Neutral Citation Number: [2013] EWCA Civ 1660

Case No: A3/2013/0824

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEENS BENCH DIVISION
COMMERCIAL COURT
MR JUSTICE FLAUX
2011 FOLIO 1047

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Friday 20th December 2013

Before :

LORD JUSTICE MOORE-BICK
LORD JUSTICE BRIGGS
and
LORD JUSTICE CHRISTOPHER CLARKE

- - - - - - - - - - - - - - - - - - - -

Between :

AstraZeneca Insurance Company Ltd	**Appellant**
- and -	
(1) XL Insurance (Bermuda) Ltd	**Respondents**
(2) ACE Bermuda Insurance Ltd.	

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Mr Paul Stanley QC and Mr Geraint Webb QC (instructed by **DAC Beachcroft LLP**) for the **Appellant**
Mr David Edwards QC and Mr David Scorey (instructed by **Clyde & Co**) for the **Respondent**

Judgment
As Approved by the Court

LORD JUSTICE CHRISTOPHER CLARKE:

1. The AstraZeneca group of companies is a major worldwide pharmaceutical group. The group (hereafter "AZ") includes the US company AstraZeneca Pharmaceuticals LP ("AZPLP") and the Canadian company AstraZeneca Canada Inc ("AZC"). AstraZeneca Insurance Company Ltd, the claimant and now appellant (hereafter "AZICO") is the captive insurer of AZ. It provided insurance cover to AZ, including AZPLP and AZC, for the period of 36 months from 1 January 2001 to 31 December 2003, including for a layer of £ 133,333,333 excess of £ 365 million. The policy by which it did so ("the Policy") is agreed to have been based on form XL004, together with amendments effected by Endorsements to that Policy.

2. Each of the defendants, and now respondents, (hereafter "the reinsurers"), both of which are incorporated in Bermuda, agreed to reinsure AZICO for a 50% share in respect of the insurance provided by AZICO under the Policy. In the case of ACE Bermuda, the second respondents, that was subject to a limit of $ 100 million per occurrence. The reinsurance contracts covered the period 31 December 2000 to 31 December 2003. AZICO had agreed to provide cover to AZ in accordance with commitments which had been obtained from the reinsurers.

3. The factual background to the preliminary issues which have led to this appeal are set out in the following paragraphs of the judge's judgment:

> *"6 ……From 1997, AZ manufactured, marketed and sold in the United States and Canada through the US and Canadian companies in the Group, a second generation atypical antipsychotic drug under the name "Seroquel" which was approved by the United States Food and Drug Administration ("the FDA") on 26 September 1997. At all material times, the label for Seroquel approved by the FDA contained information about weight gain and diabetes.*
>
> *7 On 28 August 2003 a putative class action (Zehel-Miller) was filed against AZPLP in Florida in which the plaintiffs alleged (i) that Seroquel caused personal injury; (ii) that Seroquel was defective; and (iii) that there had been a failure by AZPLP to provide adequate warning. The Complaint in that action was first notified to the claimant on or about 11 September 2003. By a letter dated 1 December 2003, AZPLP issued the claimants with a Notice of Integrated Occurrence pursuant to Article V of the Policy.*
>
> *8 Since that action was commenced, numerous plaintiffs in the United States and Canada have brought proceedings or joined lawsuits against AZ alleging that Seroquel has caused them personal injury. As at 31 October 2012, the claimant has settled claims presented by AZ for legal costs incurred in defending the claims and for settlements made in respect of the claims made against AZ of some £83.5 million excess of £365 million. It would appear that in only one of the cases has the matter been litigated through to a full trial and that resulted in a verdict for the defence. Other claims have been dismissed summarily.*
>
> *9 The vast preponderance of what AZ has paid out represents legal costs incurred in defending the claims, US$786 million, as against US$63.7 million paid out in settlements (representing on average, including settlements agreed*

> *in principle, about US$20,000 per plaintiff). The claimant insurer has indemnified AZPLP and AZC in respect of the legal costs incurred in defending the claims (referred to as "Defense Costs" in the Policy …."). It has also indemnified those insureds in respect of about 50% of settlement sums paid, but declined to indemnify in respect of the other 50% on various grounds, such as that the claims relate to injuries caused by Seroquel sold after the date of the Notice of Integrated Occurrence. The claimant claims in the present proceedings that it is entitled to be indemnified by the defendants pursuant to the reinsurance contracts, in respect of all sums it has paid in respect of settlements and Defense Costs, within the relevant layer. The defendants deny any such entitlement to an indemnity.*"

4. AZICO does not presently put forward a positive case that AZ was liable for any of the claims, assuming a correct application of the law governing the claims to the evidence as properly analysed – the test under English law for determining whether the insured has demonstrated that it was under an actual legal liability to the third party whose claim it has settled: per Aikens J, as he then was, in **Enterprise Oil v Strand Insurance Co Ltd** [2007] Lloyd's Rep IR 186 at [72]. Nor did AZ put forward such a case to AZICO.

5. This appeal is brought in respect of the answer which the judge gave to two preliminary issues, which are set out below. The first issue was phrased in a somewhat convoluted manner. The essential question, however, is whether under the Policy it is necessary for AZ, if it is to recover from AZICO, to establish that AZ was legally liable to those who made claims against it in relation to Seroquel, or whether it is sufficient that AZ settled an arguable liability with the consent of AZICO, which, as is common ground, was given. The settlements approved by AZICO were commercial settlements in the sense that they represented a settlement of modest amounts per claim which reflected the risks of litigation. They were not reached on the footing that they represented a reasonable amount in respect of what was an actual liability. The reinsurances were, so far as is presently material, on the same terms as the underlying insurance so that if AZ had to establish actual liability in order successfully to claim against AZICO, the same applied to any claim by AZICO under the reinsurances.

6. The second issue is whether the reinsurers are liable to indemnify AZICO in respect of Defense[1] Costs, in circumstances where only one claim has proceeded to judgment and in respect of that claim liability was not established.

7. XL004 is a Bermuda Form liability insurance. The nature of that form of insurance was summarised by the judge in these terms:

> "*3.…. The Bermuda Form was introduced by insurance companies, primarily in the first instance the present defendants, XL and ACE, when the US casualty insurance market collapsed in 1985. The intention of XL and ACE and of the corporate entities responsible for their initial capitalisation was to achieve a form of policy which would meet the needs for liability insurance of such substantial corporations, specifically those which faced large product liability exposures in the United States, whilst providing "a balanced policy form, aiming to hold the ring fairly between the interests of policyholders and*

[1] I use the American spelling, as in the Policy.

the interests of investors, as the same industrial corporations were in both roles"[1].

4 The resolution of disputes under an unamended Bermuda Form Policy is usually by London arbitration before three arbitrators, but on the basis that the contract of insurance or reinsurance is expressly governed by New York law. By this form of dispute resolution, major US companies and their liability insurers and reinsurers are able to have their policy disputes determined outside the United States and without the risk of jury trial, but pursuant to a system of state law for the determination of insurance disputes recognised to be more developed and neutral than that of other states in the United States[2]*. A substantial number of Bermuda Form arbitrations have taken place in London over the years, but because the insurances or reinsurances in question are governed by New York law, no questions of construction of the Bermuda Form have come before the English Courts on appeal under section 69 of the Arbitration Act 1996 (although this court is the supervisory court under that Act).*"

8. However, the Policy was, by Endorsement 14, made expressly subject to English law. AZICO and the reinsurers waived the arbitration clause in the reinsurance and agreed that the Commercial Court should determine the current dispute. This is the first occasion on which issues of construction of the Bermuda Form have come before the Commercial Court or this Court.

9. The two preliminary issues which the parties sought to have determined were as follows:

> "i) Does the Insured's entitlement to indemnity under the Policy against sums which it pays in settlement of claims, depend on whether the Insured would, on a balance of probabilities, have been liable for the claims in question, assuming a correct application of the law governing the claims to the evidence as properly analysed, so that the Insurer would always be entitled to refuse to approve settlement (or, 'would not be bound to approve settlement', being the formulation suggested by the Reinsurers) when the Insured does not assert (or, 'assert and prove', being the formulation suggested by the Claimant) that it would, on a balance of probabilities, have been liable for the claims in question?
>
> ii) Other than in cases where the Insured's relevant liability is established by judgment of a court of competent jurisdiction, does the Insured's entitlement to indemnity under the Policy in respect of Defense Costs depend on whether the Insured would, on a balance of probabilities, have been liable for the claims in question, assuming a correct application of the law governing the claims to the evidence as properly analysed?"

10. The answer which the judge gave to the first of these questions was that AZ was only entitled to an indemnity under the Policy if, on the balance of probabilities and assuming a correct application of the law governing the claim in question to the evidence properly analysed, AZ was under an actual liability for the claim.

11. The answer which he gave to the second question was that AZ was only entitled to an indemnity for Defense Costs where it established that it was liable for the claim in question in the same sense as in relation to the answer to the first issue.

The terms of the Policy

12. The Policy is very sizeable. Some of its paragraphs are extremely wordy, particularly when read with the definitions of the terms inserted into the text, which itself repeats some elements of the definitions themselves. The judge helpfully set out those terms which were of particular relevance. That summary is contained in the Appendix to this judgment. The emboldening of particular defined words is in the original. I have not, however, replicated it in the body of this judgment.

Particular features of the Policy

13. A number of features of the Policy are of particular significance. First, it is governed by English law. Second, AZICO has no duty to defend. Third, it does not contain a "follow the settlements" clause or anything similar. Fourth, it is an Occurrence Reported policy, that is, it covers the insured against liability arising out of events occurring and reported during the period of the policy.

14. The Policy also provides for the aggregation of personal injuries into one Occurrence. Thus Definition V (2), so far as applicable to Personal Injuries, provides:

> "*Except as provided in paragraph (3) below, where an Occurrence exists and a series of and/or several actual or alleged Personal Injuries….occur which are attributable directly, indirectly or allegedly to the same actual or alleged event condition, cause, defect, hazard and/or failure to warn of such, all such actual or alleged Personal Injuries ... shall be added together and treated as encompassed by one Occurrence irrespective of the period … or area over which the actual or alleged Personal Injuries … occur or the number of such actual or alleged Personal Injuries ... provided however that any actual or alleged Personal Injury … which is Expected or Intended by any Insured shall not be included in any Occurrence.*"

15. Definition V (3) is somewhat obscure but the essential effect of it and of Article V C is that, provided that the Notice identifies an Occurrence as an Integrated Occurrence (as happened in this case) the Policy potentially responds in the case of Personal Injuries attributable to the same actual or alleged event etc. AZ thus has the ability to bring within the same policy period Personal Injuries which are or are said to be attributable to the same event etc., even if they occur after the Policy has terminated.

Issue 1

16. Under English law a liability policy is, generally speaking and in the absence of wording to the contrary, a policy which indemnifies the insured in respect of actual liability. That means that, in order to recover from his insurer the insured must show that he was liable to the person who claimed against him. Liability cannot be determined in a legal vacuum. Hence the need to assume, for this purpose, a correct application of the law governing the claim in question to the facts properly found.

17. In the event of dispute the existence of liability has to be established to the satisfaction of the insurer, or, failing that, by the judge or arbitrator who has jurisdiction to decide such a dispute. It is not, therefore, necessarily sufficient for the insured to show that he has been held liable to a claimant by some court or tribunal or that he has agreed to settle with him. In practice the fact that this has occurred may cause or persuade the insurer to pay, but, if it does not, the insured must prove that he was actually liable. Under English law the ultimate arbiter of whether someone is liable, if insured and insurer cannot agree, is the tribunal which has to resolve their disputes (or any relevant appeal body). It may hold that there was in fact no actual liability and that an insured who thought, or another tribunal which decided, that there was, liability was in error either on the facts or the law or both.

18. This principle is potentially very inconvenient for insureds. It may mean that they face weak or dubious claims, which it would be commercially expedient to settle, but in respect of which, if they settle, they may not recover against the insurer because the claims cannot be shown to be well founded. In such a situation they may have to soldier on with the defence and hope to persuade the insurer that it is in his best interests to allow them to settle before trial and to indemnify them when they do, on the basis that, if they lose, the insurer is more likely to have to pay, and to pay more than he would if there was no settlement. Even if they are held liable, this may not in practice, and does not in law, mean that they are automatically covered. The insurer may still say that they were not liable.

19. There are ways of obviating or reducing these difficulties. The policy does not have to be a liability policy. The insured can seek (no doubt at a price) cover which insures him against claims made, or judgments given, or against occurrences. The policy may contain a follow the settlements clause whereby the insurer is bound to follow the settlements of the insured, in which case the reinsurer will be bound if the insured has made a settlement in a reasonable and business-like manner. The policy may contain a QC clause or a clause similar thereto. The policy may contain provisions whereby actual liability is, as between the insurer and the insured, taken to have been established if certain conditions are met. If the insurer was a party to the proceedings in which the claim against the insurer was determined it will probably be estopped from disputing that the insurer was liable; and, even if it was not a party, it may have agreed to be bound by the result.

20. Lastly, an insured may seek the consent of his reinsurer to the settlement. In the present case we were told that AZ told AZICO that they had a settlement in principle in respect of a number of cases subject to any necessary approval by insurers and reinsurers. AZICO's solicitors asked the reinsurers' solicitors for consent. The response from them was to say that there was no evidence that Seroquel causes diabetes and that there was no liability on the part of AZICO or the reinsurers. AZICO then told AZ that they had no objection to AZ entering into the settlement and would not subsequently contend that it was entered into without AZICO's consent, but that AZICO was "*unable to confirm that the settlement falls within the coverage it has provided and therefore reserves all its rights*". That reservation was subsequently withdrawn. But the agreement of the reinsurers to the settlement was never obtained.

21. That liability policies require the establishment of actual liability is apparent from considerations of language and English authority. As to the former, "liability" *prima facie* means the state of being liable and not alleged liability. As Aikens J said in

Enterprise Oil "*One cannot be obligated to pay sums by law if there is only an alleged liability"* [65][72].

22. As to the latter, the principle is summarised in **MacGillivray** on **Insurance Law** (12th edition) at 29-006 as being that "*liability insurance provides an indemnity against actual established liability as opposed to mere allegations*". The position which I have set out in paragraphs 17 and 18 above is vouched or supported in several cases which the judge considered including: **West Wake Price & Co v Ching** [1957] 1 WLR 45, 48-51; **Commercial Union Assurance v NRG Victory Reinsurance [1998]** 2 Lloyd's Rep 600; **MDIS v Swinbank** [1999] 1 Lloyd's Rep IR 516, 524; **Structural Polymer Systems Ltd v Brown** [2000] Lloyd's Rep IR 64, 67; **Thornton Springer v NEM Insurance Co Ltd** [2000] Lloyd's Rep IR 590 [34]; **Enterprise Oil**, which contained a pro-insured policy interpretation clause ("*In the event of any conflict of interpretation between the various clauses and conditions the broadest and least restrictive wording to the benefit of the insured shall always prevail*"); and **Omega Proteins v Aspen Insurance UK Ltd** [2010] EWHC 2280 (Comm).

23. In **Omega Proteins** I endeavoured to summarise the position as follows:

> "1. *The insured must establish that it has suffered a loss which is covered by one of the perils insured against:* ***West Wake; Post Office v Norwich Union*** *[1967] 2 QB 363;* ***Bradley v Eagle Star Insurance Co Ltd*** *[1989] AC 957;* ***Horbury Building Systems Ltd v Hampden Insurance NV*** *[2004] 2 CLC 453, 464;*
>
> *2. That may be done by showing a judgment or an arbitration award against the insured or an agreement to pay;*
>
> *3. The loss must be within the scope of the cover provided by the policy;*
>
> *4. As a matter of practicality, the judgment, award, or agreement may settle the question as to whether the loss is covered by the policy because the insurers will accept it as showing a basis of liability which is within the scope of the cover;*
>
> *5. But neither the judgment nor the agreement are determinative of whether or not the loss is covered by the policy (assuming that the insurer is not a party to either and that there is no agreement by the insurer to be bound).*
>
> *6. It is, therefore, open to the insurers to dispute that the insured was in fact liable, or that it was liable on the basis specified in the judgment; or to show that the true basis of his liability fell within an exception;*
>
> *7. Thus, an insured against whom a claim is made in negligence, which is the subject of a judgment, may find that his insurer seeks to show that in reality the claim was for fraud or for something else which was not covered, or excluded by, the policy:* ***MDIS Ltd v Swinbank****;*
>
> *8. Similarly, an insured who is held liable in fraud (which the policy does not cover) may be able to establish, in a dispute with his insurers, that, whatever the judge found, he was not in fact fraudulent, but only negligent and that he was entitled to cover under the policy on that account.*"

As is apparent from that summary the insured must establish both a loss and a liability. The former will be established by a judgment against him or a settlement: **Post Office v Norwich Union** [1967] 2 QB 363; **Bradley v Eagle Star** [1989] AC 957; but the latter may not.

The meaning of the Policy

24. The Policy must be interpreted in its commercial context, having regard to the circumstances that were or should have been apparent to reasonable persons in the position of the parties. Mr Paul Stanley QC for AZICO had submitted to the judge that one relevant circumstance was that the Bermuda Form is usually governed by New York law under which, as he submitted, the Policy would be construed as providing coverage for liability established by a reasonable and bona fide settlement or by a judgment, irrespective of whether there was an actual legal liability.

25. The judge rejected this proposition as heretical, and rightly so. The express choice of English law means that the Policy has to be construed against the background and in the context of what English law provides: **Hooley Hill Rubber v Royal Insurance** [1920] 1 KB 257, 272. In addition the judge held that, under New York law, cases where an insurer has been held bound to indemnify an assured in respect of an alleged liability without the need to prove it arise because of a substantive principle of New York law that an insurer who is bound to defend a claim of which he is notified, but who declines to do so, is bound by a good faith and reasonable settlement or a judgment against the insured. This is a principle of New York law, not a construction of the wording of the policy: **Feuer v Menkes Feur** 8 A.D. 2d 294 (1959); **Luria Brothers v Alliance Assurance** 780 F. 2d 1082, (1986) at 1091; **Uniroyal Inc v The Home Insurance Co** 707 F Supp 1368 (1988) at 1379.

26. Against that background the terms of the policy give every indication that the policy provides an indemnity against actual liability. The Coverage provided by Article I is, so far as presently relevant:

> "*to indemnify the Insured for Ultimate Net Loss the Insured pays by reason of liability imposed by law for Damages on account of Personal Injury*".

Both the wording quoted, taken as a whole, and the defined terms of "*Ultimate Net Loss*" and "*Damages*", on a natural reading relate to actual liability. As to the former, the indemnity is for Ultimate Net Loss paid by reason of liability imposed by law for Damages. Nothing in that phraseology is apt to indicate that the indemnity is against anything other than actual liability which the relevant law imposes or that there is to be any departure from the usual English law position. The Insured cannot properly be said to pay by reason of liability imposed by law unless an actual liability at law causes it to make the payment. The Policy uses the expression "alleged liability" often but not in Article I.

27. "*Ultimate Net Loss*" means "*the total sum which the Insured shall become obligated to pay for Damages on account of Personal Injury... "* That too is dealing with a sum which the insured is obliged to pay, which is consistent with an actual liability. "*Damages*" means "*all forms of compensatory damages etc … which the Insured shall be obligated to pay by reason of judgment or settlement for liability on account of Personal Injury... "* Damages are not defined simply by reference to a judgment or

settlement but to a judgment or settlement "*for liability*", which must, in context, mean an actual liability. Personal Injury is a defined term which does not include alleged injuries. Alleged Personal Injury is referred to elsewhere but not in Article I. In addition Damages are not payable by reason of liability imposed by law for anything other than actual personal injuries.

AZICO's submissions

28. Mr Stanley submits that this analysis, which reflects that of the judge, is erroneous. It rests on and starts with, a fallacious working assumption that liability means actual liability, when the provisions of the Policy should be looked at iteratively and as a whole; and it ignores or gives far too little weight to the fact that everything within the Coverage clause has to be "*encompassed by an Occurrence*". Taken as a whole the Policy does not require the insured to demonstrate actual liability, if it is established by a judgment or an approved settlement. An Occurrence is the first step on the route to recovery and defines the scope of the coverage. It is apparent from the definition of Occurrence, which is peppered with references to "*actual or alleged*" that it embraces alleged matters. By way of example, Definition V (2) which deals with an Integrated Occurrence contemplates an *alleged* personal Injury, which is *allegedly* attributable to an *alleged* event. Thus consequence, causation and cause can all be alleged.

29. Against that background everything else falls into place. Article I means (collapsing, so far as possible the definitions into the Article) that the indemnity is against Ultimate Net Loss (i.e. the total sum which the insured has to pay by reason of judgment or settlement) by reason of liability imposed by law, being a judgment or settlement for liability on account of Personal Injury covered by the Policy encompassed by an Occurrence, providing that the requisite notice has been given. An Occurrence covers matters that are alleged as well as actual.

30. The cover is, thus, against whatever is adjudged due or is paid in settlement in respect of an alleged Personal Injury when the judgment or settlement is in respect of a tortious claim. The words "*by reason of liability imposed by law*" refer to the type of liability in question. The expression "*shall be obligated to pay by reason of judgment or settlement for liability*" is well able to cover a settlement in respect of the liability asserted by the claimant.

31. Mr Stanley stopped short of contending that the cover under the Policy was in respect of alleged liability. He submitted that the cover was in respect of actual liability; but that the parties to the Policy had in the Loss Payable clause provided the means by which, as between themselves, the existence of actual liability should be determined or established. Under that clause liability under the Policy does not attach unless and until:

> "*the Insured's liability covered hereunder shall have been fixed and rendered certain either by final judgment against the Insured after actual trial or by settlement approved in writing by the Company, and the Insured shall have paid such liability.*"

If there was a final judgment against the Insured or (as here) a settlement approved in writing by the Company "*the Insured's liability covered hereunder"* is treated as

fixed and rendered certain. In other words, as between the insured and the insurer, actual liability is established and determined.

Discussion

Occurrences

32. These submissions were ably presented but I cannot accept them. The liability which is the subject of Coverage under Article I must be "*encompassed by an Occurrence*". There has, therefore, to be an Occurrence. This may be an actual or alleged Personal Injury, which is actually or allegedly attributable to an actual or alleged event. But the Policy does not provide cover for Occurrences. The Occurrence is the shell within which the pearl of liability must be found; or, to use the metaphor adopted by the judge, the Occurrence is the gateway to coverage. What the Occurrence does not do is to identify that which is to be the subject of indemnity. In **Yorkshire Water v Sun Alliance** [1997] 2 Lloyd's Rep 21, this Court exposed the fallacy of treating an "event" or an "occurrence" as the peril insured against.

33. The reason for the encompassing phraseology lies in the nature of the Policy. It responds when events of a particular character have happened and notice thereof has been given. Thus, in relation to an Integrated Occurrence, Personal Injuries attributable to the same event or alleged Personal Injuries allegedly attributable to the same alleged event can be notified. This enables the insured to give notice of what may turn out to be actual liability for actual Personal Injury actually caused by an actual event, when, at the time when the notice is given, it is likely to be unclear whether, and, if so, to what extent, there are or will be actual Personal Injuries. If notice could only be given of what was *in fact* the position the insured might well be unable to justify giving a notice which could only truthfully be given on the basis of what was *alleged*. AZ might not, therefore, be able properly to give any notice at all if it could not be satisfied that, say, the claimants had actually contracted diabetes as a result of the use of its Seroquel.

34. Mr Stanley submits that this is an illusory concern because, even if Occurrence only included actual Personal Injury, AZ could legitimately give notice even it did not believe or was not sure that there was any actual Personal Injury. If it turned out that there was, it would not matter that when the notice was given, the injury was only alleged. I doubt this and, in any event, it would not seem to me appropriate, on this hypothesis, to adopt a construction which contemplates that AZ should give a notice of a fact which it does not believe to be true.

35. Further, if Occurrence was limited to actual Personal Injuries, it would make Article V A – which provides that if any Executive Officer becomes aware of an occurrence likely to involve the Policy the Named Insured shall, as a condition precedent to the rights of any Insured under the Policy, give written notice to the Company as soon as practicable and in any event during the Policy Period – difficult to apply since it must be highly debatable in many instances whether AZ has become aware of an actual as opposed to an alleged Personal Injury.

36. Again, under Article V B an insured can give a Permissive Notice of an Occurrence during the Policy Period. Decisions on whether to do so, and whether to give notice of any Occurrence as an Integrated Occurrence, in order to be able to aggregate Personal

Injuries, have, thus, to be taken during the Policy period at which time it is inherently likely that the existence of *actual* physical injury and its *actual* cause is not known. In those circumstances practical commercial considerations require there to be an ability to give notice of allegations.

37. The fact that an Occurrence may involve matters which are only alleged does not, however, mean that there is cover against that which is alleged, if there is no actual liability. To treat the phrase "*encompassed by an Occurrence*" as providing the key to what is covered takes wholly inadequate account of the previous words of Article I, which are the operative definition of cover, in favour of words whose function (at the tail end of the Article) is not to signify that Occurrences are covered but to indicate that there can be no cover for liability if the liability does not fall within an Occurrence of which notice has been given as provided for by the Policy. Noticeably Personal Injuries for which cover is provided do not, as I have said, include alleged personal injuries.

38. In addition I cannot accept that when the Policy refers to amounts paid "*by reason of liability imposed by law*" it means liability, whether actual or alleged, of a type which the law imposes, whether or not it actually does so. In agreement with the judge I regard the words "*pays by reason of liability …imposed by law*" as indicating that there has to be a causal link between what is paid and an actual legal liability, and the words "*shall be obligated to pay by reason of judgment or settlement for liability*" in the definition of Damages as denoting the existence of an actual liability at law which obliges that payment.

Considerations said to support the primary argument

39. Mr Stanley relied on a number of other matters as supporting his primary argument. The first was that "*Advertising Liability*" was defined to mean:

> "*liability for Damages on account of (1) libel, slander or defamation* [and various matters] *committed or <u>alleged</u> to have been committed in any advertisement, publicity article, broadcast or telecast and arising out of the Insured's advertising activities…*"

This was said to indicate that the Policy provided cover for alleged Advertising Liability, which supported the suggestion that it provided cover for alleged Personal Injuries as well.

40. I do not accept this. I entertain some doubt as to whether, as the judge thought, "alleged" in the definition of Advertising Liability relates solely to the words which followed ("*to have been committed in any advertisement etc.*."). But, even if they also relate to that which precedes them ("*libel, slander or defamation*"), the wording is not apt to convert the Coverage clause into a clause providing indemnity in respect of an alleged liability either in relation to Advertising Liability or, *a fortiori*, in relation to Personal Injury, in the definition of which there is no reference to alleged personal injury.

41. The second matter relied on is the reference in the definition of Product Pollution Liability which refers to "*liability or <u>alleged</u> liability*" for Personal Injury or Property Damage which fulfils certain characteristics.

42. Production Pollution Liability operates as an exclusion to an Exclusion. Article IV EXCLUSIONS provides that the Policy does not apply to Pollution, as defined in Exclusion K (1) (as well as other matters). Paragraph K (2) then provides that paragraph K (1) does not apply to, *inter alia*, Production Pollution Liability and, in effect, writes such Liability back in.

43. The judge regarded the use of "actual or alleged" in the context of such a write back as readily understandable. He did so, because, as he pointed out, the opening words of Article IV provide that the Policy does not apply to a series of actual or alleged matters. Exclusion F (1) excludes Advertising Liability arising out of breach of contract but then provides that that paragraph shall not exclude liability "*for unauthorised misappropriation of advertising ideas based upon breach or alleged breach of an implied contract*". Exclusion I excludes liability arising out of the design manufacture etc. of any Aircraft but this is not to apply to any liability or alleged liability in respect of certain matters. Exclusion K in respect of Pollution has the write back in respect of Product Pollution Liability referred to in the preceding paragraph. The opening words of Article IV are wider than are necessary to provide that the matters excluded are not the subject of the coverage. They indicate that the matters excluded do not count for any policy purpose. They cannot, therefore, form part of a Notice of Occurrence or an Integrated Occurrence, which include both actual and alleged matters. It is not, therefore, surprising to find references to alleged matters in the Exclusions. Article IV serves to confirm that it is only possible to include in a Notice of Occurrence something which, if it results in actual liability, will be a liability covered by the Policy.

44. I agree.

45. There are other exclusions which cover alleged matters. Thus Exclusion N ERISA includes "*liability or alleged liability under the Employee Retirement Income Security Act of 1974*". Exclusion O REPETITIVE STRESS includes "*carpal tunnel syndrome arising or allegedly arising from ... use of keyboards or finger pads*". Exclusion P SECURITIES, ANTITRUST ETC includes "*liability or alleged liability arising out of employee, officer or director dishonesty*". These exclusions do not have a write back; but, again, given that an Occurrence can include alleged matters and given the opening words of Article IV, and their function, the reference to alleged natters is not surprising.

46. A similar analysis can be made in relation to the definition of Expected or Intended. Personal Injuries are said by Definition L to be Expected or Intended where, *inter alia*, actual or alleged Personal Injury is expected or intended by an Insured. The definition of Occurrence in Definition V (2) provides for the aggregation of Personal Injuries where there is an Integrated Occurrence "*provided … that any actual or alleged Personal Injury ….which is Expected or Intended by any Insured shall not be included in any Occurrence*." Here the reference to actual or alleged Personal Injury is entirely understandable since Personal Injury which is Expected or Intended is excluded from an Occurrence which itself is defined by reference to matters which are either actual or alleged.

47. I regard this analysis as providing an acceptable explanation for the presence of "alleged" in the places identified. In any event I agree with the judge that the references to "alleged" in the Exclusions (which are not uniform – there is none in

paragraph (2) (b) of the Pollution Exclusion) are wholly insufficient to signify that the coverage provided by Article I is, despite (i) its language, (ii) the English law context in which it sits, and (iii) the absence in it of any reference to "alleged", to be treated as covering something other than actual liability.

48. Some reliance was placed on the Cross Liability clause in Article VI with its reference to a Claim suffered by an employee of one Insured for which another Insured is or may be liable. This provision does not deal with coverage at all. It provides that if an employee of Company X suffers Personal Injury and a Claim is made against Company Y, both X and Y being Insureds, Y is covered in the same way as if there was a separate policy issued to Company Y. In that event Company Y would still have to establish actual liability.

49. Reliance was next placed on Article VI E – the Appeals Provision – which entitles AZICO to launch an appeal. That provision, also, does not address any question of coverage. Nor can it be regarded as otiose if the Policy requires the insured to establish actual liability. An existing judgment may not necessarily establish actual liability but it may be compelling evidence of it, of which the Insurer might well wish to rid itself.

50. Lastly, under this heading, reliance was placed on Article VI Q – the Policy Extensions clause, which provides:

> "*Subject to Condition L, Coverage A of this Policy may be extended at the expiration of each Annual Period for another Annual Period, subject only to agreement between the Company and the Named Insured as to the applicable premium and such other terms and conditions as the Company and the Named Insured may mutually deem appropriate. Coverage A shall expire at the end of an Annual Period if not extended (or upon cancellation thereof). Where Coverage A (or Coverage B) is cancelled or not extended, such cancellation or non-extension shall not affect the rights of the Insured as respects any Occurrence or Integrated Occurrence of which notice was given in accordance with the provisions of this Policy prior to such cancellation or non-extension and shall not limit whatever rights the Insured otherwise would have under this Policy as respects actual or alleged Personal Injury, Property Damage or Advertising Liability included in such Occurrence or Integrated Occurrence taking place subsequent to such cancellation or non-extension.*"

51. Again the provision is entirely understandable in circumstances where Occurrences may include alleged matters. It is also clear from the words "*shall not limit whatever rights the Insured otherwise would have under this Policy as respects etc....*" that it is not creating coverage.

52. We were urged to interpret the Policy in the light of commercial considerations, and, in particular, the difficulty in which AZICO would be placed if it had to establish actual liability to 30,000 or more claimants and the likely need, from AZ's point of view, to enter into settlements which recognised the risks of litigation rather than the extent of actual liability if properly considered in the light of the actual facts and the applicable law. I do not underestimate the difficulties AZ and others like them face in dealing with tort litigation in the United States. At the same time the issues with which AZ would have to deal in such litigation (e.g. was there personal injury,

causation, and fault?) are the same as those which would arise in proving actual liability in any claim against the insurers. Moreover the fact that it may have been eminently sensible in commercial terms to settle with claimants for modest sums, albeit after very considerable Defense Costs, and potentially prejudicial to the making of any such settlement if it were to become known that AZ was asserting to insurers that it was actually liable, cannot change the nature of the Policy for which AZ bargained.

The Loss Payable clause

53. The Loss Payable clause does not, in my judgment, provide that actual liability of the insured to claimants is to be taken as established if there is a judgment against the insured or a settlement approved in writing by the insurer. This is for a number of reasons.

54. First, the clause does not say that.

55. Second, the Loss Payable clause would be an odd, albeit not impossible, place in which to find such a provision which belongs more appropriately as part of, or an adjunct to, the Coverage clause.

56. Third, the function of the clause is indicated by its heading of "*Loss Payable*", namely to specify when a liability covered by the Policy is to be paid. What liability is covered by the Policy is determined earlier, in the Coverage clause. It is not determined by the Loss Payable clause.

57. Fourth, AZICO treat the words "*the Insured's liability covered hereunder shall have been fixed and rendered certain either by final judgment or by settlement...*" as showing that in those events liability is treated as having been shown to exist. Mr Stanley accepted that the wording did not operate to foreclose any question of whether or not the liability established by the judgment or settlement fell within the coverage of the Policy. He suggested that the phrase should be read as if it said something like "the insured's liability covered hereunder (if it is covered)". But, if coverage is not to be treated as established by the judgment, I do not see why liability should be treated as established either.

58. In my view the phrase is dealing with a presupposed "*liability covered hereunder*" and provides that, if there is such a liability, the loss is payable when the amount of that liability has been fixed and rendered certain by the judgment or settlement – language which, itself, is more consistent with the ascertainment of loss and the temporal attachment of the Policy rather than the existence of liability. Whether or not there is a "*liability covered hereunder*" depends on whether there is actual liability and whether that liability is one which falls within the terms of the cover. A distinction is to be made between provisions which relate to the time when a loss in respect of a liability covered by the policy is payable, or during which a loss must occur or a claim be made if the policy is to respond, on the one hand, and those which relate to the peril insured against, on the other: see **MDIS v Swinbank** [18] – [25]; **Thornton Springer v NEM** [33] – [35].

59. Fifth, the operation of the clause in the manner contended for by AZICO does not appear to work in the case of a settlement. Most settlements do not contain an

admission of liability. Many are made with an express non admission, or a denial, of liability. It is difficult to see how a settlement that in terms did not admit, or denied, liability could be taken as establishing that liability existed.

60. Sixth, the clause provides that:

> "*The Company may examine the underlying facts giving rise to a judgment against or settlement by the Insured to determine if, and to what extent, the basis for the Insured's liability under such judgment or settlement is covered by this Policy*".

61. Mr Stanley submits that, whilst this clause entitles the insurer to examine whether the judgment against the insurer is within the coverage of the policy, it does not extend to allowing the insurer to contend that the insured was never liable at all. I do not agree. The provision is not by its terms limited to entitling the insurer to examine the judgment or settlement to determine if and to what extent the basis for it (as revealed in the judgment or settlement) is covered by the policy. It extends to entitling the insurer to examine "*the underlying facts giving rise to the judgment or settlement*", which must envisage the actual underlying facts. That examination may include, as it seems to me, seeing whether, for example, the claimant did in fact suffer personal injury and whether that was in fact caused by some tortious failure on the part of the insured. Examination of the underlying facts may show that the basis of the judgment was that the judge thought that the insured was liable when in fact or in law it was not – either because he or she was misled as to the existence of personal injury, causation or negligence or because his analysis was legally fallacious or factually in error; or that the basis of settlement was in respect of an alleged liability when in truth there was none.

62. Seventh, this argument is similar to an argument rejected by Aikens J in **Enterprise Oil** [64] – [73], in circumstances more favourable to its acceptance than in the present case.

63. Lastly, looking at the question more generally, it is relevant to observe that, had a draftsman, cognizant of English law, intended the position to be as AZICO contends it to be, it is difficult to accept that he would have left his intention to be discerned by the sort of analysis upon which AZICO relies.

64. Accordingly the judge was, in my judgment, right in the conclusion that he reached, which I have set out in paragraph 10 above.

65. The judge did not in terms consider, nor, in my judgment was it necessary for him to consider, the second half of the first issue namely the words :

> *"so that the Insurer would always be entitled to refuse to approve settlement (or, 'would not be bound to approve settlement', being the formulation suggested by the Reinsurers) when the Insured does not assert (or, 'assert and prove', being the formulation suggested by the Claimant) that it would, on a balance of probabilities, have been liable for the claims in question"*

66. This formulation, which was adopted because this is a dispute between insurers and reinsurers, ties in with a submission made by Mr David Edwards, QC for the

reinsurers, that, even if AZICO was right to say that the effect of a settlement approved by the insurers was to establish that the insured was actually liable to the relevant claimants, AZICO would have no claim. In his submission, on this hypothesis the liability of the insured would only have arisen because the insurers had chosen to consent to the settlement. In so doing they would have given up a defence open to them, namely that there was no actual liability. Whilst they were entirely at liberty to do that for themselves, it was not open to them to give up a defence available and claim against the reinsurers in consequence.

67. He relied in this respect on the words of Mr Justice Lawrence in **Re London County Commercial Reinsurance Office** [1922] 2 Ch 67:

> "*The fact that the policies are reinsurance policies and that the reassured have paid under the policies which they have issued does not in my judgment operate to enable them to substantiate their claims against the company. It is well settled that, subject to any provisions to the contrary in the reinsurance policy, the reassured, in order to recover from their underwriters, must prove the loss in the same manner as the original assured must have proved it against them, and the reinsurers can raise all defences which are open to the reinsured against the original insured. This is equally true whether the reinsured had or had not paid their assured, in as much as it would be inequitable for them to renounce any of their defences so as to prejudice the reinsurers.*"

68. Mr Edwards accepted that there might be an obligation on the part of the insurers to act reasonably but, in circumstances where AZ did not assert that they were in fact liable to those who were claiming against them, and AZICO did not think that they were, there would have been nothing unreasonable in AZICO declining to consent. If it were otherwise, and if, as AZICO contends, consent to settlement establishes liability, the position would be perverse. AZICO, which does not accept liability, would be bound to consent to a settlement which established that it existed. If consent would have that consequence it could not be right that AZICO was entitled to prejudice the reinsurers by giving it.

69. In response Mr Stanley submitted that there was in the present case no abandonment of a defence but, rather, the exercise of a discretion which could not be treated as irrational and was, therefore, valid.

70. In view of my decision on the first issue I do not regard it as necessary to determine this controversy; nor is it appropriate to do so for a number of reasons. First, it was not addressed by the judge. Second, the extent to which an insurer or a reinsurer is bound to exercise a discretion as to whether to give consent is a matter upon which we had only very limited submissions. Mr Stanley referred en passant to **Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd** [2001] EWCA Civ 1047, although he did not cite it. That was a case concerning a reinsurer in which Mance LJ (as he then was) considered the extent to which reinsurers might withhold approval of a settlement in terms which suggested that they would be entitled to do so provided that they were acting in good faith and not irrationally.

71. I would not, however, wish to express an obiter view on the subject without more focused submission on the extent of, and the limitations upon, the exercise of

discretion. It is also debatable whether the principle in **Re London County Commercial** applies where an insurer has exercised a discretion in good faith and not irrationally, when he could also have exercised it the other way. I would prefer to leave that debate to a case where it matters (because the cover is not limited to actual liability); where the issue has been considered at first instance; and where it has been the subject of more extensive submission than we have had.

Issue 2 Defense Costs

72. In English law there is, in respect of non-marine liability insurance, no right to recover Defense Costs. The Policy says in terms and in capital letters that the Company has no duty to defend and that "*Defense Costs covered by this policy are included within and not in addition to the limits of liability of this policy*". Condition D (1) also makes clear that there is no duty to assume charge of the defence or settlement of any Claim against the Insured. So, as the judge observed, any entitlement to recover Defense Costs must depend on some free-standing entitlement under the Policy.

73. Insofar as the Policy deals with Defense Costs it is badly drafted. On a literal reading Defense Costs can never be recovered. This is because the insured's Defense Costs will never be incurred by reason of a liability imposed by law nor are they sums which the insured will be obligated to pay by reason of a judgment or settlement. They will be sums which are due pursuant to the contract between the insured and its lawyers.

74. The parties plainly intended that Defense Costs should be recoverable in some circumstances. Mr Geraint Webb QC for AZICO urged upon us what he described as the commercial realities facing companies such as AZ. Claims are often made in jurisdictions which are favourable to would-be claimants where there is trial by jury under minimal judicial direction. That circumstance together with the number of such claims frequently makes it imperative, or at least highly desirable, to reach a settlement, notwithstanding the merits of the defence. The fact that the case, if tried, will be tried by a jury, probably sympathetic to claimants, means that a dubious claim may well succeed. The more there are of such claims the more likely it is that at least some of them will do so. Even a small proportion of a total of 30,000 or more claims is sizeable. In some cases punitive damages may be available. Against that background the parties to the Policy must have intended that the insurers would bear the Defense Costs in respect of the defence, particularly the successful defence (or one that results in a modest settlement) of actual or anticipated Claims.

75. That would be a desirable result from AZ's point of view. But there is no provision in the Policy which stipulates that AZICO will pays the Defense Costs of Claims, which are defined as meaning "*an oral or written demand against an Insured for Damages and includes the threat or initiation of any suit or arbitration proceedings or a request for a tolling agreement*". Nor, in my view, can such a provision be implied.

76. In those circumstances the only way, consistent with the Policy wording, to ensure that Defense Costs are recoverable in some circumstances, as the Policy plainly contemplates, is to treat them as parasitical on Damages. This is what the Policy does since the only words providing for the recovery of Defense Costs are the last five words of the definition of Damages. The effect of this is, as it seems to me and as the

judge has held, that AZ recovers its Defense Costs if it establishes that it was or would have been liable for damages in respect of the claim in question; but not otherwise.

77. The words dealing with Defense Costs are, as Mr Stanley put it below, an untidy bolt on. But that does not mean that they can be regarded as providing a free standing coverage for Defense Costs in relation to any Claim. Such an interpretation divorces the words "*and shall include Defense Costs*" from the Damages in which they are to be included; and the fact that they are to be so included means that, in order to recover them, there must be a liability imposed by law for Damages, which, for the reasons I have given, means an actual liability.

78. Even if the words "*and shall include Defense Costs*" could be released from the Damages of which they are said to be a part, there is no provision in the Coverage clause or in any other clause which provides, without more ado, that AZICO will pay them. Nor can any process of interpretation create a freestanding entitlement to an indemnity in respect of Defense Costs in respect of an alleged liability.

79. The fact that Defense Costs include the costs of defending anticipated Claims does not advance the position. That provision precludes any argument that Defense Costs are irrecoverable because they were incurred at a time when the actual claim had not been made. But the definition does not extend the scope of the coverage to claims which are not in respect of actual liabilities. Coverage is determined by Article I, which is not concerned with alleged as opposed to actual liabilities.

80. This means that AZ does not recover if it successfully defends a claim. This is surprising and from the point of view of AZ, profoundly unsatisfactory. It is, however, as it seems to me, the result of having Defense Costs only catered for, and then maladroitly, by way of treating then as an addition to and an element of Damages.

81. It is no doubt unusual for Defense Costs only to be recoverable in the event of an unsuccessful defence. But it is not unheard of. As para 20-047 of **Colinvaux's Law of Insurance, 9th Edition,** records:

> "*Contractual provisions for the payment of Defence Costs vary. Some state that the insurers are not under any obligation to fund Defence Costs and that the assured is entitled to a reimbursement of Defence Costs only if the assured is ultimately found to be liable on grounds which fall within the scope of the policy, in particular the assured as not dishonest*".

Reference is made to two US authorities. At para 20-048 there is the following paragraph:

> *"It is possible to draft wording which confines recovery of Defence Costs to cases in which the assured is actually liable to the third party so that there is a substantive claim against the insurers, although that type of wording is relatively rare in liability insurance*".

General considerations

82. The result is very unfavourable to the insured. So is the provision that the loss is not payable unless and until there has been a judgment or a settlement approved by the insurer. This provision, which would be applicable whether or not a judgment against the insured or a settlement approved by the insurer "establishes" liability for the purpose of the insurance, has the effect that it is not open to the insured (against whom there has been no judgment and no settlement approved by the insurer) itself to settle with the claimants and contend, later, that it was actually liable. In addition the Loss Payable clause requires the insured to have paid the claim before it can recover. The Policy is not, therefore, to be treated as one whose terms are intended to be particularly favourable to the insured.

83. In my judgment the judge gave the right answer on both issues. Accordingly I would dismiss the appeal.

LORD JUSTICE BRIGGS

84. I agree.

LORD JUSTICE MOORE-BICK

85. I also agree.

APPENDIX

“**NOTICE**

THE COMPANY DOES NOT HAVE ANY DUTY TO DEFEND. DEFENSE COSTS COVERED BY THIS POLICY ARE INCLUDED WITHIN AND ARE NOT IN ADDITION TO THE LIMITS OF LIABILITY OF THIS POLICY.

INSURING AGREEMENTS

I COVERAGE

Zeneca Insurance Company (the "**Company**") shall, subject to the limitations, terms, conditions and exclusions below, indemnify the **Insured** for **Ultimate Net Loss** the **Insured** pays by reason of liability:

(a) imposed by law, or

(b) of a person or party who is not an **Insured** assumed by the **Insured** under contract or agreement,

for **Damages** on account of:

(i) **Personal Injury**

(ii) **Property Damage**

(iii) **Advertising Liability**

encompassed by an **Occurrence,** provided:

COVERAGE A: notice of the **Occurrence** shall have been first given by the **Insured** in an **Annual Period** during the **Policy Period** in accordance with Article V of this Policy,

or

COVERAGE B: notice of the **Occurrence** shall have been first given during the **Discovery Period** in accordance with Article V of this Policy, but only if the **Discovery Period** option has been elected in accordance with the provisions of this Policy.

III DEFINITIONS

A. "**Advertising Liability**" means liability for **Damages** on account of:

(1) libel, slander or defamation,

(2) any infringement of copyright or of title or of slogan,

(3) piracy or misappropriation of ideas under an implied contract, or

(4) any invasion of right of privacy,

committed or alleged to have been committed in any advertisement, publicity article, broadcast or telecast and arising out of the **Insured's** advertising activities.

G. "**Damages**" means all forms of compensatory damages, monetary damages and statutory damages, punitive or exemplary damages and costs of compliance with equitable relief, other than governmental (civil or criminal) fines or penalties, which the **Insured** shall be obligated to pay by reason of judgment or settlement for liability on account of **Personal Injury, Property Damage** and/or **Advertising Liability** covered by this Policy, and shall include **Defense Costs**.

H. "**Defense Costs**" means reasonable legal costs and other expenses incurred by or on behalf of the **Insured** in connection with the defense of any actual or anticipated **Claim**, including attorneys' fees and disbursements, law costs, premiums on attachment or appeal bonds, pre-judgment and post-judgment interest, expenses for experts and for investigation, adjustment, appraisal and settlement, excluding the salaries, wages and benefits of the **Insured's** employees and the **Insured's** administrative expenses.

R. **"Integrated Occurrence"** means an **Occurrence** encompassing actual or alleged **Personal Injury, Property Damage** and/or **Advertising Liability** to two or more persons or properties which commences over a period longer than thirty (30) consecutive days which is attributable directly, indirectly or allegedly to the same actual or alleged event, condition, cause, defect, hazard and/or failure to warn of such; provided, however, that such **Occurrence** must be identified in a notice pursuant to Section C of Article V as an **"Integrated Occurrence"** and is subject to all provisions of paragraphs (1) and (2) of Definition V.

V. (1) An **"Occurrence"** exists if, and only if:

(a) except with respect to actual or alleged **Personal Injury** or **Property Damage** arising from the **Insured's Products**, there is an event or continuous, intermittent or repeated exposure to conditions which event or conditions commence on or subsequent to the **Inception Date**, or the **Retroactive Coverage Date**, if applicable, and before the **Termination Date** of Coverage A, and which cause actual or alleged **Personal Injury**, **Property Damage** or **Advertising Liability**;

(b) actual or alleged **Personal Injury** to any individual person, or actual or alleged **Property Damage** to any specific property, arising from the **Insured's Products** takes place on or subsequent to the **Inception Date**, or the **Retroactive Coverage Date,** if applicable, and before the **Termination Date** of Coverage A.

(2) Except as provided in paragraph (3) below, where an **Occurrence** exists and a series of and/or several actual or alleged **Personal Injuries**, **Property Damages** and/or **Advertising Liabilities** occur which are attributable directly,

indirectly or allegedly to the same actual or alleged event, condition, cause, defect, hazard and/or failure to warn of such, all such actual or alleged **Personal Injuries**, **Property Damages** and/or **Advertising Liabilities** shall be added together and treated as encompassed by one **Occurrence** irrespective of the period (but without limiting the effect of Exclusion IV.A) or area over which the actual or alleged **Personal Injuries, Property Damages** and/or **Advertising Liabilities** occur or the number of such actual or alleged **Personal Injuries, Property Damages** and/or **Advertising Liabilities**; provided, however, that any actual or alleged **Personal Injury, Property Damage** or **Advertising Liability** which is **Expected or Intended** by any **Insured** shall not be included in any **Occurrence**. So far as **Personal Injuries**, **Property Damages** and/or **Advertising Liabilities** resulting or alleged to result from the design, formulation, manufacture, distribution, use, operation, maintenance and/or repair of an **Insured's Product**, and/or the failure to warn as to the use, operation, maintenance and/or repair of an **Insured's Product**, the term "the same actual or alleged event, condition, cause, defect, hazard and/or failure to warn of such" means any such design, formulation, manufacture, distribution, use, operation, maintenance, repair and/or failure to warn, as the case may be, as to which such losses, injuries or damages are directly, indirectly or allegedly attributable. As respects **Advertising Liability**, multiple or repeated broadcasts or publications of the same or similar materials shall constitute "the same actual or alleged event, condition, cause or defect."

(3) Notwithstanding paragraphs (1) and (2) above, if an **Occurrence** is not identified in the notice thereof as an "**Integrated Occurrence**," then actual or alleged **Personal Injury** to each person, **Property Damage** to each piece of property and/or **Advertising Liability** which commences at any time shall be deemed to be encompassed within a separate **Occurrence** from which **Personal Injury** to any other person, **Property Damage** to any other piece of property and/or **Advertising Liability** which commences more than thirty (30) days prior or later thereto is encompassed.

W. **"Personal Injury"** means **Bodily Injury**, mental injury, mental anguish, shock, sickness, disease, disability, false arrest, false imprisonment, wrongful eviction, detention, malicious prosecution, discrimination, humiliation, and libel, slander or defamation of character or invasion of rights of privacy.

Z. **"Product Pollution Liability"** means liability or alleged liability for **Personal Injury** or **Property Damage** arising out of the end-use of the **Insured's Products**, if such use occurs after possession of such goods or products has been relinquished to others by the **Insured** or by others trading under its name and if such use occurs away from premises owned, rented or controlled by the **Insured;** such goods or products shall be deemed to include any container thereof other than an **Automobile, Watercraft or Aircraft**.

AA. "**Property Damage**" means:

(1) physical damage to or destruction of tangible property, including the loss of use thereof at any time resulting therefrom;

(2) loss of use of tangible property which has not been physically damaged or destroyed arising from physical damage to or destruction of other tangible property; or

(3) losses consequent upon evacuation arising from actual or threatened **Bodily Injury** or destruction of tangible property.

AD. **"Ultimate Net Loss"** means the total sum which the **Insured** shall become obligated to pay for **Damages** on account of **Personal Injury, Property Damage** and/or **Advertising Liability** which is, and/or but for the amount thereof would be, covered under this Policy less any salvages or recoveries.

IV EXCLUSIONS

This policy does not apply to actual or alleged:

A. PRIOR TO INCEPTION OR RETROACTIVE COVERAGE DATE

Personal Injury to any individual person, **Property Damage** to any specific property or **Advertising Liability** which takes place prior to the **Inception Date** or, if applicable, the **Retroactive Coverage Date**.

F. ADVERTISING

Advertising Liability arising out of:

(1) breach of contract, but this paragraph (1) shall not exclude liability for unauthorized misappropriation of advertising ideas based upon breach or alleged breach of an implied contract;

(2) infringement of registered trademarks, service marks or trade name by use thereof, but this paragraph (2) shall not apply to titles or slogans;

(3) the failure of goods, products or services to conform with advertised quality or performance;

(4) the wrong description of the price of goods, products or services; or

(5) advertising activities on behalf of a party other than an **Insured** by an **Insured** engaged in the business of advertising.

I. AIRCRAFT

Liability arising out of the design, manufacture, construction, maintenance, service, use or operation of any **Aircraft** or any component part of or equipment thereof or any other **Aircraft** navigational or related equipment or service, including, without limitation, liability arising from a crash or

hijacking; provided, however, that this Exclusion I shall not apply to any liability or alleged liability in respect of:

(1) **Aircraft** fuelling and related operations with respect to **Personal Injury** or **Property Damage** occurring at the time of such operations, i.e., while the **Aircraft** involved is on the ground and motionless;

……

K. POLLUTION

(1) (a) liability for **Personal Injury**, **Property Damage** or **Advertising Liability** arising out of the **Discharge** of **Pollutants** into or upon land or real estate, the atmosphere, or any watercourse or body of water whether above or below ground or otherwise into the environment; or

(b) liability, loss, cost or expense of any **Insured** or others arising out of any direction or request, whether governmental or otherwise, that any **Insured** or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize **Pollutants**.

This Exclusion K applies whether or not such **Discharge** of such **Pollutants**:

(i) results from the **Insured's** activities or the activities of any other person or entity;

(ii) is sudden, gradual, accidental, unexpected or unintended; or

(iii) arises out of or relates to industrial operations or the **Waste** or by-products thereof.

(2) Paragraph (1) of this Exclusion K does not apply to:

(a) **Product Pollution Liability**; or

(b) (i) liability of the **Insured** for **Personal Injury** or **Property Damage** caused by an intentional **Discharge** of **Pollutants** solely for the purpose of mitigating or avoiding **Personal Injury** or **Property Damage** which would be covered by this Policy; or

(ii) liability of the **Insured** for **Personal Injury** or **Property Damage** caused by a **Discharge of Pollutants** which is not **Expected** or **Intended**, but only if the **Insured** becomes aware of the commencement of such **Discharge** within seven (7) days of such commencement;

provided that the **Insured** gives the **Company** written notice in accordance with Section D of Article V of this Policy of such commencement of the **Discharge** under subparagraphs (2)(b)(i) or (ii) of this Exclusion K within forty (40) days of such commencement. Such notice must be provided irrespective of whether notice as soon as practicable otherwise would be required pursuant to Section A of Article V of this Policy.

V NOTICE OF OCCURRENCE

A. NOTICE AS SOON AS PRACTICABLE

If any **Executive Officer** shall become aware of an **Occurrence** likely to involve this Policy, the **Named Insured** shall, as a condition precedent to the rights of any **Insured** under this Policy, give written notice thereof to the **Company** in the manner provided in Section D of this Article V.

Such notice shall be given as soon as practicable and, in any event, during the **Policy Period** or the **Discovery Period**, if applicable, and in accordance with Paragraph 2(b) of Exclusion K, if applicable. Failure to provide written notice as prescribed above shall result in a forfeiture of any rights to coverage hereunder in respect of such **Occurrence**.

B. PERMISSIVE NOTICE

Any **Insured** may at any time during the **Policy Period** or **Discovery Period** give notice of an **Occurrence** to the **Company** in the manner provided in Section D of this Article V.

C. PERMISSIVE NOTICE OF INTEGRATED OCCURRENCE

The **Insured** may at its option give written notice to the **Company** of any **Occurrence** as an "**Integrated Occurrence**" by designating it as such and giving such notice in the manner provided in Section D of this Article V. Once the **Insured** gives **Notice of Integrated Occurrence**, all **Personal Injury** or **Property Damage** that falls within the **Integrated Occurrence** (as provided in the terms, conditions and exclusions of this Policy) shall be treated as such for all purposes under this Policy irrespective of whether this Policy has been terminated after the **Insured** has given **Notice of Integrated Occurrence**. The limit of liability applicable to such **Integrated Occurrence** shall be the limit described in Article II of this Policy.

VI CONDITIONS

C. CROSS LIABILITY

In the event of a **Claim** being made by reason of **Personal Injury** suffered by an employee of one **Insured** hereunder for which another **Insured** hereunder is or may be liable, this Policy shall cover such **Insured** against whom such a **Claim** is made or may be made in the same manner as if separate policies had been issued to each **Insured** hereunder.

Nothing contained herein shall operate to increase the **Company's** limits of liability as set forth in Item 2 of the Declarations.

D. ASSISTANCE AND COOPERATION

(1) The **Company** shall not be called upon to assume charge of the settlement or defense of any **Claim** made or suit brought or proceeding instituted against an **Insured**, but the **Company** shall have the right and shall be given the opportunity to associate with the **Insured** or the **Insured's** underlying insurers or both in the defense and control of any **Claim**, suit or proceeding relative to

any **Occurrence** where the **Claim** or suit involves, or appears reasonably likely to involve, the **Company**, in which event the **Insured** and the **Company** shall cooperate in all things in the defense of such **Claim**.

(2) The **Insured** shall furnish promptly all information reasonably requested by the **Company** with respect to any **Occurrence**, both with respect to any **Claim** against the **Insured** and pertaining to coverage under this Policy.

(3) If liabilities, losses, costs and/or expenses are in part covered by this Policy and in part not covered by this Policy, the **Insured** and **Company** shall use their best efforts to agree upon a fair and proper allocation thereof between covered and uncovered amounts, and the **Insured** shall cooperate with such efforts by providing all pertinent information with respect thereto.

(4) Those expenses incurred by the **Company** on its own behalf in connection with claims representation pursuant to this Condition D shall be at its own expense and shall not be part of **Ultimate Net Loss**.

E. APPEALS

In the event the **Insured** or the **Insured's** underlying insurers elect not to appeal a judgment in excess of the retention or the underlying limits, as the case may be, the **Company** may elect to make such appeal at its own cost and expense and shall be liable for the taxable costs and disbursements of such appeal and post-judgment interest on the judgment appealed from accruing during such an appeal. In no event, however, shall liability of the **Company** for **Ultimate Net Loss** exceed the applicable limit of liability plus the costs and expenses of such appeal.

F. LOSS PAYABLE

Liability under this Policy with respect to any **Occurrence** shall not attach unless and until:

(1) the **Insured's** underlying insurer(s) or the **Insured** shall have paid the greater of the amount of any applicable underlying limits or the applicable retention set forth in Item 2(a) of the Declarations; and

(2) the **Insured's** liability covered hereunder shall have been fixed and rendered certain either by final judgment against the **Insured** after actual trial or by settlement approved in writing by the **Company**, and the **Insured** shall have paid such liability.

Any consideration paid by the **Insured** or the **Insured's** underlying insurers other than in legal currency shall be valued at the lower of cost or market, and any element of the **Insured's** profit or other benefit to the **Insured** shall be deducted in determining the value of such consideration. The **Company** may examine the underlying facts giving rise to a judgment against or settlement by the **Insured** to determine if, and to what extent, the basis for the **Insured's** liability under such judgment or settlement is covered by this Policy.

The **Insured** shall make a definite demand for payment for any amount of the **Ultimate Net Loss** for which the **Company** may be liable under this Policy within twelve (12) months after the **Insured** shall have paid such amount. If any subsequent payments shall be made by the **Insured** on account of the same **Occurrence** or **Claim**, additional demands for payment shall be made similarly from time to time. Such losses shall be due and payable by the **Company** thirty (30) days after they are respectively paid by the **Insured**, demanded and proven in conformity with this Policy.

AMENDMENT OF ARTICLE VI. CONDITION O. ENDORSEMENT [14]

It is hereby agreed that Article VI. Condition O. is deleted and replaced by the following:

O. LAW OF CONSTRUCTION AND INTERPRETATION

This Policy, and any dispute, controversy or claim arising out of or relating to this Policy, shall be governed by and construed in accordance with the internal laws of England and Wales, except insofar as:

(1) such laws may prohibit payment in respect of punitive damages hereunder;

(2) the law of another jurisdiction must apply pursuant to any directive of the Council of the European Community relating to non-life insurance

(3) such laws are inconsistent with any provision of this Policy;

provided, however, that the provisions, stipulations, exclusions and conditions of this Policy are to be construed in an even-handed fashion as between the Insured and the Company; without limitation, where the language of this Policy is deemed to be ambiguous or otherwise unclear, the issue shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions (without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favor of either the Insured or the Company or reference to the "reasonable expectations" of either thereof or to contra proferentem and without reference to parole or other extrinsic evidence).