Neutral Citation Number: [2018] EWHC 1083 (Comm)

Case No: CL-2016-000727

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 08/05/2018

Before :

MR ANDREW HENSHAW QC
(sitting as a Judge of the High Court)

- -

Between :

(1) THE CULTURAL FOUNDATION (doing business as American School of Dubai) (2) ABU DHABI NATIONAL EXHIBITIONS COMPANY (a Public Joint Stock Company incorporated under the laws of the Emirate of Abu Dhabi)	**Claimants**
- and -	
(1) BEAZLEY FURLONGE LIMITED (as managing agent for Syndicate AFB 2623/623 at Lloyd's) (3) GREAT LAKES INSURANCE S.E. (4) MSI CORPORATE CAPITAL LIMITED (Syndicate 3210) (5) ASPEN INSURANCE UK LIMITED (6) QBE INSURANCE (EUROPE) LIMITED	**Defendants**

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James Brocklebank QC and Henry Moore (instructed by **Covington & Burling LLP**) for the **First Claimant**
Andrew Neish QC (instructed by **Allen & Overy LLP**) for the **Second Claimant**
Tom Weitzman QC and Kate Holderness (instructed by **CMS Cameron McKenna Nabarro Olswang LLP**) for the **First Defendant**
Peter Macdonald Eggers QC and Marcus Mander (instructed by **Clyde & Co LLP**) for the **Third to Sixth Defendants**

Hearing dates: 12, 13, 14, 15 and 19 February 2018

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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 ANDREW HENSHAW QC

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Mr Andrew Henshaw QC:

(A) INTRODUCTION

1. This judgment follows a trial of ten preliminary issues as ordered by Blair J on 13 July 2017, the formulation of which was amended by consent on 6 February 2018. The case concerns a dispute between insureds, primary and excess insurers concerning certain professional indemnity insurance policies providing cover to a now insolvent architects' firm known as Robert Matthew, Johnson-Marshall & Partners ("***RMJM***").

2. The primary issue is whether and to what extent certain claims against RMJM by the First and Second Claimants ("***ASD***" and "***ADNEC***" respectively) arise out of circumstances notified to primary insurance policies underwritten by the First Defendant ("***Beazley***") and excess of loss policies underwritten by the Third to Sixth Defendants ("***Excess Insurers***").

3. ASD and ADNEC seek an indemnity against Beazley under, respectively, the primary layer policy written by Beazley for the year 1 May 2009 to 30 April 2010 (***the "2009/10 Policy"***) and the primary layer policy written by Beazley for the year 30 March 2008 to 30 April 2009 ("***the 2008/09 Policy***" or "***the 2008/09 Primary Policy***"), each insuring up to a Limit of Indemnity of US$10 million (plus defence costs) with a self-insured excess of US$250,000 any one claim. ASD alternatively seeks indemnity under the 2008/09 Policy.

4. ASD and ADNEC pursued independent claims against RMJM in separate arbitrations, resulting in an award in favour of ASD dated 31 May 2016 in the sum of AED 31,561,423 (approx. US$8.6 million) plus post-award interest ("***the ASD Award"***), and an award in favour of ADNEC dated 27 July 2016 in the sum of AED 30 million (approx. US$8.15 million) plus post-award interest ("***the ADNEC Award***").

5. Thus ASD's and ADNEC's claims individually fall within the US$ 10 million primary policy limit but together exceed it.

6. RMJM became insolvent and its estates were sequestrated by decree of the Sherriff at Edinburgh on 24 September 2015. As the sums awarded to ASD and ADNEC were not paid, they claim an indemnity from Beazley, alternatively from Excess Insurers, pursuant to section 1 of the Third Parties (Rights against Insurers) Act 1930 ("***the 1930 Act***").

7. The Excess Insurers are parties to a number of excess policies ("***the Excess Policies***") insuring limits in excess of US$10 million (plus defence costs) for the 2008/09 year, in layers which overall provide cover of US$35 million in excess of the primary policy limit.

8. The Claimants and the Excess Insurers contend that ASD's claims attach to the 2009/2010 Policy and ADNEC's claims attach to the 2008/2009 Policy. Accordingly, on their case, neither claim impacts on the layers insured by the

Excess Insurers. Beazley contends that both ASD's claim and ADNEC's claim attach to the 2008/09 policy.

9. The issues concerning the policies to which the claims attach ("***the Policy Period Issues***") form the subject of preliminary issues (1) to (4).

10. The second main set of issues (preliminary issues (5) to (7)) involves the question of whether Beazley is entitled to reduce the amount paid to ASD and/or ADNEC by reference to a proportion of the costs that Beazley has paid in defending the ADNEC Claim in arbitration and which it says exceeds the amount it is contractually required to pay ("***the ADNEC Defence Costs Issues***").

11. The third category of preliminary issue concerns the recoverability of post-award interest by ASD and ADNEC ("***the Interest Issues***") and is the subject of preliminary issues (8)-(10).

12. Although some of the later preliminary issues may not arise depending on the answers to earlier issues, the parties have asked the court to determine all the issues in case this judgment should be the subject of an appeal.

13. The procedural background is in outline as follows.

14. ASD sought leave to enforce the ASD Award as a judgment pursuant to sections 66 and 101(2) of the Arbitration Act 1996 and to enter judgment in the terms of the award pursuant to sections 66(2) and 101(3), and an order to that effect was made on 16 November 2016. ASD then approached Beazley seeking a copy of the 2008/2009 Primary Policy with a view to making a claim under the 1930 Act, Beazley having previously indicated that it was RMJM's professional indemnity insurer and that the relevant policy year was the 2008/09 year.

15. ADNEC applied for pre-action disclosure against Beazley's parent company (Beazley PLC) seeking disclosure of information and documents relating to RMJM's insurance arrangements under *inter alia* CPR 25.1(1)(i) and 31.16, and section 2 of the 1930 Act, also with a view to making a claim under the 1930 Act.

16. Before those requests had been resolved, Beazley commenced stakeholder proceedings under CPR 86 on 25 November 2016, apparently concerned that ASD and ADNEC were advancing conflicting claims for indemnification under the 2008/09 Primary Policy in circumstances where it was unclear which claim had priority and where the cover provided was insufficient to pay both claims.

17. A CMC was held on 31 January 2017 pursuant to which the proceedings were reconstituted as Part 7 proceedings with ASD and ADNEC assuming the role of claimants. Disclosure was ordered of documents relevant to RMJM's insurance arrangements and the notification of ASD's and ADNEC's claims to insurers.

18. Statements of case were exchanged and a further CMC was held on 13 July 2017 at which Blair J gave directions for the present trial of preliminary issues. Thereafter, in light of a number of amendments made to the parties' pleadings and a proposed Part 20 claim by Beazley against the Excess Insurers, the parties agreed (subject to the court's endorsement) to include a number of additional issues. I approve the addition of those issues.

19. Some of the issues have given rise to significant differences of understanding between the parties as to their scope. It was common ground between the parties that the court is not at this trial asked to decide whether or not RMJM actually had any liabilities to ASD and ADNEC: that is a matter for a later date. However, preliminary issues 1 and 2 ask the court to decide whether any such liabilities fell within particular notifications made by RMJM to insurers. As explained later, in certain respects that would require one to determine the basis on which RMJM was liable to (in particular) ASD, because different problems with RMJM's professional work were notified at different times. Thus those preliminary issues (read literally) would in substance involve the court reaching conclusions about the basis of any RMJM liability without determining what liabilities it actually had. One can envisage cases where such an approach would present no difficulty because it would be clear on what basis the liability, if any, arose. In the present case, though, some complex questions arise as to the basis on which RMJM was liable (if at all) for delays in the progress of ASD's construction project. The parties had different expectations as to whether the court could or should (a) decide, to the extent necessary, what the basis of any RMJM liability was, or (b) decide under which notifications/policy years any liability fell on various assumptions, the choice between which would be determined later if not agreed. As I explain later, only the latter approach is feasible in this case, bearing in mind among other things that it is not common ground between the parties that the ASD Award can be taken as determinative of the basis on which any RMJM liability arose. Leading counsel for Beazley indicated during the hearing that he had had some concerns of this nature when the proposed preliminary issues were being formulated, and I think those concerns were well founded. That is not to say, however, that I consider the decision to have preliminary issues to have been mistaken, even with hindsight. On the contrary, I very much hope that the findings set out in this judgment will narrow the issues between the parties, and preferably assist them in reaching an agreed resolution of this dispute without the need for further litigation.

(B) BACKGROUND TO THE DISPUTE

(1) RMJM

20. RMJM is a Scottish firm which carried on business as construction design consultants with a branch office in Dubai. Its partners comprised two companies which themselves formed part of a larger group of companies, of which the ultimate parent was RMJM Group Limited.

21. The ASD and ADNEC Awards arose from three contracts entered into by RMJM with the Claimants.

22. First, RMJM entered into a Consultancy Services Agreement with ASD dated 8 May 2005 ("***the CSA***") pursuant to which RMJM agreed to carry out the design and construction administration of a new school campus at Al Barsha, Dubai. Sector A of the project included an indoor athletics facility referred to as the Field House. Sector B of the project included a theatre.

23. Secondly, RMJM entered into two related contracts with ADNEC for the provision of consultancy services for the construction of Phases 1 and 2 of the Abu Dhabi National Exhibition Centre. The Phase 1 contract was entered into in October 2006 and the Phase 2 contract in November 2007 ("***the ADNEC Contracts***").

(2) The Arbitration Awards

24. Disputes arose under all three contracts and were referred to arbitration. ASD submitted a Request for Arbitration under the CSA on 9 April 2014, ultimately resulting in the ASD Award.

25. ADNEC submitted requests for arbitration under both of the ADNEC Contracts on 23 May 2013, leading ultimately to the ADNEC Award.

(3) The ASD and ADNEC Notifications

26. During the performance of the CSA and the ADNEC Contracts, RMJM made numerous notifications to insurers, many of which related to other contracts but some of which concerned the ASD and ADNEC projects. All circumstances notified were included on bordereaux submitted to insurers and allocated a reference number.

27. In the case of ADNEC, two of those notifications (no. 925 dated 30 March 2009 and no. 928 dated 14 April 2009) ultimately gave rise to the claims determined by the ADNEC Award. No issue arises about those notifications in relation to the preliminary issues. It is common ground that their effect is that RMJM's liability (if any) for the ADNEC Claim attaches to its professional indemnity policies for the 2008/09 policy year.

28. In the case of ASD, the first relevant notification was notification 923/08-09 dated 31 March 2009 ("***Notification 923***") which was given during the 2008/2009 policy year. The Notification was given to and/or via Integra Technical Services Ltd ("***Integra***"), a claims handling and loss adjusting services company engaged by RMJM.

29. ASD made at least two notifications during the 2009/10 policy year: notification 953/09-10 dated 10 September 2009 ("***Notification 953***") and notification 963/09-10 dated 6 December 2009 ("***Notification 963***"). It is said that further relevant notifications were also given to later policies – notifications 1030 and 1033 – the latter being a broad notification made after ASD first intimated a claim against RMJM. However, those later notifications are not the subject of the present preliminary issues.

30. The primary question that arises on the preliminary issues is which of Notifications 923 and 953 – if either – related to the claims that were ultimately made by ASD and determined against RMJM in the ASD arbitration.

(C) THE PRELIMINARY ISSUES

31. There are ten preliminary issues, which can conveniently be grouped as follows:

    i) **The Policy Period Issues** (issues 1-4): these concern whether ASD's claims against RMJM attach to the 2008/2009 Policy or the 2009/2010 Policy. This essentially turns on whether ASD's claims arose out of a "*Circumstance*" notified to the insurers by Notification 923 or Notification 953:

        a) Notification 923 was given on 31 March 2009, so that if the notified Circumstance gave rise to ASD's claims, the claims would attach to the 2008/2009 Policy.

        b) Notification 953 was given on 10 September 2009, so that if the notified Circumstance gave rise to ASD's claims, the claims would attach to the 2009/2010 Policy.

    ii) **The ADNEC Defence Costs Issues** (issues 4-7)**:** these concern whether, if ASD's claims attach to the 2008/2009 Policy, Beazley is entitled to set off against ADNEC's and/or ASD's claims a sum representing defence costs that Beazley allegedly overpaid to RMJM in respect of RMJM's defence of ADNEC's claim; and

        a) if so, whether ASD is entitled to claim an indemnity from Excess Insurers under the 1930 Act in respect of the set-off amount;

        b) if not, whether Beazley is entitled to claim the overpaid defence costs from the Excess Insurers under the 1930 Act.

    iii) **The Interest Issues** (issues 8-10)**:** whether and on what basis ASD and ADNEC are entitled to recover post-award interest in relation to their respective awards.

32. The outcome of the Policy Period Issues will determine whether or not the Excess Insurers bear any liability for ASD's and ADNEC's claims. If the ASD claim attaches to the 2009/2010 Policy, the claims will not impact on the layers insured by the Excess Policies. The second group of issues arises only if the ASD Claim (or a sufficiently substantial part of it) attaches to the 2008/2009 Primary Policy.

33. The full text of the preliminary issues is set out in the Appendix to this judgment.

34. On the basis of the decision of Christopher Clarke J in *Omega Proteins Limited v Aspen Insurance UK Ltd* [2010] EWHC 2280 (Comm), [2011] 1 All ER (Comm) 313 (as approved by Christopher Clarke LJ in *Astrazeneca Insurance Co Ltd v XL Insurance (Bermuda) Ltd* [2013] EWCA Civ 1660, [2014] 2 All ER (Comm) 55), the ASD and ADNEC Awards are not binding on Beazley and Excess Insurers, and the correctness of those awards can be challenged by Beazley, Excess Insurers, ASD (in the case of the ADNEC Award) and ADNEC (in the case of the ASD Award). This has two particular consequences in the present context. It means that:

    i) any issues as to whether RMJM was in fact liable to ASD, and if so in what amounts, are not conclusively determined by the ASD Award and (if not agreed) fall to be determined at the final trial of this action; and

    ii) the ASD Award is also not binding as to the basis on which RMJM had any liability to ASD. For example, the arbitral tribunal's conclusions as to which alleged breaches by RMJM caused which losses (e.g. in relation to delay) are not binding as between the parties to the present proceedings.

(D) WITNESS EVIDENCE

35. I heard evidence from the following witnesses:

    i) Mr Alan Cave, who worked as an Associate in RMJM's Dubai office from August 2009 to 2011 and was involved in the submission of Notifications 953 and 963. Mr Cave gave evidence from Dubai via video link.

    ii) Mr George Elliot, who began working for RMJM in 1975 as an engineer but from 2005 was responsible for the firm's global professional indemnity programme until he was made redundant in August 2013. He was involved in the placing of the policies relevant to the present case and in Notifications 923, 953 and 963 as well as certain later events.

    iii) Mr Steven Jones, who joined ASD in September 2009 as project manager in relation to the Al Barsha school project, and was involved in dealing with the main contractor's extension claims in relation to that project as well as ASD's decision to pursue the arbitration claim against RMJM.

    iv) Mr David Morgan, who was a claims manager at Beazley from January 2003 to mid December 2013 and worked on the RMJM account from 2007 onwards.

    v) Mr Anthony Kerr, a senior claims manager at Beazley who joined on 3 May 2016 and took over the handling of the RMJM account from Rebecca Reidy of Beazley (who is currently on maternity leave).

36. I formed the view that each of the witnesses was setting out his genuine recollection to the best of his ability. It is relevant to record that Mr Elliot, in particular, gave evidence with considerable care and candour, and was willing to make what might be regarded as concessions where appropriate.

(E) ISSUE 1: NOTIFICATION 923

37. The first preliminary issue is:

> "Whether and to what extent the ASD Claim (or any part of it, and which part(s))
>
> (a) arises out of circumstances notified during the 2008/2009 policy year, and (b) falls within the period of cover provided by the 2008/2009 Primary Policy?"

(1) Facts

(a) The early phases of the ASD Project

38. In 2005, a company known as Hillier produced concept designs for the new campus of the American School of Dubai. Hillier merged with RMJM, and ASD and RMJM agreed that the campus would be built on the basis of the Hillier concept designs with RMJM acting as consultants on various aspects of the project ("***the ASD Project***").

39. RMJM provided services pursuant to the CSA, which indicated that RMJM would provide to ASD "*quantity [sic] assured multi-disciplinary service including contributions from the following skills: • Project Coordination • Architecture • Structural Engineering • Civil Engineering • Building Services Engineering (Mechanical, Electrical, Plumbing and Drainage)*".

40. A tender for the main contract works was issued in January 2006 based on detailed design drawings prepared by RMJM and a bill of quantities prepared by quantity surveyors DG Jones & Partners ("***DG Jones***"). On 13 December 2007 a UAE construction company called Al Ahmadiah Aktor LLC ("***AAA***") was engaged as main contractor. DG Jones provided costs consultancy services. At this stage, the completion date for the ASD Project was set at 30 June 2009.

(b) February to July 2008: Sector A Field House beams and columns

41. In or about February 2008, it was decided that a specialist review of the design of the post-tension (PT) beams in the Field House in Sector A was required as it appeared that due to the large spans the PT beams would more than likely require an increase in depth. A contractor (HABA Structural Systems LLC) was appointed to manufacture and supply post-tension beams for various structures within the project. These were the beams which supported the superstructure of the Field House and which in turn rested upon and were supported by the Field House columns. Post-tensioning is a method of

reinforcing a concrete beam by incorporating cables within the poured concrete and then tensioning the cables as the concrete dries and hardens.

42. At some time prior to June 2008, it was decided that the Field House PT beams needed to be doubled in size.

43. On 5 June 2008, DG Jones emailed RMJM, querying whether, in light of the PT beams doubling in size, there had been "*a comparable increase in the supporting columns and … any changes to the foundation design*". DG Jones sought RMJM's assurance "*that the supports to the beams are adequate*".

44. On or about 5 June 2008, RMJM responded to say that:

> "The columns and perimeter beams were increased in size to accommodate the larger PT beams. The foundations are OK."

45. By an email dated 11 June 2008, DG Jones responded:

> "I need this to be demonstrated to me. I need the drawings and calculations to show the column sizing and that the foundations are sufficient to take the extra point loads."

As noted below, this query remained unanswered for some months.

46. I should note at this point that according to the evidence of one of ASD's witnesses in the arbitration, Ioannis Korolis (the general manager of AAA):

> "The vertical columns appeared too small to safely secure the very large horizontal beams, and Mr. Dimitriou, the AAA Project Manager of the Project at that time, told me that he raised these concerns to RMJM prior to the [DM] imposing the 24 August 2009 hold, without any action by RMJM."

However, it is unclear when AAA is said first to have expressed any such concerns, and ASD pointed out that Mr Korolis did not join AAA until November 2009. It would not be right in these circumstances to place significant weight on these hearsay statements.

47. The last of the Issued For Construction (IFC) drawings incorporating the revised design was finalised on 22 July 2008, following which the drawings were approved by the Dubai Municipality ("***DM***") and sent to AAA two days later on 24 July 2008.

(c) 2008/09 co-ordination problems

48. In late 2008 and early 2009 it became clear that RMJM was failing adequately to coordinate the work and designs of the different disciplines on site. RMJM repeatedly produced site designs which lacked sufficient detail for contractors to coordinate their work to build the school as originally designed.

49. There had been a number of complaints made soon after construction began and which had continued in late 2008 and early 2009, as to the poor co-

ordination of and lack of detail in RMJM's design drawings, which had resulted in a number of Requests for Further Information ("***RFIs***") by AAA, and in some instances the suspension of construction. As examples, the court was shown:

i) a letter from AAA dated 30 December 2008 setting out a list of outstanding drawings, RFIs and material submittals required from RMJM;

ii) three Requests for Information from AAA dating from 14 February 2009, complaining of (a) a construction drawing, load schedule and schematic diagram containing no details for the lift loads, (b) the absence of MEP (mechanical, electrical and plumbing) details for the auditorium and theatre and (c) a discrepancy as to the number of swimming pool control panels required for Sector A: in each case setting out various specific queries;

iii) a letter dated 22 February 2009 from MEP contractors Drake & Scull, and a RFI dated 23 February 2009, both relating to a lack of detailed information about layout and electrical load for kitchen equipment in the kitchen area of Sectors C and D;

iv) a letter dated 4 March 2009 from Drake & Scull complaining of missing details about lighting, auditorium power and auditorium audio-visual requirements;

v) a letter dated 4 March 2009 from DG Jones asking for outstanding details of MEP services within the car park;

vi) minutes of weekly progress meetings referring to outstanding RFIs, such as those for the meeting on 17 March 2009 (shortly before Notification 923) which referred to a RFI regarding the irrigation tank design, and to the need for RMJM to explain why it had issued a new design for the reinforcement of the post tension beams after the beams for the first floor had already been cast; and

vii) a letter dated 22 March 2009 from DG Jones about outstanding structural changes stating:

> "I am concerned about the number of changes being made to the IFC drawings and that we have still not received the drawings for structural changes being made in Sectors A and B. Please advise me when these issues will be completed. These issues are extremely urgent and they are causing major concern regarding the length of time they have been outstanding."

(d) Events in relation to Sector A from November 2008 to March 2009

50. RMJM's resident engineer, Nabeel Kareem, wrote in an internal email dated 27 August 2009 (quoted more fully in § 81 below):

> "Back in November last year Contractor had raised concerns with the Client over building this same structure at sector A, because of stability concerns. We responded to them with 'calculations' only in Mid February '09 when the Client threatened to close the site and somehow managed to pacify their concerns. I regret deeply that I did not correct it earlier when we had the chance And [n]ow it has come back to haunt us. …"[1]

51. Beazley says that it is to be inferred from this email that AAA raised concerns with RMJM in November 2008 about the adequacy of the Sector A columns, and that the calculations later provided in February 2009 (see below) were produced by RMJM in haste, at the last moment, with the aim of pacifying DG Jones and AAA.

52. However, there is no independent evidence that in November 2008, or at any time prior to Notification 953 in September 2009, AAA or anyone else had suggested to RMJM that the Sector A columns were inadequate. It is questionable whether Mr Kareem would himself have been in a position either to judge that RMJM's original calculations had been inadequate or to rectify any inadequacies in them: the correspondence quoted in §§ 77 and 80 below (as well as evidence given by Mr Cave in cross-examination) suggests that the specialist structural engineer, rather than Mr Kareem, would have had the requisite knowledge. It is also notable in that regard that an email of 25 August 2009 from Mr Cave said *"we've been trying to get some support from Head Office for our RE [resident engineer, i.e. Mr Kareem] on site. DM have attended site and want information on the PT beams which our RE would feel more comfortable with support from a Structural Engineer."*

53. The contemporary documents do indicate that DG Jones during the period June 2008 to February 2009 repeatedly pressed RMJM to provide the calculations in order to demonstrate the adequacy of the columns, but not that anyone had actually suggested (or that RMJM had been concerned) that they were in fact inadequate.

54. At a weekly progress meeting on 4 December 2008, it was noted that RMJM was yet to submit its calculations for the PT beams and the Field House columns, and that these were urgent.

55. On 23 December 2008, DG Jones wrote to RMJM requesting calculations for "*the structural elements of Sectors A and D where the post tension beams are to be installed*" and stated:

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[1] The last phrase quoted was in fact typed as *"And how it has come back to haunt us"*, but the sense of the phrase suggests that the word "*how*" was intended to be "*now*".
Beazley also drew attention to an email from Kevin Legenza (RMJM Associate Director) to Mr Elliot of RMJM dated 10 December 2009 stating: "*The design [of the post tension beam] was our responsibility and was most likely not checked for the various stages of construction. The PT subcontractor was diligent in their works. They delayed their stressing works by 21 days to ensure the beams were of adequate strength to be stressed. We never checked the transfer beam for this case.*" However, this email appears to have related to beam cracks, which were the subject of Notification 963, rather than to the Sector A columns.

> "I have repeatedly asked for the calculations of the structural elements of Sectors A and D where the post tension beams are to be installed. Although RMJM have repeatedly given their assurance that the structural design of the foundations, columns and beams is more than adequate after the re-design of the post tensioning, I require the calculations to be checked to confirm this. The contractor is proceeding with his works based on these assurances and any changes to the design at this stage could prove costly. Please issue the calculations to AAA immediately for their records, clarification and subsequent distribution to the post tensioning subcontractor."

56. At the weekly progress meeting on 23 December 2008, it was noted that DG Jones still had not received the calculations for the structural elements supporting the PT beams, and that these had been outstanding for over 6 months. According to the minutes of the meeting, RMJM agreed to submit the calculations that week. However, this was not done and the relevant parts of the minutes of the weekly progress meetings on 30 December 2008, 6 January 2009 and 13 January 2009 were in almost identical terms.

57. On 22 January 2009, DG Jones sent a further letter to RMJM which effectively repeated the letter of 23 December 2008, and went on to state:

> "Further to my letter of 23 December 2008 and previous requests and letters I still have not received the calculations for the structural elements of sectors A and D where the post tension beams are to be installed. I reiterate my point that although RMJM have repeatedly given their assurance that the structural design of the foundations, columns and beams is more than adequate after the redesign of the post tensioning, I still require the calculations to be checked to confirm this. The contractor has been proceeding with the works based on these assurances. Please issue the calculations to AAA immediately for their review and subsequent distribution to the post tensioning subcontractor. I fail to understand why the calculations are not freely available as I was under the impression that a third party review had been carried out as per Dubai Municipality requirements.
>
> After the latest problem with the design, I am not confident regarding assurances that I have received on this matter and I am considering suspending the works in these areas until the calculations have been received and checked. As you can appreciate time is critical with this issue as we do not want to hold up the works. Therefore I will require submission of the calculations of the post tensioning and the calculations for the structural supporting elements by noon on Sunday 25 January 2009."

58. On 27 January 2009, DG Jones wrote to RMJM again, requesting calculations for "*structural elements of Sectors A and D where the post tension beams are to be installed*" and stating:

> "I feel that this is an urgent safety matter and the costs of my remedial work to be carried out increases on a daily basis. This issue needs to be resolved now. I feel that in order to mitigate escalating costs that will be incurred due to any remedial works, it is necessary to instruct your Resident Engineer to issue a notice to suspend the works in Sectors A and D that are affected by post tensioning. I will in due course be claiming from RMJM any costs associated with this delay and any remedial work costs incurred."

59. At the weekly progress meeting on 27 January 2009, it was again noted that DG Jones had not received the calculations for the "*stability check*" for the columns supporting the PT beams, and that these had been outstanding for over 6 months.

60. On 10 February 2009, RMJM wrote to DG Jones enclosing the structural calculations for Sector A. There is no evidence of any response to this letter. The issue about the provision of calculations ceased to feature on the weekly meeting minutes. Sector A calculations came off the agenda and were not raised again until some six months later.

61. The weekly meeting minutes indicate that, after the calculations were provided, Sector A was anticipated to come back on schedule. Minutes of a 17 March 2009 progress meeting between ASD, DG Jones, AAA and RMJM record that "*Sector A - behind schedule but is estimated to be back on schedule within 3 months*". Minutes of a progress meeting on 31 March 2009 record that "*Work Status. Sector A - behind schedule but is estimated to be back on schedule by the end of May*".

62. The events of 2008/09 concerning the Sector A calculations were the subject of two subsequent letters written by DG Jones in September 2009, after serious problems had emerged in relation to the Sector A columns. On 4 September 2009 DG Jones wrote:

> "RMJM never submitted the calculations so that we could have a third party review and assurances were given that there are no problems with the design. In January I warned RMJM of the consequences of not having the calculations checked and that remedial works will be required if we proceed but again I was assured by RMJM that the calculations were sound and that there would be no need to change the design."

However, in a letter of 23 September 2009 DG Jones conceded that it had in fact received the calculations on 10 February 2009 and that its letter of 4 September 2009 was incorrect in this respect, and continued:

> "It should have read, "did not submit the calculations", i.e. didn't submit the calculations within the period March 2008 to January 2009. However, when we did eventually receive them it was pointless carrying out a third party review because the concrete pour had already begun and the onus of ensuring that the calculations are accurate is on RMJM."

63. The evidence did not indicate the date on which the concrete pour began, in particular whether it started between DG Jones' letter of 27 January 2009 (threatening to suspend work on Sector A) and 10 February 2009 (when the calculations were finally sent to DG Jones), though the minutes of the weekly progress meeting dated 10 February 2009 appear to indicate that the casting of the first floor beams in Sector A had begun by that date. Since the adequacy of the calculations appears to have been regarded as highly important, with DG Jones chasing regularly for them up to and including 27 January 2009, it would be surprising if following the calculations' eventual production on 10 February 2009 they were left unchecked and in effect ignored merely because in the intervening two weeks the concrete pour had begun. At any rate, there is no evidence that RMJM was told this at the time, or knew that by reason of their lateness the calculations would be unchecked.

64. The evidence of Mr Elliot was to the following effect:

> "… What was to become the Sector A issue was not known about until several months later [than Notification 923]. Further, I believe that RMJM was confident in its calculations and that, as far as it was concerned, its provision of those calculations to DG Jones on 10 February 2009 drew the issue to a close. I am of the opinion that, if Notification 923 had been intended to cover any concern about/request for the Sector A calculations, RMJM would have expressly referred to it. In particular, I believe that RMJM would have expressly and clearly notified insurers of the serious structural issues that subsequently came to light regarding sector A (as opposed to the design and coordination complaint and miscellaneous deficiencies reference in Notification 923), if it had been aware of those issues at that time."

65. Mr Elliot accepted in cross-examination that he would not have had direct involvement in the projects that resulted in notifications or direct knowledge of the matters being notified.

(e) Notification 923: 31 March 2009

66. Notification 923 was prepared by RMJM and submitted to Integra on 31 March 2009. It consisted of (a) a professional indemnity insurance (PII) notification form prepared by RMJM personnel in Dubai, and (b) a letter dated 30 March 2009 from DG Jones which was said to be attached. Details were then forwarded to underwriters on the same day by Integra.

67. The form stated in relevant part as follows:

> "3.2 Date you first became aware of circumstances/claim:
>
> 30th March 2009
>
> 3.3 Please give a resume of the facts that have led to the current situation…
>
> …
>
> The current RMJM team took over the job in July 2008 issuing the previously tendered drawings for Construction. As the construction works are proceeding, it has become apparent that many works have not been thoroughly coordinated between the disciplines leading to the Contractor submitting numerous RFI's [sc. Requests for Further Information]. RMJM has decided to review the documentation and correct any serious errors of coordination with the aim of avoiding larger abortive works by the Contractor. We have informed the Client's Rep (DG Jones) of this and are presenting any proposed changes to them for their approval.
>
> RMJM received the "notification of potential claims" letter from DG Jones on 30th March 2009."

68. The letter of 30 March 2009 from DG Jones was said to have been attached to the notification form, and referred to potential claims against ASD by the main contractor, AAA. It stated in the relevant part as follows:

> "AMERICAN SCHOOL OF DUBAI – NEW CAMPUS AT AL BARSHA FIRST
>
> MAIN CONTRACT – Notification of potential claims
>
> [ASD] is aware that there are potential claims that will be sought by [AAA] for the works at the New Campus Site for errors or changes in design which are as a result of poor initial design by RMJM. The onus for checking the design and co-ordination of the designs is solely the responsibility of RMJM. Therefore [ASD] feels it has an obligation to inform RMJM that any costs associated with such claims will be passed from the school directly to RMJM."

69. On 1 April 2009, Integra wrote to RMJM's brokers Marsh Ltd ("***Marsh***") describing the position as follows:

> "Prior to merger Hillier had produced architectural design drawings for the American School in connection with the construction of a new school campus, set in approximately 27 acres in Dubai.
>
> The contractor was initially mobilised on site in December 2007 but the project was delayed, for reasons not associated

> with the Hillier work product, and works did not commence in earnest until September 2008. The current Edinburgh based project team took over the job in July 2008, issuing the previously produced Hillier drawings for construction. As the works have progressed it has become apparent that many elements of such works have not been thoroughly coordinated between different disciplines and packages, leading to the contractor submitting multiple Requests for Information (RFI's) to the design team.
>
> In view of this RMJM has decided to review the documentation and amend any errors of coordination in order to avoid abortive works by the contractor. The project clerk of works has been advised and proposed changes are being presented for consideration. In response RMJM has received notice of potential claims in respect of any additional costs that may be incurred. At this stage it is not clear what costs might be involved and notification is being made as a precaution. No reserve is proposed for present purposes but the possible need for a reserve is being kept under review."

70. Mr Morgan in his witness statement stated that he did not receive the DG Jones letter dated 30 March 2009 until mid-2013. The significance of this is considered in section (E)(3) below.

(f) Events from April to July 2009

71. After Notification 923 a number of further complaints were received by RMJM directly from AAA complaining of delays which it said had been caused by lack of design coordination, incomplete designs or changes that RMJM had made to its designs. In addition, DG Jones complained that revisions to drawings had led to construction in several areas being placed on hold, and warned that AAA might suspend work. On 7 May 2009, AAA said that it was reducing its resources on site due to the disruption caused, although it believed that would have only minor implications for the progress of the works. AAA attached a list of the main delay events encountered in the period since August 2008 said to be attributable to the problems described.

72. On 14 May 2009, DG Jones wrote to RMJM stating that ASD would be making claims against RMJM for errors and omissions from the drawings it had issued, which DG Jones said were presently being reviewed. It attached a package of four letters "*sweeping up*" the issues that had arisen as a result of alleged deficiencies in RMJM's designs.

73. Various meetings and discussions took place concerning the status of RMJM's designs. In addition, AAA wrote to RMJM setting out its assessment of the costs which it had incurred as a result of alleged design changes. There were further complaints thereafter, following which efforts were made to prepare a list showing the status of all drawings and any to which revisions were expected to be made. That was in order to enable AAA to draw up a revised works programme in light of the delays that had been caused, and to establish

the likely final project cost. AAA, ASD and RMJM continued to work on that revised programme into August 2009, by which time it appears that the drawings for Sectors A-C of the campus had been approved.

74. At the same time, however, on 18 May 2009 Neil Gregory of RMJM said in a Hotmail message "*There are no issues with the Sector A drawings where construction is complete except for the H/C slabs*", as to which Paul De Benedictis of ASD's Board commented "*Accepted. Our current coordination programme notes that the 2nd floor (roof) of Sector B Is scheduled for release on 18th May 2009*". The message exchange also commented on an apparent need to put Sector B works on hold as a result of a lack of co-ordination in relation to drawings.

75. Before the events of late August 2009 and Notification 953, the work in relation to the columns in Sector A had been completed, as recorded in the minutes of a progress meeting on 18 August 2009.

(g) Dubai Municipality intervention: August and September 2009

76. On 16 August 2009, there was a building collapse in Dubai. This led to DM carrying out spot checks on all projects under construction in Dubai, including the ASD project. Between 24 and 27 August 2009, DM inspected Field House and raised concerns about the structural stability and load-bearing properties of the columns.

77. Mr Kareem, RMJM's Resident Engineer, sent an email on 24 August 2009 headed "*EMERGENCY!!*" and stating:

> "DM inspector Ghalib, during his site inspections had been nagging and mumbling over PT beams at sector A for some time now. Last week, he picked up all the drawings and details from the Contractor here for study. Today, early morning he called Haitham, the Structural Engineer of AAA for clarification. Just now I have received a call from Haitham. We have an emergency that Ghalib and Abib the DM structural engineer wants to meet RMJM's structural engineer for the PT beams at their office now. Their main concern is whether the columns will take the loads.
>
> Right now he's instructed AAA to re-prop all the PT beams, (which they had recently stressed and are 50% de-shuttered).
>
> He's also specifically asked for the PT beam calculations, column/wall calculations. I think Zuhair had done some work on this. I will try to arrange for the PT subcontractor, NASA-BBR's Structural Engineer Mr Pillai also to attend. I cannot confirm whether he will come because earlier he had specifically rejected to come to DM for clarifications because it was not their design.

> Pls arrange for someone to defend our design with all necessary calculations and documents.
>
> The meeting at DM tomorrow 25 August, 11 am with DM's structural engineer Abid and inspector Ghalib."

78. DM stopped the works in Sector A of the campus on the basis that columns supporting the large post-tension beams in the Field House in Sector A appeared too thin and in need of reinforcement ("***the Sector A columns issue***").

79. RMJM held a series of meetings with DM following its initial intervention, as set out in Notification 953 itself. These led to the DM insisting on the strengthening of the columns and a review of the structure. It appears that RMJM's calculations were then re-reviewed and rejected by DM on 25 August 2009 and all further DM site inspections put on hold pending clarification from RMJM.

80. Mr Kareem wrote on 25 August:

> "I am extremely sorry to say that nobody from the structural department attempted to help out or attend the emergency meeting that DM called yesterday regarding some structural stability concerns which the DM inspector picked out with sector A.
>
> However three of us from site, myself, Haitham, structural engineer from the contractor at AAA, and Pillai, senior structural engineer from NASA-BBR, PT specialist contractor, met DM's senior structural engineers, engineer Shadhy and engineer Abid. As expected, I could not clarify their technical queries and concerns and they were upset that no structural designer from RMJM attended such a serious concern.
>
> I showed them the copy of the calculations we had prepared earlier. They rejected it outright, saying it is wrong. No end moments, no loading, (moments from first floor was not considered deliberately)? The PT beam was okay and the footings seemed okay but the 600 by 600 columns critical and in their analysis were failing. They need clarification from the Designer ASAP.
>
> Till then all RMJM applications will be put on hold, all site DM inspections are on hold.
>
> We have until Wednesday to clear this off or DM will take stern actions.
>
> As discussed, column calculations and end moment loadings were discussed with NASA-BBR back in March. We may be

> able to defend our design or the worse scenario come with some proposals to strengthen/brace the existing columns.
>
> So please arrange for somebody to prepare the calculations and discuss with DM engineers tomorrow 9.30 am."

NASA-BBR, referred to in the penultimate paragraph, were the post-tension beam subcontractors. The paragraph seems to imply that there had been a discussion with NASA-BBR in March 2009 about the column loadings, with no indication (so far as the evidence indicates) of their having raised a concern at that time.

81. On 27 August 2009, Mr Kareem reported as follows:

> "Today, we -- myself and Zuher Jassim met both the DM Structural Engineers, Eng Shadhy and Eng Abid at 10.30am. At the meeting, we conceded that the loadings were erroneous and 600 x 600 columns were critical and would fail.
>
> Now we have to propose how to strengthen the columns, either by bracing or increasing the size. This will have serious implications on the project, the completion dates and on our reputation at site and especially with the client all of which we will have to bear.
>
> Back in November last year Contractor had raised concerns with the Client over building this same structure at sector A, because of stability concerns. We responded to them with 'calculations' only in mid-February '09 when the Client threatened to close the site and somehow managed to pacify their concerns. I regret deeply that I did not correct it earlier when we had the chance And [now] it has come back to haunt us. Whatever we propose has to be in tandem Architects and MEP engineers, and with as-minimum-time impact as possible. I would request that this be done as soon as possible with the greatest urgency and we work out an ideal solution with the least time and design impact. All our implications will be on hold pending a resolution to this problem.
>
> Zuhair, many thanks for attempting to defend us today."

Mr Zuhair Jassin was an RMJM engineer.

82. On 4 September 2009, DG Jones complained that it had been told that the calculations which it had asked for "*in March 2008 and continuously through until January 2009 through site meetings and discussions*" and which had been provided in February 2009 were "*sound and that there would be no need to change the design*". On 8 September 2009, DG Jones then wrote to RMJM asking them to prepare revised calculations *"as a matter of extreme urgency"*.

83. It appears to have been this last letter which led RMJM to issue Notification 953 on 10 September 2009.

(h) Notification 953: 10 September 2009

84. On 10 September 2009 RMJM prepared a PII notification form, to which were attached various emails, letters and photographs, including the letters from DG Jones dated 4 and 8 September 2009. Details of the notification were forwarded by Integra to underwriters on 14 September 2009.

85. The DG Jones letter of 4 September 2009 stated:

> "I am outraged at the current situation which has arisen with the DM regarding the remedial works to the columns supporting the post tensioning within Sector A. I asked for the calculations to support the column and beam sizes within Sector A and D in March 2008 and continuously through until January 2009 through site meetings and discussions but I was assured during the entire period that the calculations were accurate and that they have received DM approval. RMJM never submitted the calculations so that we could have a third party review and assurances were given that there are no problems with the design. In January I warned RMJM of the consequences of not having the calculations checked and that remedial works will be required if we proceed but again I was assured by RMJM that the calculations were sound and that there would be no need to change the design. Therefore it is totally unacceptable that they were not checked and double checked and now we face the situation that the work in this area will be delayed and that remedial works to thicken the columns is required. Please check whether the same situation will arise in Sector D.
>
> In my opinion the current problems are directly due to the gross negligence of RMJM and I will be issuing a claim in this regard in due course, when the costs of the changes have been evaluated."

86. The DG Jones letter of 8 September 2009 pressed for revised calculations and warned of the consequences of this problem, stating:

> "I need to know when the submission of the revised calculations for the columns supporting the post tension beams will be submitted to the DM for their review. This needs to be considered as a matter of extreme urgency. Again, this submission and the subsequent remedial work will cause delay and disruption to the project and we need to take steps now to mitigate the delay and analyse the likely consequences for the completion of this project. It is imperative that you immediately check whether the same situation will arise in sector D as we are in the process of constructing the columns in

this structure to mitigate the remedial works and delay to this sector."

87. The PII notification form stated:

"**3.2 Date you first became aware of circumstances/claim:**

Circumstances – 27th August 2009

Potential Claim – 8th September 2009

3.3 Please give a resume of the facts that have led to the current situation…

The issue relates to the size of concrete columns supporting a large concrete beam. The local authority has raised concerns regarding the ability of these columns to support the beam in question. Timeline below:

- Design of structure by RMJM ME between December 05 and March 06
- Drawings issued to Dubai Municipality (DM) for Approval during the above periods
- DM approved drawings issued to Contractor 24/07/08
- Client raises concerns over structural stability of Sector A via 4nr letters between 23/12/08 and 27/01/09
- RMJM respond with structural calculations 10/02/09
- DM ad-hoc visit to site raised query on structural stability of Sector A and request meeting at DM Head Office 24/08/09
- DM state calculations issued during meeting not accepted and future project submissions to DM will be placed on hold until DM satisfied
- 2nd meeting with DM on 27/08/09 to discuss options for resolution.
- 3rd meeting with DM on 31/08/09 to discuss options for resolution
- 4th meeting with DM on 01/09/09 to discuss options for resolution
- 5th meeting with DM on 03/09/09 to discuss options for resolution. Confirmation from DM on preferred option

- Submission of revised drawings, calculations to be submitted to DM 10/09/09".

88. The attachments to the notification included, in addition to correspondence dating from August and September 2009 (including the emails from Mr Kareem dated 24, 25 and 27 August 2009 quoted earlier), (a) RMJM's letter of 24 July 2008 to AAA attaching the original drawings and (b) RMJM's letter of 10 February 2009 enclosing the calculations in relation to the Sector A columns.

89. In his email to Integra attaching the above notification form, Mr Elliot of RMJM said:

> "Please see attached PII Notification from Dubai regarding the design of Post Tension Beams.
>
> On the face of it the situation is serious and the letters from DG Jones dated 04/09/09 and 08/09/09 are particularly worrying with the mention of a claim and gross negligence.
>
> However I have subsequently talked to Dubai and received the attached e-mail which confirms that our design does work and we can defend the gross negligence claim BUT:
>
> • There has been a recent building collapse in Dubai and the Dubai Municipality ("DM") are "nervous"
>
> • The DM previously approved our design BUT when requested to submit more calculations earlier this year we failed to do so and this has aggravated the problem
>
> • The DM will not now accept our design and are insisting that we strengthen the columns AND have put any further approvals on hold until we do.
>
> • That particular sector of the building is now on hold but the rest of the project is progressing
>
> I think we need to post a reserve at least for Legal Advice at this time."

The "attached e-mail" referred to in the third paragraph of this message has not been identified.

90. When advising underwriters on 14 September 2009, Integra described the situation as follows:

> "An issue has recently arisen in relation to the design of the post tension beams, culminating in a complaint from DG Jones, the client's project managers. It has been suggested that the beams/supporting columns, as designed, are inadequate and require more urgent modification. Having checked their design

> RMJM consider that it works and that they should be able to defend any claims brought against them. However, there has been a recent building collapse in Dubai and the Dubai Municipality ("DM") are "nervous", despite having previously approved the RMJM design. Unfortunately when requested to submit more calculations earlier this year RMJM failed to do so and this has compounded the problem. The DM will not now accept the original RMJM design, are insisting that the columns are strengthened and have refused to give any further approvals until they do so. Consequently the affected sector of the building is now on hold, although the rest of the project is progressing.
>
> In order to prepare for what could, potentially, develop into a difficult dispute RMJM consider that it might be necessary for them to seek legal advice and we are waiting for an update. Pending further clarification we are suggesting a provisional reserve (ground up) of £50,000. Developments will be advised as they occur and the reserve recommendation is being kept under review."

91. No suggestion was made in Notification 953 that its subject-matter had been the subject of any earlier notification such as Notification 923.

92. RMJM on 14 September 2009 replied to DG Jones's letter of 4 September refuting liability and including the following points:

> "As per our previous statements to which you refer, the structures in question are currently and always have been structurally safe. The structural calculations you refer to within your letter as not issued were sent to DG Jones on 10 February 2009 via a letter reference ... and signed as received by yourself. We issued these calculations at your request for your onward use if required. "
>
> It has become clearly apparent from internal discussions with RMJM project managers that since the building collapse in Abu Hall on 16th August DM's structural department have carried out spot checks on all projects under construction in Dubai. It was at this time that DM noticed the apparent design of the columns supporting the beams within Sector A. At the request of DM we reissued the previously approved structural drawings to which DM raised objections to the design of the columns. RMJM have had numerous meetings with DM to emphasise the structural calculations are approved to which DM have requested additional support. RMJM have tried numerous non-intrusive design options to limit both cost and programme implications and presented these to DM with supporting documentation. DM have rejected these options and requested increasing the thickness of the columns in question. The revised drawings will be submitted to DM on 14 September.

> We will inform DG Jones of the anticipated approval date once received.
>
> If you require a structural meeting with our ASD dedicated RMJM senior structural engineer, we are more than welcome to accommodate your queries. [sic] Once we obtain the revised approved drawings.
>
> Once again, we reiterate that the design has always been structurally sound, the structural design was approved by DM and any amendments to the design column are additional strengthening at the request of DM. We strongly deny the comment that the issue in question is due to gross negligence of RMJM as this is purely a DM additional requirement."

93. DG Jones replied on 23 September 2009 rejecting this position and making the statement quoted in § 62 above about the submission of the calculations in February 2009.

(i) Notification 963: 6 December 2009

94. On 6 December 2009, a further notification (Notification 963) was provided to Integra referring to hairline cracks in the "*Transfer Beam spanning two columns supporting Post Tensioned Beams*".

(j) Subsequent developments: Variation Order No. 1

95. Although it was appreciated that the hold on Sector A imposed by the DM would cause delay to the project, the extent of that delay was unknown at that time, as construction of Sector A could not continue without the approval of DM and it was not known when that would be given or what remedial works (if any) might be required in order to obtain it.

96. The parties had been in the process of putting together a new project programme in order to take into account the delays that had occurred to date, including those arising out of the design coordination problems. AAA protested that it could not finalise its programme given the uncertainties now caused by the hold on construction in Sector A amongst other issues. In the meantime AAA continued to work on its revised programme, and had apparently completed it by 18 November 2009 subject to finalisation of RMJM's drawings schedule and the Sector A issues.

97. ASD and AAA negotiated a formal Variation Order to AAA's contract. The aim was to agree an extended time for completion to take account of the delays to the project to date, including in particular those caused by the drawings problems and the delay in obtaining a building permit, and to compensate AAA for its additional costs incurred as a result. The agreement was embodied in Variation Order No. 1 ("***VO1***") issued on 30 December 2009. The cut-off date selected for VO1 was 20 October 2009, but VO1 was dated 30 December 2009 and was signed by DG Jones and RMJM on 30 December 2009 and by AAA and ASD on 3 January 2010.

98. VO1 represented a resolution of all variation orders, extensions of time claims made and delay claims up to 20 October 2009, and stated that the work covered included "*changes in the design initiated by [RMJM]*". VO1 referred to "*All drawings issued by the consultant/sub-consultants, Main Contractor/sub-contractors up to 20th October 2009… All specifications issued by the consultant/sub-consultants, Main Contractor/sub-contractors up to 20th October 2009*".

99. A further variation order was also entered into on 30 December 2009 (Variation Order No. 2) with the project's MEP (mechanical, electrical and plumbing) sub-contractors, who agreed to a discount to their contract price, possibly recognising that the problems thus far were partly attributable to them.

(k) Subsequent developments relating to the Sector A columns problem

100. VO1 did not deal with the delays caused by the Sector A columns issue. The additional time that would be required as a result of that factor was addressed in VO1 by fixing new completion dates for each sector of the project except Sector A plus (apparently) a two month completion and testing period once all sectors had been completed.

101. In the case of Sector A, the new agreed date was stated to be "*Repairs duration + 6.5 months from receiving DM clearance*". Thus the parties agreed that AAA would need 6.5 months to complete Sector A from the date of receiving approval from the DM for the remedial works carried out. In effect, the overall agreed new project completion date, 31 August 2010, was thus subject to DM approval being obtained and any remedial works completed by the middle of February 2010.

102. RMJM issued revised structural drawings for Sector A on 21 October 2009, and ASD on 3 November 2009 engaged a firm of engineers, Hyder Consulting Middle East Ltd, to conduct an independent peer review of the designs. Hyder reported back on 23 December 2009 that in their view RMJM's structural scheme for Sector A was unsatisfactory in respects which appear to have concerned both seismic loading and normal loads:

> "(i) The isolated foundation system supporting the shear walls have inadequate resistance for overturning moments resulting from seismic forces.
>
> (ii) Bearing pressure under some of the footing supporting columns (under dead and live load) exceeds allowable bearing capacity the increase over allowable bearing pressure under these columns is around 15 per cent above the 150 kpa allowable.
>
> (iii) Some of the columns are overstressed."

103. By 18 May 2010 RMJM had drawn up a revised design for Field House, obtained approval for that design from ASD and the DM, and had instructed

AAA to subcontract with VSL Middle East LLC ("***VSL***") to carry out the proposed remedial work. Those works were not completed and approved by DM until 28 July 2010, when DM finally lifted its hold on Sector A. That was barely a month before the revised completion date of 31 August 2010 agreed in VO1. Apparently as a result of a dispute between RMJM and AAA as to what clearances and approvals were required before AAA could proceed with construction, although the remedial work was completed by 31 July 2010, the main works did not recommence until 20 September 2010.

104. The campus was finally handed over to ASD on 11 April 2011 (i.e. approximately 6.5 months after the revised completion date agreed in VO1) although it appears that testing, completion and snagging work continued into the autumn.

(l) The delay to Sector B

105. Separate problems arose in relation to Sector B of the campus, which contained the school theatre and music rooms, the designs for which required specialist acoustic input.

106. RMJM had specifically disclaimed responsibility for preparing acoustic designs under the terms of the CSA, and had drawn attention to the fact that it had made no allowance for acoustic treatment when providing its original designs to ASD in 2008. RMJM's letter of 24 July 2008 to AAA (copied to ASD and DG Jones) enclosing drawings, schedules and specifications for the project included the statement:

> "Please note that we have not made any allowance for acoustic treatment to the music rooms (including doors) and that recommendations will need to be sought from an Acoustic Specialist."

107. According to the arbitral tribunal, AAA notified RMJM on 29 August 2009 that it had not yet received the IFC drawings for the Sector B theatre. ASD then instructed DG Jones to commence the appointment process for an acoustic consultant in November 2009. VO1 set a new completion date for Sector B as 31 May 2010.

108. Disagreements between ASD and RMJM as to what responsibility RMJM had for the appointment of acoustic sub-contractors (if any) were not resolved until 27 April 2010. The necessary acoustic designs were then eventually produced on 18 May 2010, apparently on the basis that the acoustic work would take until 10 September 2010 to complete. AAA contended that that meant that it could not commence acoustic work to the theatre until 11 September 2010, whereas it had previously intended to commence the work on 10 April 2010.

109. As well as the acoustic designs issue, there was a delay in obtaining DM approval to the structural steelwork design to the Sector B theatre. Until the structural steelwork had been completed, it appears the acoustic work could not begin. AAA had planned to commence the steelwork fabrication on 24 November 2009, but DM approval for the Sector B steelwork was not

provided until 14 June 2010, and work did not then commence until 12 July 2010 following a query raised by AAA which caused a short further delay. In the end, fabrication of the steelwork was not completed until 27 September 2010, by which time the acoustic designs were ready.

(m) The ASD/RMJM dispute and arbitration

110. The delays which occurred following the date of 20 October 2009 specified in VO1 prompted AAA to submit various extension of time ("***EOT***") claims to ASD. After the project had been handed over, AAA then submitted a comprehensive EOT claim on 30 June 2011 claiming prolongation costs of AED 71.8m on the basis that ASD and RMJM were responsible for delays amounting to 299 calendar days (from 31 August 2010 to 26 June 2011, although the latter date was in fact after the site had been handed over to ASD).

111. On 15 December 2011 ASD's solicitors Ince & Co ("***Ince***") wrote to RMJM identifying alleged breaches by RMJM in ten bullet points including "*failure to provide adequate detailed design to allow for the construction of the works*" (the first bullet point) and "*failure to adequately design the Sector A structural engineering works in accordance with local building regulations, requirements and rules*" (the second bullet point). Ince noted that AAA was pursuing a claim against RMJM, and added:

> "As a result of the above failures the completion of the Project was substantially delayed. By virtue of Variation Order 1 dated 30 December 2009 the Project was due to be completed on 31 August 2010. But on account of your numerous breaches, completion was substantially delayed until 10 April 2011 (in accordance with your recent determination) some 223 days."

112. Integra passed Ince's letter to Marsh, suggesting that the relevant matters had been notified to insurers by way of Notification 923. Integra made no mention of Notification 953, possibly because RMJM and Beazley had agreed a month earlier that Notifications 953 and 963 could be closed in the absence of any developments. However, Integra noted that RMJM was still investigating and was considering whether to make a separate notification to RMJM's current insurers.

113. In a separate email, Mr Heath of Integra said it was considered that *"most of"* what was being alleged fell within Notification 923 because (so he suggested) the thrust of the complaints made by Ince was poor coordination, but reiterated that he was considering whether notification to current year underwriters was required. Having considered the matter further, Integra later informed Marsh by a letter of 20 January 2012 that *"it is now considered that the issues being raised by [ASD]… go way and beyond matters already otherwise notified"*. Formal notification was therefore subsequently made to RMJM's 2011-2012 policy year underwriters on 20 January 2012, with Notification 1033.

114. Shortly afterwards, AAA produced a revised EOT claim on 13 February 2012 on the grounds that the original EOT claim had been prepared on the wrong

basis. The report constituted a critical path analysis suggesting that there had been 222 alternatively 365 days of delay imposed by ASD, as from 31 August 2010 (the revised completion date agreed in VO1) and claimed prolongation costs of AED 68.98m alternatively AED 63.16m.

115. The revised EOT claim set out some 175 alleged delay events, each of which was described in some detail. These included "*Event No. 39: Late Instruction of nominated Subcontractor for Acoustic Treatment Works Part I*" (the relevant acoustic works being for the Sector B theatre) and "*Event No. 57: Late Issuance of IFC Drawings and Late Instruction of nominated Subcontractor for, and Approval to proceed with, Structural Repair Works to Sector A*". AAA indicated that its claim was concerned with delays after 20 October 2009:

> "… 4. As a result of delays in issuing the building permit the works were suspended. This suspension together with the consolidation of changes in the design resulted in Variation Order No. 1 being issued, and agreed, on 30 December 2009. Accordingly, the parties agreed a revised Contract Sum and Revised Final Date for Completion of the Works of 31 August 2010. This Variation Order took into account all claims and changes up to 20 October 2009 …
>
> 1.22 VO No. 1 and the new revised Completion Date were intended to reflect the events leading up to its signing and to draw a line under delays and changes up to 20 October 2009. However, there have since that date been some 431 No. Variations and considered here are 175 notified Delay Events which have completely changed the nature of and circumstances under which the Contract Works were to have been completed …
>
> 1.32 Section 2.0 of this Submission provides details of the contractual and other entitlement to the additional preliminary costs that the Contractor has incurred beyond 20 October 2009 …"

116. The revised EOT claim indicated that six of the alleged events had been primarily responsible for the delays:

i) Event No. 57: the delay caused between 21 October 2009, when RMJM produced its revised drawings for Sector A, and 18 May 2010, when the DM-approved designs for Field House were finally provided to AAA.

ii) Event No. 65: delay relating to the Sector B steelwork.

iii) Event No. 94: the delay to 20 September 2010 in obtaining clearances and approvals to enable AAA to recommence the construction of Sector A.

iv) Event No. 144: which apparently concerned additional plumbing and drainage works to Sector A drawn up on instructions given by ASD on about 27 December 2010.

v) Drainage and domestic water testing and commissioning to Sectors B and C.

vi) "Summer works", constituting work carried out between May and August 2011 after the site had been handed over to ASD, apparently because the work could not be carried out during the school term time.

117. The subsequent expert report of Mr David Atkinson dated 12 November 2015, prepared for the purposes of ASD's claims against RMJM in the ASD arbitration, indicated that of these six main delay events identified by AAA only the first four delayed the critical path of the project. At §§ 7.1.16 and 7.1.17 of his report Mr Atkinson stated:

> "… the Contractor's Time Impact Analysis shows that the critical path initially ran through Sector A (Event 57). Thereafter it is demonstrated to have moved to Sector B (Event 65) for one three month Window before returning to Sector A (Event 94 and Event 144).
>
> This switch in the critical path is shown to take place, from Sector A to Sector B, because the Contractor was instructed to carry out additional acoustic works to Sector B in June 2010, at a time when the delays to Sector A (Event 57) had already fully crystallised and at a time when another delay event (Event 39) was shown to have already impacted Sector B.
>
> [footnote] Event 39 – *Late Instruction of nominated Subcontractor for Acoustic Treatment Works Part.* This event was shown (by the Contractor in its Time Impact Analysis) to use up an element of float on Sector B (relative to Sector A) before Event 65 occurred. Event 65, occurring later, was shown to use up the remaining float and hence shown to critically delay completion."

118. Mr Atkinson also noted that:

i) he had not been provided with information to assess the impact of Event 65;

ii) he had not been provided with information with which to undertake a detailed review as to whether the delay 'fragnets' used by AAA were reasonable for modelling the impact of Events 65 and 144;

iii) he had therefore limited his opinion to AAA's Time Impact Analysis Windows 1 and 2 i.e. the delay from 7 October 2009 to 1 April 2010;

iv) the results of that Analysis were reasonable in showing that Event 57 caused a critical delay to completion of the works throughout the 175 day period from 8 October 2009 to 1 April 2010; and

v) because of shortcomings in AAA's Time Impact Analysis and the lack of information provided to him, Mr Atkinson was unable to conclude on the reasonableness of the results for Windows 3 to 6, i.e. delay from 1 April 2010 onwards. However, Event 57 was likely to have been critical to completion over a period of 223 days from 8 October 2009 to 19 May 2010 during which AAA was unable to commence the remedial works.

119. The revised EOT claim produced a dispute which AAA referred to arbitration on 15 March 2012 claiming a total amount of AED 115,615,293, of which about AED 63,000,000 related to "*prolongation, disruption & delay recovery measures, head office overheads*".

120. AAA and ASD subsequently entered into a settlement agreement in respect of AAA's claim on 3 June 2012, by which ASD settled AAA's claims in the total sum of AED 54,114,833, of which AED 14,579,000 related to prolongation costs. ASD has said this settlement was based on the Sector A issue, citing *inter alia* the evidence of Phillip Garrison, the Chairman of ASD's board of trustees that "*The Board agreed to pay the prolongation costs to AAA on the basis of Sector A*".

121. On 5 May 2013 Ince wrote to RMJM again. They stated that ASD's complaints remained as previously stated but added that *"it has further come to our client's attention that the original structural design in relation to Sector A was wholly inadequate due to numerous structural failings"*, and indicated that ASD held RMJM responsible for the resulting delays and losses suffered. Ince formally invoked the dispute resolution provisions in the CSA by inviting RMJM to engage in "*meaningful dialogue*".

122. RMJM sent Ince's letter to Marsh, noting that Ince's allegations concerning Sector A *"would appear to be circumstances notified under Bdx 953"* and stating that they would reopen Notification 953 as a precaution.

123. A further letter was received from Ince on 17 June 2013, again stressing RMJM's alleged failings in relation to the Sector A delays.

124. ASD commenced an arbitration against RMJM on 9 April 2014 seeking damages for breach of the CSA and to recover the sum paid by it to AAA amongst other amounts.

125. The total claims as presented in the ASD arbitration were for AED 30,407,120. ASD alleged a number of broad breaches of a contractual duty to exercise reasonable skill and care, in brief outline as follows:

i) That the Sector A / Field House design had been unsafe.

ii) That RMJM's design services had been deficient in that its designs were insufficiently detailed, leading to Variation Orders and RFIs from AAA. RMJM was alleged (i) to have failed to include design elements required by the DM building codes; and (ii) to have failed sufficiently to detail its designs and to coordinate the various design disciplines prior to tender and prior to issuing drawings for construction. The specific allegations concerned acoustic design, joinery packages, safety items and classroom amenities.

iii) That RMJM's coordination and administration services were deficient because it had failed to staff the project properly.

126. These breaches were said to have caused various losses in the form of delays to the project occurring between the contractual completion date agreed under VO1 of 31 August 2010 and the actual completion date of 11 April 2011. In its Statement of Claim in the arbitration, ASD stated:

> "22. In December 2009, ASD and AAA agreed on Variation Order ("VO") No. 1 and VO No. 2, which marked a fresh start and settlement to scheduling and compensation for the Project up to 20 October 2009, VO No. 1 and VO No. 2 provided an additional AED28,627,091 in compensation to AAA, and for the first time a definitive base construction program was agreed, which provided for a revised completion date of 31 August 2010. As Project Engineer, RMJM was closely involved in assessing and agreeing VO No. 1, VO No. 2, and the construction program …
>
> 24. VO No. 1 and VO No. 2 represented a resolution between ASD and AAA of all VOs, claims, and delays prior to 20 October 2009. Accordingly, ASD's claim in this arbitration uses 20 October 2009 as its starting point for assessing liability for the delay in completion beyond the revised completion date of 31 August 2010. The revised contract amount of AED361,196,119 payable to AAA is also used as the baseline for determining the damages incurred by ASD …
>
> 52. The final sections of the new campus were officially handed over to ASD on 11 April 2011. AAA subsequently submitted a Final EOT claim, dated 13 February 2012, encompassing all delays and costs after VO No. 1 and VO No. 2 …"

127. The witness statement of Mr Jones of ASD in the arbitration included this statement about the causes of the delay (prolongation) costs:

> "The delays to Sector A and Sector B were the dominant and insurmountable causes of the overall delays to the completion of the Campus. AAA's performance was not flawless and there were other delays, but the critical delays that we could not recover were Sector A and Sector B."

and:

> "My personal conclusion and recommendation to the Board was that AAA had an entitlement to prolongation costs based on the delay caused by the Sector A Field House and the Sector B theatre. While AAA's claim encompassed a host of other delay events, the vast majority were minor or inconsequential. My understanding of the settlement was that the prolongation costs awarded to AAA were in connection with Sectors A and B, and my opinion is that ASD secured a very favourable settlement in that regard."

128. ASD claimed damages in respect of the alleged breaches under five heads:

i) AED 3,370,269 for the costs of carrying out remedial work to the Sector A Field House.

ii) AED 1,900,940 for costs of VOs in respect of matters other than Sector A.

iii) AED 6,953,704 for costs incurred to mitigate the impact of the delays in completion to the project, including by renting part of the school's old campus while ASD was unable to occupy all of the new campus.

iv) AED 14,578,514 for the prolongation costs paid by ASD to AAA. These were said to have been caused by the construction hold placed on Sector A as a result of the Sector A columns issue, and also by the delay in production of acoustic designs for Sector B, which were said to have been concurrent.

v) AED 2,325,913 for fees paid to RMJM between September 2010 and March 2012.

129. On 25 September 2014 the arbitral tribunal issued its Procedural Order No. 1 setting out a timetable for the arbitration.

130. On 24 September 2015 RMJM was placed into sequestration. After considering submissions from ASD and correspondence from RMJM's trustee and solicitors acting for Beazley, the tribunal decided to proceed with the arbitration.

131. The final hearing in the arbitration took place from 17-20 January 2016. The tribunal heard evidence from ASD's witnesses of fact and experts. RMJM was not represented and did not call any evidence.

(n) The ASD award

132. On 31 May 2016 the tribunal issued the ASD Award, awarding ASD the sum of AED 25,952,514, together with simple interest at the rate of 9% per annum and costs of AED 5,608,909.54.

133. The tribunal analysed ASD's claim against RMJM under four main headings.

134. (1) Sector A Field House: The tribunal held that RMJM's "*original design of the Field House was not executed with reasonable skill, care and diligence as evidenced by the fact that it failed to cater for the load scenarios prevalent in Dubai, it failed to properly comply with the DM regulations then applying and it failed to provide for a safe structure*."

135. The tribunal rejected RMJM's pleaded case that the cause of the delays to the Field House was a change of position by the DM and that having previously reviewed and approved the structural design of the Field House the DM "*then changed its position following the inspection on site despite the fact that the design complied with the DM's requirements*". The tribunal held that the original design had not complied with DM requirements and that, in any event, RMJM's obligation extended beyond producing a design which was compliant with the DM's requirements and instead obliged it to produce a safe design.

136. In finding that RMJM's design had not complied with the DM's requirements, the tribunal accepted the evidence of Mr Ahmed al Hashimi, whose report was adduced as expert evidence by ASD. In Mr al Hashimi's opinion RMJM's original design of the Sector A structure, including the columns, was inadequate both with regard to normal loads, i.e. loads excluding earthquake actions, and with regard to seismic loads; further, particular features of the design (including the roof structure) meant that it was necessary to consider seismic loading even though the building would have fewer than five floors.

137. The tribunal also held that RMJM had "*failed to proceed with due speed between the imposition of the DM hold on Sector A construction to the start of the remedial works*" and that "*the period of 9 months taken by [RMJM] to proceed with rectification works was excessive*."

138. (2) Acoustic design in the theatre and elsewhere: The tribunal rejected an allegation by ASD that RMJM was in breach of duty in failing to advise it of the need to appoint a specialist acoustic consultant, but held that RMJM was at fault in producing drawings "*up to and including 2009 [which] lacked the acoustic design which, by that time, would reasonably be expected to be needed to allow the Project to proceed.*" The tribunal held that RMJM should instead have "*advised [ASD] that it could not produce adequate drawings in the absence of the requisite acoustic design.*"

139. (3) Level of detail in RMJM's drawings and designs: The tribunal held that *"some of the drawings which [RMJM] produced lacked (1) the details and (2) the cross referencing to other design documents, which a designer using reasonable skill, care and diligence would have included*".

140. (4) RMJM's personnel: ASD had alleged that the personnel deployed by RMJM were not sufficiently qualified or experienced to handle the complexities and demands of the project. However, the tribunal found that this allegation had not been proven.

141. The tribunal then awarded ASD damages as follows:

i) Remediation costs of AED 3,370,269. These were the costs incurred by ASD in rectifying the defects in the design of the Sector A columns.

ii) Mitigation costs of AED 733,923. These costs related to the employment of Mr Jones by ASD as Project Manager to address the delays encountered on the project.

iii) Mitigation costs of AED 4,943,895. These costs were incurred by ASD in hiring alternative premises, this being necessary because of the delay in the completion of the project.

iv) Prolongation costs of AED 14,578,514 paid to AAA.

v) Fees paid to RMJM of AED 2,325,913. The tribunal held that such fees represented overpayments which should be reimbursed as they resulted from the period of delay attributable to RMJM's above breaches.

142. Items (ii)-(v) thus related to delay. The tribunal did not seek to allocate particular periods of delay to the particular breaches identified above. Instead, it stated that it was:

> "satisfied that:
>
> 14.15.1 the stop on the Sector A Field House must have had a material impact upon the progress of the works;
>
> 14.15.2 [RMJM's] failure to advise [ASD] that it could not produce drawings in the absence of the requisite acoustic design will, on the balance of probabilities, have had an impact on the progress of the works; and
>
> 14.15.3 [RMJM's] failure to provide drawings which properly included the details and the cross referencing to the other design documents will, on the balance of probabilities, have had an impact on the progress of the works."
>
> 14.16 The Tribunal is satisfied that it was a natural consequence of the breaches set out in paragraph 14.15 above that AAA would be delayed in performing their works on the Project, causing a liability for the Claimant to pay prolongation costs. Further, the Tribunal is satisfied that the Claimant mitigated that loss by reaching a settlement with AAA."

143. These conclusions do not appear to have been primarily based on either AAA's EOT claim of 12 February 2012 or on the expert report of Mr Atkinson which ASD adduced in evidence. The tribunal noted that the parties had not put in evidence the programme that AAA had submitted as the basis of its EOT claim, and that the details of exactly what analyses and exercises Mr Atkinson had carried out had not been explained. As a result the tribunal did not find Mr Atkinson's report to be of much assistance, and placed little weight on it. Instead, the tribunal indicated that it had based its findings on

delay on *"extensive further evidence of delay being caused by [RMJM's] breache[s] of Clause 5(1) of Part I of the Agreement [which required RMJM to exercise reasonable skill, care and diligence in the performance of its obligations] from the witnesses of fact who gave sworn testimony"*.

144. The tribunal considered the question of causation further when dealing with the application of the contractual limit of liability contained in the CSA. This provided that the maximum amount of compensation to be paid by RMJM to ASD in respect of liability pursuant to that agreement was "*Sterling 5,000,000 on any single claim or series of claims arising out of the same original cause or source*". The tribunal held that this limit applied to ASD's claim:

> "It is therefore necessary to identify whether any of the claims which the Tribunal awards to the Claimant arise from *"the same original cause or source"*. The Tribunal holds that all of the heads of claim on which an award are made primarily arise out of [RMJM's] breach of Clause 5(1) of the Agreement in the preparation of the design of the Field House. Therefore the liability of [RMJM] is limited to GBP 5,000,000."

145. The tribunal noted that:

> "5.4 It is common ground between the Parties that the Project was affected by delays from the outset. The Claimant entered into renegotiations of its contract price with AAA, which culminated in the agreement of two Variation Orders ("VOs"). VO No. 1 and VO No. 2 were both agreed on 30 December 2009. This represented a resolution of liability for certain changes and claims raised by AAA up to 20 October 2009, and provided for a revised final date for completion of 31 August 2010. The matters addressed in VO No. 1 and VO No. 2 do not form part of the subject matter of this reference …"

146. The tribunal rejected a claim originally put by ASD at AED 5,883,149, but reduced to AED 1,900,940 in the course of the hearing, for the costs of various other Variation Orders said to be attributable to RMJM's inadequate design.

147. A number of the allegations of breach made by Ince in its letter of claim of 15 December 2011 were not pursued by ASD in the arbitration (viz the third bullet point "*over engineering of the Project as a whole*", the fifth bullet point "*failure to adequately design the external surface water drainage to the Project*", the sixth bullet point "*failure to adequately design the foul water drainage to the Project*", the eighth bullet point "*failure to respond in a timely and adequate fashion to Requests for Information*" and the tenth bullet point "*failure to consider and provide an adequate and detailed response to AAA, the contractor's claims for an Extension of Time*").

(2) Applicable provisions and principles

(a) Terms of the primary policies

148. Both the 2008/2009 Primary Policy and the 2009/2010 Primary Policy contained *inter alia* the following provisions:

> "1.1 Insuring Clause
>
> In consideration of the Assured having agreed to pay the premium shown in the Schedule, Underwriters agree, subject to the terms, conditions and exclusions of this policy, to indemnify the Assured, up to the Limit of Indemnity, for any claim for compensation and/or damages (including claimant's costs and expenses) first made against the Assured and notified to Underwriters during the Period of this Policy which the Assured may become legally liable to pay and which arises out of the exercise and conduct of the Assured's Professional Business by the Assured and/or by others on behalf of the Assured.
>
> 1.2 Defence Costs in Addition
>
> Underwriters will also indemnify the Assured for Defence Costs (see 6.5) where such costs have been incurred with Underwriters' consent. Such Defence Costs are payable in addition to the Limit of Indemnity shown in the Schedule.
>
> In the event that a settlement is made with any party in excess of the amount of the Limit of Indemnity, Underwriters' liability in respect of Defence Costs shall be in the same proportion that the Limit of Indemnity bears to the sum which would be eligible for payment but for the restriction of the Limit of Indemnity
>
> …
>
> CLAIMS CONDITIONS
>
> The following claims conditions and the more general conditions listed under Section 5 apply to this policy:-
>
> 3.1 All conditions contained in Section 3 are deemed to be conditions precedent to liability.
>
> Discovery of a Claim or Circumstance
>
> 3.2 a) If during the Period of this Policy the Assured shall receive any claim, the Assured shall give notice (see 3.3) to Underwriters as soon as practicable, but in any event not later than expiry of the Period of this Policy.

b) If during the Period of this Policy the Assured becomes aware of any Circumstance, the Assured shall give notice (see 3.3) to Underwriters of such Circumstance as soon as practicable but in any event not later than expiry of the Period of this Policy.

Underwriters agree that any such Circumstance notified to them during the Period of this Policy and which subsequently gives rise to a claim after expiry of this Policy shall be deemed to be a claim first made during the Period of this Policy.

Notice

3.3 Notice to Underwriters under Clause 3.2 shall be deemed to have been properly made if received in writing by:

Integra Technical Services [contact details set out]

and;

Beazley Group plc [contact details set out]

A bordereau shall be prepared by Integra Technical Services containing details of all claims notifications. The bordereau will be prepared at intervals of approximately five and ten months after inception of this Policy until such time as all notifications are closed and/or claims paid.

Marsh Limited shall circulate the bordereau to Underwriters in accordance with requirements of the individual slip conditions.

3.4 Notwithstanding Clause 3.2. if the Assured becomes aware of a claim or discovers any Circumstances and is unable, due to any reasonable cause, to give notice during the Period of this Policy, Underwriters will accept such notice up to 15 days after expiry of this policy provided always that the matter which is being notified first came to the Assured's attention during the Period of this Policy.

…

4.6 Claim Settlements

The Underwriters may at any time pay to the Assured in connection with any claims or series of claims under this Policy the Limit of Indemnity (less any sums already paid) or any lesser sum for which such claims can be settled and upon such payment the Underwriters shall not be under any further liability in respect of such claims except for costs and expenses incurred prior to such payment.

> If a payment exceeding the Limit of Indemnity has to be made to dispose of a claim the liability of the Underwriters to pay all costs fees and expenses in connection therewith shall be limited to such of the said costs and expenses as the Limit of Indemnity bears to the amount paid to dispose of a claim."
>
> …
>
> SECTION 6
>
> DEFINITIONS AND INTERPRETATIONS…
>
> 6.5 Limit of Indemnity
>
> Shall mean the sum shown in the Schedule which is available to indemnify the Assured in respect of each claim provided always that where more than one claim arises from the same original cause all such claims shall be deemed to be one claim and only one limit of indemnity shall be payable in respect of the aggregate of all such claims.
>
> 6.6 Defence Costs
>
> Shall mean all costs and expenses incurred in the investigation, defence or settlement of any claim or potential claim and/or the cost of representation at any enquiry or other proceedings which have a direct or indirect relevance to the investigation, defence or settlement of any matter notified under the terms of this policy. This shall include the Assured's own costs, but excluding any profit element, incurred in the defence, investigation, design of remedial work, inspection and supervision of remedial works in respect of any claims notified under Claims Conditions 3.2 a) and b) of this Policy subject to Underwriters' prior agreement and acceptance of Liability under this Policy.
>
> 6.12 Circumstance
>
> Shall mean information or circumstances of which the Assured is aware which suggests that a claim is likely to be made against the Assured which the Assured may become legally liable to pay and which arises out of the exercise and conduct of the Assured's Professional Business …"

149. The "*Limit of Liability*" with respect to the relevant section of the policy was stated to be:

> "USD 10,000,000 in the aggregate, plus unlimited reinstatements as in Endorsement No. 4 of Section A of the Wording, costs in addition."

150. Endorsement 4 provided for reinstatements on a 'round the clock' basis:

> "The Liability of Underwriters hereon shall not exceed the Limit of Indemnity as set out in the schedule.
>
> However, in the event of partial or complete exhaustion of the Limit of Indemnity by payment of any claim or claims the Limit of Indemnity shall be correspondingly reinstated provided that the total liability of Underwriters in respect of any one claim shall not exceed the Limit of Indemnity.
>
> The reinstatement of the Limit of Indemnity will only apply where the additional reinsurance coverage provided by policy(ies) in excess of this policy (being at least USD50,000,000 in the aggregate) is exhausted by reason of the payment of a claim or claims and subject to the preceding paragraph shall be reinstated so that the Limit of Indemnity shall be applicable in respect of any one claim.
>
> In the event of reinstatement of the Limit of Indemnity the aggregate excess shall not be reinstated."

151. Each of the policies was expressed to be subject to English law and the exclusive jurisdiction of the courts of England and Wales.

(b) Terms of the Excess Policies

152. The Excess Insurers provided further cover in excess of the amounts written by Beazley in both policy years, but for present purposes only the excess cover written in the 2008/09 year is relevant. The additional cover consisted of US$5m excess of US$10m underwritten by the Third Defendant, and a further policy of US$30m excess of US$15m written by the Fourth to Sixth Defendants. The Excess Policies included the following provisions:

> "To indemnify the Assured for claim or claims which may be made against the Assured during the Period of Insurance hereon up to this Policy's amount of liability … in the aggregate, the excess of the Underlying Policy(ies) limits … in the aggregate, the latter amount being the subject of Indemnity Policy(ies) … issued in substitution or renewal thereof for the same amount effected by the Assured and hereinafter referred to as "the Underlying Policy(ies)"…
>
> 1. Liability to pay under this Policy shall not attach unless and until the Underwriters of the Underlying Policy(ies) shall have paid or have admitted liability or have been held liable to pay, the full amount of their indemnity…
>
> 4. With the exception of costs incurred by the operation of 3(b) above, in the event of a claim arising to which the Underwriters hereon may be liable to contribute, no costs shall be incurred on their behalf without their consent being first obtained (such consent not to be unreasonably withheld) and if they so consent

> they shall contribute to the said costs in the proportion that their share of the claim, as finally settled, bears to the total sum paid to dispose of the claim. No settlement of a claim shall be effected by the Assured for such a sum as will involve this Policy without the consent of Underwriters hereon …
>
> 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 …"

(c) Case law on notification under liability policies

153. In the present case no claim was received during either policy period, within clauses 1.1 and 3.2a, so any cover arises by virtue of the clause 3.2b extension of cover to Circumstances (as defined) notified during the policy period and thereafter giving rise to a claim. The key questions are therefore as at the time of Notifications 923 and 953:

i) what information or circumstances was RMJM aware of that suggested that a claim was likely to be made against it which it may become legally liable to pay?

ii) did RMJM notify that information or those circumstances to insurers as soon as practicable? and

iii) did that information or those circumstances subsequently give rise to a claim against RMJM, and if so what claim?

154. As to question (i), the policy wording and the case law indicate that the insured must have been aware of the matters in question at the time of the notification:

i) Condition 3.2(a) permits notification where the insured "*becomes aware of any Circumstance*", and "*Circumstances*" are defined as "*information or circumstances of which the Assured is aware* …".

ii) In *HLB Kidsons v Lloyd's Underwriters* [2008] EWCA Civ 1206; [2009] Lloyd's Rep IR 178, Rix LJ (with whom Sir Richard Buxton agreed save on an issue of fact) stated the first typical question as being *"Have such circumstances come to the attention of the insured (during the policy period) so that he can be said to be aware of them?"* (§ 72). Toulson LJ referred to *"the awareness of a circumstance, which is a pure matter of fact"* (§ 134).

iii) Akenhead J in *Kajima UK Engineering Ltd v The Underwriter Insurance Co Ltd* [2008] EWHC 83 (TCC); [2008] Lloyd's Rep IR 391 stated on similar policy wording (save that the criterion was whether the circumstances *"might reasonably be expected"* to produce a claim):

> "(d) The insured must be aware of the circumstances which it is notifying to the Underwriters. It would not be enough to say: "I

> think it is possible that there may be some unknown and unidentified design deficiencies in a particular building". That would not be a good notification because the insured would not be aware of the circumstances; the insured would simply be guessing that there might be circumstances. That is not good enough. It is only circumstances of which the Insured is actually aware which can be the subject matter of a notification.
>
> (e) The fact that notification must be given "as soon as possible after" the Insured has become aware of the relevant circumstances suggests strongly that the notification only covers those matters of which the Insured is actually aware. Further notifications have to be given as soon as the Insured become aware of new circumstances. …
>
> (h) … The factual context [of the notification] is important, not only as a matter of interpretation of the notification but also, because it is only matters of which the insured is aware that can form the basis of a valid notification.
>
> (i) The claim which is later pursued must arise not only from the notified circumstances but also only from the circumstances of which the Insured was aware. It can not arise from any other circumstances which may have happened or been discovered either after the notification or in any event after the expiry of the insurance cover. Put another way, a subsequent claim which relates to matters of which the Insured was not aware at the time of the notification would not and could not arise from the notified circumstances and, to that extent, would not be covered by the policy.
>
> (j) The claim subsequently brought can relate to new damage flowing from or consequences of the properly notified circumstances which had not occurred by the time of the expiry of the insurance cover because the claim would arise from the notified circumstances." (§ 99)

iv) These observations were followed by Moulder J in *Euro Pools Plc (in Administration) v Royal and Sun Alliance Insurance Plc* [2018] EWHC 46 (Comm), stating at §§ 67 and 98 that only matters of which the insured is aware can form the basis of a valid notification.

v) In *Zurich Insurance plc v Maccaferri Ltd* [2016] EWCA Civ 1302; [2017] Lloyd's Rep IR 200 §34 Christopher Clarke LJ stated that the question of whether an event is likely to give rise to a claim (as to which see below) *"will depend on whether <u>in the light of the actual knowledge that the insured then possessed</u> a reasonable person in his position would have thought that it [was] at least 50% likely that a claim would be made."* (my emphasis).

155. The information or circumstances, of which the insured is aware, must be such as to suggest that a claim is likely to be made against it which it may become legally liable to pay. The word "*likely"* in this context has been held to denote at least a 50% chance of a claim eventuating: see, e.g., *Zurich Insurance plc v Maccaferri Ltd* [2016] EWCA Civ 1302; [2017] Lloyd's Rep IR 200 § 16. (See also, by way of contrast, *J Rothschild Assurance plc v Collyear* [1999] Lloyd's Rep IR 6, 22: "*the test of materiality for notice is a weak one - "which may give rise to a claim", not "which is likely to give rise to a claim*".) The test is an objective one in the sense it depends on whether a reasonable person in the position of the insured, and with the insured's knowledge of the facts, would appreciate there was such a chance of a claim being made: see, in particular, *Laker Vent Engineering Ltd v Templeton Insurance Ltd* [2009] EWCA Civ 62; [2009] Lloyd's Rep IR 704 §§ 75-83, where the Court of Appeal considered the relevant parts of the judgments in *Kidsons* and concluded that that question was an objective one.

156. Difficult questions can, however, arise as to the level of generality or specificity at which the 'circumstances' known to the insured should be defined. Thus Gloster J at first instance in *Kidsons* ([2007] EWHC 1951 (Comm)) said:

> "At the end of day, it is in my view largely a question of interpretation and analysis of the document setting out the notification, in the context of the facts known to the assured, as to what precise circumstance or set of circumstances has in fact been notified to insurers. I am not therefore convinced that semantic cavilling over the precise formulation of the test assists the ultimate resolution of the problem. There may well be uncertainty at the time of notification as to what the precise problems or potential problems are; there well may be, whether known, or unknown, to the assured a "hornets' nest" which may give rise to numerous types of claims of presently unknown quantum and character at the date of the notification. Whilst in principle there is no reason why such a state of affairs should not be notified as a circumstance if the assured is aware of it, in each case the extent and ambit of the notification and the claims that are covered by such notification will depend on the particular facts and terms of the notification." (§ 76)

157. Those observations were not the subject of comment by the Court of Appeal in *Kidsons*. However, in *Kajima* Akenhead J after quoting this and other parts of Gloster J's judgment said:

> "In my view, Mrs Justice Gloster's dicta as set out above are germane, correct and applicable in this case." (§ 95)
>
> "It is possible for the insured to give notice of a 'hornets' nest' or 'can of worms' type of circumstance." (§ 99(c))

but held on the facts of *Kajima* that the circumstances notified were limited to specific matters and that it was not a 'hornet's nest' or 'can of worms' set of

circumstances. The insured in *Kajima* had erected a block of flats consisting of pre-constructed pods, and notified insurers in 2001 of the fact that the pods were "*settling and moving excessively causing adjoining roofing and balconies and walkways to distort under differential settlement*". Later it became apparent that there were serious structural problems with the building as a whole, and by the end of 2005 it had become clear that the entire building had become unstable. Akenhead J held that the notification was effective only in respect of the specific notified circumstances and did not extend to damage unless such damage was causally linked to the notified circumstances. The assured was under an obligation to make further notifications as and when further problems were identified.

158. A possible example of a 'hornet's nest' notification, though not reasoned on that basis, occurred in *Rothschild Assurance Ltd v Collyear* [1999] Lloyd's Rep. I.R. 6, where the claimants issued opt-out pensions to numerous investors to replace their occupational pension schemes. By the beginning of 1993 it had become apparent that there had been a generalised problem of pensions mis-selling, whereby investors had not been properly advised by appointed agents operating throughout the industry. It was not, at the time of the letter, possible for the claimants to identify the precise contracts that could give rise to liabilities, but a review by KPMG of a sample of the files had found 91% to be non-complaint. Rix J held the notification to be valid.

159. The requirement that the notified circumstances be such as to suggest that a claim is likely to arise may limit the extent to which it is possible validly to make a very broad 'hornet's nest' type notification. Given that likelihood of a claim is an objective test, it would seem to follow that a notification is valid only to the extent that the circumstances identified – however broad or narrow they may be – are such that a reasonable person would think them likely to give rise to a claim. Thus, to take an extreme example, a purported notification which simply stated at a high level of generality that the insured had performed a particular project badly in its entirety would be likely to be ineffective as a notification, if only because it failed to specify any particular failings or at least categories of failing that a reasonable person would consider likely to give rise to a claim. It would also fail to serve one of the purposes of a notification, namely to enable the insurer to make its own plans to deal with the potential liability. By contrast, the broad notification given in *Rothschild Assurance Ltd v Collyear* did refer to circumstances, namely the sample review by KPMG, that provided grounds on which to consider that the same problems had been replicated in other similar transactions that the firm had undertaken.

160. Where the notification arises from a complaint against the insured (as opposed to the insured's own discovery of a potential problem), the complaint forms part of the circumstances notified and the insured is aware of the complaint. It may well be the case that a valid notification can be made of the allegations made in the complaint (objectively construed) even if the insured has failed fully to comprehend the complaint. However, it remains appropriate to construe the complaint – as a communication between the client and the

insured – in the context of what has passed between and is reasonably known to those parties.

161. As to question (ii) set out in § 153 above, exactly what has been notified is a question of the objective construction of the insured's notice against the factual context in which it is served (see *Kidsons* §§ 64-65, 84, 91; *Kajima* § 99; *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] 1 AC 749, 767-768).

162. As to question (iii), the requirement that the notified information or circumstances give rise to a claim means that the claim subsequently made must be sufficiently causally related to the fact, event, happening or condition comprising the Circumstance notified so that it can fairly be said to have given rise to it (*Kidsons* § 78 per Gloster J, *Kajima* §§ 93-95). The link must be causal in nature, and not merely coincidental (*Kajima* §§ 97-99, *Euro Pools* §§ 59-76, 95-103). As Akenhead J said in *Kajima*:

> "(f) … There must be some causal, as opposed to some coincidental, link between the notified circumstances and the later claim.
>
> (i) The claim which is later pursued must arise not only from the notified circumstances but also only from the circumstances of which the Insured was aware. It can not arise from any other circumstances which may have happened or been discovered either after the notification or in any event after the expiry of the insurance cover. ...
>
> (j) The claim subsequently brought can relate to new damage flowing from or consequences of the properly notified circumstances which had not occurred by the time of the expiry of the insurance cover because the claim would arise from the notified circumstances." (§ 99)

163. As to the strength of the causal connection required by the words "*gives rise to a claim*" in clause 3.2, a number of cases consider the meaning of similar words in an insurance context. Some caution is required here, because as indicated in the case law cited in *Beazley Underwriting Ltd v The Travelers Companies Incorporated* [2011] EWHC 1520 (Comm); [2012] Lloyd's Rep IR 78 at §§ 125, it is necessary to consider the scope and purpose of the rule when considering a question of causation.

i) In the context of a clause excluding certain types of events from cover, Scrutton J in *Coxe v Employers' Liability Assurance Corporation* [1916] 2 KB 629, 634 stated that the phrases *"arising from"* and *"caused by"* denoted the proximate cause.

ii) In deciding whether insurers were compulsorily liable under section 145(3)(a) of the Road Traffic Act 1938, the Court of Appeal in *Dunthorne v Bentley* [1999] Lloyd's Rep IR 560 followed Commonwealth authority (including *Government Insurance Office of*

New South Wales v RJ Green and Lloyd Pty Ltd, 114 CLR 437, High Court of Australia) holding that in the phrase *"caused by or arising out of",* the words *"arising out of"* had a wider connotation than *"caused by"*, albeit they still required a degree of causal connection; so that Mrs Bentley's conduct in crossing the road to get assistance after running out of petrol, as a result of which an accident occurred, arose out of the use of her car.

iii) In *Kajima*, Akenhead J said of the cases referred to in (ii) above: *"Broadly those cases are simply authority for the relatively obvious proposition that where an insurance clause relates to cover for something "arising out of" a particular contingency that expression may well be wider than an expression such as "caused by". These authorities are of marginal relevance here albeit I will bear them in mind when construing that part of Condition 1 of the insurance policy which talks about "any claim arising from such [notified] circumstances""* (§ 97).

iv) In the specific context of notification clauses, Akenhead J in *Kajima* made the statements quoted in § 162 above, indicating the need for *"some causal, as opposed to some coincidental, link"* and that the subsequent claim can relate to new damage flowing from or consequences of the notified circumstances.

v) In the context of aggregation clauses, Rix J in *Scott v Copenhagen Reinsurance Co (UK) Ltd* [2003] Lloyd's Rep IR 696 § 68 stated that the phrase *"arising out of"* required a significant causal connection, bearing in mind that the aggregating function of such a clause was antagonistic to a weak or loose causal relationship between losses and the required unifying event (since otherwise there would in principle be no limit to the tracing back to causes of causes).

vi) In the context of a deed of indemnity, Christopher Clarke J in *Beazley Underwriting* held, in the context of the particular document (which included a clause using the words "*directly or indirectly*"), that the words *"arising out of"* did not dictate a proximate cause test and that a somewhat weaker but still relatively strong causal connection was required (§§ 120-130).

vii) Cooke J in *ARC Capital Partners Ltd v Brit UW Ltd* [2016] EWHC 141 (Comm) held that the words *"arising from or in any way involving"* in an exclusion from cover could be coherently construed by regarding "*arising from*" as meaning proximately caused by and "*in any way involving*" as denoting an act, error or omission that was genuinely part of the chain of causation.

164. In the present case the policy uses the phrase *"arises out of the exercise and conduct of the Assured's Professional Business"* as part of the definition of *"Circumstance"* when defining the scope of cover, and the phrase *"gives rise to a claim"* in the clause 3.2 notification extension. I consider it would be a mistake to attribute much weight to fine linguistic distinctions in this regard.

The purpose of the relevant wording in clause 3.2 is to identify the claims that will, as a result of a notification made during the policy year, be deemed to have been made during that policy year and hence benefit from cover. It requires there to be a causal as opposed to a merely coincidental link, but I see no reason to apply any further gloss.

165. Right to choose: ASD contends that if a prospective claim fell within both Notifications 923 and 953, then it is entitled to choose under which policy to advance the claim. It argues that:

i) By the operation of the insuring clause (clause 1.1) and clause 3.2(b) of the Primary Policies, cover under a particular policy period is triggered when a claim is (deemed) first made, which requires a notified Circumstance to have given rise to a claim. Once this is established, the policy is triggered regardless of whether any other policy has also been triggered.

ii) There is no term such as policies sometimes contain in the 2009/10 Primary Policy excluding a claim that is deemed first made in another period. As a result, both the 2008/09 and 2009/10 Primary Policies are capable of being engaged at the same time. If valid notifications have been made to both policies, RMJM (or ASD as statutory transferee) is entitled to choose the policy under which to claim.

iii) This approach is supported by the decision of the Supreme Court of Appeal of South Africa in *Immerzeel v Santam Ltd* [2007] Lloyd's Rep IR 106, which held that where a notification was given in one policy year (1991) and a claim was made in a later year (1993), either policy could respond at the insured's option because that was the bargain struck by the parties. The court made the points that (a) the clause extending cover to claims arising from notified circumstances (the equivalent to the clause 3.2b extension in the present case) applied for the purposes of the earlier 1991 policy covering the period in which the notification was made; (b) the equivalent clause in the later 1993 policy did not apply as there was no notification of circumstances which became known during that later period, and *"[i]n any event the condition does not provide that a notification of an occurrence which may possibly give rise to a claim during a period of insurance preceding the period of insurance of the 1993 policy is to be regarded, for the purposes of the 1993 certificate, as a claim made during the preceding period of insurance"*; (c) the later policy contained no exclusion for claims arising out of circumstances notified under earlier policies; and (d) in those circumstances the insured was free to arrange more extensive cover for periods subsequent to the one in which it had given notification of circumstances.

166. Beazley argues that the first notification takes priority, relying on the wording in clause 3.2(b):

> "Underwriters agree that any… Circumstance notified to them during the Period of this Policy and which subsequently gives

> rise to a claim after expiry of this Policy shall be deemed to be a claim first made during the Period of this Policy"

167. Further, Beazley says a right to choose between policies would circumvent the limit of indemnity, defined in clause 6.5:

> "… the sum shown in the Schedule which is available to indemnify the Assured in respect of each claim provided always that where more than one claim arises from the same original cause all such claims shall be deemed to be one claim and only one limit of indemnity shall be payable in respect of the aggregate of all such claims"

because it would allow the insured to notify claims arising from a single cause in two different policy years and (arguably) thereby avoid the application of the "*same original cause*" limit.

168. Beazley refers to the statement of Lord Mance in *International Energy Group v Zurich Insurance* [2016] AC 509 § 43 that *"It is contrary to principle for insurance to operate on a basis which allows an Insured to select the period and policy to which a loss attaches."* The context in that particular case was whether exposure to asbestos at some point during cover provided by a particular insurer meant the whole loss could be recovered from that insurer without regard to other periods of exposure.

169. It is not strictly necessary for me to resolve this particular point because I have not come to the conclusion that any part of the ASD claim was notified under both Notification 923 and Notification 953. However, it seems to me that the reasoning of the Supreme Court of South Africa in *Immerzeel* is, with respect, coherent and correct at least as regards the situation that arose there. In the absence of an exclusion of previously notified circumstances, and provided of course that proper disclosure is made, there is no sufficient reason why an insured should not place cover on a claims made basis for a later year and rely on such cover if claims are then made during that later year.

170. By extension of the same reasoning, the insured is also entitled to notify circumstances to a subsequent insurer under a claims extension provision like clause 3.2(b) in the present case, provided also that such notification has been given on a timely basis. As the court indicated in *Immerzeel*, the notification in the earlier year is not to be regarded for the purposes of the later policy as deeming the claim to have been made in the earlier year. I would accept that there is a cogent contrary view to the effect that the insured is given only a one-off option to notify circumstances during a particular policy period, following which any resulting claim is to be deemed to have been first made during that policy period: rather than an option to make successive notifications in different policy periods resulting in overlapping cover. However, on balance I think ASD is correct to say that that approach conflates two different policies, which may be with different insurers and are in any event two distinct contracts.

(d) Causation

171. The starting point is that an insurer is liable only for losses proximately caused by the peril covered by the policy; and that a proximate cause is not the first, last or sole cause of the loss but the dominant, effective or operative cause (see, e.g., MacGillivray on *Insurance Law*, 13th ed., § 21-001).

172. As to cases where there is or may be more than one effective cause, MacGillivray states:

> "It often happens that the insured's loss is attributable to at least two causes each of which is a proximate cause in the sense that the loss would not have happened if only one of the causes had been operative. In *The Miss Jay Jay*, for example, it was held that the damage was caused by the frequent and violent impacts of an adverse sea on a badly designed hull. The adverse sea was a peril insured against but the bad design of the hull was not. The Court of Appeal held there were two proximate causes and the insured could recover on the basis that it was sufficient if one of the causes was a peril insured. It is different, however, if there are two proximate causes of the loss, one of which is insured and the other of which is excluded. In Wayne Tank and Pump Co v Employers' Liability Assurance Corp, a factory was destroyed by fire partly due to the negligence of the insured's servant (which was insured) and partly due to the unsuitable nature of plastic material used in the installation (which was expressly excepted under the policy). In this situation it was held that, since the insured had promised that the insurers would not be liable for loss caused by the excepted peril, the insured could not recover." (§ 21-005)

173. MacGillivray adds in a footnote:

> "This situation must be distinguished from the situation in which there are two concurrent but independent causes, each of which would alone have been sufficient to cause the loss. In that situation, the "but for" test for causation will not be met in respect of either cause: see *Orient-Express Hotels Ltd v Assucurazioni Generali S.A.* [2010] Lloyd's Rep. I. R. 531 at 538".

174. In the case cited in the main text, *JJ Lloyd Instruments v Northern Star Insurance Co (The "Miss Jay Jay")* [1987] 1 Lloyd's Rep. 32 (CA), Lawton LJ stated:

> "What has to be decided in this case is whether on the evidence the unseaworthiness of the cruiser due to the design defects was such a dominant cause that a loss caused by the adverse sea could not fairly and on commonsense principles be considered a proximate cause at all. In my judgment, the evidence did not establish anything of the kind. What it did establish was that,

> but for a combination of unseaworthiness due to design defects and an adverse sea, the loss would not have been sustained. One without the other would not have caused the loss. In my judgment, both were proximate causes."

Slade LJ said:

> "On a commonsense view of the facts both these two causes were, in my opinion, equal, or at least nearly equal, in their efficiency in bringing about the damage.
>
> In these circumstances, if the policy had contained a relevant express exception which related to loss caused by the unseaworthiness of the vessel, the plaintiffs' claim might well have been unsustainable. …
>
> Roskill L.J. summarised the legal position thus in Wayne Tank and Pump Co. Ltd. v. Employers Liability Assurance Corporation Ltd. (1974) 1 Q.B. 57 at p. 75:
>
> > "I think the law in this respect is the same both for marine and non-marine, namely, that if the loss is caused by two causes effectively operating at the same time and one is wholly expressly excluded from the policy, the policy does not pay".
>
> However, since the instant policy contains no relevant exception relating to loss caused by unseaworthiness of the vessel, different principles apply. The legal position in such a case is stated thus in Halsbury's Laws of England (4th Edition) Volume 25 para. 181 which relates to marine insurance policies:
>
> > "It seems that there may be more than one proximate (in the sense of effective or direct) cause of a loss. If one of these causes is insured against under the policy and none of the others is expressly excluded from the policy, the assured will be entitled to recover"."

Croom-Johnson LJ agreed with both judgments.

175. I consider this case further in section (E)(3)(c) below.

176. MacGillivray notes that the reasoning in *The Miss Jay Jay* was applied by Andrew Smith J in *Venetico Marine SA v International General Insurance Co Ltd, The "Irene EM"* [2014] Lloyd's Rep. I.R. 243, a claim under a hull and machinery insurance arising out of the grounding of a cargo ship. Andrew Smith J held that the grounding was in and of itself a peril of the seas; and even if was not *per se* an insured peril of the seas, the grounding and in turn the loss had been caused by the current, which was a peril of the seas. Further, Andrew Smith J held the grounding was fortuitous and was a proximate cause

of the loss even though he concluded that the grounding would not have occurred but for the negligence of a crew member and even if that negligence was itself regarded as a proximate cause of the damage:

> "It is not disputed that Mr Gomez was seriously negligent, and as a result he did not do anything to prevent the vessel drifting on the current before she grounded or was about to ground, but I cannot accept that the causal impact of his negligent omission was so potent in terms of efficiency as to displace as proximate causes of the damage the events that he did not prevent, the action of the current that made the vessel drift and the grounding itself." (§§ 284-285)

On the specific facts of *The Irene EM*, negligence of the master, officers and crew was also an insured peril under the policy.

(3) Discussion

(a) What documents formed part of Notification 923?

177. It is common ground that DG Jones' letter of 30 March 2009 was not in fact received by Beazley until some time in 2013. Further, it is not clear from the evidence precisely when Beazley first received the PII notification form. Beazley did receive Integra's letter of 1 April 2009 during the 2008/09 policy period. The question arises as to which documents formed part of Notification 923.

178. Clause 3.3 of the primary policies provided that notice to underwriters under clause 3.2 *"shall be deemed to have been properly made if received in writing by: Integra Technical Services ... and; Beazley Group plc ...."*, and that Integra shall at intervals of approximately 5 and 10 months after inception of the policy prepare a bordereau containing details of all claims notifications which the brokers, Marsh, shall circulate to underwriters as per individual slip conditions.

179. Since the primary policies were underwritten by members of the Beazley Syndicates AFB 2623 and 623 at Lloyd's, in order to give notice to underwriters under clause 3.2 it would appear to have been necessary either (a) to notify each of the individual underwriters i.e. the relevant Names, (b) to give notice to a person with actual or ostensible authority to receive such notice aside from the policy provisions, which might include Beazley Furlonge Ltd (i.e. the First Defendant) as the managing agent of the Syndicates, or (c) to comply with the requirements of clause 3.3. In the absence of any evidence as to (a) or (b), compliance with clause 3.3 was mandatory in order to give a valid notification.

180. The literal terms of clause 3.3 required notice to be given both to Beazley Group plc and to Integra. To that extent, the policy seems to envisage that when receiving notices to underwriters pursuant to clause 3.3 Integra was acting as agent for insurers, whereas when preparing bordereaux under that

clause they acted as agent for the insured (with Marsh as broker then circulating the bordereaux to insurers).

181. It would not follow from Integra's role as agent in this particular regard that notice to Integra alone constituted notice to Beazley (i.e. to the Syndicates). Based purely on the contractual documents, Integra's authority to receive notices was derived from and delimited by clause 3.3 itself. So notification to Integra alone would constitute valid notice only if the word "*and*" in clause 3.3 were in fact correctly to be understood disjunctively, in effect as meaning "*or*". Looking purely at the policy terms, there would appear to be no good ground on which it should be so read, and it would seem more likely that the parties intended that notice should have to be sent to both Beazley Group plc and to Integra. That would ensure that Beazley did not have to rely on notifications being promptly passed on to it by Integra. Further, the inclusion of Integra as a required recipient of notifications in addition to Beazley Group plc would be explicable by the fact that they were required to prepare periodic bordereaux for underwriters.

182. I have phrased the foregoing paragraphs in qualified terms, because the evidence indicates that the parties' actual practice differed from the strict terms of the policy. Mr Morgan's evidence in his witness statement was that RMJM had engaged Integra to provide claims services long before Beazley took on the RMJM account, and Integra was also named as notification agent under the policies. Mr Morgan stated that *"Integra dealt with all notifications as the notification agent under the RMJM policies. Beazley would be put on notice of claims through ECF [the Electronic Claims File system] and the block bordereau without having received a notification direct. ... When Integra considered that a matter was significant, because, for example, it was complex or had a high potential or actual value, Integra would write to Beazley summarising the matter and sometimes enclosing relevant background information. That documentation was passed by Integra to Marsh and Marsh uploaded it to ECF for Beazley to review."*

183. Thus in relation to Notification 923, for example, Mr Morgan would have received within the policy period Integra's letter of 1 April 2009 (which Mr Morgan accepted in cross-examination was very possibly the pdf document uploaded to the ECF on that date) but may not have seen at the time either RMJM's notification form or the DG Jones letter of 30 March 2009. In relation to less significant notifications, Beazley itself would not have received notice until the next periodic bordereau was uploaded, which could be several months later than the notification by RMJM to Integra.

184. In these circumstances:

i) Beazley submits that by reason of the parties having for some years operated the system in this way, notification to Integra constituted valid notification under the policy. It followed that (a) the DG Jones letter formed part of the notification and (b) the Integra letter did not form part of it: it was in effect internal on the insurers' side. On this approach it would also follow that RMJM's notification form was part of the notification, but Beazley submitted that the commentary it set

out could not reduce the scope of the matters notified as set out in the DG Jones letter. Thus, Beazley contends, the effective substance of the notification was the DG Jones letter, despite the fact that Beazley did not itself receive that letter at the relevant time.

ii) ASD submits that since under the policy wording notice was required to be given to both Beazley and Integra, the DG Jones letter formed no part of the notification.

iii) Excess Insurers accepted that, for the purposes of these proceedings, notification to Integra alone is sufficient for the purposes of clause 3.2.

185. It would appear to follow from the ASD's approach that (a) the only matters validly notified were whatever was common ground between (i) the RMJM notification form and the DG Jones letter provided to Integra and (ii) the Integra letter of 1 April 2009 to Beazley; and (b) whilst Integra were named as a notice party in the policy, when writing their letter to Beazley they must have been acting on behalf of the insured in completing the process of giving notice under the policy.

186. Beazley notes that if the ASD's approach were correct, it would follow that the ADNEC notification fell within the 2009/10 year, because notice was given by RMJM before the 2008/09 policy expired but Integra notified Beazley (via the ECF) only afterwards. However, there is no pleaded issue regarding the year of cover into which the ADNEC Claim falls, it being common ground on the parties' statements of case that it falls in the 2008/09 policy year.

187. If it were necessary to decide whether notification to Integra alone was sufficient to comply with clause 3.2, I would conclude that it was. The evidence indicates a consistent pattern whereby both RMJM and Beazley treated notification to Integra as sufficient to comply with the policy terms (in RMJM's case by notifying Integra only and in Beazley's case by treating such notifications as valid), at least provided Integra in due course uploaded the necessary information to the ECF, such that RMJM and Beazley thereby either varied clause 3.3 by conduct or would each be estopped by convention from denying that such notification sufficed.

188. However, I do not consider it necessary to decide this point because:

i) even if notification to Integra was sufficient, it does not follow that the notification should be construed as being confined to the DG Jones letter in isolation. The notification consisted not only of that letter but also RMJM's notification form, which set out the circumstances in which the DG Jones letter had been written and in the context of which it had been received; and

ii) if, conversely, the notification was valid only to the extent that it was provided (at the relevant time, as opposed to later) both to Integra and to Beazley, then in substance the matters notified were those set out in the Integra letter – which was based on the contents of the RMJM

notification form sent to Integra and which thus reflected matters notified both to Integra and to Beazley. The Integra letter stated that *"RMJM has received notice of potential claims in respect of any additional costs that may be incurred"*. That was a reference to the DG Jones letter, and in my view sufficiently incorporated that letter by reference so as to put insurers on notice of it.

189. On both approaches, therefore, the correct approach in my view is to construe the notification by reference to both (i) the DG Jones letter of 30 March 2009 and (ii) either the RMJM notification form or the Integra letter, the contents of these latter two documents being materially the same for the purposes of the issues that arise.

(b) The Sector A Field House columns problem

190. For the reasons more fully set out below, I have come to the conclusion that to the extent that the ASD Claim arises from the Sector A columns issue, it does not arise out of circumstances notified during the 2008/2009 policy year. That is because:

i) based on the matters known to RMJM at the time of Notification 923, a reasonable person would not consider it more likely than not that that issue would give rise to a claim; and

ii) Notification 923 did not include notice of information or circumstances relating to any Sector A columns issue.

191. As to the first point, by 30 March 2009 RMJM was aware of the following matters:

i) There had been numerous instances of, and complaints about, lack of sufficient detail in designs and lack of coordination between the various disciplines involved in the project. Examples of these are referred to in section (E)(1)(c) above.

ii) DG Jones had now indicated, in its letter of 30 March 2009, that ASD was *"aware that there are potential claims that will be sought by [AAA] for the works at the New Campus Site for errors or changes in design what are as a result of a poor initial design by RMJM",* RMJM having the sole responsibility *"for checking the design and co-ordination of the designs"*.

iii) In early 2008 it had been necessary to double the size of the PT beams in Sector A, and RMJM had told DG Jones that the columns and perimeter beams had been increased in size accordingly.

iv) DG Jones had insisted on this being demonstrated to them by provision of the calculations for checking, which after considerable delay and chasing had eventually been supplied on 10 February 2009.

v) There had been no response to the provision of the calculations and the relevant item had disappeared from the minutes of meetings.

vi) At progress meetings on 17 and 31 March 2009, the project team (including DG Jones and AAA) had taken the view that Sector A was estimated to be back on schedule within 3 months or by the end of May.

192. The documentary evidence (supported by the evidence of Mr Elliot quoted in § 64 above) indicates, on the balance of probabilities, that RMJM was not aware:

i) that the calculations it had made and provided were inadequate or had been prepared on an incorrect basis;

ii) that there was any fundamental structural problem with the Sector A columns; or

iii) that ASD, AAA, DG Jones or anyone else had alleged either of (i) and (ii) above.

193. By way of partial elaboration on those points:

i) For the reasons given in section (E)(1)(d) above, I do not consider it correct to conclude from Mr Kareem's internal email of 27 August 2009 that RMJM had, as at November 2008 or at any time since then up to 30 March 2009, been aware of any matters of the kind referred to in § 192 above. There is no support in any of the contemporaneous documents for the views he appeared to express there.

ii) I do not consider that the DG Jones letter of 30 March 2009 put RMJM on notice of a potential claim to the effect that the Sector A columns were or might be subject to a serious structural weakness or that the calculations relating to them had been inadequate or prepared on an incorrect basis. The tenor of the DG Jones letter would far more naturally have been understood as relating to more routine problems of the kind referred to in §§ 48-49 above. Had there been *"potential claims that will be sought by [AAA]"* which related to serious structural issues of that kind, one would have expected that the letter would have been far more explicit, and indeed that the matter would have been raised already as a matter of the highest concern and urgency. As ASD point out, the Sector A columns problem when it later emerged was substantial and extraordinary, prompting a sudden and prolonged suspension of work.

iii) Even if it were the case that following RMJM's submission of the calculations on 10 February 2009 they were not checked because it was too late (which for the reasons given in § 63 above I doubt), there is no evidence that RMJM knew this, and it would in any event not follow that a reasonable person knowing this would conclude that it was therefore more likely than not that a claim would arise.

194. On the basis of the matters of which RMJM was aware on 30 March 2009, I do not consider that a reasonable person would consider it likely, meaning more likely than not, that a claim would be brought in relation to the adequacy of the Sector A columns. Beazley argues that the events from February 2008 to 10 February 2009 in relation to the Sector A columns show that their design was an issue of concern as at 31 March 2009. However, the fact that a question had been raised about their adequacy in 2008, followed by a request for calculations which had eventually been answered, did not make it more likely than not that a claim would be brought. On the contrary, the facts that there had been no response from DG Jones or AAA during the approximately seven weeks since the calculations had been provided, and the matter had disappeared from meeting minutes, would tend to indicate the contrary. For the reasons given above, I do not consider that a reasonable person would understand the DG Jones letter of 30 March to have been intimating a challenge in relation to the adequacy of the Sector A columns.

195. As to the second point made in § 193 above, Notification 923 as a matter of construction did not in my view include a potential claim arising from failure to design the Sector A columns in accordance with the DM regulations and/or failure to design the Sector A columns so that they could safely support the load they would bear (whether including or excluding seismic requirements).

196. The DG Jones letter of 30 March 2009, even when read in isolation, was not apt to give notice of such a claim. It is true, as Beazley says, that the words *"errors or changes in design which are a result of a poor initial design by RMJM"* could by themselves be construed as wide enough to cover fundamental design defects as to the Sector A columns' ability to bear their loads (seismic or otherwise). However, I do not consider that a matter as fundamental as the adequacy of the columns to support their loads would have been properly notified simply by the general language used in that letter. It went well beyond matters of *"checking the design and co-ordination of designs"* (the phrase used in the DG Jones letter).

197. *A fortiori* reading the DG Jones letter along with the explanation provided in either the RMJM notification form or the Integra letter, it is clear that the circumstances being notified relate to other and less fundamental matters, of the kind referred to in §§ 48-49 above. Both documents referred to problems having emerged arising from a lack of coordination between different disciplines and to the submission of multiple RFIs by AAA. That description is inapt to cover a problem of the kind that later emerged relating to the Sector A columns. Beazley argues that the latter was also a problem of coordination: between the beam and column designs, between the structural design and the statutory requirements, and between RMJM and DM. However, that is a strained interpretation, and by referring to coordination between different disciplines, the notification form and Integra letter more naturally referred to coordination between different parts of the project team.

198. Beazley also says the failure to provide the calculations to DG Jones and AAA in sufficient time for them to check the calculations was a problem of coordination. However, as I have noted, there is no evidence that RMJM knew that.

199. More generally, neither the notification form nor the Integra letter gives any inkling of possible fundamental structural problems, whether alleged by anyone or whether known or suspected by RMJM itself. I accept the evidence of Mr Elliot quoted in § 64 above that a notification relating to something as fundamental as concerns over the columns' structural stability would have been written in far clearer terms.

200. Further, I do not accept Beazley's contention that the Sector A column issue is deemed to be a single claim with the other potential claims notified on 30 March 2009 by reason of Condition 6.5 because all had the same original cause namely *"poor initial design"* by RMJM. Condition 6.5 reads:

> "6.5 Limit of Indemnity
>
> Shall mean the sum shown in the Schedule which is available to indemnify the Assured in respect of each claim provided always that where more than one claim arises from the same original cause all such claims shall be deemed to be one claim and only one limit of indemnity shall be payable in respect of the aggregate of all such claims."

201. First, Clause 6.5 is concerned with the application of the limit of indemnity to claims made during a single policy period, a matter which is potentially relevant to the reinstatement clause in Endorsement 4 quoted in § 150 above. But for the existence of clause 6.5, an insured might bring claims A and B which together exhaust the primary and excess layers, leading to reinstatement of the primary limit of indemnity, even if claims A and B arose from the same cause. Thus clause 6.5 is concerned with fixing insurers' maximum liability in respect of multiple claims that fall within a single policy year.

202. Clause 6.5 does not concern the allocation of claims between different policy periods: that is the function of clauses 1.1 and 3.2. Moreover, as Excess Insurers point out, under clause 1.1 the only claims for which underwriters agree to provide an indemnity are claims *"first made against the Assured and notified to Underwriters* ***during the Period of this Policy****…"* (emphasis added). In order for Condition 6.5 to apply, there must be two claims which arise from the same original cause and are both made during the period of the policy.

203. Moreover, any other view would cut across the scheme of the policy, which is to base cover on notification of claims or circumstances, rather than on the separate concept of original cause.

204. Secondly, and in any event, the Sector A columns issue and the claims notified under Notification 923 did not arise from the same original cause. To construe "*original cause*" so widely as to encompass <u>any</u> claims arising from bad design on a particular project by the insured architect would give too vague a meaning to those words. As ASD says:

i) The claims arising from the Sector A Issue depended on establishing that RMJM was guilty of negligent defective structural engineering, rendering the resulting building structurally unsafe.

ii) The claims on the basis of which Beazley advances its aggregation argument asserted that additional costs had been incurred because RMJM had failed to include in its designs detail and provision for coordination that was necessary for the efficient execution of the project.

iii) To characterise both categories of claim as arising from "*poor initial design by RMJM*" poses the test at so generalised a level as not to be useful in the context of a search for an effective original cause.

iv) The reference to "*poor initial design*" in the DG Jones letter notified in Notification 923 was not, in context, a general reference to any error of design but to problems of the kind that had been raised on the basis of particular types of deficiency in the designs prepared by RMJM.

(c) Causes of the delays: Sector A vs Sector B

205. As noted earlier, ASD's evidence in the arbitration was that the delays to Sector A and Sector B were the dominant cause of the prolongation costs. Further, the arbitral tribunal held that:

i) the stop on the Sector A Field House work must have had a material impact on the progress of the works;

ii) RMJM's failure to advise that it could not produce drawings in the absence of the requisite acoustic design for Sector B will on the balance of probabilities also have had an impact on the progress of the works; and

iii) (in the context of the contractual limit of liability) all of the successful heads of claim "*primarily arise out of*" RMJM's breaches in the preparation of the Sector A design.

206. The question arises as to whether, when deciding to what extent the ASD claim arises out of circumstances notified to the 2008/09 and 2009/10 policy years, the court should conclude that RMJM's breach in relation to the Sector A columns was the proximate cause of the project delays, and hence the prolongation costs.

207. ASD submits that the court should so conclude based on the facts that:

i) it was the Sector A issue that caused ASD to pursue the arbitration against RMJM;

ii) the "*dominant factor*" underlying the delay (prolongation) claim was Sector A, which Mr Korolis of AAA described as the *"driving dominant delay"*;

iii) ASD's expert, Mr Atkinson, stated that *"Event 57 was the dominant cause of delay to completion of the Works in the period from 8 October 2009 until 18 May 2010"*, and also pushed back the completion date from 31 August 2010 to 11 April 2011 based on AAA's contemporaneous progress updates;

iv) the main works for Sector A were stopped for just under 13 months, from 24 August 2009 to 20 September 2010 (including, ASD says, a 5 month period from late December 2009 to May 2010 before RMJM produced an adequate redesign and obtained necessary approvals);

v) the Sector A issue predated any delay associated with the acoustic design issues in Sector B, and was the last sector to be handed over to ASD;

vi) ASD's evidence is that it settled the AAA prolongation claim on the basis of Sector A; and

vii) the tribunal in the context of contractual limitation concluded that all of the heads of claim primarily arose out of RMJM's breach in the design of Sector A.

208. The Excess Insurers submit that none of the claims on which ASD succeeded in the arbitration arose from the circumstances notified in Notification 923. Specifically as regards the prolongation claim, they contend that the delay was entirely caused by the Sector A issue or other matters unrelated to Notification 923, because (in summary):

i) it is ASD's case and its evidence that the delays and all the damages claimed arose from the Sector A issue;

ii) the tribunal found that the Sector A issue was the primary cause of the losses ASD suffered;

iii) all known problems with RMJM's designs that had come to light prior to October 2009 were specifically compromised in VO1;

iv) AAA's revised EOT claim asserted that the delays were almost entirely caused by the delay to Sector A;

v) ASD's expert in the arbitration, Mr Atkinson, concluded that Sector A had been the dominant cause of the delay to the project;

vi) ASD settled AAA's prolongation claim because of the delays caused by Sector A;

vii) the late provision of acoustic designs which delayed Sector B (a) arose well after Notification 923; (b) does not appear to have caused the delay to Sector B: the actual cause was the delay to the steelwork; (c) did not arise from a lack of coordination or of insufficient detail in RMJM's designs because the acoustic designs were produced by a third party employed directly by ASD; (d) therefore fell outside

Notification 923; and (e) did not delay the project as a whole because the critical delays to Sector A began earlier and finished later than any others;

viii) the 'driving force' of the ASD arbitration claim against RMJM was the Sector A claim, so there was insufficient causative connection between any other matters and the claims made against RMJM; and

ix) it is for Beazley to prove any alleged casual connection between the circumstances within Notification 923 and any part of the claims for which RMJM was held liable in the arbitration award.

209. Excess Insurers submit that the principle in *The Miss Jay Jay* applies because the prolongation cost was a single cost, and if it was caused by two perils, one insured (the Sector A problem) and one merely not covered (e.g. on this analysis the Sector B problem) then there was cover for the entirety of the loss.

210. Beazley, on the other hand, takes the position that the ASD Award was not, and could not be, conclusive on these matters and that the court is not in a position (and is not being asked) to form a view on the underlying facts regarding the causes of the project delays. That is a matter that would require expert evidence as to the operative causes of the delays, and could not be determined as part of the preliminary issues. Instead, the court's task in relation to preliminary issues 1 and 2 is to decide whether, to the extent that the delays arose from the various potential causes (e.g. the Sector A columns problem or the Sector B acoustic design problem), they arose from the matters notified in Notifications 923 or 953.

211. I have come to the conclusion that Beazley's approach is correct, for three reasons.

212. First, as to the principles, the insurance policies provide cover for claims which (in this instance) led to a liability on RMJM to compensate ASD for the money ASD had to pay AAA to settle the prolongation claim and any other claims parasitic on the delay. The insured loss is not ASD's liability for AAA's claim, but RMJM's liability to compensate ASD for that loss.

213. It may be the position on the facts – I emphasise that I make no finding one way or the other – that that liability had more than one cause in the sense that different negligent acts/omissions by RMJM led to delay in the works. Moreover, it may be the position that those different negligent acts/omissions led to discrete periods of delay giving rise to different losses to AAA, and hence to different liabilities on the part of ASD and, ultimately, to different liabilities of RMJM to ASD. Depending on the detailed facts, it may be the position that the whole loss would not have occurred even if RMJM had committed only one of the negligent acts/omissions (e.g. the Sector A column design error). In other words, it is possible that each negligent act/omission resulted in some loss that would have happened even without the other negligent act/omission, so that part of the loss for which RMJM is liable arose wholly from one piece of negligence and part from another.

214. *The Miss Jay Jay* indicates where there is a single loss which has two proximate causes, one an insured peril and the other a non-excluded uninsured peril, then the insured peril remains a proximate cause of loss and the insurer is liable. The single, unitary loss in that case was the damage to the vessel.

215. The same point appears from *Global Process Systems Inc v Syarikat Takaful Malaysia Bhd* [2011] UKSC 5, upon which ASD relied to the same effect and which contains a discussion of *The Miss Jay Jay*. The (unitary) loss there was of an oil rig whose leg was broken by a wave during transportation. Again in *ACE European Group v Standard Life Assurance Ltd* [2012] EWHC 104 (Comm) and [2012] EWCA Civ 1713, which referred to *The Miss Jay Jay* by way of analogy, there was a single set of mitigation costs which the courts held should not be apportioned merely because the insured had allegedly incurred some of them for ulterior reasons. The Court of Appeal specifically found at § 22 that *"The whole payment was incurred for the relevant purpose"* and that *"the Cash Injection was one indivisible sum which had to be paid in full in order to restore the value of the Fund"*.

216. These cases do not address the situation where rather than a unitary loss there are two discrete losses arising from, for example, two discrete periods of delay. Suppose, for example, that:

    i) A contractor claims from his employer for a delay of 12 months, comprising 6 months' delay wholly caused by negligence by the architect for which the architect has insurance, and 6 months' delay wholly caused by negligence by the architect for which he has no insurance (e.g. because he placed no cover for the period in question, or the cover has been avoided). Suppose further that the employer then settles with the contractor by paying a single sum for the whole period of delay, and then sues the architect. Could the architect claim indemnity for the whole liability from his insurer on the basis that the negligence for which cover existed was a proximate cause of the whole of the architect's liability?

    ii) Alternatively, suppose that the contractor claims for a delay of 12 months, comprising 6 months' delay caused by a fault in the architect's original design several years ago, covered by insurer A, and 6 months' delay caused by the architect's more recent defective supervision of the works, covered by insurer B. Again the employer settles with the contractor by paying a single amount for the whole period of delay and then sues the architect. Could the architect claim indemnity from insurer A on the basis that the original design negligence was a proximate cause of the whole of the architect's liability? Equally could he claim indemnity for the whole loss from insurer B on the corresponding basis?

217. In both examples, it seems to me that the answer is no: each of the two distinct acts of negligence is the proximate cause of the element of the loss to which it actually gave rise, but not of the other element of the loss. It does not become a proximate cause of the other element of the loss simply because the employer chooses to bring a global claim for both elements together and then

to settle the claim on a global basis. The insured can still recover from the relevant insurer(s) provided that either the global settlement includes an allocation of the settlement between the different losses, or the insured can show loss attributable to the insured peril (see *Enterprise Oil Ltd v Strand Insurance Co Ltd* [2007] Lloyd's Rep. I.R. 186).

218. Secondly, the problem cannot be answered here simply by reference to the arbitral tribunal's conclusions, because:

i) on the basis of the case law referred to in § 34 above, it is clear that the ASD Award is not binding as between the present parties as to the causes of the prolongation costs: moreover, there is no consensus between the present parties that I should treat the ASD Award as binding on that issue; and

ii) the Award does not make clear, where it refers to the Sector A issue being the primary cause of the loss, whether the tribunal meant it was the primary cause in the sense of being the main cause of the whole loss, or in the sense of being the cause of most of the loss.

219. Thirdly, the position on the underlying facts is complex and the issue cannot be answered simply by reference to a combination of AAA's February 2012 revised EOT claim, Mr Atkinson's report and the arbitral tribunal's detailed findings:

i) As noted in §§ 114-116 above, the EOT claim included claims for delays relating to both Sector A and Sector B, the latter including Event 39 (late instruction of nominated subcontractor for acoustic treatment works) and Event 65 (delay relating to steelwork).

ii) Mr Atkinson's report indicated (§§ 117-118 above) that AAA's critical path analysis ran through Sector B for a three month window in mid 2010, but that he was not in a position to assess the actual impact of what he saw as the key Sector B Event viz Event 65.

iii) The tribunal did not decide the matter based on Mr Atkinson's report or AAA's EOT claim.

iv) Mr Steven Jones of ASD stated in his witness statement in the ASD arbitration that *"The delays to sector A and sector B were the dominant and insurmountable causes of the overall delays to the completion of the campus"*, and that he considered AAA had an entitlement to prolongation costs on that basis, albeit he stated in cross-examination in the present case that he now realised that because of the concurrent delays involved the primary driver was Sector A.

v) The tribunal found that Sector B delay had "*an impact*" on the progress of the works, but did not attempt to quantify it.

220. There is also a lack of clarity as to which factor – acoustic design or steelwork – caused any critical Sector B delay. The basic facts according to AAA's

February 2012 EOT claim are summarised in §§ 114-116 above. AAA stated in its claim that:

> "… [AAA] planned to commence the Structural Metal Roof on 24 November 2009, which would then allow [AAA] to start the Works to the Acoustic and finishing Works in Sector B by 30 January 2010 with an overall completion date of 24 April 2010 …
>
> [AAA] notes that it was only after its receipt of the DM approved and stamped Structural Steelwork Drawings for Sector B issued on 14 June 2010 under EI-197 that the Contractor could commence Site erection of Sector B Theatre Structural Steelwork. …
>
> The Engineer's late Instruction to the Contractor of DM approval for Sector B Theatre Steelwork Designs caused the Contractor to suffer delay to its Steel Erection Works, which, in turn, caused the Contractor to suffer delay and disruption to its subsequent Works to Sector B Theatre." (§§ 3.580, 3.582 and 3.589)

221. However, the arbitral tribunal made no findings on this matter. Instead it concluded that there had been a delay caused by the late acoustic design. It did not consider whether there was a delay in relation to the Sector B steelwork designs, whether (if so) that delay eclipsed the acoustic designs delay, or whether any steelwork designs delay resulted from a breach of duty by RMJM. Nor is there any other evidence (or submissions) before the court as to whether any such delay resulted from a breach of duty by RMJM, or (if so) the nature and timing of any such breach. As a result, there is no material on which the court can determine (a) whether or not any part of RMJM's legal liability to ASD resulted from a breach of duty by RMJM with regard to Sector B steelwork or (b) if so, whether that liability arose from circumstances notified to underwriters in Notification 923. Accordingly I make no findings on those matters. I do not consider it would be fair simply to determine the matter based on the burden of proof, bearing in mind that these issues are in reality inextricably bound up with questions as to RMJM's actual liabilities which the parties have agreed should be dealt with at a later stage, and the parties' different expectations as to the scope of the preliminary issues.

(d) Notification of the Sector B problems

222. The evidence indicates that there were two particular problems in relation to Sector B which may have delayed the progress of the works:

i) lateness in the obtaining of acoustic design; and

ii) a delay in obtaining DM approval to the structural steelwork design to the Sector B theatre.

223. The basic facts, so far as they appear from the evidence, are summarised in section (E)(1)(l) above.

224. I have already explained in section (E)(3)(c) above why the question of whether, and if so to what extent, either of these matters actually gave rise to any part of the ASD claim is not a matter which the court can or should resolve at this stage.

225. In this section I consider whether the circumstances relating to either of these two Sector B problems was notified as part of Notification 923.

226. Acoustic design: The arbitral tribunal concluded that RMJM was at fault in producing drawings "*up to and including 2009 [which] lacked the acoustic design which, by that time, would reasonably be expected to be needed to allow the Project to proceed*" and that RMJM should instead have "*advised [ASD] that it could not produce adequate drawings in the absence of the requisite acoustic design.*"

227. ASD makes the point that the designs that lacked the acoustic element pre-dated Notification 923, having been enclosed with RMJM's letter of 24 July 2008 issuing drawings to AAA, and contends that the acoustic design problem was a matter of coordination between disciplines and/or of poor design which fell within Notification 923.

228. Beazley denies this, pointing out that any potential problem in respect of acoustic design was not a matter that was of concern as at 31 March 2009, was first raised as an issue by AAA in August 2009, and was not a matter falling within Notification 953. (Beazley adds that it was not within any subsequent notification either, but that is not a matter before me on the preliminary issues.)

229. Although I regard the matter as finely balanced, I have come to the conclusion that the acoustic design problem was within the scope of Notification 923, for the reasons set out below.

230. As noted in §§ 156-160 above, the question is at what level of generality it is necessary for an insured to be aware of, and to set out in his notification, a set of circumstances likely to give rise to a claim in order for the notification to be valid.

231. Gloster J stated in *Kidsons* at first instance, "*There may well be uncertainty at the time of notification as to what the precise problems or potential problems are; there well may be, whether known, or unknown, to the assured a "hornets' nest" which may give rise to numerous types of claims of presently unknown quantum and character at the date of the notification. … in principle there is no reason why such a state of affairs should not be notified as a circumstance if the assured is aware of it …"*.

232. Taking that approach, it is still necessary for the insured to be aware of a set of circumstances, being circumstances that a reasonable person would consider more likely than not (on the policy wording in this case) to give rise to a

claim. It is not sufficient for the insured simply to take the view that as it has made, or been alleged to have made, a considerable number of errors on a project then it is likely to have made other types of error too: the insured would then, in Akenhead J's words in *Kajima*, "*simply be guessing that there might be circumstances*". On the other hand, Gloster J's comments in *Kidsons* indicate that the insured may know of and notify a category of problems likely to give to a claim even if the full details of each problem in the category is not yet apparent.

233. In the present case, the evidence (including the documents forming part of Notification 923 itself) indicated that having taken over the project from the existing Hillier team, RMJM had become aware that there had been many failures to coordinate works between disciplines, resulting in AAA issuing RFIs. The notification form prepared by RMJM's personnel in Dubai said:

> "The current RMJM team took over the job in July 2008 issuing the previously tendered drawings for Construction. As the construction works are proceeding, it has become apparent that many works have not been thoroughly coordinated between the disciplines leading to the Contractor submitting numerous RFIs. RMJM has decided to review the documentation and correct any serious errors of coordination with the aim of avoiding larger abortive works by the Contractor. We have informed the Client's Rep (DG Jones) of this and are presenting any proposed changes to them for their approval."

234. The reference to RMJM having *"decided to review the documentation and correct any serious errors of coordination with the aim of avoiding larger abortive works by the Contractor"* suggests that the extent of the problem as RMJM viewed it was not necessarily confined to matters that had already resulted in RFIs from AAA, but extended to other significant deficiencies of a coordination nature which RMJM considered likely to be inherent in the existing documentation, and which were liable to lead to RFIs.

235. There is no evidence that RMJM was specifically aware by March 2009 (or by the time of VO1 in December 2009) that one of those particular significant deficiencies was that drawings had been produced for Sector B without taking account of the fact that (in the tribunal's words) *"... [RMJM] could not produce adequate drawings in the absence of the requisite acoustic design"*. By December 2009 AAA had notified RMJM (on 29 August 2009) that it had not yet received the Issued for Construction (IFC) drawings for the Sector B theatre, and ASD had asked DG Jones to commence the appointment process for an acoustic consultant in November 2009. It does not appear to have been apparent yet that RMJM was at fault for having failed to warn ASD at an earlier stage of the need to do this before proper drawings could be produced.

236. Nonetheless, that deficiency in my view fell within the category of failures of coordination, inherent in the existing documents, of which category RMJM was aware by March 2009. It was a failing that existed in the documentation at least from July 2008, when RMJM submitted its drawings to AAA, and

remained present according to the tribunal in *"the drawings which [RMJM] produced up to and including 2009"*.

237. As to the scope of the notification itself (as distinct from RMJM's state of knowledge), Gloster J in *Kidsons* went on to say: "*in each case the extent and ambit of the notification and the claims that are covered by such notification will depend on the particular facts and terms of the notification*". The notification here included the RMJM notification form and/or the Integra letter, in addition to the DG Jones letter. The gist of the relevant part of the notification form and of the Integra letter were in the terms I discuss in §§ 233-236 above. I consider on balance that the acoustic design deficiency fell within the scope of Notification 923. It was within the category of errors of coordination referred to in the notification documents.

238. Structural steel issue: As I have noted in §§ 220-221 above, there are no relevant findings on this issue by the tribunal, and no material before the court on which it can decide whether the steelwork delay resulted from a breach by RMJM or the nature of any such breach. As a result, there is no material on which the court can currently determine whether any such liability arose from circumstances notified to underwriters in Notification 923, and in all the circumstances I do not consider it would be fair to make a determination based on burden of proof.

(e) Lack of detail and cross-referencing in drawings/designs

239. Another complaint advanced by ASD in the arbitration was that RMJM's tender drawings were inadequately detailed, with the result that AAA was unable to progress the construction using the IFC drawings and had to issue an unusually high number of VOs and RFIs over the course of the project. ASD provided specific examples and, the tribunal records, its witnesses *"testified that drawings had been inadequately detailed and uncoordinated"*. ASD also filed an expert's report from a Mr Pickering on this topic. The tribunal did not accept this evidence in full, but was:

> "satisfied on the evidence of Mr Jones, Ms Adada and Mr Pickering that some of the drawings which [RMJM] produced lacked (1) the details and (2) the cross referencing to other design documents, which a designer using reasonable skill, care and diligence would have included. The Tribunal is further satisfied that this contributed to the level of Requests for Further Information … issued on the Project by AAA. The Claimant makes no separate financial claim arising from the increase in the number of RFIs and therefore it is not necessary for the Tribunal to determine whether the lack of details and cross referencing were the sole or principal cause of the RFIs which were issued on the Project, or the extent to which the level of RFIs on the Project was increased as a consequence of [RMJM's] breach." (§ 10.28)

240. Nonetheless, when considering the loss arising from AAA's prolongation claim, the tribunal stated as one of the causes of the delay that:

> "[RMJM's] failure to provide drawings which properly included the details and the cross referencing to other design documents will, on the balance of probabilities, have had an impact on the progress of the works." (§ 14.15.3)

241. It may be noted, however, that the AAA critical path analysis considered by Mr Atkinson, referred to in §§ 114-118 above, does not appear to have included this factor as one of the matters that in practice caused any particular period of delay. Moreover, ASD's claim in the arbitration stated that the causes of delay other than the Sector A hold and the Sector B acoustic-related delay, including *"the large number of VOs, RMJM's late instructions and RMJM's late notices, as well as RMJM's slow project management"*, *"ran concurrently with the delays in Sector A and Sector B"*. It may be, therefore, that these other matters are not significant in causative terms to RMJM's liability to ASD.

242. However, if and in so far as any part of the ASD claim nonetheless did arise from these matters, on balance I consider them to have fallen within the circumstances notified under Notification 923. This is for essentially similar reasons to those I give above in relation to the Sector B acoustic problem. Although there is no evidence that specific details of these matters were known by 30 March 2009 (or, one may infer, by the time VO1 was agreed in December 2009), they nonetheless formed part of the category of deficiencies in terms of design detail of which RMJM had become aware by March 2009 and referred to in Notification 923.

(f) Beazley's application for permission to amend

243. During the course of the hearing there was discussion of the question of whether or not it was open to Beazley to contend that if the Claimants' approach to the scope of Notifications 923 and 953 were correct, then some of the claims had not been notified at all: in particular, ASD's claims as to RMJM's alleged failure to proceed with due speed following the DM stop imposed on the Sector A works, the Sector B acoustic design and the level of detail in RMJM's drawing and designs leading to RFIs.

244. This led to correspondence between the parties' solicitors on 16 and 19 February 2018 in which Beazley maintained that its existing statements of case entitled it so to contend, but in the alternative put forward a proposed amendment, and ASD denied Beazley's statements of case permitted such a contention and opposed any amendment.

245. ASD's Amended Particulars of Claim allege in §§ 43 and 44 that the liability established by the ASD Award fell within Notification 953, alternatively partly within Notification 953 and partly within Notification 923.

246. Beazley's Re-Amended Defence (served on 1 February 2018) admits and avers in § 34 that *"any such liability as RMJM may be under to ASD in respect of the ASD Claim falls within the period of cover of the 2008/09 Primary Policy, in that; (a) The ASD Claim arises out of the Circumstances the subject of the 31 March 2009 Notification, namely "... errors or changes*

in design which as a result of poor initial design by RMJM" and/or "works [not having been] thoroughly coordinated between the disciplines …". Beazley's § 37 pleads that ASD's §§ 43 and 44 are *"otherwise denied"*, and that without prejudice to that denial Beazley *"will say"* that *"[f]or the reasons set out in paragraphs 18 to 21 and 34 to 35 above, any such liability as RMJM may be under to ASD in respect of the ASD Claim falls within the period of cover of the 2008/09 Primary Policy"*.

247. Beazley pleads an alternative case in § 38 that if any part of the ASD Claim fell within the 2009/10 cover, then ASD had breached the notification requirement in clause 3.2 and was thus not entitled to be indemnified.

248. In Appendix 3 to its Re-Amended Defence, in the context of defence costs, Beazley states *"It is Beazley's case that both the ASD Claim and the ADNEC Claim fall within the period of the 2008/09 Primary Policy."*

249. Excess Insurers' Amended Defence dated 18 August 2017 states in § 31.3:

> "It is denied that the claims were notified to and/or fall within the 2008/09 Primary Policy. The only claims which could fall within the 2008/09 Primary Policy are any claims to which Circumstance 923 gave rise, whereas, as set out at paragraph 38.4 below, all or most of the claims made in the Arbitration arose from Circumstance 953 and/or Circumstance 963 and/or related to claims which were otherwise first made or Circumstances which were otherwise notified after the expiry of the 2008/09 Primary Policy."

Further, § 38.4 denies that Circumstance 923 *"gave rise to any part of ASD's claim or claims for the losses comprising Head 4. Head 4 comprised prolongation costs entirely or primarily caused by the [Sector A] issue".* It goes on to plead that *"all claims made by ASD against RMJM were claims to which Circumstance 953 gave rise; alternatively to which Circumstance 963 gave rise (and/or to which circumstances other than Circumstance 923 gave rise) …".* Paragraph 51 goes on to deny that the liability falls within the 2008/09 Primary Policy and to admit or aver that it falls within the 2009/10 Policy.

250. Beazley's proposed amendment, if needed, is to add a new paragraph 37A stating:

> "In the further alternative, in the event that contrary to Beazley's primary case but as contended by ASD: (i) the entirety of the ASD Claim is not to be treated as falling within the 2008/09 year of cover and/or the notification of 31 March 2009 did not encompass all claims in respect of "errors or changes in design which are as a result of a poor initial design by RMJM"; and (ii) there was no such agreement or estoppel as is alleged in paragraph 35 above, then the following claims advanced by ASD in the ASD Arbitration fell outside the scope of both the notification of 31 March 2009 and the notification

of 10 September 2009 and, as a result, fall outside the cover provided under both the 2008/09 and the 2009/10 Primary Policies:-

(1) ASD's claim that RMJM failed to proceed with due speed following the imposition by the Dubai Municipality of a stop order on the Sector A works (paragraph 10.12 of the ASD Award). Any such delay on RMJM's part occurred after 10 September 2009 and was not within the notification made on that date.

(2) ASD's claim in respect of the Acoustic Design of the Sector B theatre (paragraph 10.20 of the ASD Award). The matters giving rise to that claim were not the subject of any complaint by ASD prior to August 2009 and such matters did not fall within the scope of the 10 September 2009 Notification.

(3) ASD's claim as to the level of detail in RMJM's drawings and designs leading to the issue of RFIs (paragraph 10.28 of the ASD Award). All issues in relation to RFIs issued prior to 20 October 2009 were resolved by VOs 1 and 2 and, to the extent that any issues in relation to RFIs did not form part of the ASD Claim, those issues arose after October 2009 and did not fall within the scope of the 10 September 2009 Notification."

251. I heard submissions on these matters, including on Beazley's application to amend, on the last day of the hearing, and reserved judgment. In the light of my findings on other issues, the question of amendment may not ultimately be significant. However, it seems to me right to determine it in case the matter goes further.

252. ASD point out that Beazley's Re-Amended Defence at no point sets out any case to the effect that any part of the ASD Claim falls outside cover altogether, and the bare denial at § 37 is insufficient. CPR 16.5(2) states:

"Where the defendant denies an allegation—

(a) he must state his reasons for doing so; and

(b) if he intends to put forward a different version of events from that given by the claimant, he must state his own version."

253. I agree with ASD that Beazley's pleading did not put ASD on notice that a case would be run to the effect that any part of the ASD Claim fell outside both notifications. Thus, for example, there was no plea by Beazley in response to which it would have been necessary or appropriate for ASD to plead – as it would wish to do were Beazley to be permitted to advance this argument – that Beazley is estopped (or precluded by agreement) from

denying that any part of the ASD claim falls outside both notifications and policies.

254. It therefore seems to me that Beazley does need to amend its statements of case if it is to advance this argument.

255. As to whether permission to amend should be granted, ASD drew attention to the summary of the applicable principles given by Carr J in *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759:

> "36 An application to amend will be refused if it is clear that the proposed amendment has no real prospect of success. The test to be applied is the same as that for summary judgment under CPR Part 24. Thus the applicant has to have a case which is better than merely arguable. The court may reject an amendment seeking to raise a version of the facts of the case which is inherently implausible, self-contradictory or is not supported by contemporaneous documentation.
>
> …
>
> 38 Drawing these authorities together, the relevant principles can be stated simply as follows:
>
> a) whether to allow an amendment is a matter for the discretion of the court. In exercising that discretion, the overriding objective is of the greatest importance. Applications always involve the court striking a balance between injustice to the applicant if the amendment is refused, and injustice to the opposing party and other litigants in general, if the amendment is permitted;
>
> b) where a very late application to amend is made the correct approach is not that the amendments ought, in general, to be allowed so that the real dispute between the parties can be adjudicated upon. Rather, a heavy burden lies on a party seeking a very late amendment to show the strength of the new case and why justice to him, his opponent and other court users requires him to be able to pursue it. The risk to a trial date may mean that the lateness of the application to amend will of itself cause the balance to be loaded heavily against the grant of permission;
>
> c) a very late amendment is one made when the trial date has been fixed and where permitting the amendments would cause the trial date to be lost. Parties and the court have a legitimate expectation that trial fixtures will be kept;
>
> d) lateness is not an absolute, but a relative concept. It depends on a review of the nature of the proposed amendment, the quality of the explanation for its timing, and a fair appreciation

> of the consequences in terms of work wasted and consequential work to be done;
>
> e) gone are the days when it was sufficient for the amending party to argue that no prejudice had been suffered, save as to costs. In the modern era it is more readily recognised that the payment of costs may not be adequate compensation;
>
> f) it is incumbent on a party seeking the indulgence of the court to be allowed to raise a late claim to provide a good explanation for the delay;
>
> g) a much stricter view is taken nowadays of non-compliance with the CPR and directions of the Court. The achievement of justice means something different now. Parties can no longer expect indulgence if they fail to comply with their procedural obligations because those obligations not only serve the purpose of ensuring that they conduct the litigation proportionately in order to ensure their own costs are kept within proportionate bounds but also the wider public interest of ensuring that other litigants can obtain justice efficiently and proportionately, and that the courts enable them to do so."

256. Subsequently the Court of Appeal in *Nesbit Law Group LLP v Acasta European Insurance Company Limited* [2018] EWCA Civ 268 has provided the following short summary of the position:

> "In essence, the court must, taking account of the overriding objective, balance the injustice to the party seeking to amend if it is refused permission, against the need for finality in litigation and the injustice to the other parties and other litigants, if the amendment is permitted. There is a heavy burden on the party seeking a late amendment to justify the lateness of the application and to show the strength of the new case and why justice requires him to be able to pursue it. These principles apply with even greater rigour to an amendment made after the trial and in the course of an appeal." (§ 41)

257. The proposed amendment here is late vis a vis this preliminary issues trial, though not necessarily in the context of the case as a whole. The circumstances are, however, somewhat unusual.

258. First, Excess Insurers have by the pleadings I quote above put in issue whether or not the whole of the ASD Claim is within either the 2008/09 policy year or the 2009/10 year, or neither. I therefore have to resolve those issues, so far as I can, as between the Claimants and Excess Insurers in any event.

259. Secondly, the parties signed a consent order on 6 February 2018 which provides for determination as preliminary issues at this trial of, *inter alia*,

> "(1) Whether and to what extent the ASD Claim (or any part of it, and which part(s))
>
> (a) arises out of circumstances notified during the 2008/2009 policy year, and (b) falls within the period of cover provided by the 2008/2009 Primary Policy?
>
> and
>
> (2) Whether and to what extent the ASD Claim (or any part of it, and which part(s))
>
> (a) arises out of circumstances notified during the 2009/2010 policy year and (b) falls within the period of cover provided by the 2009/2010 Primary Policy?"

260. It is inherent in that formulation that questions (1) and (2) are to be approached separately, and that the answer to both could be 'no' as regards part or all of the ASD claim.

261. That does not automatically mean that the parties would be bound by conclusions reached on those preliminary issues to the extent that matters have not been pleaded, because the preliminary issues do not supersede the statements of case, but it does tend to suggest that the parties were content for the court to answer the questions posed and to be bound by the answers.

262. Thirdly, Beazley's contentions arise as a logical consequence of ASD's own arguments, in the sense that they are said to flow from ASD's contention that the matters falling within Notification 923 are limited to matters known to RMJM at the time of the notification. Beazley submitted that until seeing the way ASD presented the case in its submissions at the present trial, it did not appreciate that ASD would contend that Notification 923 could cover only matters that had been raised as likely claims prior to 31 March 2009.

263. Fourthly, the impact on the progress of the case as a whole is to a degree limited. For reasons given above, it was always going to be necessary to address these issues (i.e. whether the claims falls within Notification 923, Notification 953 or potentially neither), so far as possible, at this trial and the proposed amendment would not alter that. Its main practical impact on the proceedings would instead be that, if the amendment were allowed, then ASD's argument that Beazley are estopped/precluded by agreement from denying cover altogether would need to be determined at a future hearing, possibly at the final trial of the case. The estoppel/agreement point arises only as against Beazley, as it appears there was no basis on which ASD could or should have advanced such an argument against Excess Insurers.

264. ASD say that gives rise to prejudice to them because there is evidence it may have wished to adduce on the issue which it may not now be possible to adduce. First, ASD might have adduced evidence, or cross-examined, on the basis on which the ASD claim in respect of Sector A was advanced, though this might reasonably be said to be apparent (to the extent relevant) from the

arbitration documents themselves. Secondly, and more significantly, ASD would have wished to obtain evidence from Mr Elliot of RMJM, and possibly others who were at RMJM after Mr Elliot left, as well as cross-examining Mr Morgan of Beazley, in relation to its estoppel/agreement argument. In addition, ASD might, in reliance on cover being provided by Beazley, have communicated to insurers of later policy years that they were not at risk.

265. ASD made the point that these matters cannot be resolved simply by hiving its estoppel/agreement argument off for later consideration. In particular, Mr Elliot was not ASD's employee, it was not straightforward to persuade him to give evidence on this occasion, and it was not known whether he would be willing to give evidence again.

266. I acknowledge that there may be a risk of ASD encountering difficulty in persuading Mr Elliot to give evidence again, and have borne that in mind. On the other hand, it seems likely that the most critical areas of dispute in relation to ASD's estoppel/agreement argument would be what Beazley had said to RMJM, and/or more generally how Beazley had conducted itself towards RMJM, such as might provide a basis for an estoppel or agreement; and that the contemporaneous documents would be the key element in proving those matters. Having seen Mr Elliot's email correspondence and heard him give evidence, I would be surprised if he had not made some form of written record of an exchange with Beazley on such a fundamental matter. Further, in circumstances where ASD were unable to procure Mr Elliot's evidence, I would expect the court not to be unduly reluctant to infer how RMJM would be likely to have altered its position on the basis of the dealings or communications alleged to found an estoppel.

267. In addition, there is force in Beazley's point that it has always been part of Beazley's case that there was an agreement or estoppel as between RMJM and Beazley to the effect that the claims were wholly within the 2008/09 policy year. If ASD considered there to have been an agreement or estoppel to the effect that the claims were wholly within either the 2008/09 or the 2009/10 year (as opposed to being outside cover altogether), then that agreement or estoppel would also have been an answer – which one would have expected ASD to run, with its evidence, to Beazley's own agreement/estoppel case.

268. Viewing the matter in the round, and acknowledging that the arguments are finely balanced, I have concluded that it is right to give Beazley permission to make the proposed amendment.

(4) Conclusion on Issue 1

269. To the extent that the ASD Claim arises out of RMJM's defective design of the Sector A columns (being, for identification, the matter which led to the stoppage of work in 2009 and subsequent remedial works to the Sector A columns), it does not arise out of circumstances notified during the 2008/2009 policy year or fall within the period of cover provided by the 2008/2009 Primary Policy.

270. To the extent (if at all) that the ASD Claim arises out of RMJM's breach of duty in relation to acoustic works and/or RMJM's lack of detail and cross-referencing in drawings/designs, referred to in §§ 14.15.2 and 14.15.3 respectively of the ASD arbitral tribunal's award, it arises out of circumstances notified during the 2008/2009 policy year and falls within the period of cover provided by the 2008/2009 Primary Policy.

(F) ISSUE 2: NOTIFICATION 953

271. Issue 2 is:

> "Whether and to what extent the ASD Claim (or any part of it, and which part(s)) (a) arises out of circumstances notified during the 2009/2010 policy year and (b) falls within the period of cover provided by the 2009/2010 Primary Policy?"

272. I have already set out the facts relevant to this issue in section (E) above.

273. To the extent that the ASD claim arises from the Sector A columns issue, it does arise out of circumstances notified during the 2009/10 policy year because:

i) as at the date of Notification 953, RMJM was plainly aware of such a potential claim, and a reasonable person would clearly consider it likely to give rise to a claim; and

ii) Notification 953 as a matter of construction did include a potential claim arising from failure to design the Sector A columns in accordance with the DM regulations and/or failure to design the Sector A columns so that they could safely support the load they would bear (whether including or excluding seismic requirements).

274. An area of potential difficulty arises out of the tribunal's finding that it "*accepts the evidence of Mr Al Hashimi that [RMJM] failed to proceed with due speed between the imposition of the DM hold on Sector A construction to the start of the remedial works and accepts that the period of 9 months taken by [RMJM] to proceed with rectification works was excessive*."

275. Those matters self-evidently post-date Notification 953. Beazley argues that if Notification 923 was not a hornet's nest notification and did not result in all claims based on "*poor initial design*" falling within the 2008/09 year of cover, then the loss caused by failure to proceed with due speed was never notified to Beazley and falls outside the cover provided by the Beazley policies. The claim that RMJM acted in breach of its duties in failing to proceed with due speed to design rectification works to the Field House columns following the DM's imposition of a stop order on 24 August 2009 was, Beazley says, necessarily a different claim from that in respect of the original failure adequately to design the Sector A columns because RMJM's breach occurred after the stop order was imposed, was not a matter known on 10 September 2009, and did not fall within Notification 953.

276. However, even on the broadest feasible construction of Notification 923 as a 'hornet's nest' notification, I find it difficult to see how it could have covered a subsequent failure by RMJM to carry out the required remedial works to Sector A, assuming that to be a distinct and free-standing claim. It is hard to see how an insured can be said to be aware, at however high a level of generality, of a breach of duty (likely to give rise to a claim) which it has not yet committed whether wholly or partly.

277. It seems to me that the real issue is, rather, whether any failure by RMJM to proceed with due speed in relation to remediation is one of the matters arising from the Sector A column problem notified in Notification 953, or whether it is a free-standing matter falling outside that notification and which was required to be notified separately. That is in essence a matter of causation which will have to be determined at trial. However, I make the following brief observations on it.

278. The evidence of Mr Al Hashimi was based on a review of RMJM's remedial design, the Hyder report and RMJM's post-IFC drawing submission to AAA. Mr Al Hashimi said:

> "Based on my review of the above information and my own outline evaluation of the extent and magnitude of remedial works that would be required to upgrade the structure to meet the DM requirements, it is my opinion that a period of nine months between the hold on Sector A construction to the start of the remedial works is excessive.
>
> In my opinion, once the demand to comply with DM seismic and other requirements was known, RMJM should have taken the lead in producing designs for the structural changes and remedial works in order to minimise delays. I am not aware of all the circumstances of the project at the time, but a period of approximately four to six weeks should have been sufficient for the re-design, assuming no special or unusual conditions. Additional time should also be allowed for the DM re-submission and approval, which I assume was obtained prior to re-commencement of work on site." (report §§ 4.7.3 and 4.7.4)

279. AAA's February 2012 EOT under the heading Event 57 stated that the engineer issued revised structural drawings for Sector A on 21 October 2009, which the engineer advised had been issued as a result of the engineer's recent discussions with DM Structural Department concerning the structure of Sector A (§ 3.483), but that AAA was unable to commence the revised works until the revised drawings had been approved by DM (§ 3.485), which did not occur until 17 May 2010 (§§ 3.501).

280. Neither Mr Al Hashimi's evidence quoted above, nor the EOT claim, provides details of any respect in which the delay between the issue of the drawings in October 2009 and the receipt of DM approval in May 2010 was attributable to any new negligent act or omission by RMJM over and above the initial design failure that had led to the need for the remedial works in the first place. Part

of ASD's complaint in the arbitration was that delay was caused by RMJM's initial refusal to accept that changes were required. On the basis of Mr Al Hashimi's 4-6 week estimate, new designs should have been produced within about 6 weeks from the DM order to stop work on 24 August 2009, i.e. by about 5 October 2009. The first "window" of delay for which AAA claimed in its revised EOT claim opened on 7 October 2009, whereas the revised drawings were not provided until 21 October 2009. In so far as Mr Al Hashimi or the tribunal considered there was any later breach of duty by RMJM in relation to the remedial works, they provide no details of it.

281. Applying the principles discussed in §§ 162-164 above, if and in so far as there was any discrete period of delay that was attributable not to RMJM's initial design failings in relation to the Sector A columns, but instead to a new and distinct negligent act or omission in relation to the production of the revised designs or their implementation (so as in effect to be a *novus actus interveniens)*, then in principle that delay did not in my view arise out of the circumstances notified in either Notification 923 or Notification 953. The material currently before the court does not, however, enable me to conclude that there was any such period, and its existence and extent will be a matter for determination at the final trial of this case.

Conclusion on Issue 2

282. To the extent that the ASD Claim arises out of RMJM's defective design of the Sector A columns (being, for identification, the matter which led to the stoppage of work in 2009 and subsequent remedial works to the Sector A columns), it arises out of circumstances notified during the 2009/2010 policy year and falls within the period of cover provided by the 2009/10 Policy.

(G) ISSUE 3: AGREEMENT/ESTOPPEL IN FAVOUR OF 2008/09 YEAR

283. Issue 3 is:

> "If and to the extent that the ASD Claim (or any part of it) arises out of circumstances notified during the 2009/2010 policy year, whether RMJM prior to its sequestration agreed with Beazley that the ASD Claim fell within the 2008/2009 Primary Policy and/or whether RMJM was (or ASD now is) estopped by RMJM's conduct from denying the same"

(1) Facts

284. On 15 December 2011 Ince sent a letter before action to RMJM, raising, in ten bullet points, a number of alleged breaches as follows:

> - failure to provide adequate detailed design to allow for the construction of the works that resulted in a large number of Requests for Information from the Contractor, this in itself caused substantial delays to the Project;

- failure to adequately design the Sector A structural engineering works in accordance with local building regulations, requirements and rules, resulting in a Dubai Municipality rejection of the Sector A design;

- over engineering of the Project design as a whole, leading to increased building material costs throughout the Project;

- failure to adequately design or provide an adequate design to the acoustics package within the Project, resulting in our client engaging an independent Expert, re-design and subsequent rectification works to already complete aspects of the Project;

- failure to adequately design the external surface water drainage to the Project;

- failure to adequately design the foul water drainage to the Project;

- failure to administer the engineering works adequately and at any time at all throughout the Project so as to ensure or assist with timely completion;

- failure to respond in a timely and adequate fashion to Requests For Information from the contractor and subcontractors throughout the course of the Project thus delaying the completion of the works;

- failure to provide adequate quantity and qualified personnel to the Project at all material times which [led] to increased delays, inefficiency and general poor performance; and

- failure to consider and provide an adequate and detailed response to AAA, the contractor's claims for an Extension of Time."

285. A copy of the Ince letter contains manuscript annotations made by Mr Heath of Integra in a conversation with Mr Elliot of RMJM, including notes reading *"Rang DE 21.12.11 agreed refer Beasley & precaution to ACE"* (ACE being the 2011/12 primary insurers); *"953 concrete support beams 963 tension beam 923 Design Changes 1030 pump room flooding"*. The number *"923"* was written next to the first and last bullet points.

286. Mr Heath of Integra forwarded the Ince letter to underwriters via the brokers Marsh (for the attention of Mr Jones) on 21 December 2011. Integra's covering letter referred to notification 923 in the heading and included the following:

> "The current Edinburgh based project team took over the job in July 2008, issuing the previously produced Hillier drawings for construction. As the construction progressed it became apparent that many elements of work had not been thoroughly coordinated between different disciplines and packages, leading to the contractor submitting multiple Requests for Information (RFIs) to the design team.
>
> In view of this RMJM decided to review the documentation and amend any errors of coordination in order to avoid abortive works by the contractor. The project clerk of works was advised and proposed changes were presented to the client for consideration. In response RMJM received notice of potential claims in respect of any additional works that may be incurred. At the time of notification it was not clear precisely what costs might be involved and the notification was originally made as a precaution under bordereau notification number 923/08-09.
>
> Over the last two years there had been no material developments until RMJM recently received the attached letter from lawyers acting for the client, in which formal notice of a claim has been given. The letter of claim identifies a number of specific issues and aspects of the Insured's involvement in the design and coordination of the project, but the overriding assertion is that their overall performance failed to meet the required professional duty of care, with the result that delays and additional costs have been incurred by both the client and the works contractor. …
>
> The current feeling is that the allegations may be, in large part, unjustified and that the level of losses suggested is significantly overstated, particularly in so far as the contractor loss and expense component is concerned. However, it is a matter of fact, and accepted by RMJM (although not admitted to the client), that the early coordination of the project was poor and [led] to the contractor issuing multiple RFI requests, with attendant cost implications. Consequently, there may be a valid claim(s) for some of those costs.
>
> RMJM is investigating the specific allegations in more detail to (a) enable them to compile a suitable response and (b) to ascertain if a need arises to make separate notification(s) on the current policy year. … Once RMJM's further internal investigations are complete it should be possible to provide a more definitive assessment of likely exposures and, at that stage, consideration will be given to the need for a reserve to be posted against this notification."

A similar letter was sent to RMJM's 2011/12 insurers, indicating at the end that following further investigations it should be possible to assess *"whether or not formal notice of specific matters, not dealt with in the existing*

notification, need to be made under the current year policy", and asking the current year insurers to note the situation on an information only basis in the meantime.

287. An email of the same date from Mr Heath to Mr Jones stated:

> "Subject: RMJM – American School of Dubai – Project Delays – Bdx Notification No 923/08-09
>
> This notification was originally made in March 2009, following a discovery that poor project coordination had resulted in the need for the contractor to issue multiple RFIs. In the absence of any developments since the notification was made no further action has been taken but RMJM has recently received a letter from lawyers acting for the client, as per the attached. I have also appended a letter to Insurers to bring them up to date.
>
> The client has made various allegations but the fundamental thrust is that RMJM's coordination of the project, and dissemination of design information, failed to meet the required standard. For that reason it is considered that most of what is being contended falls within the scope of notification 923 but I will be writing to you separately to ensure that the current year underwriters are advised, on a precautionary basis, pending a response from the 2008-09 policy year Insurers."

288. On 7 June 2012, Integra emailed RMJM asking if there had been any further developments. This email was headed "*American School of Dubai – Design Team Performance – Bdx No 923/08-09*". It recorded that, following receipt of Ince's letter, Notification 923 had been re-opened.

289. As noted earlier, Ince wrote again some months later on 5 May 2013 stating that ASD's complaints remained as previously stated but adding that *"it has further come to our client's attention that the original structural design in relation to Sector A was wholly inadequate due to numerous structural failings"*, and formally invoking the contractual dispute resolution provisions.

290. On 7 May 2013, RMJM wrote to underwriters attaching a copy of Ince's letter of 5 May 2013. The letter was headed "*Bdx 923 American School of Dubai*". It stated that the Ince letter, among other things:

> "Alleges deficiencies in the Sector A structural engineering works. This would appear to be circumstances notified under Bdx 953 (now closed)"

and that in addition to entering a dialogue with a view to amicable settlement

> "We will also reopen Bdx 953 as a precaution, although we expect any settlement to be reached as a "global" agreement. … In the meantime we propose a Reserve of £15,000 ("ground up") against Bdx 923 for possible future legal fees …".

291. On 23 May 2013 Beazley uploaded a series of queries onto the electronic claims file ("***ECF***"), including the following:

"*The issues now being raised by the school appear broader than encompassed within 923 and 953 – what are RMJM's views on this?*"

292. On 28 May 2013, RMJM emailed Beazley to provide an update on developments since 7 May 2013 (in summary, RMJM was willing to explore an amicable settlement, maintained its stance that it was not at fault, and was seeking to recover its unpaid fees). The email was headed "*Bdx 923 American School Dubai*".

293. In an email to Marsh dated 31 May 2013, Mr Elliot of RMJM responded to Beazley's 23 May query as follows:

> "Notification Bdx 923 was made in early 2009 by Integra on our behalf as a result of a "Notification of potential claims" letter (attached) received from D. G. Jones (Project Managers). This letter was general in its allegations but did put RMJM on notice of "potential claims that will be sought by the Main Contractor" arising from alleged "errors or changes in design" and further that "any costs associated with such claims" would be passed on to RMJM. The letter further highlighted that "checking the design and coordination of the designs is solely the responsibility of RMJM".
>
> For a period of over 2 years there were no material developments until December 2011 when we received a letter from lawyers acting for the Client alleging a number of specific issues in respect of our design and coordination of the project but with an overriding assertion that our overall performance did not meet the professional duty of care. This letter together with Integra's covering letter (attached) was forwarded to Marsh at that time to keep Dave up to date on developments. We now believe that this letter may not have been forwarded to Dave and as a result the recent correspondence is the first time he may have been aware of this letter and its contents. We can only apologise for this.
>
> At that time of the first notification we did not have precise details of what the claims might be or the affect they would have on the Main Contractor's works, the progress of these works or subsequent knock on effects of any delay in progress.
>
> This was clarified somewhat by the lawyer's letter in that first 6 bullet points specifically refer to design issues and the remaining 4 bullet points, although not explicitly referring to design issues, are in our view likely to a greater or lesser degree have resulted from the original "errors or changes in design" and "coordination of the designs".

> To date we have not received any substantiation of these allegations which might give further insight into their originating cause. However given the above and the general nature of the original "Notification of potential claims" we would request that Beazley provide cover for this claim.
>
> In respect of Notification Bdx 953 we believe this issue is the 2nd bullet point in the lawyer's letter which in our opinion was caused by a change in the statutory requirements after our design had been approved by the local authority."

294. Subsequent emails continued to use headings referring only to Notification 923, including email exchanges between Mr Elliot and Mr Morgan (of Beazley) on 4, 16 and 17 June 2013 and an email exchange between Marsh and Mr Elliot on 21 June 2013 in relation to queries from the excess insurers Mitsui.

295. Beazley says it thereafter dealt with all of the claims being made by ASD against RMJM as falling within Notification 923 and the 2008/09 year of cover. In February 2015 Beazley asked RMJM for details of the excess insurers for (only) the 2008/09 policy year.

296. In mid 2015, Beazley was contemplating making a settlement offer to ASD. Prior to making that offer, Beazley's solicitors (CMS) sent an email to RMJM's solicitors (Simmons & Simmons) on 30 June 2015 requesting confirmation of three points, one of which was:

> "that they are content that, if a settlement is concluded with ASD, any payment made to ASD by Beazley under the 2008/09 primary policy will erode the policy limit".

297. Simmons & Simmons replied on 1 July 2015 quoting RMJM's response on that point:

> "we understand this position. However, we need to make it clear that the entity does not have the financial resources to meet any excess requirement under the policy and therefore if you wish to make this offer it is on the basis that Beazley will fully fund it. I would also be grateful to understand whether it is necessary to withdraw or reduce the Adnec at this time to reflect this."

298. Beazley then emailed RMJM direct on 2 July 2015 in the following terms:

> "You appear to suggest that, as a condition of this offer being made, Insurers should pay the policy excess in the ASD matter. The position remains that it is RMJM's obligation to pay the policy excess and, accordingly, this condition cannot be met."

299. RMJM responded:

> "I am not at all trying to negotiate here and am very supportive of the initiative to settle. But I just want to be clear that someone will come ask the partnership for $250k and it is just not there.
>
> Either that will mean it cannot meet its obligations to Beazley or it will result in short payment to ASD (I am unclear from the settlement mechanism which it will be)."

300. Beazley then made its without prejudice offer to ASD, which ASD rejected.

(2) Analysis

301. Beazley submits that the exchanges quoted above and its conduct in treating the ASD claim as falling within the 2008/09 Primary Policy gave rise to a binding agreement between itself and RMJM to that effect; alternatively Beazley contends that those exchanges and conduct give rise to an estoppel to similar effect, because they demonstrate a shared understanding communicated between RMJM and Beazley, which Beazley has relied on to its detriment and from which it would be inequitable to allow RMJM (or ASD and ADNEC as statutory assignees of RMJM) to depart.

302. Beazley says the consideration it provided for the agreement, and/or the detriment it suffered as a result of its reliance on the common understanding consisted of the following:

i) Beazley treating all the claims made by ASD as falling within the 31 March 2009 Notification and the 2008/09 year of cover and funding the defence of all such claims, in circumstances where if Beazley's approach to the scope of the Notification 923 is incorrect then various of those claims will never have been notified to Beazley and will not be insured by Beazley;

ii) Beazley making the without prejudice offer;

iii) Beazley not seeking to argue that there had been any breach of condition precedent in relation to the notification of the issues affecting Sector A (as to which see Issue 4 below); and

iv) Beazley accounting for the ASD defence costs and reserving for the ASD claim within its financial and reinsurance accounting for the 2008/09 Primary Policy and year of account.

303. However, I do not accept that RMJM reached an agreement with Beazley that all the claims should be treated as falling within Notification 923 or the 2008/09 policy year, or that there was any clear or unequivocal common understanding to that effect.

304. First (taking matters chronologically), Mr Heath's letter of 21 December 2011, whilst it referred to Notification 923, was preliminary in nature as the last paragraph quoted above indicates. Further, the paragraph starting "*The*

current feeling" indicated that the area where RMJM felt exposed was poor early coordination of the project leading to multiple RFIs, rather than the Sector A structural issue referred to in the second bullet point of Ince's 15 December 2011 letter.

305. Secondly, Mr Heath's email of the same date suggested that *"most"* (but by implication not necessarily all) of the complaints made fell within the scope of Notification 923.

306. Thirdly, RMJM's letter of 7 May 2013 explicitly linked the Sector A structural complaint to Notification 953 and indicated that it would (or perhaps should) be reopened.

307. Fourthly, Beazley's 23 May 2013 query indicated that at least at that stage it appeared to regard both Notifications 923 and 953 as potentially live albeit there might be broader issues going beyond either of them.

308. Fifthly, RMJM's 31 May 2013 response did not suggest that only Notification 923 remained live: on the contrary, it repeated RMJM's point that Notification 953 *"is"* the second bullet point in Ince's letter, i.e. the Sector A structural issue.

309. Beazley submits that this passage:

> "In respect of Notification Bdx 953 we believe this issue is the 2nd bullet point in the lawyer's letter which in our opinion was caused by a change in the statutory requirements after our design had been approved by the local authority"

is to be understood as covering the situation where the Sector A claim arose not out of any initial design error but out of a change in the statutory requirements (which was how RMJM presented the matter in Notification 953), whereas the claim as in fact advanced by ASD (and upheld as part of the ASD Award) was based on errors in the original design and not any change in the statutory requirements.

310. I do not read the email in that way. The pre-penultimate and penultimate paragraphs indicate RMJM's belief that the Ince letter had "*clarified somewhat*" the claims being made, in that the first six bullet points (which included the Sector A issue) specifically referred to "*design issues*", thus indicating that RMJM understood the claim to be based on an alleged error in the original design. The penultimate paragraph, asking Beazley to provide cover in respect of all the claims given the general nature of the original notification, might if taken in isolation be read as a request to provide cover for *inter alia* the Sector A issue under Notification 923 as opposed to on any other basis. However, the final paragraph in my view certainly asserts that the Sector A claim falls, specifically, within Notification 953. The words *"which in our opinion was caused by a change in the statutory requirements …"* cannot coherently be read as meaning that the claim falls within Notification 953 only if the Sector A problem was caused by a change in the requirements, for on that footing there would be no liability at all. Instead, they reflect (in

my view) no more than RMJM's repeated contention that it was not at fault at all in relation to the Sector A issue, and are thus consistent with the indication in Integra's 21 December 2011 that it was the coordination-type errors where RMJM felt its main exposure to lie.

311. Sixthly, the exchanges in July 2015 in the context of the proposed settlement were equivocal. Beazley (through its solicitors) asked for confirmation that RMJM were "*content*" that "*any*" payment made under the 2008/09 Primary Policy would erode the policy limit. RMJM replied that this was "*understood*". Beazley did not suggest – certainly not in clear terms – that what they were proposing was that the entirety of any payment would be attributed to the 2008/09 policy year as opposed to the 2009/10 policy year. Nor, in any event, did the email indicate – and again certainly not in clear terms - that if the settlement were rejected and the claims proceeded then they would henceforth be treated as relating solely to the 2008/09 year to the exclusion of the 2009/10 year.

312. Although these matters were the subject of some cross-examination, the critical factor is (as Beazley accepted) the communications which crossed the line between the parties, and in the present case those were in written form. In any event, to the extent that subjective understanding could be relevant, Mr Elliot of RMJM, whilst accepting how certain parts of the written communications might now be construed, did not believe he had intended either to abandon Notification 953 or that it should be relevant only if the Sector A columns problem arose purely from a change of approach by DM. The following two passages from his cross-examination are illustrative, relating to Mr Elliot's email of 31 May 2013 to Marsh and Mr Elliot's witness statement evidence about it:

> "Q. And your reference to 953 in the last paragraph of this email is what might be described as a fallback position. If Beazley wasn't willing to provide cover under 923 then you are asking that cover be provided under 953.
>
> A. I don't know if that went through my head.
>
> Q. Well, that's a sensible reading of this, isn't it?
>
> A. It's one interpretation of it, yes.
>
> Q. And you were presenting RMJM's view of 953 as being based on a change in the DM's requirements rather than a problem with the original design?
>
> A. I can't say that either because there was a problem. It was RMJM's view at the time that it was caused by a change in the statutory requirements. If it hadn't been that, I don't know whether I thought 953 would cover the original design.
>
> Q. Your approach was that if there was a change in statutory requirements, then 953 would cover it?

A. If that was proved to be correct, but I'm not saying that's the only thing that would be covered by 953." (Day 2/102/11-103/4)

"Q. You've confirmed to me earlier that the email of 31 May set out your views on that date as to what was the relevant notification.

A. Yes.

Q. And you've confirmed to me earlier that the effect of that email was to ask Beazley to deal with all matters as falling within the 923 notification.

A. Yes.

Q. So that last sentence is incorrect, isn't it?

A. But the letter also referred to the 953 notification.

Q. I understand that. That last sentence is incorrect, isn't it?

A. The way it's come across just now, it could be construed as being inconsistent.

Q. You were asking Beazley -- you were saying to Beazley, "This all falls within the 2008/2009-year", weren't you?

A. By saying it was 923.

Q. Which was the 2008/2009-year, wasn't it, yes?

A. It was, yes, it was.

Q. So your view as propounded to Beazley in that email is that everything fell within the 2008/2009-year.

A. From the construction of my letter. I don't know if that was in my mind at the time. I don't know, sorry.

Q. In fairness to you, Mr Elliot, these are matters which occurred a long time ago.

A. Yeah." (Day 2/118/18-119/14)

313. As a result, there was in my judgment neither an agreement nor a common understanding that the ASD claims should be treated as falling only within the scope of Notification 923 and the 2008/09 policy year to the exclusion of Notification 953 and the 2009/10 policy year (or any other relevant policy year).

314. Finally, ASD says that it would not be inequitable to allow it, as statutory assignee under the 1930 Act, to depart from any common understanding shared by RMJM and Beazley. I do not accept that contention. The effect of the 1930 Act, discussed more fully later in this judgment, is that ASD stands in the shoes of RMJM and Beazley is entitled to raise as against ASD any defences which it would have been entitled to raise as against RMJM. That result is not inequitable: by contrast, it would (as Beazley submits) be inequitable for Beazley to be deprived, as a result of RMJM's sequestration and the operation of the 1930 Act, of any defences it would have had as against RMJM.

(3) Conclusion on Issue 3

315. If and to the extent that the ASD Claim (or any part of it) arises out of circumstances notified during the 2009/2010 policy year, RMJM did not prior to its sequestration agree with Beazley that the ASD Claim fell within the 2008/2009 Primary Policy; and RMJM was (and ASD is) not estopped by RMJM's conduct from denying the same.

(H) ISSUE 4: LATE NOTIFICATION

316. Issue 4 is:

> "If and to the extent that the ASD Claim falls within the 2009/2010 Primary Policy:
>
> (a) Whether RMJM breached Claims Condition 3.2 of that policy by failing to notify Beazley of relevant matters as soon as practicable.
>
> (b) Whether Beazley waived any such breach and/or is estopped from contending that there has been any such breach"

(1) RMJM's alleged breach of condition

317. Beazley argues that if the Sector A columns claim does not fall within Notification 923 but instead was only notified on 10 September 2009 by Notification 953, then RMJM was in breach of a condition precedent in failing promptly to notify the likelihood of that claim.

318. Conditions 3.1 and 3.2 in the primary policies provide:

> "3.1 All conditions contained in Section 3 are deemed to be conditions precedent to liability.
>
> Discovery of a Claim or Circumstance
>
> 3.2 a) …
>
> b) If during the Period of this Policy the Assured becomes aware of any Circumstance, the Assured shall give notice … to Underwriters of such Circumstance as soon as practicable but

in any event not later than the expiry of the Period of this Policy."

319. As set out earlier, "*Circumstance*" is defined to mean "*information or circumstances of which the Assured is aware which suggests that a claim is likely to be made against the Assured which the Assured may become legally liable to pay and which arises out of the exercise and conduct of the Assured's Professional Business.*"

320. Beazley says the following facts and matters indicate that RMJM was aware of such a circumstance prior to 10 September 2009:

i) The various communications between DG Jones and RMJM concerning the structural adequacy of the Sector A columns prior to 10 February 2009 referred to earlier: Beazley says that as a result RMJM must have been aware that DG Jones and AAA had serious concerns as to the adequacy of the structural design of Sector A, including the ability of the columns to support the PT beams.

ii) RMJM's delay in providing the requested structural calculations until 10 February 2009: Beazley says that RMJM was aware that DG Jones and AAA required those calculations in order to check their correctness, and that as a result of RMJM's delay it was not possible for them to carry out any such check.

iii) Mr Kareem's email of 27 August 2009 in which he referred to AAA and DG Jones' stability concerns in relation to the structure of Sector A, and continued "*We responded to them with 'calculations' only in Mid February '09 when the Client threatened to close the site and somehow managed to pacify their concerns. I regret deeply that I did not correct it earlier when we had the chance And [n]ow it has come back to haunt us. ...*" Beazley relies on this email as indicating that RMJM was concerned on 10 February 2009 as to the correctness of its structural calculations.

iv) DG Jones' letters of 22 January 2009 and 30 March 2009 making it clear that ASD would hold RMJM responsible for any delays and losses arising out of errors in its design.

v) DG Jones' letter of 14 May 2009, stating that "*the American School of Dubai will be making claims against RMJM for errors and omissions from the drawings issued to the contractor in Sector A.*"

vi) As a result, Beazley says RMJM was either aware that its structural design of Sector A was likely to be inadequate or, at the very least, chose to run the risk that it might be inadequate.

321. I do not accept these submissions.

i) For the reasons given in section (E)(3)(b) above, I do not consider that the various communications between DG Jones and RMJM concerning

the Sector A columns prior to 10 February 2009 meant that RMJM was aware of circumstances that a reasonable person would have considered likely to give rise to a claim. I also do not consider that they meant RMJM must have known that DG Jones and AAA had serious concerns as to the adequacy of the structural design of Sector A (including the ability of the columns to support the PT beams): the evidence indicates only that DG Jones had pressed RMJM for calculations to demonstrate the columns' adequacy to support the increased weight of the beams, but goes no further than that. There is no evidence that DG Jones or AAA had alleged, expressly or implicitly, that the columns were inadequate or that RMJM was aware of any such allegation or concern.

ii) I would accept that RMJM must have known that DG Jones and AAA required the calculations in order to check their correctness, but as indicated in § 63 above I do not consider it established on the evidence either that it was not possible to carry out any such check, or that RMJM knew that.

iii) I do not consider that Mr Kareem's email of 27 August 2009 indicates that RMJM was concerned on 10 February 2009 as to the correctness of its structural calculations: see §§ 50-52 above.

iv) DG Jones' letters of 22 January 2009 and 30 March 2009, making it clear that ASD would hold RMJM responsible for any delays and losses arising out of errors in its design, did not make RMJM aware of any circumstances likely to give rise to a claim relating to the adequacy of the Sector A columns.

v) DG Jones' letter of 14 May 2009 stating that "*the American School of Dubai will be making claims against RMJM for errors and omissions from the drawings issued to the contractor in Sector A*" was entirely general in its terms and made no allegation in relation to the adequacy of the Sector A columns. It stated, in full:

> "I am writing to inform you that the American School of Dubai will be making claims against RMJM for errors and omissions from the drawings issued to the contractor in Sector A. the drawings are being reviewed at present and upon the submission by the contractors of costs for the work to be carried and their delay and disruption claim a claim will be submitted by the ASD to RMJM for the re-imbursement of all associated costs."

A letter was sent on the same date in relation to Sector B in otherwise identical terms. Moreover, these letters should be read in conjunction with ASD's message of May 2009 referred to in § 74 above agreeing with RMJM that there was no relevant issue with the Sector A drawings.

vi) I do not find that RMJM was either aware that its structural design of Sector A was likely to be inadequate or chose to run the risk that it might be inadequate.

322. As a result I conclude that RMJM did not breach Condition 3.2, because it gave prompt notification of the facts relating to the Sector A column issue once it became aware of them.

(2) ASD's estoppel argument

323. In the light of my findings in section (1) above, it is not strictly necessary to consider this issue. However, as the parties' general approach has been to ask the court to deal with all the preliminary issues raised, I address it below.

324. ASD contends that Beazley is estopped from alleging a breach of clause 3.2 because Beazley either held a common assumption with RMJM or else acquiesced in RMJM's belief that Notification 953 was valid. ASD makes the points that:

i) Beazley made no objection to the initial notification and acquiesced in the allocation of an initial reserve of £50,000.

ii) Beazley accepted the re-opening of Notification 953 in May 2013 after receipt of the Ince letter of 5 May 2013.

iii) In May 2013 Mr Morgan on behalf of Beazley raised with RMJM a query as to whether ASD's claims were outside both Notifications 923 and 953 *("The issues now being raised by the School appear broader than encompassed within 923 and 953 – what are RMJM's views on this?")*. Mr Morgan's question implied, ASD says, that Notification 953 was valid and effective.

iv) Mr Elliot's 31 May 2013 response to Mr Morgan (quoted in § 293 above) indicated that he too continued to regard Notification 953 as a valid and relevant notification. There was no suggestion by Beazley at any time that he was wrong to do so.

325. ASD adds that most if not all of the matters relied upon by Beazley as establishing a breach of clause 3.2 were known to Beazley at or around the time when RMJM provided Notification 953. Despite this, Beazley said nothing about breach of clause 3.2 for six and a half years and took no point about late notice on Notification 953 (having treated it as a valid notification throughout that period). Instead, it funded and exercised control of the defence of the resulting claims:

i) Notification 953 itself attached the 10 February 2009 letter from RMJM to DG Jones providing the structural calculations; it also attached the letters of 23 December 2008, 8 January 2009, 22 January 2009, and 27 January 2009. Beazley has also long had access to the 30 March 2009 letter from DG Jones that was provided to underwriters as an attachment to Notification 923.

ii) With Notification 953 RMJM also enclosed letters from DG Jones of 4 and 8 September 2009, which explained the history of the Sector A issue (as Beazley avers).

iii) Integra's report of Notification 953 on 14 September 2009 (see paragraph 90 above) told Beazley that RMJM had failed to submit Sector A calculations earlier in the year despite having been requested to do so.

iv) The first time that breach of clause 3.2 was asserted was in Beazley's Defence to ASD's Particulars of Claim served on 27 May 2017.

v) Beazley chose to conduct the defence of the ASD arbitration pursuant to clause 3.6 of the Primary Policies, and RMJM was correspondingly unable or restricted in its ability to control the conduct of the defence of the claims made against it.

vi) Mr Elliot of RMJM was not told that any of ASD's threatened claims was or might be uninsured. He and RMJM proceeded on the basis that Notification 953 was valid and had been accepted. His evidence is that, if RMJM had been aware of an alleged breach of clause 3.2, RMJM is likely to have escalated the issue to Marsh's Managing Director level, to have taken the situation very seriously and to have examined all options to minimise the resulting risk to RMJM.

326. ASD submits that this above evidence is sufficient to give rise to an estoppel, precluding Beazley from alleging breach of clause 3.2. Insofar as necessary, ASD also submits that Beazley waived any such breach or late notification and/or elected to treat Notification 953 as valid. ASD says the parties proceeded on the basis of a shared assumption of fact, or at least an assumption made by RMJM and acquiesced in by Beazley, and points out that "*agreement to the assumption (rather than merely a coincidence of view, with both proceeding independently on the same false assumption) may be inferred from conduct, or even silence*": *Blindley Heath Investments Ltd v Bass* [2017] Ch 389 § 92 *per* Hildyard J delivering the judgment of the Court of Appeal. It would be unconscionable to permit Beazley to go back on the assumption (citing *ING Bank NV v Ros Roca SA* [2012] 1 WLR 472 § 66).

327. ASD also relies on the decision of the Court of Appeal in *Ted Baker v Axa Insurance UK Plc* [2017] Lloyd's Rep IR 682 and the previous case law analysed there. The insurers in *Ted Baker* took the position that the insured's failure to provide a particular category of documents, referred to in the judgment as the "*Category 7*" documents, had been in breach of a condition precedent. Sir Christopher Clarke referred to Bingham J's statement in *The Lutetian* [1982] 2 Lloyd's Rep 140, 157 in support of the proposition that the duty necessary to found an estoppel by silence or acquiescence arose where a reasonable man would expect the person against whom the estoppel was raised acting honestly and responsibly to bring the true facts to the attention of the other party known by him to be under a mistake as to their respective rights and obligations; and to further support for that proposition found in later cases including statements of Lord Steyn in *Indian Endurance* [1998] AC 878, 913

and Rix LJ (*obiter*) in *ING Bank NV v Ros Roca SA* [2011] EWCA Civ 252. Sir Christopher continued:

> "74 Blair J considered this line of authority in Starbev GP Ltd v Interbrew Central European Holdings BV [2014] EWHC 1311. In essence he held that a duty to speak, failure to fulfil which would give rise to estoppel by acquiescence, may arise on the particular facts where one party is proceeding on the assumption that something is agreed, whereas the other party knows that it is in dispute. In such a case the duty to speak may arise because a reasonable man would have the expectation referred to by Bingham J and set out in paragraph 72 above.
>
> 75 The reference to "acting honestly" did not, he held, mean that the party against whom the estoppel was asserted had to be guilty of actual dishonesty in the sense of acting fraudulently. He accepted [133] the submission that, absent a relationship of good faith or partnership or something akin to a joint enterprise the courts would not impose a duty to speak in the absence of impropriety of some description by the person alleged to be estopped. That impropriety might, however, come from the act of staying silent itself, as where a reasonable person would expect the person who is alleged to be estopped, acting honestly and responsibly, to bring the true facts to the attention of the other party known to him to be under a mistake as to their respective rights and obligations. Andrew Smith J adopted this statement in Kaupthing Singer & Friedlander Ltd v UBS AG [2014] EWHC 2450 (Comm) , where he held that a bank would not be acting honestly (in the sense explained by Blair J) or responsibly if it knew about or even seriously suspected a mistake of the kind then in question.
>
> 76 In the present case, which does involve a relationship of good faith, impropriety in the sense identified by Blair J is, a fortiori , sufficient to give rise to an estoppel. …
>
> …
>
> 82 … The authorities show that whether an estoppel arises is not wholly dependent on whether the person sought to be estopped has made some representation express or implied. It may arise if, in the light of the circumstances known to the parties, a reasonable person in the position of the person seeking to set up the estoppel (here TB) would expect the other party (here the insurers) acting honestly and responsibly to take steps to make his position plain. Such an estoppel is a form of estoppel by acquiescence arising out a failure to speak when under a duty to do so.
>
> 84 TB [the insured]'s failure to provide the Category 7 material did not occur in a vacuum but in circumstances where Mr

> Coonan [the insurer's loss adjuster] was due to get back to TB with a response to its position after taking instructions on the two issues. It seems to me that, in the particular circumstances of this case, as known to the parties, someone in the position of TB would reasonably expect the insurers to say if they required the Category 7 material before Mr Coonan reported back, particularly if failure to provide the information was to be said to be fatal to the claim. ...
>
> …
>
> 87 In the light of what had passed between the parties, TB was, in my view, entitled to expect that if the insurers regarded the Category 7 material (alone) as outstanding, due, and unparked, then, acting honestly and responsibly, they should have told her. Not to do so was misleading.
>
> 88 An estoppel of this nature in a contract of this kind does not require dishonesty or an intention to mislead; nor any impropriety beyond that inherent in the conclusion that the insurers should have spoken but did not. In the circumstances to which I have referred the insurers were, in my view, under a duty to tell TB that the Category 7 material was indeed outstanding and was required before the upshot of any instructions was revealed. If they had done so the documents would no doubt have been supplied. Since they did not do so it would be unjust and unconscionable to allow them to escape any liability on the ground of non-compliance with a condition precedent in relation to the Category 7 material."

328. Accordingly, ASD argues, if Beazley intended to reject Notification 953 as being too late then it would be expected that Beazley, acting honestly and reasonably, would have acted to bring the true facts to the attention of ASD, which was (on this hypothesis) known by Beazley to be under a mistake as to the parties' rights and obligations.

329. Beazley responds that it has at all relevant times treated the ASD Claim as falling within the 31 March 2009 Notification and the 2008/09 year of cover, so that no question ever arose as to any breach of condition precedent. Beazley says it is only as a result of ASD asserting in these proceedings that the claim in respect of the Sector A columns falls within the 2009/10 year of cover that a question now arises as to whether RMJM was in breach of condition precedent in failing to notify that claim prior to 10 September 2009. According to Beazley, Notification 953 was presented by RMJM as arising out of a change of position of the DM and/or of the relevant statutory requirements, on which basis there could again have been no question of a breach of the condition precedent as to the giving of notice.

330. In considering these arguments, I note first that earlier case law makes clear that where (as in the present case) the issue concerns an alleged breach of condition, as opposed to a right to avoid a policy or to terminate it for breach,

it is waiver by estoppel or estoppel by convention rather than waiver by election that is realistically likely to arise: see *Kosmar Villa Holidays v Trustees of Syndicate 1243* [2008] EWCA Civ 147, [2008] Bus. L.R. 931.

331. As to waiver by estoppel and estoppel by convention, on the particular facts of the present case I consider the position to be finely balanced. The communications referred to in §§ 296 and 299 above, including ASD's request to reopen Notification 953, indicate that Beazley reasonably must have known ASD regarded the Sector A columns losses as covered by Notification 953. At the same time, the communications at §§ 297 and 302 above indicate that Beazley regarded the claims as falling within at least Notification 923 in any event. In those circumstances, on balance I do not consider that a reasonable person would expect Beazley, acting honestly and reasonably, to tell RMJM that Notification 953 was too late, unless Beazley foresaw circumstances in which the losses might fall outside Notification 923 thus making Notification 953 necessary. Further, it is unclear what real detrimental reliance ASD could be said to have placed on any understanding derived from Beazley that Notification 953 was valid, by contrast with *Ted Baker* where as noted in § 88 above the missing documents would no doubt have been provided had insurers made their position clear. Were it necessary to decide the point, therefore, I would not find Beazley to have waived or to be estopped from relying on any breach of clause 3.2 in relation to Notification 953.

(3) Conclusion on Issue 4

332. If and to the extent that the ASD Claim falls within the 2009/10 Policy:

i) RMJM did not breach Claims Condition 3.2 of that policy by failing to notify Beazley of relevant matters as soon as practicable.

ii) Had I found such a breach to have occurred, I would have concluded that Beazley did not waive it and is not estopped from contending that there had been any such breach.

(I) ISSUE 5: SET-OFF BY BEAZLEY OF OVERPAID DEFENCE COSTS

333. Issue 5 is:

> "What is the available limit of cover under the 2008/2009 Primary Policy for the ASD Claim and/or the ADNEC Claim allowing for the amount of £62,500 (equivalent to US$ 107,181.25 using the rate of exchange on the date on which the payment was made) already paid by Beazley under the 2008/2009 Primary Policy in respect of an earlier claim against RMJM), and in particular:
>
> (a) Whether Beazley is entitled to set-off a pro rata share of the costs incurred in defending the ADNEC Claim against its liability under the 2008/2009 Primary Policy to ADNEC in relation to its Claim and (insofar as the pro rata share exceeds the amount available to be set off against ADNEC's Claim)

> against its liability under the 2008/2009 Primary Policy to ASD in relation to its Claim; and/or
>
> (b) Whether Beazley is estopped from contending that it is entitled to set-off a pro rata share of the costs incurred in defending the ADNEC Claim in the manner alleged in issue 5.a. above."

334. Issues 5 to 7 arise only in the event that the ASD and ADNEC Claims both fall within the 2008/09 year of cover and together exceed the limit of cover available under the 2008/09 Primary Policy.

335. Section 1.2 of the 2008/09 Primary Policy sets out Beazley's obligations in relation to defence costs in the following terms:

> "*1.2 Defence Costs in Addition*
>
> *Underwriters will also indemnify the Assured for Defence Costs (see 6.5) where such costs have been incurred with Underwriters' consent. Such Defence Costs are payable in addition to the Limit of Indemnity shown in the Schedule.*
>
> *In the event that a settlement is made with any party in excess of the amount of the Limit of Indemnity, Underwriters' liability in respect of Defence Costs shall be in the same proportion that the Limit of Indemnity bears to the sum which would be eligible for payment but for the restriction of the Limit of Indemnity.*" (emphasis added)

336. It is common ground that the ASD Claim, as the prior claim, has priority over the ADNEC Claim. Accordingly, if both claims fall within the 2008/09 year and together exceed the limit of cover under the 2008/09 Primary Policy, then it is the ADNEC Claim that will fall partly within the limit of the 2008/09 Primary Policy and partly within the limits of the 2008/09 Excess Policies.

337. The defence of the ADNEC Claim was conducted by solicitors Simmons & Simmons ("***Simmons***") who were jointly retained by RMJM and Beazley. The total costs of that defence were US $3,038,418.66, which sum was funded by Beazley.

338. In the above circumstances, the question which arises and which is the subject matter of preliminary issues 5 to 7 is who is to bear that part of the ADNEC defence costs which is proportionate to that part of the ADNEC claim which exceeds the limit of the 2008/09 Primary Policy. For ease of reference, I adopt Beazley's reference to this amount as "*the Pro Rata Share*".

(1) Issue 5(a): Beazley's entitlement to set off the Pro Rata Share

339. Beazley claims to be entitled to set-off the Pro Rata Share of the ADNEC defence costs against its liability to ADNEC in relation to the ADNEC Claim and, insofar as the Pro Rata Share exceeds its liability in respect of the ADNEC claim, against its liability to ASD in relation to the ASD claim.

340. As Beazley submits, this issue turns on the following four sub-issues:

i) whether Beazley was liable pursuant to section 1.2 of the 2008/09 Primary Policy to indemnify RMJM in respect of only such part of the ADNEC defence costs as was proportionate to that part of the ADNEC Claim which fell within the limit of that policy, and accordingly was not liable to indemnify RMJM in respect of the Pro Rata Share;

ii) if so, whether RMJM was liable to reimburse Beazley in respect of its funding of the Pro Rata Share;

iii) if so, whether Beazley is entitled to set-off RMJM's liability to reimburse it in respect of the Pro Rata Share against Beazley's liability to RMJM in respect of the ADNEC Claim and (insofar as any sum remains outstanding) the ASD Claim; and

iv) if so, whether ADNEC's and ASD's rights to indemnity from Beazley in respect of their claims under the 1930 Act are subject to Beazley's rights of set-off.

(a) Beazley's liability for defence costs

341. Beazley submits that clause 1.2 limits its liability for defence costs to such part of any costs as is proportionate to the part of any claim that falls within the policy limit. Further, Beazley draws a parallel with the second paragraph of clause 4.6, which for ease of reference I repeat in full below:

> "4.6 Claim Settlements
>
> The Underwriters may at any time pay to the Assured in connection with any claims or series of claims under this Policy the Limit of Indemnity (less any sums already paid) or any lesser sum for which such claims can be settled and upon such payment the Underwriters shall not be under any further liability in respect of such claims except for costs and expenses incurred prior to such payment.
>
> If a payment exceeding the Limit of Indemnity has to be made to dispose of a claim the liability of the Underwriters to pay all costs fees and expenses in connection therewith shall be limited to such of the said costs and expenses as the Limit of Indemnity bears to the amount paid to dispose of a claim."

342. Beazley argues that in both clauses the word "*settlement*" is not confined to consensual resolutions of disputes, but is used in a broader insurance sense that also includes judgments and arbitral awards.

343. ADNEC, in particular, disputes Beazley's proposition. ADNEC makes the points that:

i) RMJM's "defence costs" are the subject of a separate insuring obligation and are payable, without limit, in addition to the maximum

US$10m "*compensation and/or damages*" indemnity payable under clause 1.1.

ii) As illustrated by the present case, defence costs may be incurred in very significant sums before any obligation arises to pay the insured any indemnity in respect of its legal liability for damages, and/or before it becomes apparent that the damages limit of indemnity will or might be exceeded (whether by the same claim or a combination of claims).

iii) The 2008/09 Primary Policy makes no express provision for either any reduction of the limit of indemnity under clause 1.1 by reference to any supposed overpayment of defence costs under clause 1.2, or for any right of Beazley or obligation of the insured in relation to the repayment of any supposed overpayment of defence costs.

iv) Neither the 2008/09 Primary Policy nor any of the 2008/09 Excess Policies makes any provision for a claim over against the Excess Insurers by either RMJM or Beazley in relation to a supposed overpayment of defence costs.

v) Instead, both the 2008/09 Primary Policy and the Excess Policies operate on the basis that insurers will only be liable for costs incurred with insurers' consent.

344. Against this background ADNEC submits that clause 1.2 provides only for the situation where it becomes clear that an unresolved claim that Beazley wishes to settle will exceed the US$10m policy limit. In such a case, it would be necessary to involve the affected Excess Insurers and to agree among insurers who would pay what (consistent with the terms of the Excess Policies). Clause 1.2 thus forms part of the consent regime in relation to costs which applies across all layers. If, however, Beazley has already consented to and paid costs prior to the insured being found liable for a claim (or claims), it cannot seek to recoup a pro rata share from the insured. Instead, if Beazley has jointly instructed solicitors to defend a claim which (whether or not because of other claims) seems likely to exceed the aggregate limit of the primary policy, then it needs to ensure that the Excess Insurers are aware of that possibility and have themselves consented to the costs of defending the claim or claims.

345. ADNEC says this interpretation of clause 1.2 rightly puts the onus of communication and cooperation on insurers rather than exposing the insured to an uncertain and unexpected liability to repay to Beazley sums which Beazley has paid to solicitors instructed by it.

346. ADNEC's interpretation of clause 1.2 depends on reading the words *"a settlement is made with any party"* as confined to cases where the claim for which the insured is liable is resolved by settlement rather than by judgment or award. It says the policy uses the word "*settlement*", here and elsewhere, to refer not to the settlement as between insurer and insured of a claim under the

policy, but rather to the underlying settlement with the third party who has made a claim against the insured. In particular:

i) In clause 1.2 itself, this is clear from the reference to "*any party*", meaning the third party claimant, as opposed to the insured.

ii) Clause 6.6, defining Defence Costs, refers to costs and expenses incurred "*in the investigation, defence or settlement of any claim or potential claim ...*". Thus "*settlement*" refers to settlement with the third party claimant, and the separate use of "*defence*" and "*settlement*" indicates that "*settlement*" refers to consensual resolution.

iii) Clause 3.6 permits underwriters to take over the "*investigation, defence or settlement of any claim*": similar points apply.

iv) In clause 4.6, the reference to "*any lesser sum for which such claims can be settled*" makes clear that what is contemplated is third party claims against the insured, which are compromised.

v) Similarly, the second paragraph of clause 4.6, referring to the situation where a payment exceeding the limit of indemnity *"has to be made to dispose of a claim"*, is confined to cases where the third party's claim is compromised.

347. ADNEC makes the same submission in relation to the position under the Excess Policies, clause 4 of which provides so far as relevant:

> "… in the event of a claim arising to which the Underwriters hereon may be liable to contribute, no costs shall be incurred on their behalf without their consent being first obtained (such consent not to be unreasonably withheld) and if they consent they shall contribute to the said costs in the proportion that their share of the claim, as finally settled, bears to the total sum paid to dispose of the claim. No settlement of a claim shall be effected by the Assured for such a sum as will involve this Policy without the consent of the Underwriters hereon."

348. The limit on costs liability in the first sentence of this clause applies, ADNEC says, where the third party's claim is compromised. It does not apply where the third party obtains a judgment or an award against the insured. The provision in the last sentence for underwriters to consent to settlements would not make sense if "*settlement*" included judgments or awards.

349. The absence of a limit in cases of a judgment or award is said not to be a lacuna because (as counsel for ADNEC put it) *"[insurers'] remedy does lie in [clause] 4.6, because if they get to a point where the costs are massively disproportionate to the claim, then that would be a reason to settle, even if it meant settling at the limit of liability, because otherwise you do potentially end up with a 10 million limit on the liability and unlimited liability for costs. That's what the policy provides, other than in the case of a settlement."*

350. Though ADNEC's arguments are not without some force, I am unable to accept them.

351. It was common ground between the parties that the relevant settlement in these provisions is that between the insured and the third party, rather than the settlement of the insured's claim under the policy. The key issue is the meaning of the words "*a settlement is made*" in clause 1.2 of the primary policy, and (by comparison or analogy) the words "*to dispose of a claim*" in clause 4.6 of the primary policy and the words "*as finally settled*" in clause 4 of the excess policy.

352. In my view all three of these expressions are apt to cover the settlement of the liability owed to the third party, by payment, set-off or other means, whether that liability has been ascertained by judgment or award or has been established by a compromise. I see no sufficient interpretative or logical reason to construe them narrowly as being confined to cases of compromise. On the contrary, there are good reasons not to take that view. It would be anomalous for each of the primary insurers and the various layers of Excess Insurers each to be subject to a pro rata share of costs in the event of compromise but each to have unlimited liability for costs if (say) an attempted compromise failed and the third party's claim proceeded to judgment or award.

353. Moreover, ADNEC's point that each of these insurers has the remedy of paying up to the full limit of indemnity, thereby avoiding any further liability save for costs already incurred, does not provide an adequate answer to the anomaly. It was ADNEC's own position that once a third party claim is made, the insured is immediately entitled to have its defence costs funded under clause 1.2, whereas it has no entitlement to an indemnity under clause 1.1 unless and until there is a legal liability established. It is true that the insurer has a right to give or withhold consent to expenditure of costs. However, (a) in practice the insurer will for obvious reasons reasonably wish the third party's claim to be properly defended and (b) at least under the excess policy wording (clause 4) consent cannot be unreasonably withheld. Thus in practice the insurer is likely in the event of a claim to have to either incur itself, or consent to the insured incurring, defence costs from the outset of any serious claim.

354. It may then take a long time to work out (i) how large the ultimate liability will be compared to the limit of indemnity or (ii) whether the case will settle or proceed to judgment/award, with significant costs being incurred in the meantime. Moreover, if the insured wishes to defend the proceedings (e.g. for reputational reasons) then the insurer cannot necessarily insist on the case being settled: that will depend on the outcome of the dispute resolution procedure in clause 4.4 ("*policy disputes*", i.e. the 'QC clause'). It would place the insurer in an invidious and unfair position were it to have either to take a chance that the case will settle (in which case its costs liability will be limited) or fight (in which case, on ADNEC's approach, its costs liability will be unlimited), or in effect to concede the point and pay the insured the full limit of indemnity. More generally, as a matter of principle it is difficult to see any logical reason why the costs outcome should be so radically different

depending on whether (for example) settlement discussions close to, during or even after trial result narrowly fail or succeed at the last minute.

355. I appreciate that on this approach the references to 'settlement' in provisions of the policies refer to different concepts in different places: settlement of a third party claim whether established by judgment, award or compromise, and settlement of a third party claim by compromise. However, depending on the context, the word "settlement" is apt to apply to either concept, and it is incorrect in my view to take the position that its use must necessarily be uniform throughout the policies or even necessarily within any particular clause.

356. I therefore conclude on this issue that Beazley was liable pursuant to section 1.2 of the 2008/09 Primary Policy to indemnify RMJM in respect of only such part of the ADNEC defence costs as was proportionate to that part of the ADNEC Claim which fell within the limit of that policy, and accordingly was not liable to indemnify RMJM in respect of the Pro Rata Share.

(b) Right to recover overpaid defence costs from insured

357. The right of an insurer to recover defence costs which it had funded but for which it was not liable was considered by Phillips J (as he then was) in *Cox v Bankside Members Agency Limited* [1995] 2 Lloyd's Rep 437. In that case, Lloyd's Names made claims against their members and managing agents' E&O insurers pursuant to the 1930 Act. One of the issues was whether the insurers were entitled to set off against their liability to the Names defence costs funded by them and falling within the relevant policy excess. Phillips J. held that they were.[2] He said:

"*If underwriters fund defence costs of an assured which fall within the excess, the assured will be under an obligation to reimburse underwriters. This obligation arises under the terms of general condition 1, or alternatively under principles of restitution.*" (p451 col 1)

358. The general condition Phillips J referred to did not contain any express provision for the reimbursement of sums funded by underwriters, but simply stated that underwriters were not liable for defence costs falling within the policy excess. It therefore appears that Phillips J regarded an entitlement to reimbursement as implicit in that condition.

359. As to the implication of a term here, Beazley submits that the tests of necessity and/or obviousness as set out in *Marks & Spencer Plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd* [2015] UKSC 72, [2016] AC 742 §§ 17 and 23 are satisfied in that:

    i) Beazley's obligation to indemnify the insured in respect of defence costs arises as and when such defence costs are incurred.

[2] While other parts of Phillips J.'s judgment were the subject of an appeal (also reported at [1995] 2 Lloyd's Rep 447) this finding was not.

ii) At that point in time, it will usually be impossible to apply the provisions of clause 1.2 in relation to the pro rating of defence costs. At that stage liability to the third party will generally be in dispute, the quantum of that liability will generally be uncertain and (as the present case illustrates) where there are other outstanding third party claims, the impact of those claims on the available limit of cover will also be uncertain.

iii) In these circumstances, it would be impossible to give effect to the provisions of section 1.2 unless the insurer is entitled to recover any sums funded by it and falling within the Pro Rata Share. Otherwise the insurer would be faced with a choice between either breaching its obligation to indemnify the insured, or paying on behalf of the insured sums for which it was not liable but which it was not entitled to recover from the insured.

360. In response, ASD makes the points that:

i) The test for an implied term is a strict one and has not been diluted by recent case law, as the Supreme Court made clear in *Marks & Spencer*.

ii) The language of "*indemnify[ing]*" in clause 1.2 indicates that the clause is addressing a situation in which the insured (RMJM) itself pays the costs incurred in the course of the defence of a claim, and then claims them from Beazley at the point of or after settlement. In those circumstances, the clause indicates that the insured will not be able to recover from Beazley (as opposed to Excess Insurers) any amount exceeding Beazley's proportionate share. In the present case, however, Beazley agreed to pay, and in fact paid, the costs as they arose and in return exercised its rights under clause 3.6 to control the defence of claim. Clause 1.2 is not directed to that situation.

iii) Where the insurer takes the benefit of controlling the defence, in its own interests, so as to attempt to avoid or to reduce any resulting insured liability, there is nothing surprising about the idea that the insurer must bear the defence costs (or seek to recover any excess from any other insurer affected, but not the insured). If a different result had been intended, it would have had to be clearly spelled out.[3]

iv) There is nothing necessary or obvious about a term that Beazley should be able to claim against its own insured after having itself paid defence costs throughout the defence of a particular claim.

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[3] There are said to be wordings in the market to this effect. For example, an express right of recovery apparently exists in a similar provision in the current Bar Mutual terms of cover: "*If a sum in excess of the Limit of Cover has to be paid in order to dispose of any Claim, Bar Mutual's liability in respect of Defence Costs shall be in the same proportion as the Limit of Cover bears to the sum paid to dispose of the Claim. In the event of Bar Mutual having already indemnified the Insured in respect of Defence Costs, Bar Mutual shall be entitled to recover from the Insured such proportion of them as may exceed that proportion of the sum paid in order to dispose of the Claim as is represented by the Limit of Cover.*"

v) Nor does the policy lack commercial and practical coherence without the implication for which Beazley contends. Rather, the policy works perfectly well; it is simply that Beazley does not like the result.

vi) Beazley's argument that an implied term is justified because it cannot know in advance whether a settlement will be in excess of the limit of the policy is not convincing. In deciding to exercise control of an insured's defence and pay defence costs, Beazley may be taking a risk of overpayment of defence costs, but that is a risk it is able, and well placed, to assess for itself. It is not at all surprising that the bargain between insurer and insured would place that risk on the insurer, rather than the insured.

vii) If Beazley was unwilling to assume that risk, it could have made express provision in its policy to address it, or made sure that it procured Excess Insurers' agreement to pay their share of defence costs in the event that any settlement exceeded the limit of the Primary Policy. That is clearly the intended scheme of the primary and excess policies.

361. Excess Insurers similarly argue that in the present case, unlike in *Cox*, there was a joint retainer of Simmons & Simmons by RMJM and Beazley to defend the ADNEC arbitration. Beazley and not RMJM undertook to pay and discharge Simmons & Simmons' fees: the letter of retainer provided in paragraph 7 that *"We are appointed by and will take instruction from the Clients and our fees are to be settled by RMJM's Professional Indemnity Insurers, the Beazley Group ("Beazley")"*. In these circumstances, Beazley voluntarily assumed responsibility for the payment of the ADNEC defence costs, and the costs were not incurred by (or solely by) RMJM within the meaning of clause 1.2.

362. Addressing this latter point first, in my view Beazley are correct in saying that the effect of the Simmons & Simmons retainer letter was to make both RMJM and Beazley liable for Simmons & Simmons' fees, albeit in practical terms the settlement of bills would be dealt with by Beazley. Phillips J in *Cox* stated:

> "(3) Where underwriters instruct a solicitor to conduct the defence, they thereby create the relationship of solicitor and client between the solicitor and the assured— Groom v Crocker [1939] 1 KB 194 at pp. 202–203.
>
> (4) The normal consequence of this is that the assured becomes liable to pay the solicitor's costs, even if underwriters were also liable for those costs: Adams London Improved Motor Coach Builders Ltd [1921] 1 KB 495 at pp. 501 and 504.
>
> (5) Those costs are properly deemed to be incurred by the assured, even if they are funded by underwriters: Davies v Taylor (No. 2) [1974] AC 225 at p. 230; Lewis v Averay (No. 2) [1973] 1 WLR 510 at p. 513.

> (6) If underwriters fund defence costs of an assured which fall within the excess, the assured will be under an obligation to reimburse underwriters. This obligation arises under the terms of general condition 1, or alternatively under principles of restitution.
>
> Conclusions 5 and 6 are necessarily premised, as Mr Sumption accepted that they must be, on the assumption that the assured is legally liable to pay the solicitors who are instructed to conduct the defence. This will depend upon the terms upon which those solicitors are instructed. Where a number of E & O underwriters join together to instruct a firm of solicitors to defend claims brought by an action group against a large number of agents, some solvent, some insolvent, the terms and circumstances under which the solicitors are instructed may require careful consideration in order to determine whether and to what extent individual assured are liable for defence costs."

363. The present case is *a fortiori* Phillips J's proposition 3, because a solicitor-client relationship was created between Simmons & Simmons and RMJM not merely by Beazley having instructed Simmons & Simmons to conduct the defence but also by RMJM itself being party to the letter of engagement as instructing client. I consider that RMJM were liable for Simmons & Simmons' fees, along with Beazley, and that the premise stated in Phillips J's final paragraph quoted above was therefore satisfied.

364. Excess Insurers also noted in this context that where an insurer steps in to assume the conduct of a defence under a right such as clause 3.6 of the Primary Policies in the present case, the traditional understanding absent express policy wording is that the insurer expressly or impliedly undertakes to bear the costs. Excess Insurers said this was a point of distinction from *Cox*. This topic was not the subject of any detailed submissions. The classic authority for Excess Insurers' proposition is *Allen v London Guarantee and Accident Company Ltd* (1912) 28 TLR 254. I note, however, that the Court of Appeal in *Cox* rejected an argument based on *Allen* that pre-judgment interest and costs caused by the insurers' decision to take control of the defence and resist a claim arose from that decision and not from the insured risks, so that the insurers were bound to indemnify irrespective of the policy limit. Sir Thomas Bingham said:

> "It is evident that the situation which eventuated was not either of those for which the policy made express provision. The judge had to decide who should bear the risk in a situation not expressly provided for. He held against the insurer. I would be willing to accept that he was right on the facts and the policy before him. But I do not think he was purporting to lay down a rule of law, and I do not think his decision can be used to govern a situation where the policy terms are quite different." ([1995] 2 Lloyd's Rep 437, 462).

It is also pertinent to note that in the present case Simmons & Simmons' engagement letter provided for their instructions to be given by RMJM. In these circumstances I do not consider there to be a basis for sidestepping the defence costs limit set out in clause 1.2.

365. In circumstances where both parties should (based on the policy wording) have appreciated at the outset that (a) the insurer is undertaking only a limited costs exposure in circumstances where a claim might exceed the limit of indemnity and (b) the size of the claim (and, if relevant, other claims under the same policy) may well not be known until long after substantial defence costs have been incurred, it is in my view necessary and obvious that any excess should be recoverable from the insured rather than the limit on the insurer's costs liability being ineffective. I do not agree with ASD that it is simply a risk that the insurer is able to assess for itself and which it is natural for the insured to bear. The ultimate outcome of claims may well be extremely difficult to foresee, and I see no reason to take the view that, despite the inclusion of a clear *pro rata* limit, the insurer should be assumed to be taking the risk of ending up paying a substantially greater amount of defence costs. Nor does it meet the point to say that in other policies that which is said to be implicit here has been made explicit: it is no answer to an argument for an implied term that the point could have been stated expressly or has in other contracts between other parties been so stated. Overall, the position is in my view no different in principle from that where insurers fund defence costs of an assured that fall within the excess, so that Phillips J's approach in *Cox* (with which I respectfully agree) applies.

366. ASD also submitted that a factor against implication of a term was that Beazley had a claim against Excess Insurers for the Pro Rata Share. I address that point below in the context of Beazley's alternative claim in restitution.

367. As to its alternative restitutionary claim, Beazley submits that it satisfies the requirements set out by Lord Steyn in *Banque Financière de la Cité v Parc (Battersea) Ltd* [1999] 1 AC 221, 227A-C, subsequently endorsed and explained by the Supreme Court in *Investment Trust Companies v Revenue and Customs Comrs* [2017] UKSC 29, [2017] 2 WLR 1200 and *Swynson Ltd v Lowick Rose LLP* [2017] UKSC 32, [2017] 2 WLR 1161, because:

    i) RMJM has "*benefitted or been enriched*" as a result of having the entirety of the ADNEC defence costs funded by Beazley, including the Pro Rata Share;

    ii) that enrichment was "*at the expense of the claimant*" because it was paid for by Beazley;

    iii) the enrichment was unjust; and

    iv) there are no relevant defences.

368. In oral argument Beazley proceeded on the basis that it was necessary to identify a specific reason why the enrichment was unjust, and referred to the propositions set out by Lord Goff in *Woolwich Building Society v Inland*

Revenue Commissioners [1993] AC 70, 164-166, in particular the first and fourth: money paid under a mistake, and money paid "*on such terms that it has been agreed, expressly or impliedly, by the recipient that, if it shall prove not to have been due, it will be repaid by him*".

369. It seems to me that the latter, based on express or implied agreement to repayment, cannot succeed save in circumstances where Beazley has already succeeded on its implied term argument considered above, and I therefore focus on the mistake basis.

370. Whilst in *Woolwich* Lord Goff confined his remarks to mistake of fact, it is now well established that a restitution claim can be based on mistake of law (see, in particular, *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 A.C. 349).

371. The alleged mistake was Beazley's incorrect belief that if it paid what turned out to be the Pro Rata Share then that share would be repayable by RMJM. Mr Morgan of Beazley gave this evidence in supplementary examination in chief:

> "Q: What is your understanding, looking at the matter first from a technical viewpoint, as to what happens in relation to the ADNEC defence costs which Beazley has funded which are proportionate to that part of the ADNEC Claim which exceeds the limit.
>
> …
>
> A: Okay, my understanding of how this would work is the defence costs would have been paid in the first instance by Beazley. You would look then at the amount of indemnity they paid in relation to the overall indemnity, and if they had paid too much they would be entitled to get that back from the insured, who would then go and seek from any other parties who they thought were responsible for it.
>
> Q. I asked you about how technically which I think you've answered, but how in practice does it work?
>
> A. In practice the broker would have coordinated that. So rather than Beazley, you know, get money back from RMJM and then RMJM go and have to collect money from somebody else, the broker would co-ordinate the different payments from the different parties and there would only be one set of transactions that would happen."

372. Objection was taken to those questions on the basis that the witness was being asked to comment on the meaning of the policy or some form of market practice. It emerged, however, that the purpose of the evidence was to indicate Beazley's mistake in this regard. Excess Insurers objected that Beazley was not entitled to advance a case based on mistake because no such

case had been foreshadowed in its response to requests for information. In January 2018 Excess Insurers asked Beazley to explain its restitution case against RMJM, including whether it alleged a mistake (and, if so, seeking details). Beazley's response was somewhat brief, alleging so far as relevant only that it relied on the law of unjust enrichment and that the enrichment here had been "*unjust*". The matter does not appear to have been pursued further by Excess Insurers. In those circumstances, though not without some hesitation, I have concluded that it would be wrong to shut Beazley out from advancing this argument.

373. In cross-examination Mr Morgan accepted that he did not at any stage tell RMJM that they might have to pay back part of the costs at a later day, and that there was no separate agreement apart from the policy to that effect, but said he considered that the policy wording spoke for itself.

374. ASD made three main objections to Beazley's restitution claim:

i) that there was no relevant mistake such as could give rise to unjust enrichment: instead, Beazley had simply mispredicted future events and/or assumed the risk, and had in any event paid not by reason of a mistake but because it had assumed a liability to Simmons;

ii) that there was no enrichment at Beazley's expense because Beazley had a claim against Excess Insurers for the Pro Rata Share under the 1930 Act or based on a freestanding agreement; and

iii) that ASD had changed its position by conducting its business on the basis that it would not have to refund defence costs. The evidence of Mr Elliot of RMJM was that had he known RMJM might have to make such a refund, he would have raised the matter internally and with the brokers. He said:

> "At least while I was at RMJM, RMJM conducted its business on the basis that it would not have to repay defence costs in order to avoid these kinds of problems. I suspect that if RMJM had been told about a possible need to reimburse defence costs, it would (at least during my time at RMJM) have tried to exercise some control over the costs incurred to prevent these becoming excessive."

375. As to ASD's first point, I do not consider that Beazley should be taken to have paid defence costs based on a misprediction of future events, namely that the ADNEC Claim and any other claims would not exceed the limit of indemnity. The simple fact is that the defence costs needed to be paid from the outset, and no-one was likely to know until much later on whether the claim or claims would exceed the limit. I do not accept ASD's point that the operative cause of the payment was not any mistake but Beazley's agreement in the Simmons & Simmons' engagement letter to settle the firm's fees. That contention simply begs the question of the basis on which Beazley entered into such an undertaking in the first place.

376. As to the second point:

i) For the reasons set out under Issue 7 below, I do not consider that Beazley has a claim against Excess Insurers under the 1930 Act.

ii) Even if Beazley had such a claim, it would arise only on the basis that RMJM was liable to refund the Pro Rata Share to Beazley. The fact that Beazley could in effect pursue RMJM's own claim against Excess Insurers would not prevent RMJM having been enriched at Beazley's expense in the context of a restitution claim.

iii) ASD referred to a freestanding agreement between Beazley and Excess Insurers, details of which were not disclosed to the court. However, counsel for Beazley stated (without challenge) that it arose in respect of events after RMJM's sequestration and was thus not relevant to whether or not Beazley acquired a restitutionary claim against RMJM at the time it funded the Pro Rata Share.

iv) It occurred to me that Beazley might have a freestanding restitutionary claim for what is sometimes termed equitable subrogation against Excess Insurers on the basis that by funding the Pro Rata Share Beazley had in effect discharged part of Excess Insurers' liabilities to RMJM (cf *Banque Financière* at p231G and 234A-D per Lord Hoffmann; and Burrows, "*The Law of Restitution*" (3rd ed, 2011) at 166: *"The most general form of subrogation is subrogation to extinguished rights... where a person has discharged (or his money has been used to discharge) another's liability to a third party and 'takes over' some or all of the third party's former rights and remedies against that other party. This form of subrogation has cut free from its traditional categories... so that it potentially applies wherever there has been an unjust enrichment and the enrichment comprises the discharge of another's obligation.")* However, in circumstances where no such possible claim has been pleaded or argued before me, and the scope of the doctrine (e.g. whether it extends beyond the particular sphere of secured lending) is unclear, I do not consider it would be right to take account of it.

377. As to the third point, change of position, in cross-examination Mr Elliot accepted that the second paragraph of clause 1.2 made clear that Beazley was liable for only a proportionate share of defence costs where a claim exceeded its limit, and that he would have understood that at the time. He believed he would have realised by June 2013 that the ASD and ADNEC Claims might exceed the limit of the Beazley policy, but left it to the brokers Marsh to deal with advising the excess layers. Though Mr Elliot stated that he did not see it as a matter of RMJM having to refund defence costs to Beazley, he accepted that he probably did not at the time address his mind to the issue. He accepted that having to reimburse Beazley would not have been a concern if RMJM could recover the money from Excess Insurers. Mr Elliot was asked whether he was suggesting that the defence costs actually incurred were excessive, and responded that he did not know what they were.

378. In these circumstances ASD cannot be said to have changed its position in such a way as to make it unjust for Beazley to recover the Pro Rata Share in restitution.

379. Finally, ADNEC submitted that *"RMJM has not … been unjustly enriched by Beazley's decision to instruct and pay Simmons & Simmons. Beazley's real target in relation to its increasingly convoluted case in respect of the ADNEC Defence Costs is not RMJM or even ADNEC. It is the Excess Insurers from whom, without explaining how, Beazley says ADNEC can recover any gap produced in the clause 1.1, damages, indemnity."* However, focussing on the position as between Beazley and RMJM, it is correct to say that RMJM has been unjustly enriched: Beazley has, one can see with the benefit of hindsight, paid RMJM more than Beazley's share of the defence costs. The fact that RMJM had a right to recover the excess, i.e. the Pro Rata Share, from Excess Insurers but (depending on the impact of RMJM's insolvency and the effect of the 1930 Act) ASD or ADNEC may not be able to do so, does not in my view affect the vested restitution claim which I consider was available to Beazley – along with a claim based on an implied term – at the time of RMJM's sequestration.

380. Had it been necessary to do so, therefore, I would hold that Beazley did have a claim against RMJM in restitution to recover the Pro Rata Share.

(c) Beazley right of set-off vis a vis RMJM

381. Phillips J in *Cox* stated:

> "*The obligation of an assured to reimburse defence costs funded by underwriters within the excess gives rise, in my judgment, to a right of set-off on the part of underwriters against a claim for indemnity from that particular assured, applying established principles governing set-off.*" (p451 col 2)

382. Beazley contends that its claim for recovery of the Pro Rata Share gave rise to a right of set-off as against RMJM both at common law and in equity.

383. As to common law set-off, Beazley says its claim in respect of the Pro Rata Share is a claim in debt for a sum which, while it cannot presently be ascertained, will be ascertainable without valuation or estimation once the quanta of the ASD and ADNEC Claims are known.

384. As to equitable set-off, Beazley argues that:

i) The relevant test is that set out by Rix LJ in *Geldof Metaalconstructie NV v Simon Carves Ltd* [2010] EWCA Civ 667, [2010] 4 All ER 847 § 43(vi), namely whether there are "*cross-claims…so closely connected with [the plaintiff's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim*".

ii) It would have been inequitable to allow RMJM to recover an indemnity under the 2008/09 Primary Policy in respect of the ASD and ADNEC

> claims without allowing Beazley to set-off against that liability its entitlement to recover the Pro Rata Share of the ADNEC defence costs. Both claims arise under the same insurance policy and are incidents of the performance of that policy. Further, in the case of the ADNEC claim, both the costs and the indemnity relate to the same third party claim and RMJM's and Beazley's obligations under the 2008/09 Primary Policy in relation to that claim.

385. Because of the doubt about whether a common law right of set-off can survive a 1930 Act transfer (see §§ 392-394 below), it is relevant to focus on equitable set-off.

386. As a preliminary point, ASD argues that the relevant question is whether Beazley can raise an equitable set off against ASD, rather than whether Beazley could have raised an equitable set off against RMJM had RMJM itself sued for an indemnity. ASD says Beazley has pleaded the point on the basis of the alleged equitability of set-off against ASD (and ADNEC): see Beazley's Re-Amended Defence to ASD's Particulars of Claim, Appendix 3, para 4c.

387. However, Beazley pleads the argument as a whole on the basis that it is "*entitled to advance as a defence to the claims made against it by ASD and ADNEC as statutory assignees of RMJM's rights under the 2008/09 Primary Policy, any defence that would be available to it in the event that such claims were made by RMJM*" (Re-Amended Defence to ASD's Particulars of Claim, Appendix 3, para 3e). Consistently with that approach, Beazley alleges that it *"will be entitled to recover from RMJM"* the Pro Rata Share (*ibid*., para 4b). Accordingly, where in paragraph 4c Beazley claims to be entitled to set off that claim against its liabilities to ADNEC and ASD, it should in my view be taken to be so claiming on the basis that it would have had that defence of set-off had the relevant claims been made against it by RMJM.

388. Even on that basis, ASD denies that Beazley could have raised an equitable set-off against a claim by RMJM against Beazley in respect of a liability to ASD, because the liability to ASD was not sufficiently connected to the ADNEC Claim for the ADNEC defence costs set off to be taken into account. ASD highlights the point that the defence costs were paid in respect of an entirely separate claim against RMJM by an unrelated third party, so that it would not have been unjust to require Beazley to indemnify RMJM for the ASD Claim without offset.

389. However, in my view a claim for indemnity and a cross-claim for overpaid defence costs arising under one and the same policy are sufficiently closely connected to have made it manifestly unjust to require Beazley to pay RMJM under the indemnity without credit being given for the cross-claim, even though the indemnity and cross-claim related to different claims under the policy.

390. ADNEC makes the point that it is artificial and uncommercial that Beazley seeks to recover the Pro Rata Share by set-off against the damages limit of indemnity (i.e. RMJM's clause 1.1 cover) in order to pass over to the Excess Insurers not a pro rata share of the ADNEC Costs (which have already been

paid in full to Simmons & Simmons) but, rather, part of the liability in respect of the ADNEC Claim. However, I consider the correct analysis to be that what Beazley seeks to do is simply to offset its claim against RMJM for the Pro Rata Share against Beazley's liabilities to RMJM under clause 1.1 of the policies and in partial discharge of those liabilities. That does not have the effect of passing on to Excess Insurers any part of the liability for the ADNEC Claim itself. It does give rise to a potential difficulty as to the operation or non-operation of the 1930 Act in relation to a claim in respect of defence costs (see below), but that does not affect the logically prior analysis of the set-off position as between Beazley and RMJM.

(d) Set-off against claimants under the 1930 Act

391. This sub-issue raises *inter alios* three questions of some importance and difficulty, namely:

i) how to reconcile the apparently conflicting case law about whether an insurer's right of set-off can be relied on as against claimants under the 1930 Act,

ii) whether a right of set-off can survive the operation of the 1930 Act where the sum which the insurer seeks to offset is not and cannot be ascertained until after the 1930 Act transfer has occurred, and

iii) whether after a 1930 Act transfer has occurred, an insurer claiming a right of equitable set-off must show that it would be manifestly unjust to allow such a set-off vis a vis the 1930 Act claimant, as opposed to vis a vis the insolvent insured.

392. I deal first, however, with a point about whether legal or only equitable set-off is *capable* of being asserted following a 1930 Act transfer. The key provisions of the Act for present purposes are (as amended) as follows:

> "**1.— Rights of third parties against insurers on bankruptcy &c. of the insured**.
>
> (1) Where under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur, then—
>
> (a) in the event of the insured becoming bankrupt or making a composition or arrangement with his creditors; or
>
> (b) in the case of the insured being a company, in the event of a winding-up order being made, or a resolution for a voluntary winding-up being passed, with respect to the company, or of the company entering administration, or of a receiver or manager of the company's business or undertaking being duly appointed, or of possession being taken, by or on behalf of the holders of any debentures secured by a floating charge, of any property comprised in or subject to the charge or of a voluntary

> arrangement proposed for the purposes of Part I of the Insolvency Act 1986 being approved under that Part;
>
> if, either before or after that event, any such liability as aforesaid is incurred by the insured, his rights against the insurer under the contract in respect of the liability shall, notwithstanding anything in any Act or rule of law to the contrary, be transferred to and vest in the third party to whom the liability was so incurred.
>
> …
>
> (4) Upon a transfer under subsection (1) or subsection (2) of this section, the insurer shall, subject to the provisions of section three of this Act, be under the same liability to the third party as he would have been under to the insured, but—
>
> (a) if the liability of the insurer to the insured exceeds the liability of the insured to the third party, nothing in this Act shall affect the rights of the insured against the insurer in respect of the excess; and
>
> (b) if the liability of the insurer to the insured is less than the liability of the insured to the third party, nothing in this Act shall affect the rights of the third party against the insured in respect of the balance.
>
> (5) For the purposes of this Act, the expression "liabilities to third parties," in relation to a person insured under any contract of insurance, shall not include any liability of that person in the capacity of insurer under some other contract of insurance."

The 1930 Act has been replaced by the Third Parties (Rights Against Insurers) Act 2010 as from 1 August 2016, but it is common ground that the 1930 Act applies in the present case.

393. In *International Energy Group Ltd v Zurich Insurance Plc UK* [2015] UKSC 53, [2016] A.C. 509, Lord Mance said:

> "89 A second sub-issue is that legal set-off is in any event confined to debts due and payable and either liquidated or capable of ascertainment without valuation or estimation: Stein v Blake [1996] AC 243 , 251, per Lord Hoffmann. On current authority, at Court of Appeal level, the right to recover under an insurance contract is classified not as a debt, but as a right in damages: see eg Ventouris v Mountain [1992] 2 Lloyd's Rep 281, 286, Sprung v Royal Insurance (UK) Ltd [1999] 1 Lloyd's Rep IR 111. Further, a right to claim proportionate contribution would not normally satisfy the test of legal set-off, although, on the agreed facts in this case, it might perhaps do so, since they lead to a definite percentage contribution of 22.08%.

> Regardless of the view taken on these two points, legal set-off is procedural, not substantive. When one comes to the second aspect, the statutory transfer probably therefore precludes legal set-off."

394. I understand Lord Mance's point to be that legal set-off (sometimes also known as independent or statutory set-off), as a procedural rather than a substantive right, does not affect the "*rights*" of the insured transferred under section 1(1) of the Act or the "*liabilities*" of the insurer referred to in section 1(4). The position would be different in relation to equitable set-off or any other substantive form of set-off (such as running account set-off). I do not understand this to have been challenged before me, and proceed on the assumption that it is correct.

395. Turning to the broader questions about set-off where the 1930 Act applies, the first question is the position under the case law.

396. In *Murray v Legal & General Assurance Society Ltd* [1970] 2 QB 495, Cumming-Bruce J held that a right to recover premia did not arise "*in respect of*" the insured's liability to the third party, within section 1(2), and that insurers could not therefore set off unrecovered premia under 1930 Act claimants. Cumming-Bruce J considered that in enacting the 1930 Act Parliament may, prompted by observations of the Court of Appeal in *In re Harrington Motor Co. Ltd., Ex parte Chaplin* [1928] 1 Ch. 105, 116, have had in mind section 5 of the Workman's Compensation Act 1906. That provision had provided for insolvent employers' rights against insurers to be transferred to workmen, including an express transfer of both rights and liabilities: *"... the rights of the employer against the insurers as respects that liability shall ... be transferred to and vest in the workman, and upon any such transfer the insurers shall have the same rights and remedies and be subject to the same liabilities as if they were the employer, so however that the insurers shall not be under any greater liability to the workman than they would have been under to the employer"*.

397. Cumming-Bruce J in *Murray* reasoned as follows:

> "Against this history, did the Act merely put the plaintiff into the shoes of the insured, so as to transfer to the third party the whole bundle of the rights of the insured, subject to the whole bundle of his liabilities under the contract of insurance, or did Parliament give to the third party the privileged position of asserting the rights of the insured in respect of his liability to the plaintiff and of disregarding the liabilities of the insured to the insurers, for example, in respect of unpaid premiums? What effect must be given to the words "in respect of the liability" which appear in the section? In my view, those words are of the utmost importance.
>
> It is not all the rights and liabilities of the insured under the contract of insurance which are transferred to the third party, only the particular rights in respect of the liability incurred by

the insured to the third party. When one looks at subsection (4) one finds the following language:

> "Upon a transfer under subsection (1) or subsection (2) of this section the insurer shall, subject to the provisions of section 3 of this Act be under the same liability to the third party as he would have been under to the insured, but ..."

and then follows (a) and (b) which deal with the differences between the liability of the insurers to the insured and the liability of the insured to the third party; this shows that the draftsman in that subsection was addressing his mind to problems that arise in connection with the liability of the insurers to the insured in relation to the particular liability of the insured to the third party. In my view this section had a carefully limited intention. There is no express transfer of liabilities of the insured to the insurers, as for example, is to be found in section 5 of the Workmen's Compensation Act, 1906, but if there is, under the policy, a defence by way of condition available against the insured, that defence would be available against the third party.

In my view, in the words used to create the statutory subrogation, the draftsman did carefully limit the subrogation to the rights under the contract in respect of the liability incurred by the insured to the third party. Rights which are not referable to the particular liability of the insured to the particular third party are not transferred. Thus all the conditions in the policy which modify or control the obligations of the insurers to cover a given liability to a third party are the subject of transfer. See, for example, the judgment of Atkinson J. in Hassett v. Legal & General Assurance Co. (1939) 63 Ll.L.R. 278 . The right to recovery of the premiums in this case was not a term of the policy which arose in respect of the liability of the insured to the third party. The defendants are in my view left in regard thereto with the same rights as the general body of creditors, namely, to prove in the bankruptcy." (pp502-503)

398. *Murray* was referred to by Bingham LJ in the *Fanti* [1989] 1 Lloyd's Rep. 239, without discussion, as part of a summary of the effect of the 1930 Act. Bingham LJ said:

> "The reference to the insured's rights "under the contract" has the obvious consequence that one must read and construe the insurance contract between insurer and insured to see what the insured's rights are. There can be transferred only such rights as he has under that contract. The reference to rights "in respect of the liability" to the third party has been narrowly construed: Murray v. Legal and General Assurance Society Limited [1970] 2 Q.B. 495".

His summary was approved by Lord Goff in the House of Lords ([1991] 2 A.C. 1, 38). Again there was no specific discussion of Murray, and it may be pertinent to note that Lord Goff in the same passage referred to Bingham L.J. as having:

> "stressed that the primary purpose of the Act was to remedy the injustice highlighted in particular in In re Harrington Motor Co. Ltd., Ex parte Chaplin [1928] 1 Ch. 105, in which it was held that payment by an insurance company to an insolvent insured of a sum due under a liability policy, fell to be distributed among the creditors of the insured, of whom the injured party was only one: see Bradley v. Eagle Star Insurance Co. Ltd. [1989] A.C. 957, per Lord Brandon of Oakbrook" and that "under the Act there were to be transferred to the third party only such rights as the insured had under the contract of insurance".

399. With great respect to the Judge in *Murray*, I do not agree with the reasoning quoted earlier from that case. It is clear that section 1 of the Act transfers to any given claimant only such rights against the insurer as pertain to the insolvent insured's liability to that claimant. It does not follow, however, that the Act in any way restricts the grounds on which the insurer is entitled to say that those rights are in themselves limited, whether by way of a substantive right of set-off or otherwise. On the contrary, the Act makes clear that the insurer is not to have any greater liability than it would have to the original insured.

400. The purpose of the 1930 Act was to remedy the wrong identified in *Bradley v Eagle Star Insurance Co. Ltd* [1989] 1 AC 957, 968, namely that where an insured was insolvent the sums payable by an insurer in respect of a third party claim would be paid into the insolvency pot, with the third party claimant who had suffered the relevant injury recovering only a dividend in respect of its claim. The 1930 Act was not intended to give the third party claimant greater rights against the insurer than those enjoyed by the insured, and contains no provision to that effect, as Chadwick LJ noted in *Centre Reinsurance International Co v Freakley* [2005] EWCA Civ 115; [2005] Lloyd's Rep IR 303 at §§ 34 and 36. The third party claimant takes the transferred rights subject to the terms of the policy and to any defences which the insurer would have had available to it in respect of the claim.

401. Thus the question of whether a right against the insurer is affected by a right of set-off is determined by the substantive law relating to set-off – is the insurer entitled to set off this particular liability against this particular claim? – rather than by the Act.

402. It is not difficult to see why it may have been considered unfair in *Murray* for the whole of the unpaid premia to be offset against a claim by an individual employee, but that problem arises because the Act is in a sense a blunt instrument. Prior to the statutory transfer, it may not matter much against which particular claim an insurer exercises a right of set-off; whereas following the transfer it may matter a great deal. It would seem more

satisfactory if in a case such as *Murray* the burden of the unpaid premia had to be allocated pro rata between all the 1930 Act claimants claiming pursuant to the relevant policy. However, the Act itself provides no obvious mechanism for this. It may conceivably be possible, given that equitable set-off is an equitable doctrine, for the court in an appropriate case to ensure that fair allocation occurs. What is clear, however, in my view is that the Act cannot lead to the insurer being deprived of a defence, whether equitable set-off or some other defence, that it would have had but for the transfer.

403. ASD contends that *Murray* was correct since section 1(1) of the Act transferred only RMJM's *"rights"* in respect of the liability to ASD/ADNEC, and section 1(4) referred to the "*liability*" of Beazley to RMJM rather than to what Beazley would have had to pay RMJM after allowing for any set-off. Further, the sum sought to be set off was not a right *"in respect of the liability"* owed by RMJM to ADNEC or, *a fortiori*, to ASD. I do not accept these submissions. The effect of a right of equitable set-off is to provide a defence to a claim (see *Geldof Metaalconstructie* and the earlier Court of Appeal decision *Hanak v Green* [1958] 2 QB 9 which it cites). It thus affects, by reducing, the "*rights*" of the insolvent insured against the insurer and hence the "*liability*" of the insurer. It is unnecessary to ask whether the right of set-off is itself transferred under the Act: rather, it operates by directly affecting the rights that are so transferred.

404. In *Cox* Phillips J refused to follow *Murray* and held the third party claim under the 1930 Act to be subject to a set-off arising from payment by insurers of defence costs falling within the insured's policy excess and recoverable either under an express policy term or in restitution. Phillips J said:

> "Can the insurers invoke a right of set-off that was available against an assured as against the names who step into the shoes of the assured pursuant to the provisions of the 1930 Act? In my judgment they can. It seems to me that the rights transferred under the Act must be subject to any defences that would have been available had those rights been asserted by the assured from whom they are transferred. Insofar as the decision in *Murray v Legal and General Assurance Society Ltd*., [1969] 2 Lloyd's Rep. 405; [1970] 2 Q.B. 495 is inconsistent with this conclusion, I decline to follow it." (p451 col 2)

405. More recently, in *Denso Manufacturing UK Ltd v Great Lakes Reinsurance (UK) Plc* [2017] EWHC 391 (Comm), [2017] Lloyd's Rep IR 240 one of the issues was whether an insurer was entitled to set off a liability on the part of the insolvent insured for premium against a claim by a third party under the 1930 Act. Sara Cockerill QC (as she then was) expressed the view that the insurer was not entitled to do so, distinguishing *Cox* on the basis that it related to defence costs and not premium, but also declining to follow it on the grounds that it was not binding on her at least in relation to the issue of set-off of premium (§§ 151-152).

406. The discussion in *Denso* was expressly *obiter* because as the Judge stated at § 142, the issue did not arise on the view she had taken on a prior issue. The Judge referred to *Murray*, *Cox*, and to the fact that the 2010 Act now specifically establishes a right of set-off in respect of a liability the insured has

to the insurer under the contract of insurance (see section 10). The Judge continued:

> "151. However Denso argues that *Cox* case does not concern set-off of premium, but of the effect on a third party of a costs-inclusive excess. Accordingly, the court was faced with an entirely distinct issue. Further there was no consideration by the Court of the doctrine of stare decisis. *Murray* is binding as a matter of precedent. Phillips J did not consider whether he was fully satisfied that the previous decision was wrong. The conditions for following a more recent decision are therefore not in place.
>
> 152. This is a very interesting point, although arising somewhat down the list of issues. To the extent that it may ever become relevant I prefer the argument of Denso. There is a distinction between the two cases, as is apparent from the judgment of Phillips J. This tends to be reinforced by the facts that Phillips J would be expected to have made it clear if he considered that the previous decision was inconsistent with the course he proposed. This also explains the absence of the full consideration of the previous authority before departing from it.
>
> 153. I take comfort in that conclusion from the decision of the Supreme Court in *International Energy Group Ltd v Zurich Insurance plc* [2016] AC 559 at [83]-[93]. The issue there was the slightly different one of the right to set-off contribution from the insured or third parties. The Court considered the point though leaving this debate open on the basis that any right of contribution in that case was best seen as arising from circumstances outside the insurance policy, and on that basis as not capable of giving rise to a set-off at all.
>
> 154. However the Court opined that legal set-off is "probably" precluded under the statutory transfer under the 1930 Act: § 89. It further held that if equitable set off is available, it requires analysis of whether the claims are so closely connected that it would be "manifestly unjust" to permit the claim without taking account of the cross-claim: *Geldof Metaalconstructie NV v Simon Carves Ltd* [2010] 4 All ER 847, per Rix LJ.
>
> 155. This discussion does demonstrate that if a 1930 Act transferee takes subject to equities, the insurer (here Great Lakes) will need to plead and prove the inequitability of not setting off premium. It appears that this has not been done here, and so even if the argument might arise any claim for set off would fail at this point."

407. It is not clear to what extent the Judge in *Denso* considered the *Murray* approach to be preferable to that in *Cox* outside the respective contexts of unpaid premia and defence costs covered by a policy excess. The Judge's

citation from *International Energy Group v Zurich Insurance* suggests only that any equitable set-off will require pleading and proof that the 'manifestly unjust' criterion has been satisfied. In my view, therefore, the observations in *Denso* do not undermine Beazley's case for saying that a right of equitable set-off arising from defence cost payments in excess of the contracted-for share (that being a situation analogous to that in *Cox* and distinct from that in *Murray* and *Denso*) can be asserted as a defence to a 1930 Act claim.

408. In any event, I would agree with Beazley that even if (contrary to the view I express above) the construction of the 1930 Act set out in *Murray* is correct, Beazley would not be precluded from setting-off RMJM's liability to it in respect of the Pro Rata Share as against the ADNEC Claim, because the defence costs in question were incurred in the defence of the ADNEC Claim and are referable to the relevant liability.

409. Finally on this topic, ASD submitted that whereas a 1930 Act transfer removes from the insured the rights transferred to the third party, it does not remove any rights from the insurer. The insurer can thus still make any cross-claims against the insolvent insured's estate, which may still contain some assets of value. If the insurer satisfies those claims by that means, it cannot also exercise a set-off against the third party. Yet the right of set-off cannot depend on how, following the insolvency, the insurer chooses to proceed. Those considerations do not in my view undermine the argument for the insurer having the benefit vis a vis the third party of any set-off defence it would have had against the insured. It is true that the sum which may be offset will inevitably depend on what net balance is owing following any direct recovery from the insured's assets, but that is no different in principle from the situation where the insurer recovered part of its cross-claim from the insured by (say) execution and exercised a right of set-off as regards the balance.

410. Secondly, ASD argues that Beazley cannot offset against a 1930 Act claimant a right of equitable set-off that accrues only after the statutory transfer has occurred. The key dates were as follows:

i) Up to 2011: work carried out by RMJM

ii) 23 May 2013: ADNEC commences arbitrations against RMJM

iii) 9 April 2014: ASD commences arbitration against RMJM

iv) 24 September 2015: RMJM enters sequestration in Scotland

v) 31 May 2016: tribunal issues final award in the ASD arbitration

vi) 27 July 2016: tribunal issues final award in the ADNEC arbitration

411. In terms of the 1930 Act, RMJM was insured by Beazley against liabilities to third parties which it might incur, and then was the subject of an event falling within section 1(1) in the form of its sequestration. As a result, upon the sequestration, RMJM's rights against Beazley in respect of RMJM's liability

to ASD were transferred to and vested in ASD at that time; and likewise with ADNEC. As at the time of the sequestration, ASD submits, no right of set-off existed: that right will not arise until both (a) the ASD and ADNEC claims were quantified (which occurred in 2016 upon the respective awards) and (b) the claims under the policies have been quantified. Only at that point will it be known to what extent, if at all, Beazley may have paid more than its share of defence costs in respect of the ADNEC claim. Consequently no set-off is permissible.

412. The flaw in this argument is in my view the provision in section 1(4) that *"Upon a transfer under subsection (1) or subsection (2) of this section, the insurer shall … be under the same liability to the third party as he would have been under to the insured"*. The words *"Upon a transfer"* do not limit the operation of this provision to the position at the time of the statutory transfer: they simply introduce what follows as being the consequences of the transfer having occurred.

413. It is clear that the transferred rights of the insured are not restricted to those in existence at the time of the transfer, since (as the present case illustrates) those rights may not crystallise, under ordinary principles, until a post-transfer judgment, award or settlement in favour of the third party against or with the insured. As Excess Insurers point out, if a breach of condition or warranty were to occur after the date of the statutory transfer, that could be relied on by the insurers as a defence. By way of loose analogy, as Excess Insurers note, that is also the position in relation to assignment: an equitable set-off may arise from transactions occurring after the date of notice of the assignment (see Derham on *The Law of Set-off*, 4th edn, §§ 17.32-17.34 citing inter alia the statement of Templeman J in *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 1 WLR 578, 585).

414. Beazley makes the further general point that under ordinary principles, there is no rule that a claim sought to be offset must have arisen by the time the claim against which it is sought to be offset arises, otherwise only the party with the first claim in time could ever assert a right of offset. It would be strange if the 1930 Act had in effect introduced such a rule to the potential detriment of the insurer.

415. As noted earlier, the purpose of the Act is to transfer, but not to increase, the rights available to the insured under a contract of insurance. In substance it concerns the allocation of those rights as between particular third party liability claimants and the insured's general pool of creditors. The correct approach in my view is therefore to consider what the legal position (in terms of rights and liabilities) would have been as between the insured and the insurer had there been no statutory transfer, and then to replicate that as between the 1930 Act claimant and the insurer. Any other approach may mean that the Act operates to the detriment of the insurer.

416. Thirdly and finally on this issue, ASD and ADNEC argue that after a 1930 Act transfer has occurred, an insurer claiming a right of equitable set-off must show that it would be manifestly unjust to allow such a set-off vis a vis the 1930 Act claimant, as opposed to vis a vis the insolvent insured.

417. ASD also submits that it is relevant in considering the application of the 1930 Act that it would be an unfair result to reduce ASD's recovery by reference to a separate liability on the part of RMJM arising in respect of an entirely different claim. It says the Act is not to be interpreted in a way that would prejudice the victim (ASD) or fail to give effect to the victim's legitimate expectations. In particular, it would be inconsistent with those legitimate expectations to reduce the recovery available to ASD by reference to a claim arising between Beazley and RMJM which has no connection with the liability that ASD has successfully established against RMJM.

418. ASD relies on the observations of Lord Mance (with whom the majority of the Supreme Court agreed) in *International Energy Group*. Lord Mance was considering the right of the insurer (Zurich) to offset against liability to a claimant mesothelioma victim (C) a right of contribution which Zurich would have had against the insolvent insured employer (IEG) arising from the fact that Zurich had provided cover for IEG in respect of only a part of the period in which the employee had been exposed to asbestos. It is necessary to set out Lord Mance's observations at some length:

> "85 When the 1930 Act applies, it therefore transfers to the mesothelioma victim the insured's rights under the insurance contract in respect of the insured's liability to the victim. The same is provided by the 2010 Act, not yet in force. Whether an insurer's right to contribution against the insured constitutes a full or partial answer to a victim's policy claim based on such a transfer is a question of great potential importance. It raises questions of some complexity, on which it is unnecessary to give a final answer on this appeal, but about which I wish to make some observations. One question is whether, apart from any statutory transfer under the 1930 or 2010 Act, the insurer's right to contribution would be a defence at common law to a claim by the insured for indemnity under the insurance, as opposed to giving rise to procedural remedies such as a stay. A second is whether it makes any difference to the application of the relevant common law rules in this context that the claim is being brought under the 1930 or 2010 Act. A third is whether the terms of the Act positively exclude or restrict any such defence.
>
> 86 The first and second aspects raise, as sub-issues, the existence of any right of relief based on set-off, circuity of action or other equitable basis. Zurich positively submitted that it would have no right of set-off, legal or equitable. One objection to set-off is that a right to contribution only arises on payment by the person seeking contribution: ... On the face of it, that presents a real obstacle to any suggestion by any insurer in Zurich's position of set-off, whether legal or equitable, against IEG's claim for the full amount of its loss.
>
> 87 There is however first instance authority endorsing the availability of a further remedy in cases where a person A

(here, for example, Zurich), liable to make a payment to person B (here, the person suffering mesothelioma), has a potential right to receive contribution (or a full indemnity) from a third person C (here, IEG). …

88 Accepting the fairness of the thinking behind this first instance authority without further examination, I doubt whether it could or should affect the application of the general principle mentioned in para 86 in the particular context of a claim by a victim under the 1930 or 2010 Act. Zurich's obligation under the insurance and that Act would be to indemnify the victim. Any consequential right to contribution from IEG would arise not "under", but outside, the insurance contract in terms of section 1(1) of the 1930 Act. Considerations of justice and policy would also support the treatment of the insurance and the contribution positions as legally separate, when an opposite approach would be to the prejudice of the victim, in whose favour the insurance would otherwise operate and who is not concerned with the circumstances giving rise to any contribution claim.

…

90 In contrast, equitable set-off, where available, can give rise to a substantive defence. … Again, I consider that, in a context where any set-off arises from circumstances outside the insurance policy and would be to the prejudice of a third party victim, the considerations of policy and justice behind the rules developed in Fairchild [2003] 1 AC 32 and "Trigger" [2012] 1 WLR 867 would probably mean that it was just (rather than "manifestly unjust") for Zurich to have to fulfil its insurance policy obligations, before asserting against IEG any contribution claim based on circumstances outside the scope of the insurance to the prejudice of that victim. Even in circumstances where liability insurance is not compulsory, it would be wrong to view liability insurance as if its only rationale was to benefit the insured's bottom line, rather than to give effect to legitimate expectations regarding the protection of employees and other third party victims. That rationale is reflected in the 1930 and 2010 Acts, and reinforced by the now compulsory nature of employers' liability insurance. The court would also be entitled to take it into account, when considering for the purposes of equitable set off what is or is not "manifestly unjust".

…

92 … [*Murray* and *Cox*] concerned cross-claims which arose directly from and under the insurance policy. Here, any right of contribution is best analysed in my view as arising from

> circumstances outside the insurance policy, and on that basis as not capable of giving rise to a set-off at all.
>
> 93 … Neither *Murray* nor *Cox* concerned a defence to a claim under the insurance contract which was based on a cross-claim arising from circumstances outside the insurance contract and which could only become due on person B being paid in full in respect of his liability to person C. There is thus, in my view, a strongly arguable case for treating the language of section 1(1) of the 1930 Act as entitling the third party to recover against the insurer in such a case, leaving the insurer to enforce any claim to contribution which it may have against anyone separately and in the ordinary course, subsequently." (§ 90)

419. I do not find it easy to tell from these observations whether their focus is on the types of claim that may give rise to an equitable set-off at all, or on the impact of the 1930 Act. If, as I consider to be the position, the intention and effect of the Act was not to increase the liabilities of the insurer, it is difficult to see why it should impact on the determination of what qualifies for equitable set-off in the first place. It is also difficult to see why, when considering what the set-off rights of the insurer would have been in the absence of the statutory transfer, the position of third parties can have any relevance. In any event, it is clear that Lord Mance's observations were confined to claims "*based on circumstances outside the scope of the insurance*". Beazley's claim for the Pro Rata Share, whether based on an implied term or on restitution, is based on circumstances within the scope of the contract of insurance between RMJM and Beazley: it arises directly from overpayment by Beazley, as part of its discharge of its duties under the policy, of defence costs that are the subject of clause 1.2 of the policy. As a result, I do not believe the observations in *International Energy Group* affect the outcome of the present case.

(2) Issue 5(b): estoppel

420. ASD alleges (supported by ADNEC) that Beazley is estopped from contending that it is entitled to set-off the Pro Rata Share because:

> "*Beazley assumed liability for and in fact paid the ADNEC Defence Costs as they were incurred and did not at any time indicate that the limit of liability available to RMJM in respect of the ASD Claim was limited as now asserted or that Beazley would subsequently be entitled to recover the ADNEC Defence Costs (or part thereof) from RMJM or offset it against any indemnity in respect of the ASD Claim*".

421. ASD says the estoppel arises on essentially the same factual basis as its defence of change of position. Had RMJM been told that it was potentially liable, it would have sought to protect itself from that possibility, including by reviewing its insurance position and seeking to exercise control over the costs being incurred. It would therefore be inequitable for Beazley now to assert that RMJM is required to pay part of the ADNEC defence costs.

422. Beazley accepts that it funded the ADNEC defence costs and did not at any time prior to RMJM's sequestration expressly assert its entitlement to recover the Pro Rata Share if RMJM's liability to ASD and ADNEC exceeded the available limit. However, it makes the point that silence is not generally capable of giving rise to an estoppel. Section 1.2 of the primary policy set out Beazley's liability for defence costs in circumstances where the available limit is exceeded, and its provisions were or should have been known to RMJM at all times.

423. In my view Beazley's conduct did not involve any clear or unequivocal representation to the effect that it would not seek to recover the Pro Rata Share should the relevant circumstances arise. Further, having regard to Mr Elliot's evidence about recoupment of the Pro Rata Share as summarised in §§ 374.iii) and 377 above, I do not consider that RMJM changed its position in any respect that would make it inequitable for Beazley to seek to recover it. Beazley is therefore not estopped from doing so.

(3) Conclusion on Issue 5

424. (a) Yes: Beazley is entitled to set-off a pro rata share of the costs incurred in defending the ADNEC Claim against its liability under the 2008/2009 Primary Policy to ADNEC in relation to its Claim and (insofar as the pro rata share exceeds the amount available to be set off against ADNEC's Claim) against its liability under the 2008/2009 Primary Policy to ASD in relation to its Claim. (b) No: Beazley is not estopped from contending that it is entitled to do so.

(J) ISSUE 6: RECOVERY BY ASD/ADNEC FROM EXCESS INSURERS OF OVERPAID DEFENCE COSTS

425. Issue 6 is:

> "Whether, to the extent that the amount recoverable by ASD and/or ADNEC under the 2008/2009 Primary Policy falls to be reduced by reason of the matters addressed by issue 5.a., and on the assumption that the Excess Insurers consented to the incurring of the ADNEC defence costs, any shortfall in ASD's and/or ADNEC's recovery under the 2008/2009 Primary Policy or any amount set off by Beazley can be recovered by ASD and/or ADNEC under the Excess Policies, including: (a) whether a claim by ASD and/or ADNEC under the Excess Policies in respect of any shortfall in recovery under the 2008/2009 Primary Policy would be a claim in respect of ADNEC defence costs; and; (b) whether ASD and/or ADNEC has title to sue in respect of such defence costs."

426. If Beazley is entitled to reduce the amount paid to ASD under the 2008/09 Primary Policy by reference to any overpayment of ADNEC defence costs, ASD asserts a claim against Excess Insurers for any resulting shortfall in its recovery. Excess Insurers deny that ASD can assert such a claim, in particular on the basis that it is a claim in respect of defence costs and ASD does not have title to sue for such defence costs.

427. Had RMJM remained solvent, and assuming Beazley would have been entitled to set off the ADNEC defence costs against RMJM's claim in respect of its liability to ASD, then subject to the question of consent RMJM would have been entitled to claim the difference against Excess Insurers.

428. ASD says it would be bizarre if ASD were to be in a worse position than RMJM as a result of the operation of the 1930 Act, and makes the point that that is a good reason why Beazley's set-off argument is wrong. If Beazley is right that ASD is affected by the liability of RMJM in respect of ADNEC defence costs, ASD says it must in fairness follow that ASD can recover the amount of the set off against Excess Insurers.

429. ASD submits that its claim over against Excess Insurers is a claim not in respect of defence costs but in respect of the balance of the liability owed by RMJM to ASD, because:

    i) Beazley seeks to set off costs said to be owed by RMJM against ASD's claim. Clearly ASD is not liable for those costs: rather, Beazley relies on RMJM's liability for those costs as a defence which it says reduces what it would have had to pay to RMJM and therefore what it now has to pay to ASD.

    ii) As between ASD and RMJM, the effect of Beazley paying less than the full amount of RMJM's liability to ASD (on any ground) is that that liability is not fully discharged. ASD retains a right against RMJM in respect of the non-discharged part of RMJM's liability.

    iii) It follows that when ASD seeks to claim against Excess Insurers for the amount of any set off by Beazley, ASD is simply claiming in respect of the balance of RMJM's liability to it. It is not a claim for defence costs (for which ASD could never be liable).

430. Alternatively, it is said, if a liability in respect of the ADNEC defence costs has somehow been transferred to ASD by means of the 1930 Act (or otherwise), ASD says it must follow that the corresponding right to advance a claim in respect of those defence costs has also been transferred. Otherwise ASD would suffer the prejudice of having the liability in respect of defence costs imposed on it, but acquires no corresponding rights. That would be fundamentally unfair, as well as an incoherent application of the 1930 Act. If ASD is unable to claim the amount of any set off against Excess Insurers, that is a powerful reason why Beazley's set-off argument is wrong in the first place and inequitable.

431. Similarly, ADNEC argues that ASD's claim against Excess Insurers would be a claim to excess policy cover in respect of RMJM's liability to ADNEC in circumstances where, as a result of its entitlement to set-off its claim against RMJM in respect of ADNEC defence costs, Beazley was entitled to reduce the limit of indemnity available under the 2008/09 Primary Policy.

432. I regret that I am unable to accept these submissions. The correct analysis in my view is that:

i) Any set-off to which Beazley is entitled to make of the Pro Rata Share (i.e. of overpaid defence costs), or indeed of any other claim, against its liabilities to indemnify under clause 1.1 is in principle a way of partially discharging by way of set-off the sum that would otherwise be due under clause 1.1. The position would be the same if the offset arose from some other claim, such as for unpaid premia.

ii) The effect would therefore be that (a) Beazley had paid the claim in full up to the available policy limit of $10m (less a minor claim already paid) but (b) Beazley had recouped by the set-off the overpaid defence costs, with the result that RMJM would not ultimately have received that portion of its defence costs relating to the ADNEC Claim. In other words, the effect of the set-off would in substance be to reverse Beazley's previous payment to RMJM of the Pro Rata Share of defence costs.

iii) RMJM's claim against Excess Insurers would not therefore be a claim to excess policy cover in respect of RMJM's liability to ADNEC as a result of Beazley being entitled to reduce the limit of indemnity available under the 2008/09 Primary Policy. The offset would not reduce the limit of indemnity. Instead it would be a means by which Beazley discharged its liability to pay up to the full available limit of indemnity, i.e. the full $10m less the small claim previously settled. Thus RMJM's claim against Excess Insurers would be for Excess Insurers' share of the defence costs, i.e. the Pro Rata Share.

iv) Assuming Excess Insurers consented to the incurring of those defence costs, and no other coverage issues arise under the Excess Policies, RMJM could therefore recover those costs from Excess Insurers.

v) However, as set out below, such a claim would unfortunately not fall within the 1930 Act as it would not form part of *"[RMJM]'s rights against the insurer under the contract in respect of the liability"* i.e. RMJM's liability to the third party. The Act does not transfer to the third party the insured's right to recover from his insurer the costs of defending the third party's claim.

vi) RMJM's claim against the Excess Insurers for the Pro Rata Share would therefore remain with RMJM itself, in effect with its trustee in the sequestration.

433. As to the position under the 1930 Act, RMJM's right to recovery against the Excess Insurers would have arisen under clause 1.2 of the policy wording as incorporated into the Excess Policies, not clause 1.1. Clause 1.1 provides cover for claims for negligence or error in providing professional services (plus claimant's costs and expenses). Clause 1.2 provides cover for the insured's own defence costs.

434. Excess Insurers are right in my view to say that unlike clause 1.1, clause 1.2 is not an insurance against third party liability but a first party pecuniary loss insurance. Clause 1.2 covers defence costs "incurred", whereas clause 1.1

provides cover in respect of claims for damages or compensation which the insured "*may become legally liable to pay*".

435. The 1930 Act applies where under a "*contract of insurance a person ... is insured against liabilities to third parties*". Chadwick LJ addressed this point in *Centre Reinsurance International Co v Freakley* [2005] EWCA Civ 115; [2005] Lloyd's Rep IR 303, which concerned the insured's (T&N's) entitlement to claim an indemnity in respect of a third party liability and claims handling expenses:

> "it is common ground that the liability of the insurer to T&N, as the insured, in respect of an asbestos claim advanced and established by a third party after Ultimate Net Loss has reached the Retained Limit includes (i) a liability to indemnify T&N in respect of the asbestos claim and (ii) a liability to indemnify T&N in respect of the expenses of handling the asbestos claim. Assume, then, that (before any payment is made) there is a transfer of rights under section 1(1) of the 1930 Act on T&N's insolvency. The effect of section 1(4)(a) of the Act will be that, thereafter, the insurer will be under the same liability to the third party in respect of the asbestos claim as it would have been to T&N. But the liability of the insurer to indemnify T&N in respect of the expenses of handling the asbestos claim will be unaffected by the statutory transfer. That is because T&N, as insured, is under no liability to the third party in respect of its own expenses. The liability of the insurer to T&N under the policy exceeds the liability of T&N to the third party in that respect." (§ 40, my emphasis)

436. Beazley and the Claimants dispute these arguments, in the case of Beazley because they affect its prospective claim which is the subject of Issue 7. The Claimants and Beazley make the point, first, that the question of whether there might be any restrictions on the liabilities so transferred was considered by the Court of Appeal in *In Re OT Computers Ltd (In Administration)* [2004] EWCA Civ 653. In that case, the Court of Appeal held that the relevant words of the statute are "*perfectly general*", and are not to be confined to tortious liabilities and contractual liabilities akin to tortious liabilities. Whilst it was not part of the *ratio*, the Court of Appeal also expressed the view that the phrase "*liabilities to third parties*" extended to liabilities voluntarily incurred, and to debts as well as damages.

437. Beazley, in particular, makes the point that defence costs covered under section 1.2 of the primary policies, and as incorporated by reference in the Excess Policies, do fall within the 1930 Act because they are liabilities incurred by the insured to its solicitors. RMJM thus incurred a liability in respect of defence costs, and the Act extends to all categories and all aspects of liability insurance.

438. As to the case law, the Claimants and Beazley submit that:

i) So far as the handling costs were concerned in *Freakley*, the matter was common ground between the parties since there was no issue about a claim for such costs being transferred to any third party under the 1930 Act: thus Chadwick LJ's comments are not authoritative.

ii) In *Tarbuck v Avon Insurance plc* [2002] QB 571 it was held that a liability in respect of defence costs did not fall within the 1930 Act. The solicitors to whom the fees were owed were therefore unable to recover them from the insurers under the Act. Toulson J said at p577:

> "I have to choose between construing the words 'where a person is insured against liabilities to third parties which he may incur' as limited to insurance against liabilities which may be imposed on that person by operation of law whether for breach of contract or in tort was including the underwriting of liabilities voluntarily undertaken by that person, ie the payment of contract debts. I do not believe that the words were intended to include the latter so with regret on the facts of the present case I would hope that the plaintiff has no right of claim against insurers under the Act.""

iii) In *T&N Ltd v Royal and Sun Alliance plc* [2003] EWHC 1016 (Ch), [2003] 2 All ER (Comm) 939 Lawrence Collins J followed *Tarbuck* and held that a liability in contract to reimburse a funder did not fall within the 1930 Act.

iv) However, the Court of Appeal in *In Re OT Computers* indicated that it considered *Tarbuck* and *T&N* to have been wrongly decided, though it was not necessary to overrule them. The issue in *OT Computers* related to extended warranty products that had been sold to customers, and the liability under those extended warranty products had then been insured. The insured vendor of the extended warranties went into administration or insolvency. Longmore LJ (with whom the other members of the court agreed) stated:

> "18 So understood Tarbuck [2002] QB 571 is distinguishable from the present case and any observation on it by this court will be obiter. Mr Moss expressly accepted that in this case OT Computers and Tiny would be liable to damages to customers if they failed to repair or replaced faulty hardware or if they failed to attend the customers' premises when they were obliged to do so.
>
> 19 Nevertheless the question whether Tarbuck was rightly decided was fully argued and in those circumstances it would only be right for me to express my view. I am, for my part, reluctant to draw a distinction for the purposes of the Act between a liability which sounds in debt and liability which sounds in damages and to say that it is only the latter which is covered by the Act. The words are (to repeat them again) "insured against liabilities to third parties which he may incur".

These words are perfectly general (as I have already observed) and are apt to include liabilities in debt just as much as liabilities in damages.

20 That is not to say that the insurance policy itself may not specifically provide that the insured liability is to be a liability in damages or even a liability for damage; in such a case the policy will not apply to a contract debt since liability for such a contract would not be a liability in damages and it will probably not be a liability for damage either (although we heard no argument on the point). This court does not, of course, know the terms of the insurance in the present case because the administrators have so far declined to reveal it. But as far as the 1930 Act is concerned there is no such limitation in the phrase "liabilities to third parties". In Tarbuck itself the insurance provided for "payment of legal costs up to £50,000"; on the assumption that those were the only relevant words of the policy I would say that the insurance was against the liability to pay legal costs and that that is sufficient for the purposes of the Act. I note that the Law Commission proposes in its final Report on the 1930 Act (Law Com No 272) (14 June 2001) that Tarbuck should, in any event, be reversed by legislation: see paras 1.20-1.21 and 2.39-2.44.

…

22 Lawrence Collins J held [in *T&N*] that he should follow *Tarbuck* and conclude that what was insured was the non-payment of a contract debt due from T&N to Lloyd's and that such non-payment was not covered by the 1930 Act. But a liability to make a payment in a certain event is, as I have said, something against which insurance can be taken out and, if it is, there is no reason why the 1930 Act should not apply. It may be that the terms of the policies justified Lawrence Collins J's conclusion on the facts of his case but his apparent acceptance of Curzon's argument that the 1930 Act only covered "tortious liabilities and contractual liabilities akin to tortious liabilities" cannot, in my view, be justified. It is not clear that the shipping cases were cited—certainly no reference to them is made—and, in my view, *T&N Ltd v Royal and Sun Alliance plc* insofar as it accepted the full width of Curzon's argument, should, with respect to Lawrence Collins J, no longer be treated as authority for the proposition that the 1930 Act only applies to tortious liability or liability akin to tortious liability.

…

53 I would summarise the effect of this judgment in the following way.

> (1) There is no reason in principle why the 1930 Act does not apply to contractual liabilities (whether in debt or for damages), although the actual terms of the insurance may determine whether the Act will apply in any particular case. Tarbuck v Avon Insurance plc [2002] QB 571 and T&N Ltd v Royal and Sun Alliance plc [2003] 2 All ER (Comm) 939 should no longer be followed. …"

v) Beazley submitted that though these comments in relation to *Tarbuck* were *obiter*, they were correct and to be preferred. Further it was part of the *ratio* of *OT Computers* that the 1930 Act can apply to contractual liabilities whether in debt or for damages, although the actual terms of the insurance may determine whether the Act may apply in any particular case.

439. Excess Insurers make the point, however, that the insured liability in *OT Computers*, against legal liability under an extended contractual warranty, is significantly different from defence costs cover. In the case of defence costs cover, the obligation to pay the solicitors engaged in exchange for legal services is something that is immediately recognised as owing. It is in substance a form of direct first party pecuniary loss insurance rather than third party liability insurance. By contrast, liability under an extended contractual warranty is cover against a fortuity, in which context it makes sense to speak of the insured as being insured against a third party liability. These points were not considered by the Court of Appeal in *OT Computers;* whereas something akin to defence costs – namely handling costs, another form of first party pecuniary loss – was considered in *Freakley* as part of a full review of the law.

440. I see considerable force in Excess Insurers' submissions on this point. Literally speaking, the section 1.2 cover for defence costs might be regarded as a form of insurance against liability to a third party, viz the insured's own legal advisers. In substance, however, it is cover for the insured's own direct expenses rather than for liability to a third party. I therefore do not consider that it falls within the rubric *"under any contract of insurance a person (hereinafter referred to as the insured) is insured against liabilities to third parties which he may incur"* in section 1(1) of the Act.

441. In any event, there is in my view another, insuperable, problem with the Claimants' case in this regard. Where section 1(1) of the Act applies, its effect is to transfer the insured's relevant rights against the insurer to the third party, i.e. the person to whom the insured has incurred a liability in respect the contract of insurance entitles him to an indemnity.

442. If the defence costs cover in the policies meant that RMJM was *"insured against liabilities to third parties which he may incur"*, then that third party was RMJM's defence lawyers, and they (if anyone) are the persons to whom rights would be transferred under the Act. Thus in *Tarbuck* it was the unpaid solicitors who sought to bring a claim under the Act.

443. RMJM was not, however, insured against liabilities to ASD or ADNEC (or others in their position, i.e. clients) in respect of any liability to pay RMJM's defence costs. ASD and ADNEC are not therefore persons to whom the Act could have transferred any rights in respect of the defence costs cover.

444. It occurred to me that it might be possible to argue the point on a different basis, namely that although the *"liabilities to third parties"* against which RMJM was insured were liabilities in damages to ASD and ADNEC for professional negligence, and not liabilities for RMJM's own defence costs, nevertheless RMJM's *"rights against the insurer under the contract in respect of the liability"* included RMJM's rights under section 1.2 in respect of defence costs – because those were (taking a broad view) still rights *"in respect of"* the underlying liability for professional negligence. However, aside from the fact that I do not understand the matter to have been argued before me on that basis, I do not consider it to be correct. It would mean that defence costs rights would be transferred to the third party to whom the insolvent insured had the substantive liability (e.g. in professional negligence), whereas one normally would expect them to be transferred, if at all, to the out-of-pocket defence lawyer (as was argued in *Tarbuck*).

445. It follows that RMJM's claim under the Excess Policies is not one which has been transferred to ASD or ADNEC under the 1930 Act.

446. I can, to a degree, see the force in ASD's point that this is an unfair result. However, it seems to me an inescapable result of the correct application of the Act in the somewhat unusual circumstances of the present case. Further:

i) ASD's fairness point does not in my view indicate that Beazley's set-off claim must be wrong. Beazley's set-off is founded on the straightforward propositions, each of which is unobjectionable, that (a) it will have overpaid defence costs by paying more than was due under section 1.2 of the policy, (b) it would have been entitled to recover the excess from RMJM by way of set-off against sums otherwise due to RMJM by way of indemnity under the same policy and (c) following the 1930 Act transfer it will remain entitled to offset the overpayments against sums that will now be due not to RMJM but to the 1930 Act transferees of the same rights to indemnity.

ii) The fact that the claim Beazley seeks to offset happens to relate to an overpayment of defence costs which RMJM could *prima facie* have recouped from Excess Insurers but which the Claimants may not be able to recoup (because it falls outside the 1930 Act) does not mean that it would have been unfair for Beazley to have set off the overpayment as against RMJM. If Beazley would have been so entitled, it must in my view follow that it is entitled to rely on the same set-off defence as against the Claimants.

iii) The position is no more unfair than it would be if Beazley were entitled to offset some other sum, such as unpaid premia or perhaps an overpayment made by Beazley on some other claim RMJM had made, which the Claimants would have no means of recouping. However, it

> is inherent in the 1930 Act that claimants may fail to make a recovery to the extent that any defence would have been available to the insurer against the insured. Any other view would mean that the Act had altered the position not merely between different classes of creditor of the insolvent assured but also as between the assured and its creditors on the one hand and the insurer on the other hand.

447. In oral argument ASD put forward an alternative argument, namely that if under the 1930 Act Beazley is entitled to offset the Pro Rata Share, it follows that ASD and ADNEC have discharged RMJM's liability to Beazley in respect of the Pro Rata Share and must be equitably subrogated to it. On that basis they are entitled to recover the Pro Rata Share from Excess Insurers independently of the 1930 Act. Such a claim would have a similar basis to the one I mention in § 376.iv) above as having occurred to me in relation to a claim by Beazley against Excess Insurers. It became apparent during oral submissions that the ASD version of this potential claim was also a new point that had not been heralded in the statements of case or ASD's skeleton argument, and it would not be right to determine it now. That was certainly Excess Insurers' position and counsel for ASD was realistically, and I think rightly, disposed to accept that. The issue will therefore have to be decided, if necessary, at a later stage.

Conclusion on Issue 6

448. To the extent that the amount recoverable by ASD and/or ADNEC under the 2008/2009 Primary Policy falls to be reduced by reason of the matters addressed by Issue 5.a., and on the assumption that the Excess Insurers consented to the incurring of the ADNEC defence costs, any shortfall in ASD's and/or ADNEC's recovery under the 2008/2009 Primary Policy or any amount set off by Beazley cannot (based on the arguments before me, i.e. excluding the possible future argument referred to in § 447 above) be recovered by ASD and/or ADNEC under the Excess Policies. A claim by ASD and/or ADNEC under the Excess Policies in respect of any shortfall in recovery under the 2008/2009 Primary Policy would be a claim in respect of ADNEC defence costs; and such a claim does not pass to ASD or ADNEC under the 1930 Act.

(K) ISSUE 7: RECOVERY BY BEAZLEY FROM EXCESS INSURERS OF OVERPAID DEFENCE COSTS

449. Issue 7 is:

> "Whether, to the extent that the answer to issue 5.a. is "No" and/or the answer to issue 5.b. is "Yes", Beazley is entitled to recover a pro rata share of the ADNEC defence costs from the Excess Insurers under the 2008/2009 Excess Policies pursuant to the Third Parties (Rights Against Insurers) Act 1930 (it being assumed for this purpose that the Excess Insurers consented to the incurring of such defence costs in accordance with clause 4 of the WNM 1989 Professional Indemnity wording as incorporated into the 2008/2009 Excess Policies)"

450. This issue arises in the event that Beazley fails in its primary case that it is entitled to set-off the Pro Rata Share (or any part of that share) against its liability to ADNEC and ASD in relation to their respective claims. In such circumstances, Beazley says that it is entitled to recover the Pro Rata Share from Excess Insurers pursuant to the 1930 Act. It says that entitlement depends on it succeeding in relation to the following four propositions, the first two of which also arose in relation to Issue 5:

i) Beazley was only liable pursuant to section 1.2 of the 2008/09 Primary Policy to indemnify RMJM in respect of that part of the ADNEC defence costs which was proportionate to that part of the ADNEC Claim which fell within the limit of that policy, and accordingly was not liable to indemnify RMJM in respect of the Pro Rata Share;

ii) RMJM was liable to reimburse Beazley in respect of its funding of the Pro Rata Share;

iii) RMJM was entitled to be indemnified by Excess Insurers pursuant to the 2008/09 Excess Policies in respect of its liability to reimburse Beazley for the Pro Rata Share; and

iv) RMJM's above entitlement to be indemnified by Excess Insurers has been transferred to Beazley under the 1930 Act.

451. I have concluded in Beazley's favour on propositions (i) and (ii) as part of Issue 5.

452. As to proposition (iii), clause 4 of the WNM 1989 Professional Indemnity wording, which, it is common ground, was incorporated into the 2008/09 Excess Policies, provides that:

"*With the exception of costs incurred by the operation of 3(b) above, in the event of a claim arising to which the Underwriters hereon may be liable to contribute, no costs shall be incurred on their behalf without their consent being first obtained (such consent not to be unreasonably withheld) and if they so consent <u>they shall contribute to the said costs in the proportion that their share of the claim, as finally settled, bears to the total sum paid to dispose of the claim.</u> No settlement of a claim shall be effected by the Assured for such a sum as will involve this Policy without the consent of Underwriters hereon.*" (emphasis added)

453. All the ADNEC defence costs were "*incurred*" by RMJM: see §§ 362-363 above referring to *Cox*. As a result, if RMJM had itself paid Simmons & Simmons' bills, it would be entitled pursuant to clause 4 to recover the Pro Rata Share from Excess Insurers.

454. Further, Beazley contends, the fact that Beazley funded the ADNEC defence costs does not alter the position. RMJM's liability to reimburse Beazley is a liability in respect of defence costs, and accordingly falls within clause 4. Any other result would be contrary to commercial common sense and would render the parties' performance of their obligations in relation to defence costs

impossible: the insured will generally require its defence costs to be funded by its insurers as and when they are incurred but, as explained above, it will not usually be possible to assess what a pro rata share of those costs is until the relevant claims have been settled.

455. As to proposition (iv), the 1930 Act provides for the transfer to the third party of the insolvent insured's "*rights against the insurer under the contract in respect of the liability*" (s1(1)(b)). As discussed under Issue 6, Beazley contends that the Court of Appeal in *In Re OT Computers Ltd* held that the relevant words of the statute are "*perfectly general*" (§ 14), and were not to be confined to tortious liabilities and contractual liabilities akin to tortious liabilities; and also expressed the view that the phrase "*liabilities to third parties*" extended to liabilities voluntarily incurred, and debts as well as damages.

456. RMJM's liability to Beazley arises either pursuant to an implied term or by way of restitution. Beazley says that on either basis, such liability falls within the 1930 Act.

457. As set out above under Issue 6, in my view Excess Insurers are right to say that the Act does not provide for the transfer of rights in respect of defence costs, because defence costs cover is not a form of third party liability insurance.

458. In any event, Beazley's argument in my view founders on the same basis as discussed in §§ 441-443 above in relation to ASD's and ADNEC's claims under Issue 6. The third party, liability to whom RMJM was on this hypothesis insured against in respect of defence costs, was not Beazley but RMJM's defence lawyers. Beazley is therefore not a third party to whom rights in respect of defence costs are transferred under the Act.

459. Counsel for Beazley suggested in oral submissions that the relevant third parties in this context were the defence solicitors and also Beazley. Beazley could claim because it had funded the defence costs and RMJM had a liability to Beazley in respect of that funding. That liability was transferred to Beazley under the Act because it was a liability in respect of that part of the defence costs which was insured by Excess Insurers.

460. Those points do not in my view lead to a transfer of rights under the Act. The basic buildings blocks of section 1(1) are that:

i) an insured is insured against liabilities to third parties which he may incur;

ii) the insured incurs such a liability ("*any such liability as aforesaid*");

iii) the insured becomes insolvent; and

iv) the insured's rights against the insurer in respect of the liability are transferred to the third party.

461. The liability incurred, step (ii) above, must be a liability to a third party in respect of which the insurance contract provides cover. The rights are then transferred to that third party.

462. RMJM's liability to Beazley is, in a broad sense, a liability in respect of defence costs, and the excess insurance contract does provide cover in respect of defence costs. However, if and insofar as that cover is a form of liability insurance, it is cover for liability to RMJM's defence lawyers. The excess insurance does not provide cover for any liability RMJM may have to primary insurers for the refund of overpaid defence costs. The primary insurers are not the relevant third party, liabilities to whom are the subject of the excess insurance. There can be no transfer to Beazley under the Act of rights in respect of defence costs.

Conclusion on Issue 7

463. To the extent that the answer to issue 5.a. is "No" and/or the answer to issue 5.b. is "Yes", Beazley is not entitled to recover a pro rata share of the ADNEC defence costs from the Excess Insurers under the 2008/2009 Excess Policies pursuant to the Third Parties (Rights Against Insurers) Act 1930 (it being assumed for this purpose that the Excess Insurers consented to the incurring of such defence costs in accordance with clause 4 of the WNM 1989 Professional Indemnity wording as incorporated into the 2008/2009 Excess Policies).

(L) ISSUES 8 and 9: INDEMNITY FOR POST AWARD INTEREST

464. Issue 8 is:

> "Whether ASD is entitled to recover an indemnity in respect of post-award interest under the Policies and in particular:
>
> (a) Whether such interest is compensation and/or damages; and/or
>
> (b) Whether any liability which RMJM has for such interest is an insured liability falling within the cover provided by clause 1.1 of the Primary Policies"

465. Issue 9 raises the same issue in relation to ADNEC, who took the lead in submissions on this issue.

466. Clause 1.1 of the 2008/09 Primary Policy required Beazley to indemnify RMJM against *"…any claim for compensation and/or damages (including claimant's costs and expenses) first made against the Assured and notified to Underwriters during the Period of this Policy which the Assured may become legally liable to pay and which arises out of the exercise and conduct of the Assured's Professional Business by the Assured and/or by others on behalf of the Assured"*.

467. The word "*compensation*" is not defined in the policy but, the Claimants say, ordinarily means:

> "*Something, typically money, awarded to someone in recognition of loss, suffering, or injury*" (https://en.oxforddictionaries.com/definition/compensation)

468. Clause 1.1 is not limited to *"damages"* and includes other legal liabilities beyond those for *"claimant's costs and expenses"*.

469. The Claimants argue that interest awarded to them on damages and costs is *"compensation"* within the meaning of clause 1.1. It is a monetary award which recognises, and compensates them for, the loss of use of the damages and costs awarded until they are paid: "*Interest is awarded to compensate claimants for being kept out of money which ought to have been paid to them*" (*Carrasco v Johnson* [2018] EWCA Civ 87 § 17(1), *per* Hamblen LJ); *"…the essence of interest is that it is a payment which becomes due because the creditor has not had his money by the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation."* (*Riches v. Westminster Bank Limited* [1947] AC 390,400 (HL) per Lord Wright. Further, RMJM was (and is) legally liable to pay the interest awarded.

470. The Claimants say there is no difference in principle between that legal liability for post-award interest and the legal liability for pre-judgment interest that fell within the insuring clause of the professional indemnity policies in issue in *Cox*.

471. In *Cox* the claimants were insured *"against their legal liability for compensatory damages and/or costs and/or legal expenses"*. At first instance, Phillips J held that the phrase *"compensatory damages"* was wide enough to encompass pre-judgment interest awarded against the insured under section 35A of the Supreme Court Act 1981. In doing so he took account of the fact that the policy conditions gave the insurers the right to decide whether the claim should be contested, the consequence of which would (if the claim against the insured succeeded) inevitably be a substantial award of interest under section 35A. It would be *"commercially unattractive in the extreme"* if that liability fell on the insured rather than the insurer.

472. It was common ground that any post-judgment interest should be dealt with, not as part of the insured indemnity, but as interest under section 35A of the Senior Courts Act 1981:

> "Mr. Sumption suggested that the remedy of the assured, or of third parties in the shoes of an insolvent assured, for delay in receipt of an indemnity after the third parties have established a quantified claim is an award of interest under s.35A of the 1981 Act. No defendant seemed inclined to challenge this, perhaps not surprisingly, for it leaves it open to the Court to award interest which will match any Judgment Act interest to which the third parties are entitled without regard to the limit of cover." (pp 449-450)

473. The insurers did not appeal from Phillips J's conclusion that the expression "*compensatory damages*" included pre-judgment interest. In the Court of Appeal Sir Thomas Bingham MR observed that he had no doubt that the judge had been right about that. He noted that on a straightforward reading of the policy wording, it covered damages and pre-judgment interest, costs and expenses ([1995] 2 Lloyd's Rep 437, 461). The question of post-judgment interest was not specifically considered.

474. Excess Insurers submit that post-award interest is not recoverable because it does not fall within the scope of clause 1.1 of the policy wording: it is not a claim for compensation arising out of the exercise and conduct of the insured's Professional Business:

    i) While an award of interest may be said to amount to "*compensation*", it is not a right to compensation which arises out of the exercise of the insured's Professional Business (as defined). It is a sum awarded to the claimant as compensation for delay in payment of the award, if any.

    ii) If the insured does then delay in paying the award, it is that delay which is the proximate cause of the liability, not anything done by the insured in the conduct of its Professional Business. That is self-evidently true if the failure to pay is deliberate, for example, and none the less true if it is the result of impecuniosity or insolvency. In the latter situation, the insured is no longer conducting any Professional Business at all.

475. Excess Insurers make the further point that if post-judgment interest fell within the clause 1.1 indemnity, as opposed to being potentially recoverable merely as statutory interest, then it would erode the available limit under the primary policies. Thus delay by Beazley in paying the Claimants' claims would increase the loss in excess of the primary limit and result in Excess Insurers bearing the interest arising from Beazley's delay. By contrast, if ASD and ADNEC are entitled to statutory interest only, then Beazley bears the consequences of its failure to pay the ASD Claim and its share of the ADNEC Claim.

476. As to this latter point, the Claimants say the problem arises only where a claim straddles two layers – if it does not then the primary insurers have every incentive not to delay payment – and therefore does not assist in construing the scope of clause 1.1 which is of general application. I am inclined to agree.

477. However, I have concluded that Excess Insurers are correct to argue that post-judgment interest falls outside clause 1.1 because it is a liability arising not from the conduct of the insured's professional business but from a new supervening cause namely the delay in paying the judgment or award once made. The Claimants make the point that clause 1.1 clearly covers other types of auxiliary liability arising from the insured negligence, such as costs, and is designed to exclude only things falling outside the scope of professional liabilities altogether (e.g. the insured's office administration costs). However, there is in my view a distinction between (a) the liabilities for damages, costs and pre-judgment interest arising from a contested professional negligence

claim and (b) post-judgment interest arising from delay in satisfying any resulting judgment or award (or indeed in satisfying the terms of any settlement). Items (a) arise in ordinary course from an act of negligence that results in a claim that is contested in the ordinary way. Item (b) arises from a new and distinct failure by the insured which is too remote from the original negligence to be considered to arise from it. It does not therefore fall within clause 1.1. If the delay in satisfying the judgment/award/settlement terms results from the insurer's failure to make timely payment against the insured's right of indemnity which has been established, then it may be compensatable by an award of statutory interest against the insurer in proceedings for breach of the contract of insurance.

Conclusion on Issues 8 and 9

478. ASD and ADNEC are not entitled to recover an indemnity in respect of post-award interest under the Policies. Such interest is not compensation and/or damages within the Policies, and any liability which RMJM has for such interest is not an insured liability falling within the cover provided by clause 1.1 of the Primary Policies.

(M) ISSUE 10: STATUTORY POST-AWARD INTEREST

479. Issue 10 is:

> "Whether, in respect of any sums due to ASD in respect of which post-award interest was not awarded by the arbitral tribunal and/or if the answer to issues 8 and/or 9 is that ASD and/or ADNEC is not entitled to recover an indemnity in respect of post-award interest under the Policies, ASD and/or ADNEC is entitled to interest on sums found due pursuant to section 35A of the Senior Courts Act 1981 at such rate and for such period or periods as the Court may hereafter determine."

480. ASD and ADNEC claim statutory interest on all sums awarded to them if and to the extent that they are not entitled to post-award interest. Excess Insurers accept that if ASD and ADNEC are not entitled to claim an indemnity for post-award interest under clause 1.1 of the Policies, they are entitled to statutory interest in the same way that RMJM would have been.

481. The only point of contention here is that ASD claims statutory interest on sums (namely, the Claimants' costs) awarded by the arbitrators in respect of which the tribunal did not award post-award interest. Excess Insurers take the point that if RMJM has not paid the costs ordered by the arbitral tribunal to be paid to ASD, and there is no order by the tribunal for post-award interest in respect of such costs, then there is no reason why RMJM is entitled to interest in respect of its liability for such costs at least before RMJM paid such costs. ASD, by virtue of its right to claim against the insurers under the 1930 Act, should be in no better position than RMJM. Accordingly, ASD is not entitled to interest under section 35A in respect of the costs awarded by the tribunal because the tribunal itself did not order such interest and RMJM has not paid it.

482. Until RMJM has paid the costs, it is not out of pocket and has not suffered any loss compensatable by statutory interest against the insurers. If RMJM had been liable (by reason of an award by the tribunal of post-award interest on the costs, or pursuant to statute, or pursuant to the applicable arbitral rules) to pay pre or post-award interest to ASD on the costs, and its delay in doing so were caused by the insurers' delay in meeting RMJM's claim for indemnity in respect of the costs award, then it would be appropriate to award statutory interest against the insurers in respect of those costs. However, the tribunal did not award interest on the costs, and it was not suggested that RMJM was or is liable on some other basis to pay interest to ASD on the costs. Accordingly, it would not have been appropriate to order interest in RMJM's favour in respect of its liability for ASD's costs, and equally it is not appropriate to order such interest in favour of ASD.

483. It is true that RMJM had a right of indemnity as from the issue of the award, and that at that time its relevant rights were transferred to ASD. However, the transfer of rights could not put ASD in a better position than RMJM would have been in but for the transfer. On the footing that RMJM would not have been liable for interest on costs to ASD or entitled to claim such interest from the insurers, ASD must equally lack any such entitlement. This somewhat counterintuitive result flows from the facts that (a) RMJM's relevant rights under the policy, transferred to ASD upon the award, are rights of indemnity against liabilities, and (b) as regards costs (unlike the other elements of the award) it appears RMJM did not have any liability to interest in the event that it delayed satisfying its obligations under the award.

Conclusion on Issue 10

484. Save in respect of any sums due to ASD or ADNEC in respect of which (a) RMJM has not made payment, (b) post-award interest was not awarded by the arbitral tribunal and (c) RMJM was/is not liable on any other basis for post-award interest, ASD and ADNEC are entitled to interest on sums found due to them pursuant to section 35A of the Senior Courts Act 1981 at such rate and for such period or periods as the Court may hereafter determine.

(N) OVERALL CONCLUSIONS

485. Issue 1: To the extent that the ASD Claim arises out of RMJM's defective design of the Sector A columns (being, for identification, the matter which led to the stoppage of work in 2009 and subsequent remedial works to the Sector A columns), it does not arise out of circumstances notified during the 2008/2009 policy year or fall within the period of cover provided by the 2008/2009 Primary Policy.

486. To the extent (if at all) that the ASD Claim arises out of RMJM's breach of duty in relation to acoustic works and/or RMJM's lack of detail and cross-referencing in drawings/designs, referred to in §§ 14.15.2 and 14.15.3 respectively of the ASD arbitral tribunal's award, it arises out of circumstances notified during the 2008/2009 policy year and falls within the period of cover provided by the 2008/2009 Primary Policy.

487. Issue 2: To the extent that the ASD Claim arises out of RMJM's defective design of the Sector A columns (being, for identification, the matter which led to the stoppage of work in 2009 and subsequent remedial works to the Sector A columns), it arises out of circumstances notified during the 2009/2010 policy year and falls within the period of cover provided by the 2009/2010 Primary Policy.

488. Issue 3: If and to the extent that the ASD Claim (or any part of it) arises out of circumstances notified during the 2009/2010 policy year, RMJM did not prior to its sequestration agree with Beazley that the ASD Claim fell within the 2008/2009 Primary Policy; and RMJM was (and ASD is) not estopped by RMJM's conduct from denying the same.

489. Issue 4: If and to the extent that the ASD Claim falls within the 2009/2010 Primary Policy:

i) RMJM did not breach Claims Condition 3.2 of that policy by failing to notify Beazley of relevant matters as soon as practicable.

ii) Had I found such a breach to have occurred, I would have concluded that Beazley did not waive it and is not estopped from contending that there had been any such breach.

490. Issue 5: (a) Yes: Beazley is entitled to set-off a pro rata share of the costs incurred in defending the ADNEC Claim against its liability under the 2008/2009 Primary Policy to ADNEC in relation to its Claim and (insofar as the pro rata share exceeds the amount available to be set off against ADNEC's Claim) against its liability under the 2008/2009 Primary Policy to ASD in relation to its Claim. (b) No: Beazley is not estopped from contending that it is entitled to do so.

491. Issue 6: To the extent that the amount recoverable by ASD and/or ADNEC under the 2008/2009 Primary Policy falls to be reduced by reason of the matters addressed by Issue 5.a., and on the assumption that the Excess Insurers consented to the incurring of the ADNEC defence costs, any shortfall in ASD's and/or ADNEC's recovery under the 2008/2009 Primary Policy or any amount set off by Beazley cannot (based on the arguments before me, i.e. excluding the possible future argument referred to in § 447 above) be recovered by ASD and/or ADNEC under the Excess Policies. A claim by ASD and/or ADNEC under the Excess Policies in respect of any shortfall in recovery under the 2008/2009 Primary Policy would be a claim in respect of ADNEC defence costs, and such a claim does not pass to ASD or ADNEC under the 1930 Act.

492. Issue 7: To the extent that the answer to issue 5.a. is "No" and/or the answer to issue 5.b. is "Yes", Beazley is not entitled to recover a pro rata share of the ADNEC defence costs from the Excess Insurers under the 2008/2009 Excess Policies pursuant to the Third Parties (Rights Against Insurers) Act 1930 (it being assumed for this purpose that the Excess Insurers consented to the incurring of such defence costs in accordance with clause 4 of the WNM 1989

Professional Indemnity wording as incorporated into the 2008/2009 Excess Policies).

493. Issues 8 and 9: ASD and ADNEC are not entitled to recover an indemnity in respect of post-award interest under the Policies. Such interest is not compensation and/or damages within the Policies, and any liability which RMJM has for such interest is not an insured liability falling within the cover provided by clause 1.1 of the Primary Policies.

494. Issue 10: Save in respect of any sums due to ASD or ADNEC in respect of which (a) RMJM has not made payment, (b) post-award interest was not awarded by the arbitral tribunal and (c) RMJM was/is not liable on any other basis for post-award interest, ASD and ADNEC are entitled to interest on sums found due to them pursuant to section 35A of the Senior Courts Act 1981 at such rate and for such period or periods as the Court may hereafter determine.

495. I am most grateful to counsel and the wider legal teams on all sides for their very clear and well thought out written and oral submissions.

APPENDIX – THE PRELIMINARY ISSUES

Policy period issues

1. Whether and to what extent the ASD Claim (or any part of it, and which part(s)) (a) arises out of circumstances notified during the 2008/2009 policy year, and (b) falls within the period of cover provided by the 2008/2009 Primary Policy?

2. Whether and to what extent the ASD Claim (or any part of it, and which part(s)) (a) arises out of circumstances notified during the 2009/2010 policy year and (b) falls within the period of cover provided by the 2009/2010 Primary Policy?

3. If and to the extent that the ASD Claim (or any part of it) arises out of circumstances notified during the 2009/2010 policy year, whether RMJM prior to its sequestration agreed with Beazley that the ASD Claim fell within the 2008/2009 Primary Policy and/or whether RMJM was (or ASD now is) estopped by RMJM's conduct from denying the same.

4. If and to the extent that the ASD Claim falls within the 2009/2010 Primary Policy:

a. Whether RMJM breached Claims Condition 3.2 of that policy by failing to notify Beazley of relevant matters as soon as practicable.

b. Whether Beazley waived any such breach and/or is estopped from contending that there has been any such breach.

Issues concerning ADNEC defence costs (which may or may not arise depending on the answers to issues 1-3)

5. What is the available limit of cover under the 2008/2009 Primary Policy for the ASD Claim and/or the ADNEC Claim allowing for the amount of £62,500 (equivalent to US$ 107,181.25 using the rate of exchange on the date on which the payment was made) already paid by Beazley under the 2008/2009 Primary Policy in respect of an earlier claim against RMJM), and in particular:

a. Whether Beazley is entitled to set-off a pro rata share of the costs incurred in defending the ADNEC Claim against its liability under the 2008/2009 Primary Policy to ADNEC in relation to its Claim and (insofar as the pro rata share exceeds the amount available to be set off against ADNEC's Claim) against its liability under the 2008/2009 Primary Policy to ASD in relation to its Claim; and/or

b. Whether Beazley is estopped from contending that it is entitled to set-off a pro rata share of the costs incurred in defending the ADNEC Claim in the manner alleged in issue 5.a. above.

6. Whether, to the extent that the amount recoverable by ASD and/or ADNEC under the 2008/2009 Primary Policy falls to be reduced by reason of the matters addressed by issue 5.a., and on the assumption that the Excess Insurers consented to the incurring of the ADNEC defence costs, any shortfall in ASD's and/or ADNEC's recovery under the 2008/2009 Primary Policy or any amount

set off by Beazley can be recovered by ASD and/or ADNEC under the Excess Policies, including: (a) whether a claim by ASD and/or ADNEC under the Excess Policies in respect of any shortfall in recovery under the 2008/2009 Primary Policy would be a claim in respect of ADNEC defence costs; and; (b) whether ASD and/or ADNEC has title to sue in respect of such defence costs.

7. Whether, to the extent that the answer to issue 5.a. is "No" and/or the answer to issue 5.b. is "Yes", Beazley is entitled to recover a pro rata share of the ADNEC defence costs from the Excess Insurers under the 2008/2009 Excess Policies pursuant to the Third Parties (Rights Against Insurers) Act 1930 (it being assumed for this purpose that the Excess Insurers consented to the incurring of such defence costs in accordance with clause 4 of the WNM 1989 Professional Indemnity wording as incorporated into the 2008/2009 Excess Policies).

Post-award interest issues

8. Whether ASD is entitled to recover an indemnity in respect of post-award interest under the Policies and in particular:

a. Whether such interest is compensation and/or damages; and/or

b. Whether any liability which RMJM has for such interest is an insured liability falling within the cover provided by clause 1.1 of the Primary Policies.

9. Whether ADNEC is entitled to recover an indemnity in respect of post-award interest under the Policies and in particular:

a. Whether such interest is compensation and/or damages; and

b. Whether any liability which RMJM has for such interest is an insured liability falling within the cover provided by clause 1.1 of each of the Primary Policies.

10. Whether, in respect of any sums due to ASD in respect of which post-award interest was not awarded by the arbitral tribunal and/or if the answer to issues 8 and/or 9 is that ASD and/or ADNEC is not entitled to recover an indemnity in respect of post-award interest under the Policies, ASD and/or ADNEC is entitled to interest on sums found due pursuant to section 35A of the Senior Courts Act 1981 at such rate and for such period or periods as the Court may hereafter determine.