Neutral Citation Number: [2006] EWHC 253 (Comm)

Case No: 2006 FOLIO 1156

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/02/2007

Before:

LORD JUSTICE TOULSON

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Between:

(1) NOBLE ASSURANCE COMPANY **(A corporation created pursuant to the laws of Vermont, USA)** **(2) SHELL PETROLEUM, INC** **(A corporation created pursuant to the laws of Delaware, USA)**	**Claimants**
- and -	
GERLING-KONZERN GENERAL INSURANCE COMPANY – UK BRANCH **(A UK Branch of a Company incorporated under the laws of the Federal Republic of Germany)**	**Defendant**

- -
- -

Richard Jacobs QC, David Foxton QC and Stephen Houseman (instructed by **Fulbright & Jaworski International LLP**) for the **Claimants**
John Lockey QC (instructed by **Kennedys**) for the **Defendant**

Hearing date: 11, 12 December 2006

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Judgment

Lord Justice Toulson:

The Application

1. On 9 November 2006 I granted a temporary injunction to the claimants, on a without notice application, to restrain the defendant from taking further steps to prosecute proceedings begun against the claimants in the United States District Court for the District of Vermont. The claimants seek the continuation of that order; the defendant opposes the application and says that the order ought not to have been granted.

The parties

2. The first claimant ("Noble") is a subsidiary of the second claimant ("Shell") and is its captive insurer. Noble's principal place of business is in Vermont. Shell is a Delaware corporation with its principal place of business in Wilmington, Delaware.

3. The defendant ("Gerling") is an international reinsurance company with a UK branch which has its principal place of business in London.

The Noble/Shell Policy

4. For the period between 1 July 1997 and 1 July 2000, Noble issued a policy of insurance number NB-GL-9707-015-01 ("the Noble Shell Policy") which provided coverage for various entities beyond Shell itself. The coverage included a number of wholly or partly owned limited liability entities (or "LLEs").

5. The policy provided cover against liability for events, exposure to conditions or use of the insured's products, causing personal injury or property damage.

6. Clause 5 (o) provided:

> "Arbitration
>
> Any dispute under this Policy shall be finally and fully determined in London, England under the provisions of the English Arbitration Act of 1950, as amended and supplemented …"

It is common ground that this should be construed as a reference to the Arbitration Act 1996.

7. Clause 5 (q) provided:

> "Governing Law and Interpretation
>
> This Policy shall be governed by and construed in accordance with the internal laws of the State of New York, except in so far as such laws may prohibit payment in respect of punitive damages hereunder and except in so far as such laws pertain to regulation by the Insurance Department of the State of New York of insurers doing business or issuance or delivery of policies of insurance within the State of New York; provided,

> however, that the provisions, stipulations, exclusions and conditions of this Policy are to be construed in an even handed fashion as between the Insured and the Company; without limitation, where the language of the Policy is deemed to be ambiguous or otherwise unclear, the issues shall be resolved in the manner most consistent with the relevant provisions, stipulations, exclusions and conditions (without regard to authorship of the language, without any presumption or arbitrary interpretation or construction in favour of either the Insured or the Company and without reference to parol evidence)."

The Gerling Contract

8. Gerling provided Noble with a $50 million layer of reinsurance, subject to an excess of $100 million, under a contract of reinsurance number 509/DL210497 ("the Gerling Contract"). Gerling originally participated as a direct excess insurer of Shell, but the contract was converted into a reinsurance policy by endorsement number 6 which provided:

> "Quota Share Reinsurance and claims control (QSRCC)
>
> It is hereby understood and agreed that this Policy is amended from a direct insurance and shall operate as a 100% quota share reinsurance of Noble Assurance Co.
>
> Notwithstanding the above, all provisions of the underlying Policy, including Conditions relating to Notice of Occurrence and Claim …. shall apply to this Policy as though this Policy was a direct insurance".

9. Endorsement 10 also stated that:

> "The insurance provided by this Policy shall follow all the terms and conditions of Underlying Umbrella Policy number NB-GL-9707-015-01 issued by Noble Assurance Company."

Equilon and OPL

10. On 15 January 1998 Shell and Texaco formed a joint venture known as Equilon Enterprises LLC ("Equilon") to amalgamate their down stream assets in the western United States. Shell owned a 56% stake in Equilon. One of Texaco's assets, held through a subsidiary, was a 37.45% equity interest in Olympic Pipeline Company ("OPL"). OPL owned a pipeline that transported gasoline products about 400 miles from a refinery north of Seattle (owned by Atlantic Richfield Company or "ARCO") to Portland, Oregon. Texaco's interest in OPL was transferred to Equilon on 1 April 1999.

11. The Noble Shell Policy had two endorsements relating to LLEs, endorsement 12 headed "Limited Liability Endorsement – General" and endorsement 13 headed "Limited Liability Endorsement – Specific".

12. Endorsement 13 provided:

> "In consideration of the premium charged, it is understood that the following Limited Liability Endorsement shall form part of this Policy NB-GL-9707-015-01.
>
> 1. Each entity listed below and each Subsidiary thereof shall be an Insured under the Policy subject to the limits, retentions, terms, conditions and exclusions in the Policy and set forth below.
>
> …
>
> 3. Any LLE in which the Named Insured after 1 January 1998 acquires more than 5% or less than 100% of the equity and to whom the reinsured hereon issues a Policy which is not otherwise an insured and which does not meet the criteria set forth in paragraph 2 above shall be an Insured under the Policy provided that …."

The LLEs listed in the endorsement included Equilon.

13. The Gerling Contract contained substantially reciprocal endorsements. These were originally endorsements 11 and 12, but they were replaced by endorsements 17 and 18 prior to the events giving rise to the dispute. Gerling endorsement 17 mirrored Noble Shell endorsement 12, and Gerling endorsement 18 mirrored Noble Shell endorsement 13.

The Accident

14. On 10 June 1999 there was a rupture of the pipeline owned by OPL near Whatcom Creek in Bellingham, Washington, with a resulting fire and explosion. ARCO claimed against its business interruption insurers for $500 million. After settlement of the claim, ARCO and its insurers joined in claiming against Equilon and OPL. Equilon agreed to settle for $200 million. OPL was bankrupt and paid nothing.

15. Equilon's coverage under the Noble Shell Policy was limited to 56% of the sum insured, being the same proportion as Shell's stake in Equilon. So Noble agreed to pay $112 million and claimed from Gerling 56% of the sum reinsured under the Gerling Contract, amounting to $28 million. Gerling refused to pay the full amount but paid $14 million. It argued that it had provided reinsurance in respect of Equilon but not OPL, and that Equilon and OPL were each severally liable for 50% of the underlying claims compromised in the ARCO settlement. Gerling paid $14 million direct to Shell on or about 24 January 2005.

16. Meanwhile on 5 October 2000, i.e. 15 months after the accident, Noble issued to Equilon a Certificate Policy, number NB-SP-9808-032-01, providing cover for the period from 1 January 1999 to 31 December 1999.

The arbitration

17. While the settlement negotiations with ARCO were proceeding, on 4 January 2005 Noble and Gerling entered into a written agreement headed "Agreement to Arbitrate Dispute" ("AAD").

18. Clause 1 recited various matters, including the following:

> "d. ARCO and its insurers brought a law suit against Equilon and OPL in the United States District Court for the western district of Washington seeking to recover alleged losses of approximately $500 million…
>
> e. The plaintiffs and Equilon have entered into settlement negotiations with the purpose of settling, if possible, the litigation.
>
> f. Noble believes that the Gerling contract fully reinsures, and provides 100% coverage for, that proportion of the prospective settlement that Noble would pay in the layer between $100 million and $150 million… In Noble's view, Gerling's contribution to the settlement of the litigation should be its full layer, $28 million (56% of $50 million).
>
> g. Gerling disputes Noble's position and maintains that OPL is not a covered entity under the Gerling contract, and, therefore, it is required only to pay its share of that portion of the settlement that can apportioned to the liability of Equilon.
>
> h. Both Noble and Gerling desire the settlement of the litigation to go forward, and to preserve for arbitration their dispute as to whether Gerling must reimburse Noble its full layer of $28million."

19. By clause 3 the parties agreed, among other things, as follows:

> "a. If the litigation settles, upon conclusion of the settlement, Noble shall contribute 50%, up to $14 million for the layer comprising Gerling's layer of $28 million and Gerling shall contribute 50%, up to $14 million.
>
> b. Neither party shall be deemed a volunteer or in any other manner to be waiving its right to litigate or arbitrate the issue of whether Noble is entitled to full reimbursement of the Gerling layer of $28 million.
>
> c. The parties shall promptly submit this dispute to arbitration in accordance with section V, paragraph (o) of the Noble/Shell Policy, which provides for arbitration in London England, pursuant to the English Arbitration Act of 1950, as amended and supplemented.
>
> d. The parties agree that, for the purposes of the arbitration, Shell and OPL shall each be presumed to have 50% liability in the litigation, and that, if the litigation had been tried, each would have been found 50% liable by the court and jury.

e. The parties shall also stipulate that the amount paid in settlement was reasonable, that no portion of it was paid as a volunteer or without the approval of Gerling, and that Gerling consented to and approved the settlement.

f. The parties agree that the only issues to be tried in the arbitration shall be: (1) whether the Gerling contract provides coverage for OPL; and, if it does not, (2) whether Equilon would be jointly and severely liable, thereby requiring Gerling to contribute up to 100% of its layer to the settlement reached. Should Noble prevail on either issue, it shall be entitled to recover from Gerling the sums which it paid pursuant to paragraph 3.a above. The arbitration shall be bifurcated and tried in two separate proceedings, using the same panel of arbitrators. In the first proceedings, the parties shall try issue (1) above; if necessary, in a later proceeding, they should try issue (2)."

20. Noble appointed as arbitrator Mr John M Mathias Jr. Gerling appointed as arbitrator Mr Stewart Boyd, CBE, QC. The party-appointed arbitrators appointed Sir Christopher Staughton (familiar to English lawyers as a distinguished commercial lawyer and former judge) as chairman and third arbitrator.

21. On 16 May 2005 the tribunal gave directions for pleadings and disclosure on stage one (whether the Gerling Contract provided coverage for OPL).

22. On 16 May 2005 Noble served its statement of claim.

23. On 27 June 2005 Gerling served its points of defence, which included the following statements:

> "5 …Gerling notes that the statement of claim does not specify the basis for Noble's contention that the Gerling contract covers OPL. Accordingly, Gerling reserves its rights to raise such additional defences as appropriate once Noble has articulated its theories of coverage. Gerling specifically reserves its rights to raise defences as may be appropriate relating to any misrepresentation or non-disclosure by Noble with respect to coverage of OPL.
>
> 17. Prior to the Whatcom Creek Incident, Noble did not disclose to Gerling the fact that Equilon had purchased an ownership interest in OPL.
>
> 21. Prior to its issuance, Gerling was never informed that Noble intended to issue the Certificate Policy to Equilon nor given the opportunity to agree or disagree to the same. Gerling first learned of the existence of the Certificate Policy several years after its issuance. Had Gerling been aware of a Certificate Policy, it would never have given Noble its consent to the said Policy without additional consideration for the extension of coverage. Gerling never received an additional premium payment

> from Noble for increased liabilities resulting from the issuance of the Certificate Policy.
>
> 22. As part of its annual submission provided to Gerling and other reinsurers in July 1998, Noble expressly represented that:
>
> > "Policies issued in the names of Equilon Enterprises LLC and Motiva Enterprises LLC will not be issued by Noble Assurance Company."
>
> The 1998 submission did not disclose Equilon's ownership interest in OPL."

24. The main thrust of the defence was that neither endorsement 17 nor endorsement 18 to the Gerling Contract provided coverage in respect of OPL and that Gerling did not reinsure the certificate policy issued to Equilon.

25. On 8 July 2005 Noble served its points of reply. It contended that Noble insured OPL under endorsements 12 or 13 of the Noble/Shell Policy and/or under the certificate policy. In relation to misrepresentation and non-disclosure, paragraph 7 (2) stated:

> "No case of misrepresentation has been pleaded. Pursuant to section 3105 of the New York Insurance Law, the burden of pleading and proving any misrepresentation is upon the insurer, who must establish materiality (i.e. that the Gerling-Noble Policy would not have been issued). Nor has any case of non-disclosure been pleaded. Any such case would fail not least because Gerling affirmed the validity of the reinsurance contract by making payment there under: see too paragraph 55 of Gerling's Points of Defence, where Gerling refers to "its obligations to Noble."

26. On 29 July 2005 Gerling served a rejoinder dealing solely with misrepresentation and non-disclosure. It stated:

> "2. Gerling currently does not have sufficient knowledge of the relevant facts to determine whether a case for non-disclosure or misrepresentation may be presented and to date does not know whether it may have any rights to rescind the Gerling contract. Therefore, nothing Gerling has done to date nor nothing Gerling does or says hereafter regarding the facts of this case or regarding its present knowledge of the facts is or can be treated as an affirmation of the Gerling contract.
>
> 3. With respect to paragraph 7 (2) of Noble's reply, Gerling notes that section 3105 of the New York Insurance Law expressly does not apply to contracts of reinsurance and is, therefore, irrelevant to this matter. Instead, the relationship between a reinsured and reinsurer is governed by the principle of Uberrimae Fidei (utmost good faith).

> Accordingly, Noble was obligated to disclose to Gerling all facts that materially affected the subject risk. If facts are ultimately developed which demonstrate that Noble breached this duty, the Gerling contract would be rendered void ab initio.
>
> Gerling denies that it affirmed in any manner the Gerling contract and continues to reserve its rights to allege, plead or otherwise prove non-disclosure and/or misrepresentation and to ultimately rescind the Gerling contract if appropriate."

27. Prior to the hearing the parties exchanged written briefs. In its brief dated 28 November 2005 Gerling repeated, at paragraphs 21–23, the points made in paragraphs 21–22 of its points of defence. The brief also included the following paragraphs under the heading "Gerling did not reinsure the Certificate Policy":

> "81. It is well established New York Law that the relationship between a reinsurer and its reinsured is governed by the doctrine of uberrimae fidei (utmost good faith) which requires the reinsured to disclose to the reinsurer all facts that materially affect the risk. Allendale Mute Ins Co Excess Ins Co Limited, 992F Supp 278, 282 (SDNY 1998); in re Liquidation of Union in Dem Ins Co of New York 89 NY 2d 94, 651 NYS 2d 383 (NY 1996); Christiana General Ins Corp of New York v Great American Ins Co, 979F 2d 268 (2d CIR 1992); Nichols American Risk Management Inc, 202 WL 31556384, slip op (SDNY No 18, 202) the burden is on the reinsured to volunteer all material facts, since the reinsured is in the best position to know of any circumstances material to the risk. It must reveal those facts the underwriter, rather than wait for the underwriter to enquire. Allendale Mutual, 992 F supp at 282; see, In Re Liquidation of Union Indemnity, 89 NY 2d at 106, 651 NYS 2d at 390; Sumitomo Marine and Fire Ins Co v Cologne Reinsurance Co 75 NY 2d 295, 303, 552 NYS 2d 891 (NY at App div 1990); Knight v US Fire Ins Co 804 F 2d 9 (2d Cir 1986).
>
> 82. In unilaterally issuing the Certificate Policy 16 months after the Whatcom Creek incident, Noble violated its obligation to Gerling to act in utmost good faith. As such, Gerling has no obligation to afford reinsurance coverage to Noble with respect to the Certificate Policy."

28. Noble responded to these matters in some detail in a reply brief dated 19 December 2005.

29. A hearing took place in London on 25 and 26 January 2006, when both parties were represented by leading and junior counsel.

30. An important issue before the arbitrators was whether the words "and to whom the Reinsured hereon issues a policy" in endorsement 13 to the Noble/Shell policy and in

endorsement 18 to the Gerling Contract were a necessary formality. The argument for Noble was that they were meaningless in the Shell/Noble Policy, and that the intention of the reciprocal endorsement to the Gerling Contract was that where there was cover under the original policy there should be cover under the reinsurance. Gerling argued, contrariwise, that the issue of a specific policy to the LLE was a rational and necessary protection. Mr Kealey QC developed the argument on behalf of Gerling on the second day of the hearing. At page 41 of the transcript he said:

> "Insofar as it is necessary even to look at what benefit might accrue to the insurer/reinsurer, the benefit is shown by the fact that issuance of a policy to the LLE in question unequivocally records a deliberate decision and intention to extend the insurance cover to that LLE and goes towards the reduction of the abuse that can take place in circumstances where the LLE is a potential insured, but there is no record of the intention or desire to extend the insurance to that potential insured until after the occurrence of a loss."

31. He went on, at pages 56 to 61, to contrast the position under the certificate policy, about which he said that:

> "…you no longer have the wording which requires any non-consolidated entities of the named insured to be specifically named for coverage purposes, and you have a broad limited liability entity endorsement, and you have a date of October 5, 2000, which is about 15 months after the date of the loss, known to all concerned.
>
> The differences, in our respectful submission, exemplify – I am not saying there is abuse – precisely the jeopardy and the risk of abuse…
>
> The whole point of requiring a policy to be issued to the LLE in question is so that you do not have these piggyback endorsements creating insureds where none might have been contemplated, envisaged or intended."

32. Mr Kealey also referred to certain correspondence "to explain the possibility of not deliberate abuse but the possibility of abuse occurring by a side wind".

33. Mr Jacobs QC, who appeared for Noble in the arbitration and on the present application, drew attention to these passages to make the point that there was a clear disavowal of a suggestion that there had been actual abuse.

34. Mr Kealey also said, at page 65 of the transcript, that "we are not running a non-disclosure case…or a misrepresentation case".

35. The arbitrators delivered a partial award dated 27 March 2006 in which they concluded that Gerling ought to have paid $28 million in respect of the ARCO settlement, as opposed to the $14 million which it had paid. They awarded the balance to Noble with interest.

36. In their reasons for the award, the arbitrators rejected an argument put forward by Noble that OPL fell within endorsement 17 to the Gerling Contract. They then considered whether OPL came within the requirements of endorsement 18, paragraph 3. After setting out the words of the paragraph they continued:

> "9. The requirements of paragraph 3 in endorsement 18 are satisfied by OPL, save for the possible requirement of "any LLE to whom the Reinsured hereon issues a policy…"
>
> 10. …Endorsement 18 of the Gerling policy effectively matches endorsement 13 of the Noble policy, with some minor differences immaterial to this dispute.
>
> 11. The argument for Noble is that there is no logical reason under endorsement 13 why the reinsured should be required to issue a policy to OPL. The wording, according to Mr Jacobs, "made no sense at all in the context of endorsement 13" of the Noble policy. We would agree, on the assumption that no further premium is to be required for the inclusion of OPL in the coverage. It would be an unnecessary formality in the context of endorsement 13 for Noble to issue a policy to OPL.
>
> 12. For Gerling it is said that entities which are under the control of Shell do not give rise to a need for such a policy, but those which are not wholly under the control of Shell do give rise to such a need. Shell would want to know what entities were able to use their $650 million of cover, and who would be the first to use it if it was likely to be consumed. We do not find that argument convincing, and believe it to be a notion of counsel rather than an idea of their clients. OPL is a relatively small entity, and Shell is likely to be open to exercise such control as is needed. Or at any rate the contrary is not established.
>
> 13. The second issue of importance is the certificate policy. This was issued by Noble on 5 October 2000, and therefore 15 months after the accident suffered by OPL on 10 June 1999. That was, of course, issued at the time when the accident was known to the parties. But it is not said that there was an abuse on the part of Noble in issuing the certificate policy, or by anyone else as far as we know. There seems to be a habit of retroactive insurance without abusive intent. It was also not the first occasion when a certificate policy had been issued in this connection.
>
> 14. The certificate policy on this occasion was issued to the named issued Equilon Enterprises LLC. It is endorsed –

> "Subject to the name LIMITED LIABILITY ENTITY ENDORSEMENT (attached)."
>
> The attachment does not contain a requirement that "the reinsured hereon issues a policy." It would seem that the certificate policy does provide coverage by Noble to OPL, and therefore by Gerling. As Noble argued, there was no agreement that Gerling should be told about the issue of any particular policy during the year. The Noble argument is that where there is coverage under the original policy there must be coverage under the reinsurance, and that in any event the certificate policy would satisfy whatever requirement there may be under either endorsement 13 of the Noble policy or endorsement 18 of the Gerling policy regarding the phrase "to whom the Reinsured hereon issues a policy." That is in our view well- founded. "

The interpretation of the arbitrators' award

37. It is convenient at this stage to deal with a key question about the interpretation of the arbitrators' reasoning, on which the parties disagreed. What were the arbitrators referring to in the final sentence of paragraph 14, "That is in our view well-founded"?

38. Mr Jacobs submitted that they were referring to the Noble argument summarised in the immediately preceding sentence, i.e. (a) that where there was coverage under the original policy (as there was under endorsement 13, since the words "any LLE to whom the reinsured hereon issues a policy" made no sense – as the arbitrators agreed – in the context of that endorsement), there was also coverage under the reinsurance; and (b) that the certificate policy would satisfy whatever requirement there might be under either endorsement 13 of the Noble Shell Policy or endorsement 18 of the Gerling Contract. In short, Noble was entitled to cover on either of two bases. This was Noble's argument in the arbitration (as Mr Jacobs demonstrated by reference to the documents in the arbitration), and he submitted that the arbitrators accepted the argument.

39. Mr Lockey QC (who appeared as junior counsel in the arbitration) submitted that paragraph 14 of the partial award was directed entirely to the effect of the certificate policy. The concluding sentence was merely an acceptance of the final part of the preceding sentence, i.e., that the certificate policy satisfied any requirement of endorsement 18 of the Gerling Contract. He therefore argued that the award in favour of Noble was dependant on the certificate policy.

40. I do not believe that the tribunal under this chairman would have expressed themselves as they did if they had intended to convey the meaning for which Mr Lockey contends. In the penultimate sentence of paragraph 14 the arbitrators were summarising an argument advanced by Noble which fell into two parts, the second introduced by the words "and that in any event". I have no doubt that they would not have described the argument as well founded if they had been intending to accept only the second part of it. Moreover, the paragraph does not stand in isolation. They had noted that endorsement 13 of the Noble Shell Policy and endorsement 18 of the

Gerling Contract were a matched pair, the only differences between them being immaterial. They had gone on to consider whether the issue of a policy by Noble to OPL was a condition of its inclusion in the coverage, summarising the argument for Noble in paragraph 11 and for Gerling in paragraph 12. They expressed agreement with the former. It is perfectly true that they did not state in express terms that their conclusion extended to endorsement 18, but if they had considered that the point was relevant only to endorsement 13 of the Noble Shell Policy and had no relevance in relation to the matching endorsement 18 of the Gerling Contract, it is inconceivable to my mind that they would have failed to say so, since they were dealing with a claim under the Gerling Contract. It is equally inconceivable that they would have expressed their agreement with the argument in the penultimate sentence of paragraph 14 that where there was coverage under the original policy, there was also coverage under the reinsurance. As Mr Lockey would read their award, they were saying the opposite – that although there was coverage under endorsement 13 of the original policy (without the certificate policy), liability under the Gerling Contract was dependant on the certificate policy. In my view any linguistic lacuna which there might have been in paragraphs 10 to 12 was closed by the final two sentences of paragraph 14. For those reasons, I read the award as holding that Noble was entitled to cover both under endorsement 18 of the Gerling Contract and (had it been necessary) under the certificate policy.

41. While dealing with this subject, it is convenient also to refer to certain observations of Judge Sessions, Chief Judge of the United States District Court for the District of Vermont, to which it will be necessary to return for other reasons. In a judgment dated 18 May 2006, dealing with whether he should continue an anti-suit injunction (a temporary restraining order or "TRO") to prevent Noble and Shell from taking any action in any court to preclude or enjoin Gerling from proceeding with its claims in Vermont, he said (at page 8 of his judgment):

> "In the Tribunal's view, the question of whether the Gerling policy provided coverage for OPL turned on whether OPL met the criteria specified in endorsement 18 to the Gerling policy. It found that OPL satisfied all of the criteria listed in that endorsement, "save for the possible requirement of "any LLE to whom the Reinsured hereon issue a policy…" " The tribunal expressed agreement with Noble's argument that "it would be an unnecessary formality…for Noble to issue a policy to OPL". It went on to conclude that in any event, any requirement that Noble have issued a policy to OPL was satisfied by the Certificate Policy."

42. Later in his judgment, at page 25, he referred to the question whether the doctrine of collateral estoppel was likely to be appropriate to Gerling's claims in the Vermont proceedings. He considered it unnecessary to address the issue, but observed shortly that it was likely to be inappropriate for two reasons, the first of which was:

> "First, as evidenced by a vigorous dispute between the parties on this matter, the Award contains some ambiguity as to whether the Tribunal found that OPL was covered under the certificate policy, the Noble policy, or both policies.

> Accordingly, it may be difficult to determine which issues the Tribunal decided "with clarity and certainty"."

43. In a judgment dated 1 November 2006, rejecting an application by Gerling for summary judgment in its favour, the judge referred to the importance of the question whether the issue of the certificate policy increased Noble's coverage and Gerling's liability to indemnify it. He said, at page 29:

> "Whether issuance of this certificate policy expanded the risk to Gerling is one of the key areas of controversy in this case. For example, although Gerling has consistently argued that the arbitration tribunal based its conclusion that the Gerling policy provided coverage to Equilon and OPL on the existence of the certificate policy, Noble has emphasised that the tribunal found an alternate basis for coverage. It is by no means undisputed that issuance the certificate policy expanded the scope of Gerling's coverage, given Noble's, and the arbitration tribunal's, interpretation of endorsement 18 of the Gerling policy."

44. Whatever else may be disputed, two things seem to me to be plain.

45. First, the effect of endorsement 18 of the Gerling Contract on its own (i.e. without the certificate policy) and the effect of the certificate policy were matters squarely within the arbitrators' jurisdiction. As it turned out, they were the central points to which the parties' arguments were addressed.

46. Secondly, the interpretation of the arbitrators' award is a matter falling properly within the jurisdiction of this court. It is not only a necessary matter for me to decide for the purposes of this application, and formed an important part of both sides' arguments, but it is also an appropriate matter for this court to decide. Under the Arbitration Act 1996 the arbitration process is subject to the supervisory jurisdiction of this court. The Act also provides its own remedy for parties where an arbitration award contains ambiguity. Under section 57 a party may apply to the tribunal to correct an award so as to remove any ambiguity in it. Failure by a tribunal to clarify a material ambiguity would potentially constitute serious irregularity which could give rise to a challenge to the court under section 68. Under that section the court has power, among other things, to remit the award for reconsideration. The court also has power under section 70, when considering a legal challenge to an award, to order the tribunal to state its reasons in fuller detail. These provisions are part of the framework of English arbitration law and are designed to enable the arbitration process to work effectively.

The Vermont Proceedings

47. On 14 April 2006 Gerling began proceedings in Vermont against Noble and Shell.

48. The essential nature and purpose of the action was summarised by Judge Sessions in the opening words of his judgment dated 18 May 2006:

> "This case arises out of a dispute over whether the plaintiff ("Gerling") should be required to indemnify the defendant Noble Assurance Co ("Noble") for losses arsing out of the explosion of a petroleum pipeline. Gerling brought this action to rescind its reinsurance contract with Noble and to vacate an arbitration award that was issued in Noble's favor."

49. The relief claimed was as follows:

> "(a) a temporary restraining order and a preliminary injunction enjoining Defendants, or others acting in concert and on their behalf from taking any action to confirm the Award or otherwise deprive this Court of jurisdiction to adjudicate the issues here presented;
>
> (b) rescission of the Gerling contract;
>
> (c) vacatur of the award rendered in the arbitration between Noble and Gerling;
>
> (d) a declaration rendering the certificate policy void and unenforceable;
>
> (e) judgment against each of the Defendants herein jointly and severally, for a sum which will fully and fairly compensate Gerling for the damages incurred (including recovery of all loss payments that Gerling has paid to the defendants under the Gerling contract in excess of the premiums received);
>
> (f) pre and post-judgment interest as provided by law;
>
> (g) attorney's fees and related costs and expenses; and
>
> (h) such other and further relief as the Court deems just and equitable."

50. The judge noted (at page 19 of his judgment) that:

> "Gerling's claims fall into two broad categories; Counts I, II, III, IV, and VIII seek rescission of the Gerling policy ("the rescission claims"), while Counts V, VI, and VII seek vacatur of the Award ("the vacatur claims")."

51. The judge also noted that the seventh and eighth counts of the complaint were both numbered "VII" but he referred to the latter as count VIII (as was clearly intended) and I will follow the same course.

52. In his second judgment, dated 1 November 2006, Judge Sessions held that the court had no jurisdiction to entertain the vacatur claims, so they are no longer live. On a small technical point, he noted that count VII sought a declaration that the certificate policy was an illegal and unenforceable contract which necessitated vacatur of the

award. It seems that technically the declaratory part of the claim remains live but not the vacatur part.

53. The allegations advanced in the various counts were premised entirely, and expressly, on the basis that the arbitrators had found that Gerling had no liability to Noble except by reason of the certificate policy. This appears repeatedly throughout the complaint. In the section headed "factual allegations" Gerling alleged as follows:

> "H. Noble-Gerling Arbitration
>
> 42. The issue of whether the Gerling contract provided coverage for OPL was subsequently submitted for arbitration before an Arbitration Panel in London. During these proceedings, Gerling contended that OPL was neither covered under the Noble-Shell policy nor the Gerling contract. Gerling further argued that Noble's coverage obligations to OPL solely arose as a result of its issuance of the Certificate Policy (a policy which Gerling did not reinsure).
>
> 43. Noble contended that OPL was, in fact, covered by various provisions of the Noble-Shell policy as well as the Gerling contract. Noble specifically argued that its "case does not rest on the Certificate Policy." Instead, it claimed that the Noble-Shell policy automatically extended "temporary coverage" to qualifying acquisitions, including OPL.
>
> 44. On March 27 2006, the Arbitration Panel issued a "Partial Award" in favor of Noble ("the Award"). In doing so, the Panel expressly rejected Noble's arguments that OPL was covered under other provisions of the Noble-Shell policy and the Gerling contract. Instead, it found that "the certificate policy does provide coverage by Noble to OPL, and therefore by Gerling."
>
> 45 *The Panel's ruling in Noble's favor was exclusively predicated on the post-loss issuance of the certificate policy. As such, the panel conclusively established that the issuance of the certificate policy was material to the extension of coverage to OPL's liabilities under the Gerling contract.*"
>
> (Emphasis added)

54. On that premise, the complaint then sets out the various counts.

55. Count I alleged fraudulent misrepresentation. Gerling alleged that in July 1998 Shell and Noble specifically represented to Gerling that policies in the name of Equilon

would not be issued by Noble and that the issue of the certificate policy was contrary to that express representation: paragraphs 50 and 51.

56. It continued:

> "52. Shell and Noble knew, or were reckless in not knowing, that issuance of the certificate policy extended coverage under the Gerling contract (a) to OPL, an entity not otherwise insured by the Gerling contract, and (b) for a known, existing loss which had the potential of exhausting the entire layer of coverage afforded by Gerling."

57. In paragraph 53 Gerling alleged that Shell and Noble knew that issuance of the certificate policy violated public policy prohibitions against the issue of insurance for known losses.

58. Paragraph 57 alleged that Gerling had therefore suffered damage, the premise being that the issue of the certificate policy had caused Gerling to incur a liability for a loss for which it would not otherwise have been liable.

59. Count II alleged negligent misrepresentation. The allegations were similar to those of fraudulent misrepresentation, except that the allegation was of negligence rather than dishonesty. The allegations related entirely to the provision of information regarding the certificate policy.

60. Count III alleged material non-disclosure. Again, the pleading related exclusively to the certificate policy:

> "67. Shell and Noble failed to disclose to Gerling their intent to and actual issuance of the certificate policy extended coverage to OPL.
>
> 68. As recently determined by the arbitration panel in the award, Noble's issuance of the certificate policy materially altered the risk covered by the Gerling contract by expanding coverage to include a known, existing loss covered by OPL."

61. In Count IV Gerling repeated the same allegations but under the heading of breach of duty of utmost good faith:

> "73. Noble breached that duty [i.e. the duty of utmost good faith] by failing to disclose to Gerling its intent to and actual issuance of the certificate policy extended coverage to OPL.
>
> 74. As recently determined by the arbitration panel in the award, Noble's issuance of the certificate policy materially altered the risk covered by the Gerling contract by expanding coverage to include a known, existing loss incurred by OPL."

62. Count VII was headed "The certificate policy is an illegal contract and should be deemed unenforceable as to Gerling". The basis of the alleged illegality was that it is contrary to public policy for an insurer to issue a policy in respect of a known loss. Gerling put its case as follows:

> "96. Although it is not a party to the certificate policy, Gerling has standing to challenge its validity since Gerling will suffer direct harm as a result of its issuance. Pursuant to the award, it was the issuance of this certificate policy which now obligates Gerling to reimburse Noble and Shell for OPL's share of liabilities arising out of the Whatcom Creek incident.
>
> 97. Based upon the foregoing, the court should find the certificate policy to constitute an illegal contract, declare it unenforceable, and vacate the award."

63. Count VIII also related only to the certificate policy and was headed "The certificate policy violated a condition precedent to coverage." The complaint made under this count was that the issue of the certificate policy unilaterally extended coverage under the Gerling contract to OPL with respect to a loss which had already occurred.

64. On 17 April 2006 Judge Sessions granted an ex parte TRO to Gerling to restrain Noble from taking any action in any court to convert the arbitrators' award into a judgment, or taking any action in any court to enforce the award or taking any action to preclude or enjoin Gerling from proceeding with its claims in Vermont.

65. After an inter parties hearing Judge Sessions set aside the TRO for reasons which he gave in his judgment dated 18 May 2006. At page 14 of his judgment he set out the merits requirement which had to be established by a party seeking preliminary injunctive relief. This was that "there is either a likelihood of success on the merits, or sufficiently serious questions going to the merits to make them a fair ground for litigation, with the balance of hardships tipping decidedly in the movant's favor".

66. As I have previously mentioned, he observed that Gerling's claims fell into two broad categories: counts I, II, III, IV and VIII (the rescission claims) and counts V, VI and VII (the vacatur claims). He considered the merits of each category in turn. He concluded that Gerling had failed to establish in relation to any of the claims either a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation.

67. It is unnecessary to make any further reference to what he said about the vacatur claims, because claims for the vacatur of the award have now disappeared as a result of his later judgment.

68. In relation to the rescission claims, the judge recorded Noble's argument that under the doctrines of res judicata and collateral estoppel the award precluded consideration of Gerling's claims by the US Court.

69. As to res judicata, the judge said at pages 21 to 23:

> "Noble contends that the rescission claims that Gerling now presents to this court are, in substance, the same as the arguments Gerling raised before the Tribunal. To determine whether this is the case, the court must consider "whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." *Woods v Dunlop Tyre Corp* 972 F 2d 36, 38 (2d Cir 1992).
>
> Although the rescission claim relies on a number of different legal theories, including misrepresentation, non disclosure, and breach of duty of good faith, they all arise out of the same essential factual allegation: that the defendants failed to notify Gerling that Noble had retroactively extended coverage to OPL by issuing the certificate policy…
>
> A review of Gerling's submissions in the arbitration proceedings reveals that it presented this very same factual allegation to the tribunal in the context of its argument that the Gerling policy did not provide reinsurance coverage…
>
> As this comparison of the underlying factual allegations demonstrates, all three factors of the *Woods* test appear to be met. In both the rescission claims and the arguments raised in the arbitration, the "same transaction…is at issue," i.e. the issuance of the certificate policy. Similarly, "the same evidence is needed to support both claims": both arguments required Gerling to show that Noble retroactively extended coverage to OPL without notifying or seeking consent from Gerling. Finally, "the facts essential to the second" set of claims, namely the issuance of a policy and the defendants' failure to disclose it, were raised in the arbitration."

70. The judge then referred to an argument advanced by Gerling "that because it "did not even have a material misrepresentation claim until the issuance of the Award" it could not have raised that claim in the arbitration." The judge noted that it was true that in contrast to the defences raised in the arbitration, the rescission claims sought a different form of relief and were based on new legal theories, but he held that this did not make them different "claims" for res judicata purposes.

71. I interpose at this stage that on the application before me Mr Lockey on behalf of Gerling reiterated the same point, i.e. that Gerling had no ground for rescission of the Gerling contract until it received the arbitrators' award.

72. This serves to emphasise once more that Gerling's claim to rescind the contract is founded on an interpretation of the award which I have rejected, i.e. that the arbitrators found that the Gerling contract provided coverage in respect of OPL by reason of the certificate policy and would not have provided such coverage otherwise.

73. To return to the first judgment of Judge Sessions, his reasoning in relation to res judicata led to the conclusion that Gerling had failed to establish that the rescission claims had a likelihood of success on the merits or raised sufficiently serious questions going to the merits to make them a fair ground for litigation.

74. As to collateral estoppel, he said, at pages 24 to 25, that:

> " "Collateral estoppel is permissible as to a given issue if (1) the identical issue was raised in a previous proceedings; (2) the issue was actually litigated and decided in the previous proceedings; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits." *Bear Stearns and Co v 1109580 Ontario, Inc* 409 F 3d 87, 91 (2d Cir 205). As with res judicata, collateral estoppel is applicable to issues that were decided in an arbitration proceeding."

75. The judge said that in the light of his holding as to res judicata, it was unnecessary to address this issue, but he noted that collateral estoppel would likely to be inappropriate for two reasons. I have referred to the first (i.e. whether the award contained the necessary clarity). The second was that the precise issue of rescission had not been raised before the tribunal. But before leaving the subject it is pertinent to note the judge's observation, at page 16 of the judgment that:

> "...If Noble obtained a judgment in another court confirming the award, it could rely on the doctrines of res judicata and collateral estoppel to prevent Gerling from proceeding with its claims here."

76. I will consider the significance of this later.

77. After the delivery of Judge Sessions' first judgment, the parties issued various motions. The matter came back before the judge on applications by Noble to dismiss the action for lack of subject matter jurisdiction and improper venue, by Shell to dismiss the action against it for lack of personal jurisdiction, and by Gerling for summary judgment on its rescission claims.

78. In his judgment dated 1 November 2006 the judge found that the court had no subject matter jurisdiction in respect of the claims for vacatur of the award, but that it did have subject matter jurisdiction in respect of Gerling's other claims, and he rejected Noble's submission to dismiss for improper venue.

79. On Shell's motion to dismiss for want of personal jurisdiction he concluded that Gerling had not made out a prima facie case that the court had personal jurisdiction over Shell, but he considered it possible that after discovery Gerling might be able to establish personal jurisdiction, so the motion to dismiss was denied without prejudice, and Gerling was permitted limited jurisdictional discovery.

80. Gerling's motion for summary judgment was denied. In the course of his judgment he noted, at page 12, that whether Gerling's rescission claims were arbitrable and

whether they should have been submitted to the arbitration tribunal was not an issue then before him. Noble had withdrawn its request for an order requiring arbitration and had not moved for dismissal based on res judicata. He also noted, at page 14, that an arbitration clause which merely called for arbitration of "any dispute arising under this policy" was unquestionably a narrow one under the law of the Second Circuit; that, if reviewing a narrow clause, the court must determine whether the dispute was over an issue that was within the purview of the clause or over a collateral issue; and that, although the counts' captions indicated that the claims did not involve interpretation or performance of the contracts at issue, a closer examination of the facts alleged suggested that not all the claims could fairly be considered collateral. For example, the fraudulent misrepresentation count alleged that after the parties had entered into their contract Noble flouted its terms by issuing the certificate policy, and this might be arbitrable despite the narrowness of the clause.

Further arbitration

81. By a letter dated 10 November 2006, Noble gave notice to Gerling that it was commencing a new arbitration, essentially in respect of the issues raised in Gerling's complaint in the Vermont proceedings. The parties have sensibly agreed to take no further steps in that arbitration until 5 days after determination of the claimants' present application.

The temporary injunction

82. I granted a temporary injunction on two bases; first, that the proceedings in Vermont were brought in breach of an arbitration agreement mandating arbitration in London; and secondly, that the institution of the proceedings by Gerling constituted an abuse which this court had jurisdiction to restrain and should restrain. Mr Jacobs submitted that the injunction should be continued on both bases, but he presented his arguments in the reverse order, concentrating on the complaint of abuse. As he developed his argument, the main thrust of it was not that the proceedings instituted by Gerling are in the wrong tribunal, but rather that it has initiated them at all. If Gerling had sought to commence a second arbitration raising the matters which it has sought to advance in Vermont, the logic of Mr Jacobs' argument is that the second arbitration would have been a collateral attack on the previous award and an abuse of process.

83. Mr Lockey submitted that both bases of the application were ill-founded, and that, even if this court had jurisdiction to grant an anti-suit injunction in the present circumstances, it ought not to do so as a matter of discretion in view of the stage which the Vermont proceedings have reached.

Jurisdiction to grant an anti-suit injunction

84. There are many authorities on this subject.

85. In *Donohue v Armco* [2001] UKHL 64, [2002] I Lloyd's Rep 425, at para 19, Lord Bingham referred to the following principles identified by Lord Goff in *Societe Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] AC 871 at 892 as now beyond dispute:

> "(1) The jurisdiction is to be exercised when the ends of justice require it.
>
> (2) Where the court decides to grant an injunction restraining proceedings in a foreign court, its order is directed not against the foreign court but against the parties so proceeding or threatening to proceed.
>
> (3) An injunction will only be issued restraining a party who is amenable to the jurisdiction of the court, against whom an injunction will be an effective remedy.
>
> (4) Since such an order indirectly affects the foreign court, the jurisdiction is one which must be exercised with caution."

86. In *Glencore International AG v Exter Shipping Limited* [2002] EWCA Civ 528, [2002] 2 All ER (Comm) 1, Rix LJ stated the principles more fully as follows:

> "42. Thus the respondent to such an injunction has of course to be amenable to the territorial or personal jurisdiction of the English courts…If that is established, section 37(1) of the Supreme Court Act 1981, which enables the court to grant an injunction "in all cases in which it appears to the court to be just and convenient to do so", provides the essential power to grant an injunction to restrain the respondent from commencing or continuing proceedings in a foreign court. However, jurisprudence has limited the conditions under which such an injunction may be regarded as "just and convenient". The following conditions are necessary. First, the threatened conduct must be "unconscionable". It is only such conduct which founds the right, legal or equitable but here equitable, for the protection of which an injunction can be granted. What is unconscionable cannot and should not be defined exhaustively, but it includes conduct which is "oppressive or vexatious or which interferes with the due process of the court" (see the *South Carolina* case) [1986] 3 All ER 487 at 496, [1987] AC 24 at 41 per Lord Brandon of Oakbrook). The underlying principle is one of justice in support of the "ends of justice" (see the *SNI Aerospeciale* case [1987] 3 All ER 510 at 519, 520, [1987] AC 871 at 892, 893 per Lord Goff of Chieveley). It is analogous to "abuse of process"; it is related to matters would should affect a person's conscience (see *Turner v Grovit* [2002] 1 WLR 107 at para 24 per Lord Hobhouse of Woodborough). Secondly, to reflect the interests of comity and in recognition of the possibility that an

> injunction, although directed against the respondent personally, may be regarded as an (albeit indirect) interference in the foreign proceedings, an injunction must be necessary to protect the applicant's legitimate interest in English proceedings; he must be a party to litigation in this country at which the unconscionable conduct of the party to be restrained is directed, and so there must be a clear need to protect existing English proceedings ([2002] 1 WLR 107 at paras 27-28; the A*irbus Industrie* case). It follows that the forum for the litigation must be in England, but this, while a necessary, is not a sufficient condition.
>
> 43. While these are the conditions (and in this sense may be said to go to jurisdiction) for the grant of an anti-suit injunction, at a secondary stage, that of the exercise of discretion, these principles will be again respected. Thus for reasons again of comity, the court will always exercise caution before granting an injunction…Moreover, because the court is concerned with the ends of justice, the respondent will always be entitled to show why it would nevertheless be unjust for an injunction to be granted."

87. There is no doubt that Gerling, as a reinsurance company with a UK branch which has its principal place of business in London, is amenable to the jurisdiction of this court. Moreover the injunction is sought to protect Noble's (and ultimately Shell's) interest in English proceedings. This is the corollary of the fact that the whole object of the Vermont proceedings is to undo the finding of the arbitrators as to Gerling's obligation to indemnify Noble. I do not think that the fact that the award has been delivered, rather than is pending, weakens the position either on authority or in principle. As to authority, in the *Glencore* case the court observed, at para 68, that the issues sought to be raised by the respondents in another jurisdiction had to a large extent already been decided by the English court (and that, to the extent that the issues had not already been determined, they had been deliberately ducked in England when they ought properly to have been raised if the respondents wished to raise them). As to principle, a collateral attack on a binding judgment or award of a properly constituted tribunal is capable of being oppressive conduct at least as much as if the same proceedings had been commenced before the judgment or award had been given.

88. The remaining questions are whether in the circumstances of this case Gerling's conduct in instituting the Vermont proceedings is properly to be regarded as oppressive or vexatious or an abuse of process or unconscionable; and, if so, whether the court should exercise its discretion to grant an injunction, bearing in mind both the need for caution before granting such an injunction for reasons of comity and the court's perception of the requirements of the ends of justice.

89. The arguments ranged widely, but I will confine myself to what I consider the most important features.

90. I have examined the first two key features: (1) the interpretation of the award, and (2) the nature and foundation of the claims made in the Vermont proceedings.

91. The next key issue to which I return is the point made by Gerling, both in Vermont and on the present application, that it could not have raised its non-disclosure, misrepresentation and similar claims in the arbitration, since it did not have a misrepresentation claim until the award was issued and/or the arbitration was limited in its scope. Accordingly, Gerling submits, it is just that it should be able to advance those claims now. (Whether the appropriate forum is the Vermont court or a London arbitration is a distinct and subsidiary point.)

92. I am unimpressed by this argument for two separate reasons. The first flows directly from the two key issues already examined, namely the interpretation of the award and the nature of the claims being advanced. I repeat, without going back over the details, that all of the claims now sought to be advanced by Gerling are built on the foundation that the arbitrators found that the Gerling contract afforded coverage for OPL only by reason of the certificate policy, and that it was the combination of the issue of that policy and the finding of the arbitrators as to its effect which gave Gerling a right to rescind the contract. But in my judgment that is a false reading of the award. If my judgment is right in that respect, there is no foundation for the claims which Gerling seeks to advance.

93. Secondly, I reject the argument that Gerling could not have advanced its case on rescission in the arbitration. Mr Lockey submitted that the narrow scope of the arbitration confined it to issues of construction.

94. The first issue identified in the AAD for decision by the arbitrators was "whether the Gerling contract provides coverage for OPL". It is axiomatic that a rescinded contract does not provide coverage. It would have been open to Gerling to raise that point before the arbitrators, and, viewed objectively, it appears to have considered doing so, since in its points of defence it stated that it reserved the right to raise additional defences including, specifically, defences relating to misrepresentation or non-disclosure. At no point did Noble suggest that it would be outside the scope of the arbitration for Gerling to do so. As already described, Gerling elected to take the position that it did not suggest that the issue of the certificate policy was an abuse of Noble's position, nor did it seek to run a misrepresentation or non-disclosure case. It could have done so; it elected not to do so; and it now seeks to do the reverse.

95. In summary, this is a case of a London reinsurer, doing business on the London market, who has been held in arbitration proceedings under the Arbitration Act 1996 to have provided certain coverage to the reinsured, and who now attempts to nullify the result by bringing suit in another jurisdiction, founded on an assertion which is in my judgment contrary to the matters determined by the arbitrators. I consider that for a London reinsurer to proceed in that way against a reinsured is properly to be described as vexatious, oppressive, and an abuse of process and/or unconscionable. It is also objectionable that the reinsurer should seek in those proceedings to make allegations of misrepresentation, non-disclosure and bad faith, when it had the opportunity to make such allegations in the arbitration, but told the arbitrators on the contrary that it was not making a case of misrepresentation, non-disclosure or abusive behaviour.

96. It is equally objectionable that the reinsurer should seek to join in the proceedings the ultimate insured. No independent claim is made in those proceedings against Shell, but it was joined on the theory that, as Noble's parent, its legal position could be identified with that of Noble. Irrespective of the soundness of the theory, if they are to be treated as Siamese twins the objectionability of the proceedings against Noble applies with equal force in relation to Shell. I remain of the view which I expressed in granting the temporary injunction that "this is an attempt to reverse the effect of the arbitration award by a collateral attack joining an ultimate assured as well as the reinsured, and in so far as the attempt is an abuse against the reinsured, it is equally an abuse against an ultimate insured."

97. For those reasons I conclude that the court has jurisdiction of this case to grant an anti-suit injunction against Gerling on the application of both Noble and Shell, and it becomes a question of discretion whether the temporary injunction should be maintained.

98. Having arrived at that conclusion, the alternative question does not arise whether, if it were not objectionable in itself for Gerling to seek to bring what Judge Sessions referred to as its rescission claims, they should take the form of a fresh arbitration rather than litigation in Vermont. For those reasons I do not propose to go further into arguments about the proper law of the arbitration clause, because I now consider it unnecessary to do so in the context that there has been an arbitration which has, in my judgment, reached a determination inconsistent with the foundation of the claims now sought to be advanced.

Discretion

99. I have found this the hardest issue. Against the grant of an injunction a number of points can be made.

100. There are the general points about the need for caution and respect for comity. There is also the fact, properly stressed by Mr Lockey, that the Vermont proceedings have been continuing since April 2006. During the intervening months, the parties have spent a lot of time and money on the proceedings. The court has also been heavily involved. Although an injunction is directed at the respondent personally, a decision to grant it may have the appearance of interference in the affairs of the other court, especially in circumstances where the other court has already devoted considerable time to considering issues in the action.

101. It is also for consideration whether this court might best serve the ends of justice by steps intended to assist the Vermont court rather than by an anti-suit injunction. As I have previously noted, Judge Sessions said in his first judgment that "If Noble obtained a judgment in another court confirming the award, it could rely on the doctrines of res judicata and collateral estoppel to prevent Gerling from proceeding with its claims here." It would be perfectly proper for this court to make summary declaratory judgments as to the interpretation, scope and validity of the award. In effect, I have already done so in this judgment after hearing due argument on both sides. I have concluded that the arbitrators found that there was coverage for OPL under the Gerling Contract by reason of endorsement 18, regardless of the certificate policy, as well as by reason of the certificate policy. I have found that it was open to Gerling to advance assertions of misrepresentation and non-disclosure by way of

defence in the arbitration and that Gerling ought to have done so if it wished to rely on such matters. Such conclusions could properly be put into the form of a declaratory judgment.

102. Judge Sessions has already concluded that Gerling's claims did not pass the test of being likely to succeed on the merits or even raising sufficiently serious questions going to the merits to make them a fair ground for litigation, because of the probability that they are defeated by the doctrine of res judicata.

103. A declaration of this court declaring the scope and affirming the validity of the award would provide a further foundation on which Noble and Shell would be entitled to rely. It could, as Judge Sessions indicated, provide a platform not only for res judicata but also for collateral estoppel.

104. As to the latter, Judge Sessions in his first judgment thought that collateral estoppel was likely to be inappropriate because of ambiguity in the award and because of an absence of identity of issue in the subject matter of the arbitration and the subject matter of the Vermont proceedings. A declaratory judgment of this court as to the scope of the award would meet both points. It would meet the first point by providing a judicial determination as to the scope and effect of the award. It would likewise meet the second point because it would deal with the issue which lies at the foundation of the Vermont proceedings, i.e. whether "the Panel's ruling in Noble's favor was exclusively predicated on the post-loss issuance of the certificate policy", as alleged in paragraph 45 of Gerling's complaint. If I have jurisdiction to grant an injunction, I must have jurisdiction in the alternative to grant declaratory relief if I consider it just and convenient to do so.

105. In his second judgment Judge Sessions noted that Noble had not moved for dismissal based upon res judicata. Armed with a declaratory judgment of this court, it would be in a position to move for dismissal based upon res judicata and/or collateral estoppel.

106. These are weighty considerations.

107. On the other side, it was argued with force by Mr Jacobs that Noble and Shell had been put to substantial expense and inconvenience in Vermont by reason of the vexatious conduct of Gerling. The issue of the Vermont proceedings placed them in a dilemma how to proceed, for such conduct by a London insurer or reinsurer after the issue of an arbitration award against it is unprecedented so far as counsel have been able to discover. Noble and Shell have understandably been careful not to take any step in the Vermont proceedings which could be construed as a submission to the jurisdiction. In the circumstances, they cannot be said to have been tardy in making the present application, and, if I am satisfied (as I am) that the proceedings in Vermont are vexatious and oppressive, I ought to grant the appropriate injunction.

108. Mr Lockey submitted that for this court to do so would be to take on the role of the world's judicial policeman. That is an exaggeration. The court would be performing a much more modest role set in the context of the London insurance market and the process of arbitration under the Arbitration Act 1996. The London insurance and reinsurance market serves insureds across the world. Parties frequently elect for dispute resolution in London, as the present parties did in relation to the matters which they referred to the arbitrators. They do so in the expectation that the insurers

will respect the result. For this court to use its powers in support of that process in the interests of justice is not in my view exorbitant.

109. However, on balance I have concluded in the exercise of my discretion that at this stage of proceedings the ends of justice will be sufficiently served if I grant relief in declaratory rather than injunctive form. I will invite counsel's submissions as to the appropriate wording.