Neutral Citation Number: [2011] EWHC 2837 (Comm)
Case No: CLAIM NO. 2010 FOLIO 1454

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/11/2011

Before :

THE HONOURABLE MR JUSTICE BEATSON

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Between :

Faraday Reinsurance Co Ltd	**Claimant**
- and -	
(1) Howden North America Inc	**Defendants**
(2) Howden Buffalo Inc	

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John Lockey QC (instructed by **Barlow Lyde & Gilbert**) for the **Claimant**
Richard Jacobs QC (instructed by **Covington and Burling LLP**) for the **Defendants**

Hearing date: 7 October 2011

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Judgment

Mr Justice Beatson :

Introduction

1. In this application, issued on 17 July 2011, the defendants apply to set aside service out of the jurisdiction, pursuant to an Order granted by David Steel J. Although both Howden North America Inc ("HNA") and Howden Buffalo Inc are named as defendants, there is in fact only one corporate entity because, on 1 September 2010, Howden Buffalo Inc changed its name to Howden North America Inc, and I shall refer to both as HNA. It does so because of the existence of proceedings in Pennsylvania concerning HNA's insurance cover for asbestos liabilities.

2. The underlying dispute concerns three excess layer policies written by General Star International Indemnity Ltd ("GSIIL") in respect of "Howden Group Ltd and/or subsidiary companies". The period of insurance under the first policy was 22 July 1998 to 31 May 1999, under the second it was 1 June 1999 to 31 May 2000, and under the third it was 1 June 2000 to 31 May 2001. With effect from 30 November 2010 all policies written by GSIIL, including these, were transferred to the claimant, Faraday Reinsurance Co Ltd ("Faraday") pursuant to section 111(1) of the Financial Services and Markets Act 2000.

3. The second and third policies contain choices of English law and jurisdiction. Mr John Lockey QC, on behalf of Faraday, submitted that there was an implied choice of English law in the first policy and that English law is the law with the closest connection to that policy.

4. Faraday issued proceedings on 6 December 2010. It did so after receiving a letter dated 23 August 2010 on behalf of HNA from Charterbrook Associates LLC ("Charterbrook") giving notice of occurrences which it was said may entitle Howden to claim under the second and third policies. A later letter dated 14 January 2011 from Covington & Burling LLP ("Covington") clarified that HNA also intended to refer to the first policy.

5. HNA's coverage litigation in Pennsylvania has been in progress since 2003, and related mass tort proceedings have been on foot since 1999. Until very recently, GSIIL and Faraday have not been involved. The ultimate underlying substantial issue between the parties arises because of the differences of approach by the Pennsylvania courts and the English courts. The first difference is whether exposure to a hazardous condition is itself an injury. Under English law (see *Bolton MBC v Municipal Mutual Insurance Ltd* [2006] 1 WLR 1492) it is not, but under the laws of United States jurisdictions including Pennsylvania, a theory of multiple triggers of periods of insurance from exposure to manifestation has been followed: see the authorities based on *Keene Corporation v Insurance Corporation of North America* 667 F2d 1034 (1981), and in Pennsylvania, *J.H. France Refractories v All State Insurance Co* 626 A2d 502 (1993).

6. The second difference is that, in English law, but not in the relevant United States jurisdictions, the period clause is a fundamental provision of an insurance policy: see *Municipal Mutual Insurance Ltd v Sea Insurance Company Ltd and others* [1998] Lloyd's Rep. IR 421 at 435-6 – "the stated period of time is fundamental and must be given effect to" – and *Wasa International Insurance Co v Lexington Insurance Co* [2009] UKHL 40 at [3], [39], [74] and [77]. There is also a difference between English and Pennsylvania law as to the relevant principles of the conflict of laws because the English approach to determining the applicable law is concerned only with the circumstances at the time of contracting, whereas the evidence is that the approach in Pennsylvania permits consideration of factors applicable at the time of the dispute.

7. In the English proceedings Faraday seeks declarations that: (a) the policies by which GSIIL insured Howden are governed by English law and subject to the jurisdiction of the English courts; (b) as a matter of English law, effect must be given to the periods under each policy during which GSIIL was on cover, (c) under section 1 of each policy, Faraday is liable to indemnify HNA for any sums which HNA may become legally liable to pay in respect of claims made against it for damages, costs and expenses in respect or in consequence of personal injury and/or damage to material property only insofar as this happened (or occurred) during (and not before or after) the relevant policy period, and (d) under section 2 of each policy, Faraday is liable to indemnify HNA in respect of legal liability arising out of the matters set out in section 2 only insofar as (i) claims were made against HNA during the relevant policy period or (ii) claims have subsequently been made against HNA which arise out of any circumstances which could reasonably have been expected to give rise to a claim

under section 2 of the policy, and of which AG Maclachlan Esq., of Howden Group Ltd, or a person nominated to act on his behalf in his absence shall have become aware during the relevant policy period. The application for permission to serve out was made on 8 March 2011, permission was granted on 9 March, and HNA was served on 1 June.

8. The evidence on behalf of Faraday consists of three statements of Kiran Soar, a partner at Barlow Lyde and Gilbert LLP, respectively dated 8 March, 31 August and 30 September 2011. The evidence on behalf of HNA consists of two statements of Francis Roger Enock, dated 19 July and 23 September 2011, and two statements of William Greaney, dated 23 September and 4 October 2011. Messrs Enock and Greaney are partners at Covington. Mr Enock is an English solicitor based in the firm's London office, who has conduct of these proceedings on behalf of the defendant. Mr Greaney is based in the firm's Washington DC office and is lead counsel in proceedings by HNA pending against Gerling and New Hampshire in the United States Federal District Court's Third Circuit (the "Pennsylvania proceedings").

9. HNA's application for David Steel J's order to be set aside is made on two grounds. First, Mr Richard Jacobs QC on its behalf, challenged the "utility" of these proceedings. He submitted that Faraday has failed to show that the present proceedings are justified and serve a useful purpose. This, he submitted, is because, in the light of a recent change in HNA's position, there is no dispute about the second and third policies which requires resolution. In the case of the first policy, it is because Faraday has instituted these proceedings in order to try and establish issue preclusion on the point in the Pennsylvania court or deference to it in that court, but a judgment by the English court granting the relief sought in these proceedings will not achieve that purpose. Secondly, he submitted that, even if there is justification for the relief sought, Pennsylvania is the appropriate forum for these proceedings because of the longstanding insurance proceedings in Pennsylvania about the dispute between HNA and its many historical insurers. After being served with these proceedings, HNA filed a motion to join Faraday/GSIIL as additional defendants to the most recent, 2011, Pennsylvania proceedings.

10. I first set out the material terms of the three GSIIL policies. I then outline the relevant corporate structures and the nature of the 2003, 2009 and 2011 Pennsylvania proceedings, the background to this application, and summarise the applicable principles.

The terms of the three GSIIL policies

11. The three policies are excess public and products liability policies. They are composite policies. Each identifies the assured as "Howden Group Ltd and/or subsidiary companies" with, in the first two policies, an address in Renfrew, Scotland. In the third policy the same Renfrew address is on the slip. Under the heading "Trading", the policies stated "Glasgow, Scotland and various anywhere worldwide as per policy".

The first policy: No. LH9813364

12. The period of this policy was from 22 July 1998 to 31 May 1999, both days inclusive. The limits of indemnity are £40 million excess £10 million per occurrence and, in respect of products liability and financial loss, in the aggregate annually.

13. The policy was placed in London by Lloyd Thomson Ltd, now JLT, London brokers, and is set out in a London market underwriting slip. The slip refers to London market institutions such as ILU and LIRMA (London Insurers and Reinsurers Market Association), and London's "unique market reference" for numbering risks, although the *pro forma* containing these references is, save for the policy number, blank. GSIIL subscribed a 10% line on 28 September 1998.

14. The terms of the policy include a number of London market clauses; the Several Liability Notice LSW/1001 (Insurance) clause, and the brokers cancellation clause. GSIIL's stamp uses London market abbreviations, denoting LIRMA as the policy signing and premium collecting office and providing that "NCAD", notice of cancellation at anniversary date. The policy states that liability is "as more fully detailed in the underlying policy wording".

15. The underlying policy provided public and products liability cover of £9 million excess of £1 million. It too is a London market policy, broked and underwritten in London, and containing a number of London market clauses. These are: the Institute of London Underwriters radioactive contamination exclusion clause, the "several liability" notice, and the brokers cancellation clause. The policy provides that claims are to be notified to Lloyd Thomson Ltd in London. It also refers to the Motor Vehicles (Authorisation of Special Types) Order 1969, SI No 344.

16. The underlying policy provides *inter alia*:

    (a) "in the event of reduction or exhaustion of the aggregate limit or limits contained in such primary and/or underlying policy or policies, solely by payment of such losses in respect to accidents or occurrences during the period of such primary and/or underlying policies, it is hereby understood…that such insurance as is afforded by this policy shall apply in excess of the reduced underlying limit or, if such limit is exhausted, shall apply as underlying insurance and shall pay excess of the assured's retention where applicable…",

    (b) "[T]he underwriters will indemnify the assured…where any sums which they may become legally liable to pay…in respect of claims made against them for damages and costs and expenses in respect of or in consequence of [personal injury and/or loss of or damage to property] happening anywhere in the world during the period stated in the schedule" (section 1),

    (c) The indemnity granted by the product liability extension shall apply only in respect of "claims made against the assured during the period of insurance specified in the Schedule hereto or claims against the assured which may subsequently arise out of any circumstances which could reasonably be expected to give rise to a claim…and of which [the assured] shall become aware during the period of insurance specified in the Schedule" (section 2), and

    (d) "[T]he term 'Occurrence' whenever used…shall mean a single occurrence or claim or a series of claims arising out of any one event or attributable to a single cause" (the general definition section).

17. Neither the first GSIIL policy nor the underlying policy contain an express choice of law or jurisdiction clause.

The second policy: No. LK9905225

18. The period of this policy was from 1 June 1999 to 31 May 2000, both days inclusive. The limits of indemnity are £45 million excess £5 million per occurrence and, in respect of products liability and financial loss, in the aggregate annually.

19. The policy was placed in London by JLT Risk Solutions Ltd, London brokers, and, like the first policy, is set out in a London market underwriting slip. GSIIL subscribed an 11% line on 26 May 1999.

20. The terms of this policy also include the Several Liability Notice LSW/1001 (Insurance) clause, and provides that claims are to be notified to JLT Risk Solutions Ltd in London. The detailed provisions include the wording set out in relation to the underlying policy of the first policy in [16] above. It also refers to the Motor Vehicles (Authorisation of Special Types) Order 1969, and GSIIL's stamp is marked "IUA", denoting that as the policy signing and premium collecting office, and "NCAD". Significantly, this policy included an insurance disputes clause which provided:

> "Any dispute concerning the interpretation of the terms, conditions, limitations and/or exclusions contained herein is understood and agreed by the Insured to be subject to UK law. The Insured agrees to submit to the jurisdiction of any court of competent jurisdiction within the United Kingdom and to comply with all requirements necessary to give such court jurisdiction. All matters hereunder shall be determined in accordance with the law and practice of such court."

It is clear that where cover is underwritten in the London market, a reference to "UK law" is taken to be a reference to English law: see *Catlin Syndicate v Adams Land & Cattle* [2007] 1 Lloyd's Rep IR 96 at [22] (Cooke J) and *Teal Assurance Co Ltd v W R Berkley Insurance (Europe) Ltd* [2011] Lloyds' Rep IR 285 at [24] (Andrew Smith J).

The third policy: No. LK0005589

21. The period of this policy was from 1 June 2000 to 31 May 2001, both days inclusive. The limits of indemnity are £45 million excess of £5 million any one occurrence and, in respect of products liability and financial loss, in the aggregate annually.

22. This policy, like the second, was placed in London by JLT Risk Solutions Ltd, and is set out in a London market underwriting slip. GSIIL subscribed an 11% line on 13 June 2000. In this policy the slip has been completed with entries for the "unique market reference", denoting IUA as the policy signing and premium collecting office, and, as I have noted, giving the Scottish address of Howden Group Ltd. This policy incorporated the wording of the underlying excess policy, and contained an insurance disputes clause in identical terms to the clause in the second policy, save that the law chosen is "English law" whereas in the second policy it is stated to be "UK law".

The relevant corporate structures

23. Faraday and GSIIL are English companies and both in the General Reinsurance ("General Re") group of insurance and reinsurance companies. Faraday is an indirect subsidiary of Berkshire Hathaway Inc. It, however, has no direct connection with

Berkshire Hathaway because (see Mr Soar's second statement, paragraph 39) it is independently managed by General Re from London.

24. HNA's corporate history is more complicated. It is summarised in paragraphs 9 – 21 of Mr Enock's first statement. For present purposes, it suffices to state that in 1993 the Howden Group, an international engineering group with operating companies in many parts of the world, entered into a stock purchase agreement with Ampco-Pittsburgh Corporation under which it acquired all the stock in the Buffalo Forge Company, a Delaware corporation then owned by Ampco-Pittsburgh. The activities of Buffalo Forge, which was originally incorporated in 1901 in the state of New York, have given rise to many asbestos claims. Under the stock purchase agreement, Buffalo Forge retained all its assets and liabilities, including the rights it possessed under historic liability insurance policies purchased by the original New York company or by Ampco-Pittsburgh during the period in which it owned Buffalo Forge. After other changes of name, in 1999 the Buffalo Forge entity was renamed Howden Buffalo Inc, and, as I have stated, in September 2010 it was renamed Howden North America Inc, i.e. HNA.

25. The effect of the 1993 stock purchase agreement was that Howden Group plc, a Scottish company with its principal place of business in Renfrew, became the ultimate parent company of the Buffalo Forge entity. In 1997, Howden Group plc was acquired by Charter plc and was re-registered as a Scottish private company, Howden Group Ltd. Accordingly, in 1998, when the first policy was placed, Howden Group Ltd was the holding company for Howden entities operating in many parts of the world, including Howden Buffalo/HNA.

26. In 2008 Charter plc became a wholly-owned subsidiary of Charter International plc, a Jersey company with headquarters in Dublin. As a result of internal restructuring by Charter plc which commenced in December 1997, at a date unspecified by Mr Enock, HNA ceased to be a subsidiary of Howden Group plc/Howden Group Ltd and became a subsidiary of Anderson Group Inc, a Delaware corporation indirectly owned by Charter International plc.

27. Mr Enock's evidence (first statement, paragraph 21) is that Buffalo Forge and its successors, including HNA, have always been United States companies and have never had manufacturing facilities, offices or other property in the United Kingdom. Although three of HNA's directors are based in Scotland, all board meetings are held in the United States.

The Pennsylvania proceedings

28. Since 1999 numerous suits have been brought against HNA in the United States alleging that, as Buffalo Forge's successor, it is liable for injuries caused by exposure to asbestos products manufactured by Buffalo Forge. HNA is insured under many insurance policies for the period from 1961 to June 2002. The majority of the insurers are United States insurers. In 2003 HNA commenced proceedings in the United States Federal District Court for the Western district of Pennsylvania against numerous insurers who provided primary and first layer occurrence cover to it and its predecessors against *inter alia* asbestos liability. It did so in that court because (see Mr Enock's first statement, paragraph 55) the 1993 stock purchase agreement

between them contained a choice of forum clause, in the case of proceedings by HNA, exclusively favouring a Federal or state court in Pittsburgh Pennsylvania and the 2003 proceedings *inter alia* concerned a dispute between HNA and Ampco-Pittsburgh as to the allocation of rights to insurance cover between them under that agreement. Until June 2011 there were no proceedings against GSIIL or Faraday but the litigation included claims against the primary policy in the "tower" of cover which includes the first policy.

29. The 2003 proceedings were settled in September 2005 after negotiations supervised by Judge Conti, the judge with conduct of those proceedings. The settlement included comprehensive asbestos funding agreements. In general terms, Howden Buffalo and Ampco-Pittsburgh agreed to share access to certain primary and other policies issued to Buffalo Forge and Ampco-Pittsburgh, and the insurer defendants in the 2003 proceedings agreed to share in the cost of defending claims involving Howden Buffalo and Ampco-Pittsburgh.

30. A second coverage action was instituted in 2009 and is currently in progress before Judge Conti. HNA brought claims against excess insurers whose policies were or would soon be triggered by exhaustion of the underlying primary and umbrella policies in certain years, including a direct claim by it under the policy which is immediately underneath the first policy. HNA did not, however, name as defendants insurers such as GSIIL (now Faraday) which had issued or subscribed only to higher level excess policies. This was (see Mr Enock's first statement, paragraph 66) because the asbestos proceedings had not had an impact on those policies and it was uncertain whether it would do so. As a result of the factual and legal similarities between the earlier and the more recent proceedings, Judge Conti has conduct of the 2009 proceedings.

31. In the 2009 proceedings settlements have been reached with some of the insurers, but not with HDI-Gerling Industrie Versicherung AG ("Gerling") or New Hampshire insurance Company ("New Hampshire"). That litigation remains pending before Judge Conti and pre-trial procedures continue. Gerling unsuccessfully applied to remove itself from the 2009 proceedings on jurisdictional and *forum non conveniens* grounds.

32. In February 2011 a third coverage action was instituted in the Federal District Court. Ampco-Pittsburgh brought this against some 20 insurers which had issued excess policies to it in part of the period in which it owned Buffalo Forge seeking declarations that HNA has no rights under those policies. HNA filed a counterclaim and a cross-claim against the insurer-defendants.

33. After being served with the present proceedings, on 14 June HNA applied to join all solvent insurers which had subscribed to the 1998 second excess policy, including GSIIL and Faraday, as additional defendants to its counterclaim. On 11 July Judge Conti granted HNA's *ex parte* application. Faraday and GSIIL have since applied to challenge both the assumption of jurisdiction and the joinder of Faraday. I was informed that their applications will come before the Pennsylvania court on 16 November 2011.

The background to these proceedings

34. I have stated ([28] and [30]) that the 2003 and 2009 proceedings were not brought against GSIIL, Faraday or other higher level excess insurers, and that Faraday's involvement started with the letter dated 23 August 2010 from Charterbrook. That letter was addressed to General Re. It stated that it was advising General Re:

> "of one or more occurrences that may give rise to a claim under the insurance policies identified in the attachment…that [GSIIL] issued covering Howden Buffalo", that
>
> "in light of the attachment point of the policies Howden Buffalo is not presently seeking coverage from [GSIIL] for the Underlying Asbestos Suits", but
>
> "due to uncertainty surrounding asbestos litigation and the difficulty of estimating potential exposure, we are providing precautionary notice to our higher-level excess carriers, and will seek coverage as and when the costs incurred in connection with the Underlying Asbestos Suits reach the attachment point of the Policies".

The attachment identified only the second and third of the GSIIL policies, but, as I have noted (see [4]), Covington later stated that HNA had intended to refer to the first GSIIL policy as well as to the second and third policies.

35. The letter also stated that 13,500 Underlying Asbestos Suits had been instituted, that Howden Buffalo had paid or agreed to pay some US $1.75 million in indemnity under these claims and described the asbestos funding agreements and the methodology agreed "for apportioning Howden Buffalo's and Ampco-Pittsburgh's asbestos-related defence and indemnity costs to all primary and umbrella policies that do not exclude coverage for asbestos claims". It concluded by stating that HNA would advise GSIIL of material developments in the Underlying Asbestos Suits and updates on the status of any impairment of underlying limits and reserving all its "rights under the policies and applicable law".

36. At the time Faraday issued proceedings on 6 December it took no steps to serve the proceedings or to disclose the existence of the claim form to HNA or its lawyers, but, in a letter dated 8 December, replied to Charterbrook. Apart from raising the question of the first policy, this reply stated that it would be helpful to have further understanding of how claims against Howden Buffalo "might impact the policies" and asked a number of questions.

37. The first question was how HNA claimed to be an assured and to clarify whether Howden Buffalo was a subsidiary of Howden Group Ltd. The second was whether the total sum paid in connection with the 13,500 asbestos claims included defence costs, if not what defence costs had been incurred, and over what period had the total sum been incurred. The third was as to the basis on which the total sum and any defence costs was allocated to years of coverage, and the extent to which the underlying policy layers in the three policy years been exhausted by losses occurring in those years, and the primary and excess policy layers in earlier years been exhausted by losses occurring in those earlier years. The other questions asked whether HNA intended to make claims under sections 1 and 2 of the policies in respect of personal injury and product liability, and, in relation to section 1 for details of injuries during the relevant policy periods. This, it was said, was because as a matter of English law Faraday may be liable for injury occurring during the policy period and claims made

during it, and that for diseases such as mesothelioma "the trigger is when the disease occurs, not the exposure".

38. A letter dated 14 January 2011 from Covington's Washington DC office stated, with regard to exhaustion of policies underlying the GSIIL policies, that "the first-layer of coverage has been exhausted, and currently the second layer is impacted". The request for information about exhaustion of other policy periods was not answered because Covington did "not think such information is pertinent to GSIIL at this time". The letter also summarised Howden Buffalo's corporate history, stated that the total figure represented indemnity paid since 1999, and that it did not include defence costs which "have generally been around $1.4 million" a year.

39. The letter stated that HNA was not "currently making a claim for coverage against GSIIL" but was advising it "of one or more occurrences that may give rise to a claim under the GSIIL policies" (emphasis in original). It did not respond to the questions about the interpretation of the policies "in light of the fact that GSIIL's coverage is not yet implicated and it will be quite some time before Howden calls upon GSIIL to provide coverage" but enclosed copies of the asbestos funding agreements which contained the allocation methodology. The final paragraph of the letter contained a full reservation of HNA's rights under the policies and applicable law.

40. After the grant of permission to serve out, a letter dated 16 March 2011 to Covington's Washington DC office summarised Faraday's understanding of the method under the asbestos funding agreements for allocating indemnity and defence costs between policies and stated that, if that understanding was correct, the method "is different to the English approach to the allocation of asbestos claims" and that "it appears that the policies need to be interpreted under English (UK) law". The letter also reiterated the request for information about how underlying layers of cover have been exhausted in past years in order to assist Faraday in determining the risk of claims being made on the GSIIL policies.

41. Covington replied in a letter dated 25 April 2011. This stated that Howden did not agree that English law applied or that Faraday had accurately summarised it, but that "because Howden is not presently seeking coverage from [GSIIL], we think it prudent to defer a discussion on this topic". The letter set out HNA's position that the underlying policies for 1999/2000 and 2000/2001 had been exhausted through payments of *inter alia* asbestos claims subject to the asbestos funding agreements. Again, the letter reserved all HNA's rights "under the policies and applicable law".

42. These proceedings were served on HNA on 1 June. I have referred ([33]) to HNA's subsequent application to join Faraday and GSIIL to the 2011 Pennsylvania coverage proceedings. There was also further correspondence between the parties' solicitors. Covington did not agree that English law and English jurisdiction applied to the three policies. Notwithstanding this, in a letter dated 18 July to Faraday's solicitors, Barlow Lyde and Gilbert, Covington stated "that [HNA] has not made, and will not in the future make, any demand for coverage in respect of the proceedings against HNA arising from claims for personal injuries allegedly caused by the underlying tort plaintiffs' exposure to asbestos in products manufactured by Buffalo Forge and any other predecessors of HNA (the "US Asbestos Proceedings") under the 1999/2000 or

the 2000/2001 policies", that is the second and third GSIIL policies. The letter also stated that:

> "HNA has stated repeatedly, in correspondence dating back to August 2010, that it was not presently seeking coverage under these policies for any of the US Asbestos Proceedings. There are ample unimpaired limits remaining in layers below the attachment point of the policies, and no projections have been made as to whether or when those policies might be impacted by the US Asbestos Proceedings in the future.
>
> Under these circumstances, any proceedings in respect of the 1999/2000 and 2001/2 policies are hypothetical and/or there is no serious issue to be tried in respect of them and we trust that you will withdraw the abstract request for declarations relating to these two policies."

43. As to the 1998/1999 policy, Covington stated that it did not accept that England is the proper forum for the resolution of any dispute involving it, and summarised the reasons it considers the Pennsylvania court is a more appropriate and convenient forum, and foreshadowed the grounds in support of HNA's application to set aside David Steel J's order.

The applicable principles

44. There is no dispute in the present case as to the principles governing service out. There are three requirements; a jurisdictional gateway, a merits requirement, and a *forum conveniens* requirement.

45. The jurisdictional gateways are contained in CPR 6.36 and paragraph 3.1 of Practice Direction 6B. In this case the material sub-paragraph of paragraph 3.1 of the Practice Direction is (6) "claims in relation to contracts". It provides a claimant may serve a claim form out of the jurisdiction with permission of the court the claim is made in respect of a contract where the contract:-

> "(a) was made within the jurisdiction;
>
> (b) was made by or through an agent trading or residing within the jurisdiction;
>
> (c) is governed by English law; or
>
> (d) contains a term to the effect that the court shall have jurisdiction to determine any claim in respect of the contract."

46. Although, formally an applicant for permission to serve out has to show "a good arguable case", in the context of the jurisdictional gateways to service out, the court applies the test by in effect requiring a higher standard. This is because (see Christopher Clarke J in *Cherney v Deripaska (No. 2)* [2008] EWHC 1530 (Comm) at 344 at [41] – [44]) the jurisdiction to serve out is an exorbitant one over those who are not within the ordinary reach of the court and the court seeks to avoid the risk of compelling individuals or companies to submit to a jurisdiction to which they ought not in truth to be made subject. The higher standard was expressed in *Canada Trust v Stolzenburg (No. 2)* [1998] 1 WLR 547, 555-7 per Waller LJ by asking whether the applicant "has much the better of the argument". The decision was affirmed ([2002] 1 AC 1) without specific reference to this phrase (sometimes referred to as the *Canada Trust* gloss). Although Hamblen J applied the *Canada Trust* gloss in *Cecil v Bayat* [2010] EWHC 641 (Comm) he suggested (at [35]) that, in the light of *Cherney v*

Deripaska (No. 2) and *Sharab v Al Saud* [2009] EWCA Civ 353, the test can be formulated by asking "who has the better of the argument".

47. As to the merits requirement, CPR 6.37(1)(b) provides that an application for permission to serve out of the jurisdiction must state that "the claimant believes that the claim has a reasonable prospect of success". This is understood to be a similar test to that for summary judgment, namely in relation to the foreign defendant that there is a serious issue to be tried on the merits and that there is a real (as opposed to a fanciful) prospect of success. In *Cherney v Deripaska (No. 2)* Christopher Clarke J described this as "a relatively low threshold". In *Cecil v Bayat* Hamblen J stated (at [19]) that, where one of the ingredients of a cause of action is also part of what has to be established for the purpose of the jurisdictional gateway in CPR 6.36 and the Practice Direction, the lower standard of proof for the merits test is in practice subsumed into the higher requirement for jurisdiction and is irrelevant.

48. The *forum conveniens* requirement is contained in CPR 6.37(3) which provides "the court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim".

49. As to the jurisdiction to grant negative relief, such as a declaration of non-liability or the relief sought in these proceedings, in *New Hampshire Insurance Co. v Philips Electronics North America Corp* [1998] CLC 1062 the Court of Appeal approved the formulation of the principles in that case by Rix J as an accurate summary of the effect of the authorities. Rix J's formulation (set out at 1066-7) is:

> "1. There is power to grant a negative declaration in an appropriate case, the fundamental test being whether it would be useful.
>
> 2. However, careful scrutiny will be exercised not only to test the utility, or on the other hand the futility, of seeking to determine the claim by means of a negative declaration in England, but also to ensure that inappropriate forum shopping is not allowed, let alone encouraged.
>
> 3 A negative declaration will not be appropriate where it is premature or hypothetical, viz where no claim has been made or threatened against the plaintiff.
>
> 4 The existence of imminent or a fortiori current foreign proceedings is always a highly relevant consideration, not only for the purpose of testing the utility of the English claim, but also so as to having in mind the need to avoid the twin dangers of forum shopping and of the vices of concurrent proceedings"

50. Phillips LJ (with whom Leggatt and Morritt LJJ agreed) stated that the question of whether there is justification for seeking the relief and the separate question of whether England is the appropriate forum in which to seek it "cover common ground". He also stated that, where the possibility exists that the plaintiff in the English proceedings will be sued by the defendant in an alternative jurisdiction, the court "must be particularly careful to ensure that the negative declaration is sought for a valid and valuable purpose and not in an illegitimate attempt to pre-empt the jurisdiction in which the dispute between the parties is to be resolved". In *Insurance*

Corporation of Ireland v Strombus [1985] 2 Lloyd's Rep 138, a decision referred to by Phillips LJ, Mustill LJ stated (at 144) that "the jurisdiction is one to be exercised with caution lest … the action becomes 'an exercise in futility'" and the court "should be careful not to bring a foreigner here as a defendant, where no positive relief is claimed against him, unless it can be shown that a solid practical benefit would ensue". Similar caution was shown in *DR Insurance Co v Central National Insurance Co* [1996] 1 Lloyd's Rep. 74 at 84 (although this was in part because the claimant in the English proceedings was relying on the illegality of its corporate predecessor). The heading to the relevant section in Fentiman, *International Commercial litigation* (2010) § 14-33 is "a neutral approach". Dicey, Morris and Collins, *The Conflict of Laws* 14th ed., §12-039 describes the modern attitude of the court as one of "neutral caution". It is in that spirit that I turn to consider the circumstances in this case.

Discussion

51. It is not suggested on behalf of HNA that the jurisdictional gateways are not satisfied. Mr Jacobs accepted that in the case of the second and third policies the requirements of PD6B 3.1(6) (a) – (d) are clearly satisfied. He also conceded that, whether the test is "the better of the argument" or "much the better of the argument", the claimant has a good arguable case that the claim under the first policy is within PD6B 3.1(6) (a) and (b), although he did not accept that the claimant has a good arguable case that it is governed by English law and thus within PD6B 3.1(6) (c**)**. He invited me to set aside the order in its entirety. The majority of his lucid and elegant submissions on "justification" or "utility", and *forum non conveniens*, however, concerned the first of the three policies where there is no express choice of law or jurisdiction clause.

52. Mr Jacobs' submissions on "justification" or "utility" can be summarised as follows.

    (a) In the light of the principles set out in *New Hampshire Insurance Co. v Philips Electronics North America Corp* [1998] CLC 1062, the relief sought by Faraday must serve a useful purpose. Because the relief sought is more limited than a declaration of non-liability and is "a step along the road to but without attempting to reach that destination", the requirements for establishing jurisdiction should be heavier and the court more cautious.

    (b) In the present case, in view of the content of Covington's letter dated 18 July (summarised at [38]) there is no dispute about the second and third GSIIL policies which requires, or will ever require, resolution.

    (c) As to the first GSIIL policy, a judgment of this court that English law is the applicable law of the first policy will not suffice for Faraday's purposes which are to establish issue preclusion on the point in the Pennsylvania proceedings or to achieve a decision to which the Pennsylvania court will defer. This is because the relevant conflict of laws principles in Pennsylvania differ from those in England and Wales so that a determination as to applicable law by the English court will not be regarded as of "the same issue" as that which the Pennsylvania court has to determine. Moreover, the Pennsylvania court will apply its own conflict of laws principles, in the same way that (see, for example, *The Irish Rowan* [1991] 2 QB 206 at 229G) an English court would.

53. The *forum non conveniens* ground is based on the current and long-standing proceedings in Pennsylvania on related issues, and the fact those proceedings are likely to continue. Although Mr Jacobs' submissions were far ranging, he relied in particular on the scope of those proceedings, which he described as comprehensive, and include the immediately underlying policy to the policy written by Faraday. The plaintiff insurers and a clear majority of the defendants in those proceedings are United States corporations, and the underlying asbestos proceedings arose entirely in the United States where a preponderance of the witnesses and documents are located.

54. Mr Jacobs argued that the Pennsylvania court is in a position to provide clear and consistent relief that will be binding upon all those with an interest in the dispute. Recovery under the policy immediately underlying the first policy is, in view for example of the "drop-down" clause (set out at [16]), directly material to a claim under the first GSIIL policy. Since the terms of the immediately underlying policy are incorporated by reference in the first GSIIL policy to provide seamless cover, in the light of the follow form structure in the underlying policy, it would be undesirable for the first GSIIL policy to mean something different to what Judge Conti decides that the underlying policy means. Recovery under other policies will also have an impact on how much, if at all, HNA can recover from Faraday under the first GSIIL policy because *inter alia* insurers will seek contribution from each other.

55. The policies written by Faraday and these proceedings, by contrast, involve only a fragment of the potential claim for coverage and do not seek to establish whether Faraday is liable to HNA, that is they do not address the real dispute. Mr Jacobs also contended that, when Faraday wrote the risk, it must have been aware that it was providing liability cover to United States companies in respect of liabilities that would arise in the United States. Mr Jacobs submitted that, in these circumstances, HNA cannot be accused of "forum shopping" in seeking to ensure that disputes about the policies to which Faraday subscribed are litigated in Pennsylvania. He argued that it is in fact Faraday which is forum shopping. The present claim, he maintained, is in the nature of a pre-emptive strike by Faraday.

(i) Applicable law

56. Approaching the circumstances of this case with the "neutral caution" required by the authorities (see [49] – [50]), I first consider whether Faraday has shown a good arguable case that the first GSIIL policy is governed by English law. I do so because this is a case in which the determination of the applicable law is likely to have, in the words of Aikens J in *Dornoch Ltd v Mauritius Union Insurance Co Ltd* [2006] 1 Lloyd's Rep. 127, at [72], "a crucial impact on the shape and possible outcome of the case".

57. There was a dispute as to whether the "applicable law" question was to be determined by reference to the regime under section 94B(1) and Schedule 3A of the Insurance Contracts Act 1982, or that in the Rome Convention scheduled to the Contracts (Applicable Law) Act 1990. Mr Jacobs submitted that there is a difference between the two regimes where parties have not made an implied choice of law and the court has to determine the country with "the closest connection" because of the presumption of closest connection under the regimes differs. Under the Rome Convention it is the principal place of business of the party who is to effect the performance which is the

characteristic of the contract. Under the Insurance Contracts Act it is (see paragraph 1(1)) the place where the policyholder has its central administration, in the present case (by virtue of paragraph 4(1)) Scotland. But the concept of "choice" is the same in the two regimes: see *American Motorists Insurance Co v Cellstar Corporation* [2003] EWCA Civ 206, [2003] Lloyd's Rep IR 295 at [18] *per* Mance LJ. Since, for the reasons I shall give, I have concluded that Faraday has shown a good arguable case that the parties made an implied choice of English law which can be demonstrated with reasonable certainty, it is not necessary to decide which regime applies.

58. I can deal with one other matter briefly. Mr Lockey (skeleton argument, paragraph 81(g)) stated the underlying policy contains a number of specific references to English legislation and relied on these as showing an implied choice of English law. There is in fact only a reference to the Motor Vehicles (Authorisation of Special Types) Order 1969. That is a UK statutory instrument (SI No 344) made under the Road Traffic Act 1960, which applied to Scotland, the place of Howden's address on the policy, as well as to England and Wales. It was revoked in 1973 when it was replaced by a similar provision made under the Road Traffic Act 1972, which also applied to Scotland. Mr Lockey can gain no assistance from it.

59. Mr Jacobs relied on the fact that the third policy is not made on a standard form known to be governed by English law, such as the Lloyds SG form. He argued that the recognition in the Giuliano-Lagarde report on the Rome Convention that in such a case the parties may have made a choice of law even though there is no express provision to this effect in the contract does not apply. He submitted that because the first policy consists of a mixture of clauses which have been drawn together, including clauses which have been tailored to meet the specific requirements of the insured, no implied choice of law has been demonstrated with reasonable certainty. Lloyd Thompson, the brokers, stated in a draft response dated 12 January 1998 to a request by J & H Marsh for details of the Howden placement that "the Howden wording is a pure manuscript wording which has evolved over many years" and "is not based on any standard market wording".

60. The standard London market "several liability" notice clause is in the policy signed by the underwriter. But the Institute Radioactive Contamination Exclusion clause is in the immediately underlying policy which, on Faraday's evidence, the underwriter did not see: see Mr Soar's second witness statement, paragraph 15. Mr Jacobs argued that neither the Giuliano-Lagarde report nor the subsequent case law indicates that the mere fact that a policy is placed in the London market is sufficient of itself to demonstrate an implied choice of English law with reasonable certainty, and the inclusion of a couple of London market clauses cannot make the difference.

61. The fact that the parties have not used an English standard form of policy has not been regarded as inconsistent with an implied choice of English law: see e.g. *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange* [2010] EWHC 2279, [2011] Lloyd's Rep. IR 171 at [35], accepting the submissions summarised at [23]. The mere fact that a policy is placed in the London market may not be sufficient of itself, but the fact that it was broked and issued in London is clearly a material and important factor to be taken into account. See, for example, *DR Insurance Co v Central National Insurance Co* [1996] 1 Lloyd's Rep. 74, at 81: "when parties enter a particular market in order to transact business they can usually be taken to intend that

their relationship will be governed by the law in force in that market, unless they provide some clear indication to the contrary".

62. There is no such clear indication; indeed the indications are of an intention that the relationship was to be governed by English law. The first GSIIL policy is set out on a London market underwriting slip which, although in this case not completed save for the policy number, refers (see [10]) to London market institutions and features such as the "unique market reference" for numbering risks. Apart from the London market clauses in the policy and the underlying policy, GSIIL's stamp which was applied to the slip itself employs London market abbreviations: see [14]. Moreover, under the underlying policy, claims are to be notified to the brokers, London brokers, in London.

63. Factors such as these were relied on by Beldam LJ in *Gan v Tai Ping* [1999] Lloyd's Rep. IR 472, at 480 – 481, in concluding that an implied choice of English law had been made, and by Christopher Clarke J in *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange* in concluding that the party contending that an implied choice had been made had "much the better of the argument". Christopher Clarke J also relied on the fact that in *Stonebridge's* case the characteristic performance was to be by an English underwriter, which it also was to be in the present case. I have concluded that in this case Faraday also has much the better of the argument as to whether an implied choice of English law has been made. Accordingly, Faraday has satisfied the jurisdictional gateway in PD6B 3.1(c) as well as those in PD6B 3.1(a) and (b).

(ii) Forum conveniens

64. The next question is whether England is the appropriate forum in which to seek the relief. HNA's case is that, even if the first policy is governed by English law, applying English conflicts principles, this does not outweigh other factors which mean that it is not. A major part of the submissions on this issue concerned whether the fact that the English proceedings only involve a fragment of the potential claims for cover when compared with the Pennsylvania proceedings mean that England is not the appropriate forum. I shall return to this point after considering the other *forum conveniens* factors relied on by the parties.

65. Mr Jacobs recognised the importance of the fact that the contract is governed by English law, but submits that this is not a conclusive factor: see *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange* at [44] and *DR Insurance Co v Central National Insurance Co* [1996] 1 Lloyd's Rep. 74 at 84. In the *DR Insurance* case Mr Moore-Bick QC (as he then was) stated, of contracts for which there was a strong argument that their proper law was English, that the fact that the defendant's prospects of success were significantly greater in New York was not something which should deter the court from setting aside the grant of leave to serve out. But just as this factor does not conclusively mean England becomes the clearly more appropriate forum simply because a claimant will be deprived of a juridical advantage if proceedings are conducted elsewhere, so also it is important not to downplay the importance of the fact that English law is, or is likely to be, the proper law of the relevant contract.

66. The general principle that a court applies its own law more reliably than does a foreign court assists in identifying the appropriate forum. In this case, my conclusion that Faraday has much the better of the argument on proper law is a strong pointer to that forum being England. This is particularly so in the case of insurance written on the London market in respect of which there are major issues of law and construction: see the cases cited by Dicey, Morris and Collins, *The Conflict of Laws* 14th ed., §12-029 note 30. The major issues of law in this case concern whether exposure to a hazardous condition is itself an injury, and whether the insured is obliged to show "injury" (as that term is understood in English law) during the relevant policy period.

67. A second factor that points to the appropriateness of these proceedings is that if they remain constituted as they are, that is without a counterclaim from HNA, the trial could come on quickly. If there is to be evidence in a trial of the claim for a declaration as to the proper law of the first GSIIL policy, Mr Best, the broker, Mr Proctor, the underwriter, and relevant Howden Group personnel are all in the United Kingdom. If, for the purposes of the second, third and fourth declarations sought, there are issues as to what constitutes "injury" during the policy period, England is the appropriate forum for determining that. The position is similar in relation to whether there is a "single occurrence".

68. If HNA brings a counterclaim, the likely issues that will arise will be questions as to what constitutes "injury" or whether there is a single occurrence. At this stage, there is unlikely to be any extensive investigation of the underlying asbestos proceedings requiring an examination of the medical evidence, the circumstances of the underlying claimants, and the other matters identified in paragraph 16(c) of Mr Enock's second statement.

69. Mr Lockey also relied on the fact that HNA would, under English law, be unable to claim defence costs in respect of claims for injuries which did not occur during the relevant policy period and that the costs of a successful party are generally irrecoverable in the United States. These factors are, however, only relevant in this context in the rare cases in which differences in the level of recoverability of costs will deny substantial justice (see Dicey, Morris and Collins, *The Conflict of Laws* 14th ed., §12-033; *Radhakrishna Hospitality Service Private Ltd v Eurest SA* [1999] 2 Lloyd's Rep. 249, at 254) and that is clearly not the case here.

70. I, however, accept Mr Lockey's submission that a number of the other factors relied on in the evidence submitted on behalf of HNA are of limited relevance or outweighed by other factors. So, the fact that HNA did not have manufacturing facilities or offices in the United Kingdom, and that its asbestos liability arises exclusively in the United States must be set against the fact that the insurance was composite insurance arranged on a group basis, the Howden group operates worldwide, the cover in the first GSIIL policy is worldwide, and the business was placed in London, by London brokers, with a London underwriter. HNA's United States lawyers undoubtedly have much experience in relation to its claims for cover, but the issues between Faraday and HNA in these proceedings concern choice of law and questions of English law. In that context, the experience of HNA's United States lawyers is of less significance. Similarly, in the light of Mr Soar's evidence (see [23]), the fact that Faraday is an indirect subsidiary of Berkshire Hathaway Inc, a United

States corporation, is also of very limited relevance because it is independently managed from London.

71. I return to the "fragment" point. It is true that the litigation in Pennsylvania involves many claims for cover, has been proceeding for a number of years, and is wider-ranging. But Howden's insurance programme was written with different insurers in different layers, and often without identity of insurers from one year to the next. GSIIL was not asked to participate in an overall programme covering multiple layers and multiple years. Its subscription under the first policy (and indeed the other policies) gave rise to a separate contract between it and the assured. There was no joint underwriting decision taken by GSIIL and its co-insurers.

72. As a matter of English law, while the English court will show all appropriate comity to the Pennsylvania court, the interpretive rulings of the latter with respect to the underlying policy will not (cf. Mr Enock's second statement, paragraphs 8(a) and 16(a)) "create precedent applicable to Faraday and its co-subscribers".

73. In *New Hampshire Insurance Co v Philips Electronics North America Corp* the court held the appropriate forum for a trial of the facts was Illinois but the appropriate forum for determining points of construction was England. Phillips LJ stated (at 1070) that while it is normally undesirable that one jurisdiction should be seised of issues of law in a dispute, while the other is seised of issues of fact, the answer to the question whether the English court should decline to entertain an application for a negative declaration which would have this effect depends on the facts of the particular case and is not a matter of principle. Significantly, he also stated that "there is an obvious anomaly in requiring a plaintiff to resolve a point of law designed to obviate an inquiry of fact, not in the country whose law is applicable, but in the country where the issues of fact should be resolved if the plaintiff fails on the law".

74. As in the *New Hampshire Insurance* case, these proceedings in their present form may not ultimately obviate a need for a trial of the facts. But, given the appropriateness of the English court determining the applicable law and the questions as to the meaning of what constitutes "injury" and whether there is a single occurrence, I do not consider that Pennsylvania is the more appropriate forum for those issues.

(iii) "Justification" and "Utility"

75. The submission that Faraday has failed to show that the present proceedings are justified and serve a useful purpose relies heavily on HNA's joinder of the insurers which subscribe to the 1998 second excess policy, including GSIIL and Faraday, to its counterclaim to the 2011 coverage action, and, in respect of the second and third policies, the statement in Covington's letter dated 18 July 2011, that HNA does not intend to seek coverage under those policies in respect of its asbestos liabilities. Both of these events post-date the institution of these proceedings. Mr Lockey maintained that the submission that a decision of the English court in Faraday's favour will serve no useful purpose because it will be ignored in proceedings to which Faraday have only been joined as a reaction to the English proceedings, is unattractive and tantamount to a threat that if HNA is unsuccessful in its present application and Faraday succeeds in obtaining the relief it seeks, it will take steps in the Pennsylvania proceedings to render the English judgment pointless. I, however, first consider the

circumstances of this case without regard to the impact on the issues before me of that joinder.

76. If the matter is considered as at the time Faraday instituted these proceedings, and without taking account of HNA's subsequent joinder of Faraday and GSIIL to its counterclaim in the 2011 Pensylvania proceedings, I am clear that Mr Jacobs' submission that Faraday has not sufficiently demonstrated that they have utility must be rejected. Faraday undoubtedly had a legitimate interest in asking this court to decide the issue as to the applicable law under the three GSIIL policies.

77. I reject the contention that, notwithstanding the terms of the letters from Charterbrook (see [31]) and Covington's 14 January 2011 letter (see [34] – [35]), the fact that those letters stated that HNA was not currently making a claim for coverage, but only advising it of occurrences that "may" give rise to a claim, meant Faraday's interest was academic or hypothetical. It is recognised that a party may have a legitimate commercial need to obtain an early determination as to a matter concerning his liability to another who may seek to claim against him. See Dicey, Morris and Collins, *The Conflict of Laws* 14th ed., §12-041 and the cases cited, including *Phillips v Avena*, [2005] EWHC 3333 (Ch), *The Times*, 22 November 2005, of which it is said (note 88) "an application for a declaration that a foreign judgment would be entitled to recognition in England was justified even though no other proceedings to seek to subvert that judgment were in prospect". See also, Fentiman, *International Commercial litigation* (2010) § 14-43, who states that relief may be granted "although no proceedings are pending against the claimant", provided a sufficiently defined issue has been formulated and (§ 14-44) that "litigation may sometimes be contemplated although no claim has been made".

78. The statements in Dicey, Morris and Collins and in Fentiman were made about applications for negative declarations of liability. Mr Jacobs submitted that a more stringent test is required where, as here, a different form of relief (which he described as a "lesser form of relief") is sought. Provided, however, that the approach in applications for negative declarations is applied, I do not accept that the more limited nature of the relief sought or that the relief sought may not obviate the need for further proceedings is a reason for requiring a higher threshold. After all, in *New Hampshire Insurance Co. v Philips Electronics North America Corp* [1998] CLC 1062 itself (see 1070), the declarations sought in the English court concerned preliminary points of construction on the basis of agreed facts, the determination of which might, but might not, obviate the need for a trial of the facts.

79. The position is less straightforward if account is taken of the developments since the service of these proceedings and the effect of HNA's motion joining Faraday and GSIIL as additional defendants to its counterclaim in the 2011 proceedings. I first set aside the position of the second and third policies and deal only with the position in relation to the first policy. Mr Lockey's primary submission was that it is not appropriate to consider the effect of this in circumstances in which these proceedings were launched and served on HNA before the *ex parte* joinder of Faraday and GSIIL to the Pennsylvania proceedings. He contended that the threat to seek to thwart or ignore any decision of this court as to the proper law of the policies by continuing to pursue Faraday in Pennsylvania, does not render Faraday's purpose in seeking this court's determination illegitimate or improper, or mean that these proceedings have

no utility. His secondary submission was that, even if the developments since David Steel J's order are taken into account, these proceedings have utility.

80. I have concluded that, even taking account of the developments since David Steel J's order, this is not a case in which it can, at this stage, be said that these proceedings serve no useful purpose because the determination of this court (which would bind HNA as a matter of English law) would be ignored by the Pennsylvania court. It is common ground that this court should not evaluate the merits of, or express a view on, Faraday's application challenging jurisdiction which is presently pending before the Pennsylvania court. The position is similar in relation to the extent to which a decision this court makes in these proceedings will be taken into account in the Pennsylvania litigation.

81. Whether the purpose of these proceedings is (see Mr Soar's second statement, paragraph 60) to try to establish issue preclusion on this point, or whether it is because the determination of this court will assist the Pennsylvania court in some way short of issue preclusion, are matters on which there is conflicting evidence before me, and on which there are rival submissions. Apart from considerations of comity, in an application of this sort it is not appropriate to resolve the conflict in the evidence before the court as to the position as to preclusion under Pennsylvania law. The submission that the Pennsylvania court would accord a decision of this court on proper law deference does not sit comfortably with the proposition, as to which there is common ground, that the Pennsylvania court would apply its own conflict of laws principles, just as an English court would: see *The Irish Rowan* [1991] 2 QB 206, 229 (Staughton LJ) and *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange* [2010] EWHC 2279 (Comm), [2011] Lloyd's Rep. IR 171 at [33]. But, on the wider matter, while recognising the force of HNA's submissions based, for example on *Merck v Teva* 288 F Supp. 2d 601 (2004), it is, at this stage, not possible to say that Faraday's evidence on issue preclusion is such that this court can now conclude that it has not shown these proceedings have any utility.

82. It is instructive that in *CGU International Insurance plc v Szabo* [2002] Lloyd's Rep. IR 196, proceedings in England were started after proceedings in Ohio, but were allowed to proceed. Toulson J recognised (at [53]) that there was a potential risk of conflicting outcomes and that that was a valid consideration. But, because he concluded (see [52]) that CGU had a strong case for saying that the construction of the policy was governed by English law, he regarded the English court as the natural forum for determining its construction. In those circumstances, he did not consider that justice would be served by staying the English proceedings because of the potential risk of conflicting outcomes. He stated (at [53]) that it seemed to him "that the Ohio court, which is also seized of a jurisdictional argument, might welcome a ruling by this court on the proper law of the policy and its proper interpretation (if this court judges it to be governed by English law)". I note that in *Phillips v Avena,* [2005] EWHC 3333 (Ch) at [28] Sir Francis Ferris took a similar approach.

83. I return to the position of the second and third policies. Mr Lockey suggested that it is doubtful that the court has any discretion in the matter but he is not assisted by the case he referred to, *Equitas Ltd v Allstate Insurance Co* [2009] Lloyd's Rep. 227 at [64], because that concerned an exclusive jurisdiction clause. The important question regarding the second and third policies is the effect of the statement in Covington's

letter of 18 July (see [42]) that HNA has not made, and will not in the future make, any demand for coverage "in respect of the proceedings against HNA arising from claims for personal injuries allegedly caused by the underlying tort plaintiffs' exposure to asbestos…". Mr Lockey asked whether this offer was confined to the claims in the proceedings against HNA which are referred to in the letter, or applied to all coverage under the second and third policies. My understanding was that, during the hearing, Mr Jacobs stated that the letter applied to all coverage for US asbestos personal injury claims.

84. In the evidence in support of Faraday's case it is contended that HNA's abandonment of the possibility of claims under the second and third policies only ten months after it notified Faraday of them was a tactical move in the light of these proceedings, particularly if it is considered together with HNA's joinder of Faraday and GSIIL to the 2011 proceedings after being served with these proceedings. Tactical manoeuvres are not uncommon in jurisdiction fights, and HNA has argued that these proceedings are a pre-existing forum shopping strike by Faraday. But however one characterises Covington's letter, if as Mr Jacobs stated, it applies to all coverage in respect of HNA's asbestos personal injuries liabilities under the second and third policies, the proceedings do not satisfy the "justification" or "utility" test in *New Hampshire Insurance Co v Philips Electronics North America Corp*. In those circumstances the Order of David Steel J should be set aside in respect of those two policies. I will hear submissions as to whether, on my understanding of Mr Jacobs' statement during the hearing, the fact that the concession applies to all coverage under the policies in respect of HNA's asbestos personal injuries liabilities should be embodied in an undertaking given to the court to assist its enforceability by Faraday.

Conclusion

85. As to comity, in *Szabo's* case Toulson J stated (at [53]) that he would not wish to give the appearance of seeking to influence the Ohio court which would have an opportunity of indicating how it would wish the litigation to proceed when it ruled on the jurisdictional dispute before it, and that, in determining the future progress and timetable of the case before him, the English court would give great respect to any views which that court may express on the subject. However, at the stage of the proceedings before him, he did not consider that it would be just to set them aside or stay them. I consider that those considerations and that approach, including great respect to any views which the Pennsylvania court may express, apply in the present case.

86. While these proceedings were undoubtedly a reaction to the letter from Charterbrook, for the reasons I have given, I have concluded that they are an attempt to resolve a threshold issue (as to the proper law of the policies) which has significant implications for the scope of Faraday's obligations under the policies, and which remains an issue in respect of the first policy. Accordingly, for the reasons I have given, Faraday has a legitimate interest in having the proper law established at this stage in respect of the first GSIIL policy and I do not consider that at this stage the order permitting service out of the jurisdiction granted by David Steel J, and that service out of the jurisdiction, should be set aside.