating proper law, dependent upon where the underlying claims were made. However, if English law is applied to the policy (as provided for in clause 11), such a floating proper law is not permissible: see *Armar Shipping Co v Caisse Algerienne d'Assurance et de Reassurance* [1981] 1 WLR 207.

98. If (as I conclude) the PPJC envisages a single governing law to be applicable to the Global Umbrella, the same conclusion should in my view apply in relation to the question of jurisdiction; ie the place where "all matters arising hereunder" are to be determined. Indeed, the PPJC refers to "the law and practice of such court" in the singular, indicating that the parties did not have in mind a plethora of potential courts in different jurisdictions.

99. The alternative, permissive, approach results in a very large range of potential courts having jurisdiction, depending upon where proceedings against a particular insured are commenced. If different insureds are sued in a number of different jurisdictions, a number of courts would have jurisdiction. This is the antithesis of the contract certainty which one would expect from a jurisdiction provision in an excess insurance policy placed in the London market. As Mr Scorey submitted, the argument gives rise to difficulties, in identifying the applicable jurisdiction, in the case where it is unnecessary for the insured to bring proceedings against the insurer under the primary policy. If one posits the situation where the insurer has paid out under the primary policy without the need for proceedings against the insured, or against the primary insurer, the law and jurisdiction of the Global Umbrella (and subsequent layers) would – on the Defendants' argument – be forever unknown.

100. Even if some of these difficulties could be overcome or are overstated, it seems to me that on any view the jurisdictional and applicable law regime contemplated by the Defendants' argument is one of very considerable uncertainty. This should be contrasted with the certainty provided by the clear contractual agreement in clause 11.

101. The Defendants relied upon the judgment of Foxton J in *Generali v Pelagic Fisheries*, paras [85] – [95], in support of the proposition that priority should be given to specifically negotiated terms ahead of incorporated standard or printed terms. Accordingly, Mr Stewart submitted that any conflict between the PPJC and clause 11 should be resolved in favour of the former.

102. At paragraph [85] of *Generali*, Foxton J referred to authority in support of the proposition that where "a contract contains specifically negotiated terms, and also incorporates a pre-existing set of standard or printed terms, the former will prevail over the latter to the extent of any inconsistency". Mr Quiney submitted that this was not a "hard and fast rule", and therefore that the utility of the proposition would depend upon the particular terms of the contract under consideration. I agree. I accept that there is a canon of construction, or principle of interpretation, as described by Foxton J in *Generali*: see the discussion of the authorities in *Lewison* paragraphs 7.37 – 7.45. However, the authorities also make clear, as summarised in paragraphs 7.01 – 7.06 of *Lewison*, that cannons of construction or principles of interpretation are no more than pointers to ascertaining the meaning of a written contract. They are therefore not to be slavishly applied. Other principles may therefore point in a different direction, in which case the court must select those which will produce a sensible and just result.

103. In the present case, I accept that the PPJC can be regarded as a "specifically negotiated term", in the sense that it has been included in the earlier part of the policy setting out the Risk Details which are now required (see paragraphs 50-51 above). It is therefore to be contrasted with clause 11, which forms part of a set of standard terms and conditions. I accept that the application of the principle of construction referred to in *Generali* would therefore indicate that the PPJC should prevail ahead of clause 11.

104. In the present case, however, the PPJC is not a clause which specifically identifies a particular governing law or jurisdiction. (The clause is therefore unlike that which was being relied upon by the insurers in *Generali*). Rather, it is a clause which requires reference to a further contract for the identification of the relevant law and jurisdiction. In my view, this gives rise to the potential application of the principle discussed in *Lewison* para 3.83 (see paragraph 95 above). There was also force in Mr Scorey's submission that the PPJC appeared to be a standard Marsh clause: hence its inclusion in all of the excess policies in the tower. Accordingly, the court is considering and comparing two standard clauses. More importantly, however, it is obvious that the PPJC was designed to be used in conjunction with primary policies which contain an express applicable law and jurisdiction clause (or clauses) in which case there will be no difficulty in importing the relevant law and jurisdiction of the primary policy into the excess layer. In the present case, that cannot be done.

105. Against this background, and in the light of the considerable uncertainty which the Defendants' construction produces, I do not consider that it makes sense to apply the principle of construction relied upon by the Defendants, with the consequence that the clearly agreed law and jurisdiction agreement in clause 11 is to be disregarded. On the contrary, it seems to me that full effect should be given to the clear agreement on law

and jurisdiction in clause 11. If it is necessary to select a principle of interpretation which should be applied, I consider that the approach of the cases discussed in *Lewison* para 3.83 is preferable.

106. The Defendants also submitted that if the PPJC was not given primacy, clause 11 should be read consistently with it; ie as a non-exclusive jurisdiction agreement. Foxton J said in *Generali* (para [87]) that the court's enthusiasm for reading provisions together will vary between contractual terms and contractual contexts. There is therefore no principle of law that clauses should always be harmonised. Here there is a clear agreement for exclusive jurisdiction in clause 11. I do not consider that it is appropriate for that agreement to be watered down or transformed via the PPJC and terms as to jurisdiction in the primary policy which do not in fact exist.

107. In summary, it seems to me that the parties in clause 11 have made a clear choice as to applicable law and jurisdiction. This choice should prevail and is not undermined by the PPJC. Since I consider that the Claimants' construction of the Global Umbrella policy is correct, I consider that the "high degree of probability" requirement for the grant of an anti-suit injunction is satisfied.

G: The First and Third Excess

108. Both of these policies have, in clause 12, clear exclusive jurisdiction clauses providing for English law and jurisdiction. The arguments relating to clause 11 of the Global Umbrella (as to "Scottish policy" and "non-exclusive") are not available to the Defendants in relation to clause 12. My conclusion that clause 11 of the Global Umbrella prevails, and that the high degree of probability requirement is satisfied, is equally applicable to the provisions of the First and Third Excess policies.

109. The First and Third Excess insurers also relied upon the argument, addressed below, advanced by the Second Excess insurers, that that PPJC incorporated the jurisdiction clause in the Global Umbrella policy. In view of clause 12, this point was not critical to their case. Had it been critical, I would have rejected it for the reasons discussed in the context of the Second Excess policy in Section H below.

H: The Second Excess

110. The position of the insurers under the Second Excess is more difficult. This is because there is no jurisdiction clause which is the direct equivalent of clause 11 of the Global Umbrella or clause 12 of the First and Third Excess policies. Clause 4.10 of the Liberty International standard terms provides for English law, but this is not sufficient to establish an agreement for exclusive English jurisdiction.

111. Accordingly, those insurers need to rely upon the PPJC as providing a route to an exclusive jurisdiction agreement. They therefore argue that the term "primary policy" in the PPJC should be construed as a reference to the Global Umbrella policy, and thus to the law and exclusive jurisdiction clause in the Global Umbrella. They submit that the term "primary policy" (lower case) is not a defined term within the Second Excess policy. In the context of the excess programme, that term should be construed as a reference to the Global Umbrella. This is because, as a matter of language, the Global Umbrella policy is that to which the excess layers are excess, and it makes sense to describe it as the 'primary' policy in this context. It was most unlikely to be the Global

CGL policy, since this did not contain a law or jurisdiction clause. The parties would therefore be effectively incorporating no terms when plainly they mean to incorporate some terms. Furthermore, in the context of an excess programme which is clearly constructed to interlink in important respects, it would be odd if the law and jurisdiction of the excess layers differed from the first umbrella layer. This was the foundation of the excess programme, and in that sense was primary. The reference to 'primary' policy was unlikely to refer to a policy below the layer of the Global Umbrella, because there was no such single policy to which reference could be made. There was a multiplicity of policies below the excess programme, and there was no reason why the Global CGL policy should be regarded as the only 'primary'. It made no sense to talk about an overarching primary until one reached the Global Umbrella. Overall, Mr Scorey QC submitted that the PPJC in the Second Excess should be construed so as to give it meaning, rather than to defeat the parties' intention. This meant that one should look for the relevant policy which did contain an applicable law and jurisdiction clause, rather than one which did not. This led to the Global Umbrella.

112. I do not accept this argument. I must construe the contract which the parties have made, not a contract which it might have been more sensible for them to make. The PPJC in the Second Excess refers to the "primary policy". That language does not naturally refer to a Global Umbrella policy which sits above a series of underlying policies. Rather, it indicates a policy which provides the insured with its first tranche of insurance cover, above any self-insured retention. I agree with Mr Stewart that this connotes the policy at the bottom of the tower, rather than excess layers.

113. Furthermore, the PPJC is adjacent, or more or less adjacent, to the Underlying Insurer(s) clause in the various excess policies, including in the Second Excess. The Underlying Insurer(s) clause refers specifically to the "Umbrella Excess". If the parties had intended to refer to that policy in the PPJC, this could easily have been done. Instead, the parties referred in the PPJC to the "primary policy". I have little doubt that this was because this was a Marsh standard provision, rather than the result of careful scrutiny of the precise terms of any of the policies which underlay the excess programme. However, the fact remains that the parties referred to the "primary policy", and this cannot in my view be read as a reference to the Global Umbrella policy.

114. That conclusion is reinforced by the fact that the parties, in the Underlying Insurer(s) clause, have referred to a particular policy under the heading: "Primary". A different policy is identified under the heading: "Umbrella Excess". The obvious conclusion is that the parties had in mind, as the "Primary" policy, a policy which was beneath the Global Umbrella. The straightforward conclusion is, in my view, that the "primary policy" to which the parties were referring in the PPJC was indeed the Global CGL policy, which is specifically identified under the heading "Primary" in the Underlying Insurer(s) clause.

115. Even if it were possible to take a wider view of 'Primary", by reason of the words at the end of the Underlying Insurer(s) clause ("And as per schedule of underlyers shown herein"), this would not assist the Second Excess insurers. This wider view would lead to the conclusion that there were, as indicated by the schedule, a large number of policies which were primary, together with the Global CGL policy. However, the Second Excess insurers need to establish the incorporation of the jurisdiction provisions of the Global Umbrella. The schedule of underlying policies does not enable them to do that.

116. Accordingly, since I reject the argument of the Second Excess insurers that the jurisdiction clause in the Global Umbrella is incorporated into that policy via the PPJC, those insurers have failed to establish the requisite high degree of probability necessary to maintain the anti-suit injunction.

I: Full and Frank Disclosure

117. By letter from Bennett Jones dated 27 August 2021, the Defendants identified the relevant failures of full and frank disclosure as relating to "the evidence as to the law of Canada and a fair presentation of the communications between the parties in relation to the proceedings in Canada". These points were subsequently developed in Bennett Jones' letter dated 9 September 2021, which expressed the Defendants' concerns at "what appears may have been deliberate non-disclosure on the part of Mr Beresford". The particular points made were that:

    a) the court would be invited to infer that Clyde & Co were advised of the *Amchem* decision, but chose not to refer to it during their ex parte application;

    b) Mr Beresford chose not to disclose to the court that it was unlikely that the Defendants could obtain an *ex parte* declaration that Alberta is the forum conveniens, notwithstanding that at the time Mr Beresford was aware of this;

    c) Mr. Beresford quoted selective excerpts from the correspondence, unfairly presenting the risk that the Second Defendant would take the aggressive steps described in paragraphs 14-20 of Mr. Beresford's first witness statement.

118. As far as concerns Chubb, represented by DAC Beachcroft, the Defendants contended that although they were not privy to the advice received by Mr Beresford, there had been no independent inquiries into the Canadian legal position, and this was a culpable failure. There was also a culpable failure to draw the court's attention to the relevant correspondence.

Legal principles

119. 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."

120. 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].

121. 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."

Application to the facts: (i) Canadian law/Amchem issues

122. Mr Beresford's witness statement in support of the application, the material parts of which have been set out in Section B above, contained reference to Canadian law advice which had been received. The advice related to what Mr Beresford described in his witness statement as "a risk that the Second Defendant will take steps in the Court of Queen's Bench Division of Alberta to restrain the anti-suit proceedings in London and to require the Claimants to litigate any coverage dispute in Alberta". In paragraph 17 of his statement, Mr Beresford referred to the existence of a "real risk" that the court would grant such application, especially if it proceeded initially on a without notice basis.

123. Mr Beresford later waived privilege in the Nicholl memo; ie the written advice given by Mr Nicholl in conjunction with Ms Sanderson. In his third witness statement, his evidence was that this was the advice to which he had referred in his first statement. There was no application to cross-examine Mr Beresford on his witness statement. I therefore proceed on the basis that what Mr Beresford has said, in a statement supported by a statement of truth, is true.

124. Mr Stewart submitted that the statement to the court, that there was a "real risk" that the court would grant the relief which might be sought by the Second Defendant, was not supported by the written advice received. I disagree.

125. It is true that the written advice in the Nicholl memo does not use the precise expression "real risk". English lawyers are familiar with that expression from case-law which, in various contexts, distinguishes a "real" risk from a risk which is fanciful or insubstantial. Canadian lawyers may not use the same terminology. In their statement dated 3 September 2021, Mr Hammel/ Ms Lister (who were responding to Mr Mack

QC's statement) said that the phrase "real risk" did not "have a specifically defined legal meaning nor is it commensurate with a certain level of recognized legal risk in Alberta. As such, we have simply assessed whether the general risk of the Alberta Court granting each of the applications on an *ex parte* basis, unless another level of legal risk is expressly stated".

126. It is clear from a fair reading of the written advice, in my view, that Mr Nicholl and Ms Sanderson were conveying that there was indeed a real risk of a successful application. They say that if an application for a TRO or anti-anti-injunction was pursued, "it is certainly within the realm of possibility that an application by [the Second Defendant] would be granted, especially if it proceeds initially on a without notice basis". They go on to say that if the application were to be granted without notice, then the insurers would be obliged to overturn the decision, with the TRO or anti-anti-suit injunction remaining in force in the meanwhile. In the concluding paragraph, they refer to the risk that, if the Second Defendant could convince the court at the without notice hearing to grant the injunction, many months would then pass before there was an opportunity to reverse the decision. It is in my view apparent that the Canadian lawyers regarded this as, in English terminology, a real risk. There was no suggestion that it was simply a fanciful possibility, or indeed that the application was unlikely to succeed. The advice referred to the adverse consequences of a successful application. That would seem unnecessary, or at least would have been substantially qualified, if the Canadian lawyers considered that there was nothing to worry about because there was no real possibility of the application succeeding.

127. I also have no doubt that this was how Mr Beresford, and the (Clyde) Claimants' English legal advisers, understood what they were being told. The application made on 2 August came on as a matter of urgency. The reason for that urgency was explained in the "Urgency and Ex Parte" box in the Claimants' skeleton argument. It arose because of the article by Law 360 which reported the commencement of the English proceedings. It is apparent from that statement, and the way in which the matter was presented to me at the hearing on 2 August 2021, that there was a genuine concern on the part of the Claimants' advisers as to the consequence of the article which had recently been published.

128. Accordingly, the position is – as Mr Scorey submitted – that the Claimants took advice as to the relevant legal position in Canada, including from a lawyer who did not work for Clydes, and then – having received written advice – fairly set out the effect of that law as they understood it to be, and the risk that was posed. This is not a promising basis, indeed any basis, on which to make an allegation of culpable non-disclosure. Whilst there might be a disagreement on the evidence as to the accuracy of the legal advice as to foreign law actually received, that is simply a factual dispute which the court cannot finally resolve on an interlocutory application such as the present. It cannot be repackaged as a non-disclosure case in support of an argument that the injunction should not be continued.

129. The Defendants rely heavily upon the *Amchem* decision as the foundation for various submissions. They submit that this case should have been drawn specifically to the attention of the court. They say that the case is of such obvious relevance that any Canadian lawyer must have advised Mr Beresford about it, and its significance. In the light of *Amchem*, it is argued that it was unlikely that any interim relief could have been

obtained in Canada, and that the court should have been so informed. I reject all of these arguments.

130. It does not seem to me that the *Amchem* decision addresses the question of whether urgent interim relief could have been sought, and obtained, by the Second Defendant in Alberta. The principles governing the grant of urgent interim relief are not discussed in that case. The procedural history (described in pages 907 – 908 of the report) indicates that an ex parte injunction had been granted by Cowan J in those proceedings. The Canadian Supreme Court was not, however, concerned with that injunction, but rather with an injunction which was later granted by Esson C.J.S.C. This appears to have been a permanent injunction. Thus, in discussing procedure at pages 930 – 931, the court said:

> "Moreover, although the application is heard summarily and based on affidavit evidence, the order results in a permanent injunction which ordinarily is granted only after trial. In order to resort to this special remedy consonant with the principles of comity, it is preferable that the decision of the foreign court not be pre-empted until a proceeding has been launched in that court and the applicant for an injunction in the domestic court has sought from the foreign court a stay or other termination of the foreign proceedings and failed."

131. It was common ground between Mr Mack and Mr. Hammel/ Ms Lister that the principles which govern the grant of interim relief in Canada are the tripartite test set out in *RJR MacDonald Inc v Canada (Attorney General)* [1994] 1 SCR 311. These are: (a) there must be a serious question to be tried; (b) the applicant must suffer irreparable harm if the application is refused; and (c) on a balance of convenience it must be determined which party would suffer greater harm from the granting or refusal of the remedy.

132. The statement of Mr Hammel/ Ms Lister explained why each of these requirements would potentially be satisfied. The "serious issue to be tried" threshold was "low". They also considered that the chance that an Alberta court would find that the second and third requirements were met was "not remote or improbable given the consequences of the anti-anti-suit injunction being denied and its interim nature". It was therefore their conclusion that there was a "reasonable chance that an Alberta Court would grant the Second Defendant an anti-anti-suit injunction, had it applied for the same: the possibility of this having occurred was not remote or improbable".

133. It seemed to me that there was nothing which was obviously wrong with this analysis. It therefore showed that *Amchem* was not a decisive case against the grant of urgent interim relief, and also that the advice in the Nicholl memo (although much less detailed) was sound.

134. Indeed, Mr Hammel/ Ms Lister were also able to identify one case where a British Columbia court had granted an urgent anti-anti-suit injunction, subsequent to the *Amchem* decision: see paragraph 17 above. In my view, this confirms the existence of the "real risk" which Mr Beresford had described, on the basis of the Canadian law

advice received at the time. It is true that the injunction in the British Columbia case was shortly thereafter set aside by agreement between the parties. To my mind, however, this simply shows that the parties in that case were able to reach an agreement as to the way forward. It does not demonstrate that there was anything wrong with the order previously granted, nor negate the risk of similar orders being made on a without notice basis in subsequent cases.

135. I also consider that, when the decision in *Amchem* is considered, it cannot reasonably be regarded as precluding the grant of an anti-anti-suit injunction in a case such as the present. *Amchem* says that it is "preferable" not to pre-empt the decision of the foreign court, and to apply to the Canadian court only after an application to the foreign court for a stay or other termination has failed. "Preferable" does not connote an absolute requirement. In the context of anti-suit proceedings in England, it seems to me that there would be – and certainly a party applying for an injunction could identify – very real potential difficulties in following the course identified in *Amchem*. That course involves awaiting an outcome in the foreign (here English) court of an application for a stay or termination, and only applying to the Canadian court if the application fails. However, if a challenge to an anti-suit injunction fails, the injuncted party will face very real difficulties in returning to the Canadian court for relief; because to do so will risk breaching the very anti-suit injunction that had been granted and upheld by the English court. This appears to be one reason why Mr Hammel/ Ms Lister consider that interim anti-anti-suit relief, applying *RJR MacDonald*, is potentially available "given the consequences of the anti-anti-suit injunction being denied and its interim nature". An interim application to the Canadian court if successful, would therefore preserve a party's right to obtain the permanent injunction which is potentially available under *Amchem* principles. If interim relief were unavailable, then that potential right risks being destroyed.

136. Accordingly, it seems to me that there was a sound basis for the advice given by Mr Nicholl and Ms Sanderson, and then reflected in Mr Beresford's evidence on the without notice application. There was therefore in my view no material non-disclosure. The position might have been different if *Amchem* was indeed a decisive authority against the grant of such relief. But for the above reasons, it was not.

137. In reaching this conclusion, it is not necessary to resolve such differences as to Canadian law as exist between Mr Mack and Mr Hammel/Ms Lister. Mr Mack accepts that "in theory, the Second Defendant would have been able to take each of the steps identified seeking an Alberta court order to restrain English anti-suit proceedings". This seems to me to confirm the potential availability of such relief. He also accepts that the principles in *RJR MacDonald* apply. The disagreement between the Canadian experts therefore comes down to the question of whether an Alberta court would likely grant the relief sought. Mr Mack considers it "unlikely", although he does not say that it is impossible. Mr Hammel/ Ms Lister take a different view. That dispute is, as Mr Scorey submitted, a dispute over the quantification of the risk, as to which reasonable views might differ. I agree with the Claimants, however, that once a real risk of anti-anti-suit relief in a foreign court is identified – as it was in the case – then that can properly be advanced, as here, as the basis for a without notice application, even if there may be scope for disagreement as to the quantification of that risk.

138. The Defendants invited the court to infer that Mr Beresford was aware of the *Amchem* decision, and deliberately decided not to refer the court to that decision. I do not

consider that there is any evidence which supports that factual case. It is not appropriate for the court to draw adverse inferences from the fact that, as is apparent from Mr Beresford 3rd witness statement, a claim for privilege is maintained in relation to communications other than the Nicholl memo that has been disclosed. Mr Stewart submitted that the disclosure of that written advice (and indeed the earlier reference in Mr Beresford's first witness statement to advice received) gave rise to a waiver of privilege in a wider range of documents than the written advice actually disclosed. However, if that argument was sound, then the appropriate course is for an application to be made for disclosure of the wider range of documents in which there has been an alleged waiver. No such application was made. The drawing of an adverse inference is not an alternative to taking this course.

139. In any event, even if I were to assume that Mr Beresford was aware of the *Amchem* decision, I see no reason why it should have been disclosed in circumstances where it did not, for reasons given above, negate or cast doubt upon Mr Beresford's evidence (based on written advice received) as to the "real risk" of interim relief in Canada.

140. Finally, the Defendants rely upon the fact that Mr Hammel/Ms Lister do not support the point made by Mr Beresford, in his first statement, that the Alberta court might grant, on a without notice basis, a declaration that Alberta was the appropriate forum to determine the coverage dispute. It does not seem to me, however, that this was a material point in the context of the application for the injunction. At most, it was ancillary to the key point (which was referred to in paragraph 2 of my short judgment on the without notice application) as to the availability of injunctive relief. Any error on this point was therefore not material, and would not justify setting aside the order. An additional reason for this conclusion is that Mr Beresford's statement on this point, as to the availability of declaratory relief, was made on the basis of the written advice received at the time. Even if the advice in that respect was not sound, Mr Beresford did not appreciate that at the time. There was therefore no culpable non-disclosure in that regard.

141. In the light of these conclusions, it is not necessary to consider the position of Chubb separately. If the non-disclosure case cannot be made good against the (Clyde) Claimants, it is no better against Chubb. There was, however, force in Mr Quiney's argument that Chubb were entitled to proceed, urgently, in the way that they did. Evidence in support of the risk had been provided by Mr Beresford. That evidence had been accepted by the court when the injunction was granted. There was therefore no need for Chubb to reinvent that particular wheel by seeking separate advice on the issue already addressed and found by the court to be sufficient to justify the grant of the injunction.

Application to the facts: (ii) correspondence

142. Mr Beresford set out, in his first witness statement, the basis for his conclusion that there was good reason to consider that the Second Defendant would bring one of the applications for interim relief. I do not consider that there is anything in the underlying correspondence which was material to the court's consideration of that issue. The underlying correspondence indicates that there was a willingness on the part of the Defendants to discuss coverage issues with their insurers. I do not see how this had any bearing on the question of how the Defendants might react to proceedings by the insurers in England which made a fundamental challenge to the right and ability of the

Defendants to pursue the coverage proceedings in Canada. There was no suggestion, for example, that the Defendants had indicated in correspondence a willingness amicably to discuss whether proceedings should continue in London or Canada.

143. There was, therefore, no culpable non-disclosure in this regard, and certainly none which would justify declining to continue the injunction which is necessary in order to preserve the contractual rights of AWAC and the insurers under the Global Umbrella and First and Third Excess policies.

Conclusion

144. The consequence is that the anti-suit injunctions should continue in respect of the claims by AWAC, and the insurers under the Global Umbrella and the First and Third Excess policies. However, the claim by the Second Excess insurers (apart from AWAC) to continue the injunction fails.

145. The parties should attempt to agree an appropriate order to reflect this judgment.