Neutral Citation Number: [2016] EWHC 141 (Comm)

Case No: CL-2015-000915

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 29/01/2016

Before:
MR JUSTICE COOKE

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Between :

ARC CAPITAL PARTNERS LIMITED
(A company incorporated under the laws of the Cayman Islands) — **Claimant**

- and –

(1) BRIT UW LIMITED
(on its own behalf and on behalf of the underwriting members of Syndicate 2987 at Lloyd's for the 2013 year of account)

- and – — **Defendants**

(2) QBE UNDERWRITING LIMITED
(on its own behalf and on behalf of the underwriting members of Lloyd's Syndicate 1886 for the 2013 year of account)

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Mr G. Kealey QC and Mr C. Holroyd (instructed by Orrick) for the claimant
Mr J. Lockey QC (instructed by Norton Rose Fulbright) for the defendants

Hearing dates: 25th January 2016

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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 COOKE

Introduction

1. The Claimant, ARC Capital Partners Limited (the "Manager"), is a subsidiary of PAG Holdings Limited ("PAG"). PAG is a large alternative investment management firm managing a diverse array of funds in private equity, real estate and absolute return strategies.

Background

2. On 15th August 2014 ARC Capital Holdings Limited, a company incorporated under the laws of the Cayman Islands (the "Fund"), issued proceedings against the Manager in the Commercial Court for professional negligence. The Fund's claim is for the value of an allegedly negligent investment of RMB 480 million (c. US$75 million) made by the Manager on behalf of the Fund in December 2010 in relation to the property business of Orient Home Group ("OH") plus interest and costs.

3. The Fund's claim was notified to the Manager's insurers in January 2014. PAG and its subsidiaries (including the Manager) have the benefit of professional indemnity insurance for the period 23rd October 2013 to 23rd October 2014. This insurance is provided by five different insurers in various tranches, including the Defendants ("the Insurers") who insured the Second Excess Layer (the 2013/2014 Policy).

4. The same insurers entered into consecutive annual contracts of insurance on similar terms for periods prior to the relevant cover starting on 5th June 2009. The same insurers also entered into contracts of insurance on similar terms for the period 23rd October 2014 to 23rd October 2015. On each occasion, the Second Excess Policy incorporated the terms of the Primary Policy save as otherwise set out in the Second Excess Policy.

5. The Manager and the Fund have engaged in without prejudice discussions to settle the action. It is in the context of those discussions that the Defendants have raised issues as to whether the proposed settlement amount and the Manager's losses in respect of the actions against it (including defence costs) are covered by the Primary Policy and the endorsement to it and/or the Second Excess Policy. The position now reached is that settlement of the Fund's claim has been agreed in principle on the basis of the primary case as pleaded by it against the Manager and that the Insurers have consented to such settlement, subject, to coverage issues and the advice of Counsel.

6. The Defendants now take issue in relation to the coverage under the Second Excess Policy, which gives rise to three questions for decision by this court. These are set out in the Agreed List of Issues as:

    i) Whether, on a true construction of the Retroactive Date Clause in the 2013/2014 Policy, the Fund's claim against the Manager is a claim "*in any way involving any act, error or omissions committed or alleged to have been committed prior to 5th June 2009*" within the meaning of this Clause.

    ii) Whether the Letter from the Fund's solicitors dated 2nd April 2013 contained or constituted "*a written demand for monetary damages or non-pecuniary*

relief" within the definition of "Professional Services Claim" in the primary policy, and was thus a "Claim" for the purposes of that policy.

iii) If the letter from the Fund's solicitor dated 2nd April 2013 did contain or constitute a "Claim" for the purposes of the primary policy, whether

a) (as the Manager says), cover is provided under policy extension 5j of the primary policy, which extends cover to Claims which should have been notified under the prior year's policy(ies) of which the 2013/14 policy(ies) was/were a renewal without interruption with the same insurer(s), or

b) (as the Insurers say), the Manager is not entitled to an indemnity under the 2013/14 Policy as a result of a breach of the condition precedent contained in Clause 14 of the primary policy, which requires notice of any Claim to be given as soon as practicable.

The Insurances

7. The 2013/14 Policy, like its predecessors and its successor, provided for the incorporation of the LSW 055 wording and the underlying IMI wording as far as applicable. LSW 055 is the A.W.G.S. Excess Wording attached to the Policy which provides for indemnity "for claims first made against the Assured during the period of insurance" and for liability under the policy in question not to attach "unless and until the Underwriters of the underlying layers shall have paid or admitted liability or have been held liable to pay the full amount of their indemnity inclusive of costs and expenses".

i) The LSW wording also requires the immediate notification by the Assured of any claim or any circumstances known to the Assured which are likely to give rise to claims, but not as a condition precedent to recovery under the policy, in the following terms:

> "5. Any claim(s) against the Assured or the discovery by the Assured of any loss(es) or any circumstances of which the Assured becomes aware during the subsistence hereof which are likely to give rise to such a claim or loss, shall, if it appears likely that such claim(s) plus costs and expenses incurred in the defence or settlement of such claim(s) or loss(es) may exceed the indemnity available under the Policy(ies) of the Primary and Underlying Excess Insurers, be notified immediately by the Assured in writing to the Underwriters hereon."

ii) It further provides:

> "7. Except as otherwise provided herein this Policy is subject to the same terms, exclusions, conditions and definitions as the Policy of the Primary Insurers. .."

iii) Condition 6:

> "Retroactive Date.
>
> This Broker Insurance Document shall not indemnify the Assured against any claim and or claims arising from or in any way involving any act, error or omission committed or alleged to have been committed prior to 5th June 2009."

8. The Retroactive Date of 5 June 2009 is the date of inception of the second excess layer professional indemnity policy which the Defendants first wrote in 2009: *viz*. the date of inception of the 2009/10 Policy.

9. The Primary Policy for the period 23rd October 2013 to 23rd October 2014 (to the terms of which the 2013/14 Policy was subject) and for the period 23rd October 2012 to 23rd October 2013 (to the terms of which the 2012/13 Policy was subject),

   i) defined the Primary Insurers as "the Company"; and

   ii) provided Asset Management Cover on the terms of the Asset Management Coverage Section;

10. The Asset Management Coverage Section contained (among others) the following terms (Insuring Clause 2):

> "Professional Liability
>
> The Company shall pay, on behalf of an Insured, Loss which such Insured becomes legally obligated to pay on account of any Professional Services Claim first made against an Insured during the Policy Period … for a Wrongful Act occurring before or during the Policy Period."

11. With respect to Insuring Clause 2, Claim was defined as meaning any Professional Services Claim; and Professional Services Claim was defined as meaning:

> "(a) a written demand for monetary damages or non-pecuniary relief;
>
> (b) a civil proceeding;
>
> (c) an arbitration, mediation, conciliation or alternative dispute resolution proceeding;
>
> (d) a criminal proceeding; or
>
> (e) any investigation into possible violations of the law or regulation initiated by any governmental body or self-regulatory organisation, or any proceeding commenced by the filing of a notice of charges, or formal investigative order or similar document;
>
> against an Insured for a Wrongful Act, including any appeal therefrom."

12. With respect to Insuring Clause 2, Wrongful Act was defined as meaning:

> ".. any act or omission, including but not limited to, any error, misstatement, misleading statement, neglect, breach of duty or breach of trust committed or attempted, by an Insured .. while performing or failing to perform Professional Services .."

13. Professional Services was defined as meaning:

> "financial, economic or investment advice given or investment management services performed or required to be performed by an Organisation in respect of a Fund or a Mandate. In clarification and not in limitation of the foregoing, Professional Services shall include: the formation, capitalization, operation and management of any Fund; the marketing of any Fund and the solicitation of potential investors in any such Fund; portfolio management and asset allocation services; Professional Supervision; administration, custodial or registry services; trustee services; or publications prepared or written by any Insured for or on behalf of any Fund or any client. Professional Services shall include the failure to render services required to be performed as set forth above."

14. Extension Clause 5j, headed "Continuity of Cover" provided, as follows:

> "Notwithstanding Exclusion 7(b), coverage is provided for Claims or circumstances which could or should have been notified under any policy or coverage section of which this Coverage Section is a renewal or replacement or which it may succeed in time provided always that:
>
> a. The Claim or circumstance could and should have been notified after the Pending or Prior Date set forth in the Schedule [10 October 2008];
>
> b. The Company has continued to be the insurer under such previous policy or coverage section without interruption; and
>
> c. The cover provided by this Extension shall be in accordance with all the terms and conditions of the policy or coverage section under which the Claim or circumstance could and should have been notified."

15. Exclusion Clause 7 provided, so far as relevant:

> "The Company shall not be liable for Loss on account of any Claim
>
> (a) based upon, arising from or in consequence of any fact or circumstance if notice of same has been given under any

> policy or coverage section of which this Coverage Section is a renewal or replacement of or which it succeeds in time.
>
> (b) based upon, arising from or in consequence of any demand, suit, proceeding pending against, or order, decree or judgment entered for or against any Insured or Outside Entity on or prior to (i) the Pending or Prior Date …"

16. Clause 14, Reporting, provided so far as relevant:

> "The Insureds shall as a condition precedent to exercising any right under this policy, give to the Company written notice of any Claim as soon as practicable and, in any event, no later than:
>
> (a) sixty (60) days after the effective date of the expiration or termination of this policy, provided that no Extended Reporting Period is granted by the Company; or
>
> (b) the expiration date of the Extended Reporting Period, if granted by the Company.
>
> If during the Policy Period, or any applicable Extended Reporting Period (if granted), an Insured becomes aware of any circumstances which could give rise to a Claim and gives written notice of such circumstances to the Company as soon as practicable thereafter but before the expiration or cancellation termination of this policy, then any Claim subsequently arising from such circumstances shall be considered to have been made during the Policy Period or Extended Reporting Period in which the circumstances were first reported to the Company. ..."

The Fund's claim against the Manager

17. In determining whether or not a claim falls for indemnity under a professional indemnity policy, regard must be had to the true nature and substance of the claim made against the insured. There is no suggestion here that the claim made by the Fund, as contained in its Amended Particulars of Claim, does not represent the true nature and substance of it.

18. The original draft Particulars of Claim were attached to the letter of 21st January 2014 sent by solicitors for the Fund. The Insurers then raised the issues (amongst others) with which I am concerned. The Amended Particulars of Claim contained an alternative claim to that originally put forward in paragraphs 87 and 88 of the draft Particulars whilst the terms of those paragraphs were, for all material purposes, repeated in paragraphs 88-90 of the amended version. Paragraph 42 of the Amended Particulars of Claim (in materially identical terms to paragraph 41 of the draft) reads thus:

> "42. The Claimant's principal claims against the Manager in these proceedings concern the Manager's breach(es) of contract

> and/or duty and/or negligence in and about making and releasing an investment of RMB 480 million to OH Co on behalf of the Fund under the 2010 Onshore Share Purchase Agreement ("the Investment") without putting in place any escrow (or other similar) arrangement or obtaining any security for the performance by OH Co of its obligation under the 2010 Onshore Share Purchase Agreement and/or for the repayment of the Investment. The transaction contemplated by the 2010 Onshore Share Purchase Agreement was never contemplated because the conditions precedent were not satisfied (or waived). OH Co has failed however to repay the Investment or any part of the Investment to the Fund."

19. The crucial particulars of breach of contract, duty and negligence appear in paragraph 88 of the Amended Particulars of Claim:

> "88.1 The Manager agreed that the full amount of the Investment be paid to OH Co prior to the transfer of any shares in OH Property to Shanghai Zhengda and Shenzhen Zhongke and/or prior to the satisfaction of waiver of all conditions precedent.
>
> 88.2 The Manager arranged for the full amount of the Investment to be paid to OH Co without ensuring or taking any or any adequate steps to ensure that an escrow (or other similar) arrangement was in place pending the completion of the transfer of shares in OH Property to Shanghai Zhengda and Shenzhen Zhongke.
>
> 88.3 The Manager arranged for the full amount of the Investment to be paid to OH Co without ensuring or taking any or any adequate steps to ensure that any or any adequate security was obtained for the performance of OH Co for its obligations under the 2010 Onshore Share Purchase Agreement or for the repayment of the Investment.
>
> 88.4 By virtue of the fact that it arranged for the full amount of the Investment to be paid to OH Co without ensuring or taking (adequate steps to put in place an escrow (or other similar) arrangement or to obtain adequate security, it is to be inferred that the Manager failed to give any or any adequate consideration to the matters set out in sub-paragraphs (a) to (i) above.
>
> 88.5 The Manager erroneously linked or purported to link the making of the Investment to the alleged outstanding funding commitments of ARCH in relation to OH Retail when there was not in fact any such linkage;

> 88.6 The Manager failed to take any or any adequate steps to inform or advise the Fund that the full amount of the Investment would be paid to OH Co:
>
> 88.6.1 prior the completion of the transfer of shares in OH Property to Shanghai Zhengda and Shenzhen Zhongke;
>
> 88.6.2 prior the satisfaction or waiver of all conditions precedent;
>
> 88.6.3 without putting any escrow (or other similar) arrangement in place pending the completion of the transfer of shares in OH Property to Shanghai Zhengda and Shenzhen Zhongke; and
>
> 88.6.4 without obtaining any or any adequate security for the performance of OH Co of its obligations under the 2010 Onshore Share Purchase Agreement or for the repayment of the Investment.
>
> 88.7 The Manager failed to take any or any adequate legal or other professional advice before entering the 2010 Onshore Share Purchase Agreement and/or making the Investment and releasing the full amount of the Investment to OH Co.
>
> 88.8 The Manager failed in all the circumstances to exercise the reasonable care and skill to be expected of a reasonably competent investment fund manager."

20. All these allegations which form part of the Fund's primary case relate to events which occurred in 2010. At paragraph 91 however appears the Fund's alternative contingent case which is expressly pleaded upon the basis that if (which is denied) the Manager did not act in breach as alleged in paragraphs 88 and 89, they acted in breach in concluding a Capital Injection Agreement in 2008 at a time when they should not have done so and, by unspecified acts or omissions post-December 2008, they exposed the Fund and the companies it owned, to arguments that it was bound to complete one of the two 2008 Agreements and/or was in breach of the other.

21. On the primary way of putting the case, there is therefore no wrongful act of any kind alleged against the Manager prior to 5th June 2009. On the alternative case, there is.

The retroactive date clause

22. The retroactive date clause provides that the second Excess Layer Insurers will not indemnify the Manager against a particular species of claim. In order to appreciate how this exclusion from cover operates, it is important to see it in the context of what is covered by the insurance.

23. The 2013/2014 Policy is a "claims made" Policy. It is clause 2 of the primary policy which sets out the primary insuring provisions of the 2013/2014 Policy by virtue of the terms of the LSW Wording. The liability of the Insurers under clause 2 is to pay

loss which the Insurer is legally liable to pay on account of any Professional Services Claim first made against the Insurer during the Policy period for a Wrongful Act occurring either before or during the Policy Period. In the definitions clause, it is provided that:

i) "Claim" with respect to insuring clause 2, means "any Professional Services Claim".

ii) A Professional Services Claim means a written demand for monetary damages or non-pecuniary relief against an Insured for a Wrongful Act.

iii) A Wrongful Act means "any act or omission, including but not limited to, any error …" as set out earlier in this judgment. Each of the examples given following the word "error" covers culpable action which is capable of giving rise to liability.

24. The Retroactive Date Clause in the 2013/2014 Policy uses the words "Claim", "Act", "Error" and "Omission" and the Primary Layer Policy definitions must, in the absence of wording to the contrary, apply.

25. I was inevitably referred to the line of authorities on construction of contracts in which emphasis is placed and the need to start by construing the language of the contract in accordance with the ordinary meaning of the words and phraseology used. Nonetheless words must be read in context and with an eye to their most sensible construction in the light of the nature and object of the contract in question.

26. It is common ground that 5th June 2009 is the date when the 2013/2014 Policy Insurers first came on risk in respect of the Manager's Professional Indemnity cover and the commercial object of the Retroactive Date clause must therefore be to exclude liability in respect of matters which precede that date. The question is the degree of connection required between the acts, errors and omissions in question and the claims which would otherwise be the subject of indemnification.

27. I have come to a clear view on this by reason of the wording used, the nature of the cover and the authorities to which I have been referred. There must be some element of causation of the claims or the alleged liability which gives rise to the claims by the acts, errors or omissions in question. If this were not the position, as the Insurers primarily contend, any claim which had any connection of any kind with the past history could fall to be excluded, whether the past events said to constitute an act, error or omission made any contribution to the liability for which the claim is made at all, whether such acts were wrongful or not, and whether or not such acts or omissions could give rise to liability. If the historical context against which acts of negligence or breach of duty are alleged consist of transactions which pre-date the Retroactive Date, then, on Insurers' arguments, there is no cover. This was the first argument which Insurers put forward. In my judgment clear wording would be required for an exclusion from cover to have that effect. I conclude, in accordance with the tenor of other authorities, that the events in question must have some causal connection, whether direct or indirect, to the claims and liability alleged in order for the exclusion to operate.

"Acts, errors or omissions"

28. It is said by Insurers that the phrase "acts, errors or omissions" in the Retroactive Date clause is not synonymous with the term "Wrongful Act" in the Primary Policy, but, as already set out, the term "Wrongful Act" is defined as an "act or omission" of which examples are given, including "any error".

29. In *Wimpey Construction UK Ltd v DV Poole* [1984] 2 Lloyds LR 499, Webster J held that, in an indemnity clause in a professional indemnity cover which insured builders against loss arising from any claim "arising out of or through any omission, error or negligent act in respect of design or specification of work", the words "omission or error" included errors or omissions where there was no negligence. He held however that only losses which could in principle create liability were recoverable under the policy.

30. Where a professional indemnity insurance covers losses from claims for Wrongful Acts which are defined as "acts or omissions" which include errors and other classes of act which are obviously wrongful, it would be inconsistent to regard the words "act, error or omission" in the Retroactive Date clause as covering anything other than the same ground – namely matters which could in principle create liability under the policy.

31. Since the policy cover is in respect of losses which the Insured is legally liable to pay on account of a claim (a demand made against the Insured during the period of insurance for a Wrongful Act, alleged or actual, committed before or during the period of cover) the exclusion of claims made during the period of cover for Wrongful Acts committed before the Insurers had granted any cover at all to the Insured fits with the commercial purpose of cover, particularly given the continuous cover provisions which are the subject of the third issue between the parties to which this judgment later refers.

"Claims arising from or in any way involving …"

32. Mr Gavin Kealey QC, for the Manager, submitted primarily that the two phrases in the clause had much the same meaning. "Arising from" meant "proximately caused by" whereas "in any way involved" merely extended the exclusion to cover the situation where there could be said to be more than one proximate cause or where there was a chain of direct causation leading to the claimed liability, where one of those elements pre-dated 5th June 2009. This however would merely reinforce the principle of law relating to the application of an exclusion clause as set out in the decision in *Wayne Tank and Pump Co v Employers' Liability Assurance Corp* [1974] QB 57 (see also McGillivray paragraph 21.04-2015).

33. I was referred to the decision of Scrutton J (as he then was) in *Coxe v Employers' Liability Assurance Corporation Limited* [1916] 2 KB 629, where at page 634 he equated the phrase "arising from" with "caused by" and said that they were words which were always construed as relating to the proximate cause. The wording which he had to consider excluded death or injury "directly or indirectly caused by, arising from or traceable to … war". He did not consider that the words "traceable to" went any further than "caused by" or "arising from" but held that the words "directly or indirectly" meant that a more remote link in the chain of causation was contemplated than a proximate and immediate cause which could not intelligibly be described as "indirect".

34. In *Dunthorne v Bentley* [1997] Lloyd's LR 560, the Court of Appeal held (without any citation of *Coxe*), when construing the 1988 Road Traffic Act phrase "caused by or arising out of" the use of a car, that "arising out of" contemplated a more remote consequence than that envisaged by the words "caused by". They referred, however, with approval to Australian authority to the effect that the phrase "arising out of" meant a result which was less immediate but still carried "a sense of consequence". Where the use of the car was a casual concomitant, that would not be sufficient, but where the use of a car was a contributing factor in the causal sense, that was enough (Rose LJ at page 562, Pill LJ at page 563, (subject to a typographical correction which is plain in the context) and Hutchinson LJ at page 563.) A causal connection of some kind was required.

35. In *Beazley Underwriting v The Traveler Companies* [2012] Lloyd's LR 78, Christopher Clarke J (as he then was) traversed a number of authorities including those to which I have just referred. He was concerned with the meaning of a Deed of Indemnity in the sale of a business, where the relevant words of indemnity covered "each loss, liability, claim or cost … arising out of any event or matter before completion". A later clause however qualified that indemnity by referring to it as providing indemnification "arising directly or indirectly out of" any such matters. He held that these words did not require a proximate but a weaker causal connection, albeit a relatively strong degree of causal connection. The words "directly or indirectly", in the light of *Coxe* (*ibid*.) plainly led to that conclusion.

36. It would, as Mr John Lockey QC for Insurers argued, be an oddity if the words "in any way involving" carried the same meaning as "arising from" if the latter meant "proximately caused by". The words "in any way" required some latitude in the connection, whatever the word "involving" meant, even if a dictionary definition of it as "including as a necessary part or result" were to be applied.

37. The Insurers accepted that the words "arising from" could be taken in the 2013/2014 Policy to mean "proximately caused by" whilst submitting that the words "in any way involving" must be taken to have a different and therefore wider meaning. That meaning contemplated a connection or association between the Insured's liability for the claim and the act, error or omission in question which was "a loose or remote one". It was sufficient that there be "a broad or loose connection or association" between the claim for which the Insured was liable and the act, error or omission which had preceded 5th June 2009.

38. Insurers drew attention to the words "in any way" as showing the absence of any restriction in the involvement contemplated. In both their skeleton argument and orally, Insurers also referred to "indirect" as opposed to "direct" or "proximate" causation as sufficient to satisfy the connection or involvement required.

39. It was submitted that there was no authority to support the proposition that "in any way involving" meant proximate cause in the way that "arising from" could be taken to have that meaning in a professional indemnity insurance. Moreover, the fact that the former phrase was used in addition to "arising from" showed that it must have a different meaning, even if there is no presumption against surplusage in insurance contracts. If, however, meaning is to be given to both phrases in the clause, namely "arising from" and "in any way involving" the meaning of the latter cannot embrace the former, since it would leave it without any real content. If the latter means no

more than a loose association without any causal element at all, there is no purpose served by the earlier phrase which requires such a cause, since the latter is so much wider. If "arising from" is however construed to mean "proximately caused by" or "directly caused by" and "in any way involving" is taken to mean "indirectly caused by", the two phrases are given recognisably distinct meaning and the clause hangs together as a whole. It is then taken to mean a claim (for liability) caused directly or indirectly by any act, error or omission committed or alleged to have been committed prior to 5th June 2009.

40. This appeared to be the fall back position of both the Insured and the Insurers' counsel if their primary arguments failed. In my judgment it is the correct construction of this clause which requires a causal connection between a wrongful act committed prior to 5th June 2009 and the claim made in the policy period for a loss which the Manager is legally liable to pay.

41. As to the meaning of "indirectly caused by", as compared with "proximate cause", Scrutton J's dicta in *Coxe* (*ibid.*) are of assistance. In the context of the death of a captain in the equivalent of the Territorial Army as a result of being hit by a train whilst inspecting sentries on a railway line they were guarding in wartime, the learned judge said:

> "But a line must be drawn somewhere. For instance, the birth of Captain Ewing, even though it may be said to have led in the chain of causation to his being in the position in which he was killed, could not be considered as causing his death. …
>
> If war had merely placed Captain Ewing in a position not specially exposed to any danger, and in that position a particular incident not connected with war caused his death, I think that most probably in that case the matter would not come within the condition. For instance, suppose that, in connection with the war, the assured had gone to a military camp not in any way specially exposed to lightning, but where lightning had struck and killed him, I should be disposed to think that the war was so remote from the death that in that case it could not be said that the death was indirectly caused by the war. If however, the war had placed the assured in a position specially exposed to danger, as for instance in a place where he was specially exposed to being struck by lightning – if such a place can be conceived – and he was there struck and killed by lightning, it appears to me to be a question of fact, not of construction, whether the death was indirectly caused by war.
>
> … It is clear upon the facts that he was placed in a position of special danger, namely, he had to be about the railway line performing his military duties at night with the lights turned down, in consequence of war, and while doing his military duties in that position of special danger he was killed by reason of the special danger which prevails at that particular place and to which he was exposed by reason of his military duties."

42. I have concluded that causation is a key element of the exclusion contained in the Retroactive Date clause and that the intention was to exclude claims directly or indirectly caused by acts, errors or omissions preceding 5th June 2009. The only such acts, errors or omissions which could have causative effect would be wrongful acts which could in principle give rise to liability. This makes sense of the words used in the light of the authorities and fits well with the nature of a professional indemnity policy. Looking at the words in combination in the clause, meaning is given to each phrase and to the whole.

43. In ascertaining what could be classed as an indirect cause, "a line must be drawn somewhere". It is not enough that circumstances arise prior to 5th June 2009 in which a wrongful act takes place thereafter. That would merely represent the historical context or background against which wrongful acts occurred. There must be some act, error or omission which could give rise to liability which occurs prior to the Retroactive Date which is genuinely part of a chain of causation which leads to liability for the claim in question.

The application of the Retroactive Date Clause

44. On the primary case put forward by the Fund against the Manager:

    i) There is no complaint of any wrongful act prior to 5th June 2009.

    ii) There is no act of any kind by the Manager which can properly be said to have any causal connection, whether direct or indirect, to the alleged liability for the claim.

45. All the complaints made about actions taken, errors committed or omissions made relate to steps taken or not taken in 2010. They are taken against the background of agreements made in 2008, the fall out of events thereafter and the motivation of the Manager in concluding the 2010 Onshore Share Purchase Agreement in the terms that they did. There is not a single act, error or omission of the Manager which is relied on by the Fund as constituting any element in the chain of causation resulting in liability which gives rise to the claim.

46. The Fund's Amended Particulars of Claim speak for themselves and I need not refer to them in any detail. Whilst it may be true that the 2010 Onshore Share Purchase Agreement was made with the motivation of completing the 2008 Onshore Purchase Agreement which was commercially part of a larger transaction involving the 2008 Offshore Purchase Agreement, this is of no significance in the context of the policy wording. Whilst the commercial links between the Term Sheet, the Concept Paper, the Investment Proposal, the 2008 Agreements and the 2010 Onshore Sale and Purchase Agreement may be evident, and the desire to achieve the original commercial objective may have motivated the conclusion of the 2010 agreement, it is the conclusion of that Agreement without any provision for security for sums paid by the Fund under it or performance by the other party to it which gives rise to the potential liability on the claim made. None of the earlier factors has any causative connection with that at all.

47. There is no suggestion that the Amended Particulars of Claim do not properly represent the claim made and the nature of the liability alleged. The 2008

Agreements and their aftermath represent the background, the historical context, and the situation in which the Manager found itself when committing the acts which constitute alleged breaches of duty in 2010 or omitting to do what it is alleged they should have done at that time.

48. The alternative case which is hardly particularised by the Fund at all, is an alternative case which is only to be pursued if the primary case fails. Although it refers to acts in 2008 as causative of alleged liability – the conclusion of the Capital Injection Agreement – this is not the case being actively pursued. It is not the case that the Manager wished to settle. It is not in truth a liability which is maintained either by the Fund or the Manager. It is therefore irrelevant for current purposes and the exclusion clause cannot bite since the true nature of the claim and the alleged liability are contained in the primary case where neither arises out of or involves acts, errors or omissions prior to 5th June 2009.

Late Notification – the letter of 25th April 2013

49. Under clause 14 of the Primary Policy, which was incorporated into the 2012/2013 and 2013/2014 Policy wording on the second excess layer, it was a condition precedent to the Manager's right to recover that notice of any claim be given to Insurers "as soon as practicable and, in any event, no later than 60 days after the effective date of the expiration or termination of the policy". The same clause provided that if, during the Policy Period, the Manager became aware of any circumstances which could give rise to a claim and gave notice of such circumstances to Insurers as soon as practicable, any claim arising from such circumstances was to be considered as made during that Policy period. It was not a condition precedent to recovery under the policy that such circumstances should be reported as soon as practicable after the Insured became aware of them. In this respect the wording of LSW055 adds nothing to the wording of the Primary Policy save that notification is to be given if it appears likely that a claim plus costs and expenses incurred in defence or settlement may exceed the indemnity available under the underlying policies.

50. Clause 24 of the Primary Policy provided that there should be no avoidance by the Insurers on renewal in respect of any non-disclosure, whether innocent, negligent, fraudulent or otherwise, subject to the absence of cover for any senior figure or individual with knowledge of any misrepresentation or non-disclosure.

51. The Insurers maintained that a claim had been made against the Manager by the Fund by a letter of 2nd April 2013 which was not the subject of reporting to the Insurers. Insurers were first made aware of a claim on 23rd January 2014 when the letter of 21st January 2014 from the Fund's solicitors was forwarded with the draft particulars of claim. If the letter of 2nd April 2013 was in fact a claim, within the meaning of the Policy Terms, then it is not suggested by the Manager that notification was made as soon as practicable and none was in fact made within the period of the 2012/2013 policy.

52. The letter of 2nd April 2013 was sent by the Fund's Solicitors to legal counsel for the Manager. It is unnecessary to recite all of its terms but the following are the key parts of it:

> "*Introduction*

As you are aware, we have been instructed by the Fund to provide it with advice on a number of legal, regulatory and other matters, and this has included advice on the Fund's rights against, and obligations to, ARC Capital Partners Limited ("the Manager"). As part of our instructions, we have been asked to consider the circumstances surrounding the payment, in December 2010, of RMB489 million ("the Payment") to Orient Home Industrial Co., Ltd ("the Seller"), pursuant to an equity transfer agreement dated on or around 10 December 2010 ("the ETA"). We understand that the Payment was made without being paid into escrow, without security, and with a number of conditions precedent under the ETA still to be satisfied before the shares in the target company, Orient Home Industrial Co. Ltd, were to be transferred. We also understand that, notwithstanding the fact that the shares in the target company were not transferred by the Seller pursuant to the ETA, and notwithstanding demands that they do so, neither the Seller nor any other entity in the OH group has returned the Payment to the buyer under the ETA, the manager or any other entity on behalf of the Fund. We also understand that the Seller and/or other entities in the OH group have asserted claims against the Fund and/or related companies.

Claims by the Fund

It is our view, based on our preliminary investigations, that the Fund has a strong claim against the Manager for recovery of the Payment and all related losses, costs and interest. Whilst the principal purpose of this letter is to endeavour to agree a process for the swift and effective recovery of these sums from OH, rather than to assert or expand on the Fund's claims against the Manager or to invite a detailed debate about them, we do wish at this stage to make it clear that the Fund's rights under the investment management agreements from time to time between the Fund and the Manager, and its rights more generally as against the Manager, are fully reserved. We also wish to make it clear that any steps taken by the Fund, whether with or without the Manager, to recover the Payment and related sums from the Seller and/or the other OH group entities, are not in any way a waiver of the Fund's rights or an acceptance or admission that the Fund is required to pursue such claims prior to claiming against the Manager (which for the avoidance of doubt is denied).

Payment of legal and other costs in recovering the Payment

As explained above, it is our view that the Fund has a strong claim against the Manager in connection with the Payment. In the circumstances, the Manager is not entitled, under the relevant investment management agreement, to recover from the Fund the costs of pursuing the return of the Payment. In

> any event, it seems to us entirely appropriate that the Manager meets up front the costs of the recovery strategy in full, to include external legal and other fees and any costs (or security) that are required in connection with the enforcement of any award (whether before or after the obtaining of any such award). Please confirm that this is agreed.
>
> *Recovery strategy protocol*
>
> As discussed at the meeting at our offices on 5 March 2013, attended by Jon Lewis and Derek Crane, the Fund wishes to (and is entitled to) be fully involved in all aspects of the attempted recovery of the Payment. In this connection, and so as to avoid any doubt or dispute about how the Fund and Manager should work together going forward, we have prepared, and attach as an annex to this letter, a recovery protocol for the Manager and the Fund to follow. This sets out, in more detail, the matters raised at the meeting on 5 March. Please confirm as soon as possible that the terms of the protocol are agreed."

53. In the definitions clause in the primary policy, a "claim" means, with respect to insuring clause 2, any Professional Services Claim. The latter phrase is also defined to mean civil proceedings, arbitration, mediation, conciliation or alternative dispute resolution proceedings, criminal proceedings or regulatory investigation or "a written demand for monetary damages or non-pecuniary relief". The question which arises here is whether the letter constituted such a written demand. There is no formality required for such a demand so long as it is in writing but there must be a demand.

54. In my judgment, this letter does not constitute a demand. It is expressly a letter in which rights are reserved to pursue a claim against the Manager. Whilst the letter expressed the view that the Fund had a strong claim against the Manager, the principal purpose of the letter was expressed to be the attempt to agree a protocol for the swift and effective recovery of sums from OH, rather than to assert or expand on the Fund's claims against the Manager. It was in that context that the Fund's solicitors made it clear that its rights against the Manager were fully reserved and that any step taken by the Fund to recover from OH was not be seen as a waiver. The suggestion that it was entirely appropriate that the Manager should meet upfront the costs of the recovery strategy was not in itself a claim either. The request for confirmation of agreement to the funding of the recovery strategy was not a written demand for monetary damages or non-pecuniary relief.

55. The contrast between the form of this letter and the letter of 21st January 2014 which refers to the basis of the Fund's claim as set out in detail in the enclosed draft Particulars of Claim and the intention to issue and serve proceedings, whilst expressing willingness to refrain from doing so if the Manager were to reimburse the Fund with RMB480 million, is clear. Although the 2nd April 2013 letter referred to the fact that the solicitors' view was that there was a strong claim against the Manager, it expressly reserved the rights of the Fund to make the claim, rather than actually making it. By way of contrast the letter of 21st January 2014 with the draft particulars of claim enclosed could not be seen as anything but a demand.

56. The terms of the Recovery Protocol attached to the letter of 2nd April 2013 confirm this conclusion. Paragraph 3 of the Protocol provided that nothing in it should prevent or restrict the ability of any party to pursue any claims which it might otherwise lawfully bring. The fact that the Manager replied to the letter by way of a solicitors' letter is not surprising but does not alter the character of the letter written by the Fund's solicitors nor bring it within the meaning of a "Claim" for the purposes of the Policy terms.

Breach of condition precedent – Extension clause 5j

57. This point does not arise if, as I have held, the letter of 2nd April 2013 was not a claim for the purposes of the Policy. Even if it was, however, in my judgment it is clear that the terms of clause 14, in the context of the 2013/2014 policy do not take effect to nullify the effect of the Continuity of Cover Clause.

58. It is true that the underlying purpose of inclusion of term requiring notification of a claim as soon as practicable must be to give Insurers "the opportunity to associate with" the Manager and the right to be consulted in advance in relation to investigation, defence and settlement of any such claim, but this is of no assistance in construing Extension clause 5j and clause 14 of the relevant policies.

59. Under Clause 5j, the Continuity of Cover Clause in the Primary Policy (which provision was incorporated in each of the second excess layer policies between 2009 and 2015) coverage was expressly provided for Claims or circumstances which could or should have been notified under any policy of which the current policy was a renewal or replacement, in circumstances where the Insurers had granted continuous cover without interruption and where the cover provided by the extension was to be that which applied at the time when the claim or circumstances could and should have been notified.

60. The Insurers contend that because it was provided that "the cover provided by this Extension shall be in accordance with all the terms and conditions of the policy or coverage section under which the Claim or circumstances could and should have been notified" and because the wording at the end of clause 5 provided that "Cover as set forth in the above extensions is subject to all the provisions of this policy unless stated otherwise" the fact that clause 5j permits the Manager to notify a claim to the 2013/2014 Policy which should have been notified to the previous years' policy does not mean that the Manager is not bound to comply with clause 14. Thus, it is submitted that a "Claim" which is made against the Manager during the currency of the 2012/2013 policy, which should have been but was not notified to that policy, may be notified and therefore covered by the 2013/2014 Policy only if the notification to the subsequent year's policy was "as soon as practicable".

61. Quite how this construction is intended to operate is unclear since it appears to be contended that the failure to notify "as soon as practicable" in the 2012/2013 year carries over into the 2013/2014 year. Thus the whole period between receipt of the 2nd April 2013 letter from the Fund's solicitors and the 23rd January 2014 when the 21st January letter of that year was notified, is said to be the relevant period which shows that notification was not made as soon as practicable. The alternative is that the relevant period for assessing whether the notification was made "as soon as practicable" commences at the inception of the 2013/2014 year (October 23rd 2013),

with the same result because there is a three month delay before notification was actually given.

62. In putting forward this construction, the Insurers argue that clause 5j cannot permit the Manager to notify a claim to a later policy period without any restriction of time. It is said that clause 5j cannot mean that the Insurers could rely on a non-compliance with clause 14 to decline liability in respect of a claim first made during the policy period of the 2012/2013 policies which the Manager notifies, late, to that policy but, that if the Manager waits till the following policy period (2013/2014) it can then notify the claim at any time during that policy period. If for example a claim was made against the Manager on day one of a prior policy year, but not notified until day 364 of the same policy period the notification could be rejected, but Insurers would not be entitled to decline indemnity if the same claim was notified two days later on day one of the new policy period or even on day 364 of that new policy period, nearly two years after the date when the claim was first made.

63. In my judgment the Insurers' argument has no merit. It is accepted by the Manager that notification on 23rd January 2014 was not in accordance with clause 14 as incorporated in the 2012/2013 policy, if the letter of 2nd April 2013 was a claim. No indemnity would therefore arise under the 2012/2013 policy. Equally, under the 2013/2014 Policy, clause 2 could not apply to the claim against the Manager since it covers only loss which an Insured becomes legally obliged to pay "on account of any Professional Services Claim first made against an Insured during the Policy period". On the hypothesis that the claim against the Manager was first made on 2nd April 2013, clause 2 of the 2013/2014 policy cannot apply.

64. However the specific purpose which underlies the extension given by clause 5j of the 2013/2014 Policy for claims which could or should have been notified to the earlier year would be rendered nugatory if clause 14 of that year's Policy was held to apply, whether in respect of the whole period from the date when the claim was first made against the Manager in the previous year or in respect of the period since October 23rd 2013. The extension grants cover on the terms of the preceding year so that although the claim is made late under the 2013/2014 Policy, it is the terms of the 2012/2013 Policy which will apply because the claim should have been notified in that period (and if the other requirements of continuity of cover are met). The effect of the Insurers' argument is that a breach of the condition precedent in the 2012/2013 Policy prevents reliance upon the Continuity of Cover Clause in the 2013/2014 Policy which is designed specifically to cater for that circumstance. The whole point of extension clause 5j in the 2013/2014 Policy was to extend cover to the claim in circumstances where there had been a breach of the condition precedent or notification in the 2012/2013 Policy year. It was that very non-compliance which triggered the extension of cover under clause 5j.

65. As the Manager submits, the word "claim" in clause 14 (the condition precedent clause) is a reference to a claim first made against the Manager during the policy period in question. The cover which is granted by extension clause 5j, however, relates to a Claim which was first made against the Manager during the preceding year's policy period and such a claim is therefore unaffected by clause 14 in the later year's policy. The "as soon as practicable" provision cannot therefore apply to that claim at all under the later policy, whatever period might fall to be taken into account in assessing timely notification. Whether clause 14 of the previous year's policy or

clause 14 of the current year's policy is said to apply in circumstances covered by Extension clause 5j, the result for which Insurers contend would be perverse and would prevent its operation. There is no anomaly of the kind Insurers suggest.

i) If a Claim is first made against the Manager in the earlier year and is notified later than required, there will be a breach of clause 14 of that year's policy and no right to indemnity under it. In those circumstances it is irrelevant whether the Claim is first notified before the end of that policy year or after the end of it.

ii) If the earlier year policy insurers do not renew for a subsequent year or if they renew on terms which do not include clause 5j or something similar, there would then not be any cover for such a claim against the Manager in the subsequent year either.

iii) If however the earlier year policy insurers renew for another year on terms including clause 5j then the subsequent year policy, by its express terms, provides cover for claims which should have been notified under the earlier year's policy. Cover then exists for the claim under the subsequent year policy, regardless of the date when insurers are put on notice of that claim in the subsequent year.

66. There is nothing odd about this since that is the intended effect of the Continuity of Cover Clause and there is no reason not to give it its intended effect. It would make no sense for the period of delay in notification in the earlier year to take effect in the light of Clause 5j. The effect of the Insurers' alternative argument that the relevant period for assessing "as soon as practicable" is to commence at inception of the 2013/2014 policy is that the window for notification would be minimal. Where a claim against the Manager was made under the earlier policy and there had been failure to comply with the requirement to notify "as soon as reasonably practicable" in that year, if that provision applied in the subsequent year, what time more could be allowed at the beginning of that later policy year? If a claim was made in the earlier policy year, and the time allowed by clause 14 had not expired by the date of inception of the subsequent year policy, the remaining allowable period for notification under the earlier year (a maximum of 60 days after expiration) would almost certainly be the same period as that required for notification under the subsequent year. Clause 5j would thus be deprived of any real effect.

67. In my judgment, it is obvious that clause 5j was intended to have the effect of coverage being granted in respect of late notified claims, as long as the continuity of cover requirements were satisfied.

Conclusion

68. In these circumstances, in my judgment, the Manager is entitled to the declarations sought, the form of which was agreed should the Manager be held to be correct in its construction of the policies. Those declarations are as follows:

i) A declaration that the Claim was first made within the Policy Period.

ii) A declaration that, if the Claim was not first made within the Policy Period but, rather, was made by letter from Stephenson Harwood dated 2 April 2013, it is covered by the Second Excess Policy by virtue of Extension Clause 5j, and the Defendants are not entitled to decline cover by virtue of Clause 14.

iii) A declaration that the Claim, in any event and/or if and when settled on the basis of the Fund's primary claim against the Claimant, is not excluded by the Retroactive Date Clause at clause 5 of the Second Excess Policy.

69. In the circumstances, subject to any submissions the parties wish to make the costs of this action should follow the event.