England and Wales High Court (Commercial Court) Decisions

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Case No: 2003 FOLIO NO 429

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

Royal Courts of Justice
Strand, London, WC2A 2LL
13/03/2006

B e f o r e :

MR JUSTICE COLMAN

Between:

BP Plc	**Claimant**
- and -	
AON Limited **Aon Risk Services of Texas Inc**	**Defendant**

Mr A Popplewell QC, Mr R Masefield and Mr F Pilbrow
(instructed by Herbert Smith) for the Claimant
Mr George Leggatt QC, Mr T Weitzman QC and Mr P Ratcliffe
(instructed by Simmons & Simmons) for the Defendants
Hearing dates: 17 October to 20 December 2005

HTML VERSION OF JUDGMENT

Mr Justice Colman:

Introduction

1. This is a claim for damages in tort against the First Defendant, referred to in this judgment as "Aon London". It is brought by BP on its own behalf and on behalf of (28) co-insureds in respect of the placement and operation by Aon London of a Global Construction All Risks Open Cover agreement ("the Open Cover"). The co-insureds were of three categories: (i) affiliates of BP, (ii) international oil and gas companies which were co-venturers with BP or its affiliates, and (iii) project contractors. The purpose of the Open Cover was insured on an all risks basis in respect of physical loss and damage to the property of BP and/or its co-assured involved in oil and gas construction projects throughout the world. That part of the Open Cover in respect of offshore projects, with which this claim is concerned, took effect from 23.59 on 31 December 1998 and terminated on 1 July 2000 at 00.01 GMT. In order to obtain cover in respect of any such project that project had to be declared to the underwriters under the Open Cover.

2. Some 30 projects were declared to the leading underwriters, Swiss Re and AIG. BP had no interest in the relevant loss or damage to project property which forms the basis of these claims. The losses were sustained by BP affiliates and joint venture partners in the projects or by contractors or sub-contractors whose losses were passed on directly or indirectly to BP's affiliates or the joint venturers. Whether a particular joint venturer was covered depended upon whether it chose to avail itself of the facility offered by BP's Open Cover. The extension of cover to particular contractors was usually the consequence of effect being given by project participants to contracts to procure cover for such contractors. BP affiliates have taken assignments of various claims of contractors and sub-contractors involved in projects that have been declared.

3. In order to explain how the claims now advanced arise it is necessary to set out, at this stage in

outline, the unusual history of the Open Cover and the ensuing litigation in relation to it.

4. The initial negotiations for the Open Cover did not involve BP. They took place in the latter part of 1998 and involved Amoco, Aon and the European and London markets, including certain Lloyd's syndicates, as well as the American market. The European and London Leaders were Swiss Re and the American Leaders were AIG. Aon became involved as placing brokers by having taken part in and won a tender process competition conducted amongst American brokers by Amoco. By a Broker Letter of Record dated 29 July 1998 Amoco confirmed that, with immediate effect, it had appointed Aon Risk Services Inc, its exclusive insurance broker for its Global Onshore and Offshore Construction Program. However, Aon Risk Services Inc was a non-existent entity in the sense that there was no separate corporation of that name. The Aon Group had many offices and included various separate corporations throughout the United States and abroad and, although "Aon Risk Services" was often used in correspondence to refer to different broking offices, there was no corporation of that name. The earlier stages of the negotiations between Amoco and Aon were handled by Mr Burke of Aon Risk Services of Texas Inc based in Houston, to which I shall refer as "Aon Texas", and Mr Cahill of Aon Risk Services Inc of Connecticut. Less directly involved was Roger Backhouse of Aon Group Ltd, which was incorporated in London and which in 2000 changed its name to Aon Ltd - the first defendant. In the course of the evidence it emerged, as I accept, that Aon personnel drawn from different Aon offices and employed by different companies in the Aon Group cooperated to produce the presentations to Amoco directed to winning the Global Cover brokership appointment.

5. By 20 July 1998 Amoco and Aon had agreed to the fee structure applicable for Aon's services as brokers. This structure was divided between remuneration for the "implementation" of the Global Construction Programme, which related to the wording and placement of the Open Cover and a percentage fee per project of 6.25 per cent of the gross premium of each project declared to the Open Cover. The fee structure thus reflected the two main aspects of Aon's function of placing brokers, namely the placing of the Open Cover but limited to a maximum free of US$75,000 per project itself and the making of the declarations to underwriters in respect of each project for which Amoco sought cover.

6. As to the placing function, on 28 July 1998 Mr Tentinger of Aon Texas sent a draft slip to Mr Canning of Amoco. This was then further discussed by email between Mr Canning and other Amoco representatives, Mr Burke, Mr Young and Mr Tentinger of Aon Texas, in Houston, and Mr Cahill of Aon Connecticut. There was then prepared a presentation document for the purpose of being shown to underwriters. It set out both the slip wording and the policy wording and was stated to have been prepared by Aon Natural Resources, Houston. It was sent to Aon London on 11 August 1998 for presentation to the London and European market. "Aon Natural Resources" was not a corporate entity within the Aon Group, but rather a convenient description of a group of employees drawn from various Aon companies who had experience in natural resources insurance.

7. The first presentation to Swiss Re in Zurich was by Aon London on 13 August 1998. Mr Brewer

and Ms Humfrey of Aon London then referred back to Mr Tentinger in Houston a number of proposals raised by Swiss Re who had tentatively expressed willingness to lead the Open Cover with a 20 per cent line. Aon Texas then replied to Aon London who passed on the reply to Swiss Re. In the event on 18 August Swiss Re agreed to a 15 per cent line and on 19 August they sent to Aon London a signed slip and wording.

8. In the course of the period from 19 August to 11 November 1998 Aon succeeded in placing 100 per cent of the Open Cover except that the Copping Syndicate and the Cox Syndicate only accepted a line on the offshore section for 12 months. Well over half the risk had been placed by Aon London on the London and European Markets. The placing of the 20 per cent line with AIG as leader of the American Market was managed by Mr Cahill of Aon Connecticut. Mr Tentinger of Aon Texas was working in parallel with him in liaising with Amoco with regard to the placement exercise.

9. In the meantime two developments were in progress which were to have an important bearing on the issues in this case.

10. On 11 August 1998 an official announcement was made of a proposed merger between Amoco and BP, the new company to be known as BP Amoco plc and to have its head office in London. On 8 November 1998 it was formally announced that the merger would take effect on 31 December 1998. Whereas hitherto Mr Siebenaler of Amoco based in Chicago had alone been in charge of the management of the Open Cover placement for Amoco, the centre of gravity of corporate management, including that relating to insurance services, began to shift to London and in particular to BP's Insurance Department where Mr Colin Wannell had overall management responsibility for integration of insurance and risk management following the merger. Immediately following the merger the question arose whether the merged company should utilise the Open Cover to provide insurance relating to projects which were operated or to be operated by BP, its affiliates or joint venturers but as to which Amoco had previously had no interest. By 14 January 1999 in the course of discussions between the insurance offices of the former Amoco in Chicago and the former BP in London it was decided that the Open Cover should be utilised if possible for BP "heritage" projects and that it would be necessary to approach underwriters to obtain their consent. Mr Wannell, however, made it clear that for this purpose BP wished to deal with the underwriters through Aon London as they already had a good working relationship with Aon London personnel, including in particular with Mr Mike Wilks who had for some time been BP's designated account executive at Aon London. Aon Texas indicated its willingness to accept this request. BP was anxious to proceed as quickly as possible with application of the Open Cover. They had in mind to obtain cover for three projects – the Schiehallion Heat Exchanger project and, less urgently, the West Delta and Bruce Booster Compression projects. Mr Siebenaler approached Aon Texas to obtain underwriters' consent to extend the Open Cover to BP heritage projects. By 22 January 1999 Aon New York had obtained AIG's agreement. In the meantime, Aon London were in the process of obtaining the consent of the London and European underwriters. By 2 February 1999 Swiss Re and the following market had formally accepted that BP heritage projects could be declared to the Open Cover and on 29 January 1999 Aon London

sent the first declaration for Schiehallion to Swiss Re.

11. The manner in which the operation of the Open Cover was to be undertaken by Aon had been the subject of internal discussion at Aon in late January 1999 and it had been agreed by 26 January that Aon London would handle declarations to the Open Cover emanating from BP's office in London. Declarations from the BP Amoco Chicago office would be handled by Mr Cahill and/or Aon Illinois, using the Houston office of Aon Texas as and when required. This was to be subject to BP's approval. Eventually, by 19 March 1999 there was agreement at Aon as to how declarations would be handled. Projects emanating from the BP Chicago Office would be handled at the outset by Aon Houston and then be sent on by them to Aon Chicago who would then declare to AIG "and other applicable US leaders" and to Aon London who would then declare to Swiss Re "and other applicable leaders" and then confirm to Aon Chicago that the agreed declaration had been made. Aon Chicago would then confirm to BP Chicago office that the declaration had been bound and issue documentation and an invoice. As to projects emanating from BP's London office, BP would send the information to Aon London who would then review it, set up the declaration and declare the project to Swiss Re "and other applicable leaders" in the London and European markets and send on the declaration to Aon Chicago who would declare the project to AIG "and other applicable US leaders" and confirm that declaration to Aon London. The latter would then confirm to BP's London office that the declaration was bound and issue an invoice and documentation. The reference to declarations being made to the "applicable leaders" had been the subject of some discussion at Aon. In the course of a telephone conference on 19 March 1999 between Aon personnel from Aon Illinois, Aon Texas and Aon London, the London office had stated that "only Swiss Re and AIG need to be declared (not the entire slip)". This was to become a matter of major importance in the development of the present litigation. Thereafter both BP and Aon proceeded on the basis that declarations to the Open Cover need only be made to the leaders and need not be made to the following market. It is now accepted by Aon London that this was not correct and that the Leading Underwriter clause in the policy wording as placed did not permit declarations to be made in this way: there had to be a separate declaration to each underwriter.

12. Alongside the development of an agreed procedure for declarations there was internal agreement as to how the fees for the placing and operation of the Open Cover were to be divided internally at Aon. The fee income from declarations was to be divided 50/50 between Aon offices in America and Aon London. This allocation of fees was a matter of internal accounting and was not the subject of agreement between BP and any member of the Aon Group.

13. The second important development was the negotiation and conclusion of a Service Agreement. This was in substance a broker's agreement which set out the terms upon which Aon were to act as brokers for the placement, administration operation and claims recovery under the Open Cover. This included the fees to be earned, divided into an implementation fee for placing the Open Cover and a fee for each project declared. The negotiations were conducted during the period from 1 July 1998 to 16 October 1998 between Mr Burke of Aon Texas and Mr Canning (under the management of Mr Siebenaler) of Amoco's Risk Management and Insurance

Department in Chicago. The draft agreement, arrived at by email on the latter date, was expressed to be between Amoco Corporation and Aon Risk Services of Texas, Inc. The Agreement was to run for three years from 1 July 1998 with an option to extend it for a further two years. The services to be provided by Aon Texas as identified in Exhibit A were a comprehensive list of all that would need to be done by Aon as brokers for the placing of the Open Cover and for its operation, particularly the making of declarations to the underwriters of particular projects.

14. Although the wording of the Service Agreement had been agreed by 16 October 1998, it was not executed in hard copy form until 19 April 1999. By that time the Open Cover had been fully placed and the first three declarations had been made to it. Further, the BP Amoco merger had taken place. The need for signature of the agreement seems to have been overlooked both by Aon and by BP's Chicago office. The parties appear to have proceeded on the basis that the terms of the Service Agreement, notably the fee structure, were binding as from 16 October 1998. Although the merger between BP and Amoco had taken effect on 31 December 1998, the Service Agreement as signed was expressed to have been entered into between Aon and Amoco. Nothing turns on this. Nor does anything turn on the evidence of Mr Wannell of BP's London office that he could not recall being aware of the Service Agreement in February 1999 and that it may be that it was not until as late as 2004 that a copy of this Agreement was received by BP London. Given that, by the time when the material events occurred in 2000, BP Amoco was dealing with Aon as a single, merged corporate entity, the knowledge of Mr Siebenaler, Mr Mitilier and Mr Canning in 1999 as to the existence of the concluded Service Agreement was that of BP as a whole.

15. Of the 30 projects purportedly declared to the Open Cover by 30 June 2000, 4 were withdrawn by agreement with underwriters in October 2000 and 14 expired without loss. The remaining 12 projects have given rise to claims of the order of US$220 million. Of these 12 the declarations by Aon in respect of 4 projects were made prior to 1 July 2000 to the leading underwriters and to some but, not all, of the following market. In relation to the other eight projects the declarations prior to 1 July 2000 were made only to the leaders.

16. The sequence of purported declarations was remarkably uneven. Only 4 projects having been declared in 1999 and another 4 up to 26 April 2000, there were then 22 declarations between 4 May and 29 June 2000. The explanation for this is as follows.

17. When in 1998 the rates for the Open Cover were negotiated with underwriters the market was relatively soft. However, in the course of the following 18 months the market hardened considerably. Thus, in the course of the period from September 1999 there was much discussion between representatives of BP and Aon respectively as to the course which ought to be taken to maximise to BP's advantage the relatively low rates available under the Open Cover before it expired at the end of June 2000. It was decided at a meeting in London between Mr Siebenaler and Mr Wannell and others from BP and Mr Helfert (Aon Illinois) Mr Tentinger (Aon Texas) and members of Aon London that Aon should attempt to negotiate with underwriters the cancellation of the Open Cover and its re-writing on terms acceptable to BP but more beneficial to the

underwriters than the terms of the existing Open Cover. However, by 15 March 2000 it had become apparent to Aon that it would be difficult if not impossible to get sufficient support from the market for the cancel and re-write plan. Mr Siebenaler of BP then discussed the insurance prospects with those companies leading projects in the Gulf of Mexico and concluded that the most economic course would be for BP to declare as many as possible eligible projects under the Open Cover before expiry on June 2000. By that means some US$13 million in premium was likely to be saved. It was against this background that the final rush of purported declarations in May/June 2000 took place.

18. Some of the underwriters objected to the cascade of last minute declarations. They queried many of the declarations on the grounds that no property was on risk prior to the expiry of the Open Cover. They also sought to rely on misrepresentation and non-disclosure.

19. By a Settlement Agreement concluded in October 2000 between BP, Swiss Re and AIG those leaders agreed to accept declarations 8 to 26 as having been validly made to them, but in relation to three of them, this was subject to an increased premium and increased deductibles and was also subject to BP's withdrawal of four projects, 27 to 30.

20. Although Aon persuaded some participants in the following market to enter into the October 2000 Agreement, it was unable to persuade 41.66 per cent of the London following market to do so. It is convenient to refer to these participants as "the Frankona Defendants", ERC Frankona Reinsurance Ltd, subsequently called G E Frankona Reinsurance Ltd, having a 2.5 per cent line. There were in addition QBE International Insurance Ltd and International Insurance Company of Hannover Ltd, together with the following six Lloyd's Syndicates: Cotesworth (1688), Cox (1208), Euclidian (1243), MV Howell (1093), Upton (187) and Spinney (1308).

21. The Frankona Defendants, represented by Norton Rose, initially relied both on the eligibility points and on misrepresentation and non-disclosure. By the autumn of 2001 negotiations had got nowhere and on 21 September 2001 BP commenced proceedings for declaratory relief. The Frankona Defendants served a defence relying mainly on the project ineligibility and misrepresentation points. However, in October 2002 in a draft Amended Defence they raised for the first time the point that declarations had not been made to particular underwriters. On 19 November 2002, having obtained permission to amend from Toulson J. at a pre-trial review on 15 November, the Frankona Defendants served their formal Amended Defence. An order for the trial of preliminary issues was also made on that occasion. Included amongst those issues was the following:

> "Was it necessary for the declaration to be presented by the Claimant or its agent Aon to each of the First to Ninth Defendants during the period of Open Cover or presented to the Leader alone during the period of the Open Cover, or was it not necessary for it to be presented to any of the Defendants during the period of the Open Cover?"

22. The issue of avoidance for misrepresentation and/or non-disclosure was not included in the preliminary issues.

23. By its letter of 14 November 2002 to Herbert Smith on behalf of BP, Aon Law Division agreed to be bound by the court's decision on the preliminary issues as then defined.

24. The trial of the preliminary issues was heard by Cresswell J. and judgment was given on 27 February 2003. For present purposes the key conclusions were that for there to be a valid declaration to a particular insurer it had to be made specifically to that insurer, as distinct from the leading underwriter, and it had to be made within the period of the Open Cover, that is by 30 June 2000. It followed that in relation to three out of the four test project declarations, none of the Frankona Defendants were bound by them and in relation to a fourth project only some of the Frankona Defendants were bound by it. On the project eligibility issue BP was largely successful.

25. On 10 July 2003 BP entered into a settlement agreement with the Frankona Defendants expressed in a Consent Order. The Frankona Defendants accepted that all those declarations made to them individually before the Open Cover expired were valid, thereby abandoning the non-disclosure and eligibility issues and BP and its co-assureds accepted that those declarations that had not been presented to an individual insurer before the expiry of the Open Cover period were invalid. Each side bore its own costs.

26. However, that was not the end of the litigation for, notwithstanding the October 2000 settlement, the other insurers – Swiss Re, AIG, Aegis, ACE and Axa – had re-opened their points as to the validity of the declarations and AIG and Aegis had on 9 December 2002 commenced proceedings against BP in New York. They gave notice to BP that they avoided all 26 declarations. On 6 May 2003 BP commenced a second claim in London against AIG, Swiss Re, Aegis, Axa and Ace and in August 2003 issued an application for summary declaratory judgment on the basis of the decision of Cresswell J. on the matters of construction before him. AIG and AEGIS also applied for a stay of BP's claim on the grounds of the pending New York proceedings. On 27 February 2004 I dismissed both applications.

27. In the meantime, following the judgment of Cresswell J., Herbert Smith, on behalf of BP, by their letter to Aon Law of 4 March 2003 had invited Aon to name the proper defendant in the Aon Group to be sued in the Frankona proceedings. On 15 April 2003 Simmons & Simmons, who had very recently been instructed by Aon Law, informed Herbert Smith that Aon London was the correct Aon defendant company.

28. On 11 June 2004 Herbert Smith confirmed to Simmons & Simmons BP's intention to join Aon London in the second London action and to include a claim against it arising out of its failure to make declarations to the Frankona defendants as well as to raise a claim against Aon should it fail to recover against the existing defendants in the second London action. Observing that AIG's evidence in the summary judgment application proceedings suggested that Aon Illinois, Aon

Texas, Aon New York and Aon Connecticut were also required to be joined, they invited Simmons & Simmons to confirm that they agreed that those companies were proper defendants in respect of the activities of Aon in the United States and, if so, whether they would submit to the jurisdiction.

29. On 6 July 2004 Simmons & Simmons replied that, without seeing BP's draft pleading, it was difficult to identify the relevant Aon company but they drew attention to the fact that the relevant contract of retainer was that with Aon Texas and that subject to further investigations their preliminary view was that the proper Aon defendant was Aon Texas and that the view expressed in their letter of 15 April 2003 that Aon London was the proper defendant might be incorrect. BP thereupon immediately applied to join the Aon defendants. On 12 July 2004 they obtained permission to serve outside the jurisdiction. Aon challenged the joinder and the jurisdiction of this court. That challenge was settled by means of a consent order made on 30 September 2004 under which both Aon and BP agreed that 19 August 2004 should be deemed for limitation purposes to be the date when proceedings were commenced against Aon and Aon withdrew its challenge on the grounds of joinder and jurisdiction. The second London action therefore comprised claims under the Open Cover against AIG, Swiss Re, AEGIS, ACE and Axa and claims against the Aon defendants for breach of their duty as BP's brokers for an indemnity if and to the extent that BP could not recover from those insurers and/or were obliged to repay to those insurers monies already received from them and further for an indemnity against Aon London to the extent that BP and its co-insureds were not insured by the Frankona Defendants or any of them by reason of Aon London's failure to make declarations to those defendants within the period of the Open Cover and/or for damages and/or in respect of costs which were incurred by BP in pursuing the Frankona action but which it did not recover from the Frankona Defendants. There was also a claim against Aon London, Aon Illinois and/or Aon Texas for an indemnity in respect of the Canyon Express project where additional premium had been paid for additional coverage.

30. On 10 November 2004 the New York proceedings were stayed. During the period 10 December 2004 to 10 August 2005 each of the first five defendants – AIG (by then called National Union Fire Insurance Company of Pittsburgh PA), Swiss Re, AEGIS, Ace and Axa – had reached settlement agreements with BP and the second London action against them had been stayed. BP in consequence abandoned its claim for an indemnity and/or damages against the Aon Defendants in respect of any shortfall in recovery against those insurers. That left alive BP's claim for the shortfall in its recovery against the Frankona Defendants, due to the failure to declare projects to each of those Defendants within the period of the Open Cover, together with the costs of the Frankona action.

31. Although BP had initially based all its claims against the Aon Defendants on the allegation that they were in breach of a contractual duty to exercise reasonable skill and care in providing broking services, in particular the making of timely declarations under the Open Cover and had for this purpose relied in part on the Service Agreement with Aon Texas, in February 2005 BP abandoned all claims for breach of contract against all Aon Defendants and substituted claims

against them in tort. However, with the abandonment of the claims against the first five defendants in July 2005, there ceased to be a claim against Aon Texas, there being no available claim against that defendant in respect of the Frankona Defendants. However, BP, by an application to re-amend issued some weeks before the start of the trial and argued in the course of the trial, sought to substitute a claim against Aon Texas for an indemnity in respect of the failure to make the declarations to the Frankona Defendants under clause 12 of the Service Agreement. That application was refused for reasons given in my judgment dated 16 November 2005. Thereupon there were no outstanding claims in these proceedings against Aon Texas and the only Aon company subject to claims in respect of failure to make timely declarations to the Frankona Defendants was and remains Aon London. Having regard to the undertakings given to the court on behalf of Aon Texas and accepted by me in the course of the hearing of that application it will be open to BP, should it choose to do so, to commence proceedings against Aon Texas in the courts of the State of Illinois, that being the venue indicated in the non-exclusive jurisdiction clause in the Service Agreement, but subject to all parties to such proceedings being bound by all decisions on issues of fact and law made in these proceedings, even if such decision did not give rise to an issue estoppel in English or Illinois Law. Aon Texas has remained a party to these proceedings for the purpose of binding it to such decisions. The result of this is that, if BP commences proceedings against Aon Texas claiming a contractual indemnity under the Service Agreement, both parties will be bound by this judgment in so far as it decides relevant matters of fact and law, leaving it to the Illinois courts to decide any further relevant matters of fact or law and in particular the question whether the claim against Aon Texas is time-barred.

32. Against that background the claim now advanced by BP and the other claimants and the defences raised to it can be outlined as follows.

BP's Claims and Aon London's Defences

Duty of Care

33. BP allege that having regard to the circumstances in which it came to act as brokers or sub-brokers for BP, Aon London assumed a responsibility to BP to exercise reasonable skill and care in performing the services which it undertook to carry out as brokers or sub-brokers, in particular in performing BP's instructions. When once instructed by BP that it wished to declare a particular project to the Open Cover, Aon's duty was to effect within the period required under the Open Cover declarations of that project to each of the subscribing underwriters containing such information as was required by the terms of the Open Cover.

34. To the extent that BP instructed Aon London to obtain coverage for third parties under the Open Cover including those co-assureds referred to in Schedule 1 of the Re-Amended Particulars of Claim in the Frankona action, Aon London owed to those co-assureds a similar duty to exercise reasonable care and skill in obtaining and maintaining coverage.

35. Having regard (i) to the judgment of Cresswell J. in the Frankona action, in order for a contract of insurance to be created under the Open Cover in respect of a given project, a declaration in respect of that project had to be delivered to each underwriter on or before 30 June 2000 (prior to expiry of the period of the Open Cover) and (ii) to the fact that by the letter dated 14 November 2002 Aon London agreed to be bound by the outcome of the trial of preliminary issues before Cresswell J., Aon London were negligent in failing to make declarations in respect of certain projects to certain of the Frankona Defendants having been instructed to declare each of them in sufficient time to have made the declarations to each of the underwriters concerned.

36. As a result of Aon London's negligence BP has suffered loss and damage in as much as it has been unable to recover the full value of the claims in respect of the projects which should have been declared. The Frankona action having been settled by BP on terms of no order as to costs, since Aon London's negligence exposed BP to the risk of litigation, it is entitled to recover its costs from Aon London.

37. If any of the contractors or other BP entities or co-venturers are unable to recover in respect of projects the subject of declarations and to the extent BP and/or those it represents are consequently in breach of contract to the contractors on such projects, in particular in breach of obligations to procure and maintain construction all risks insurance for the benefit of the contractors, BP and/or those it represents will suffer loss and damage to the extent of their liability to those contractors which will be equivalent to the recovery which the contractors would have been entitled to make under the Open Cover if the declarations had been made in time to each underwriter.

38. Aon London's response is as follows.

39. It is denied that Aon London owed any duty of care with regard to the performance of brokerage services. This results from the whole of the circumstances surrounding the appointment of Aon to obtain cover for Amoco's business throughout the world and then to operate the cover. There was a common assumption that this placing operation would involve Aon's worldwide resources, involving placing the risk in the United States, London and Europe. The cover would then be managed and administered by a team of Aon personnel from various corporate entities in the Aon Group but who were experienced in construction all risks insurance in the energy industry. The parties gave a contractual structure to their relationship by agreeing the terms of the Service Agreement in July/October 1998 and formally entering into it in April 1999. That Agreement was intended by both parties to cover all relevant aspects of Aon's broking operations wherever conducted and by whichever Aon company they were carried out throughout the period of the Agreement, beginning in July 1998 as soon as Aon was selected. For the purpose of consolidating the rights and duties of the various Aon entities likely to be involved Aon Texas was selected as the "carrier" corporation. It was to be solely entitled to receive payment for Aon's services and it was to be solely responsible for the performance of Aon's duties no matter which individuals or corporations in the group carried out the various functions. Further, the Agreement imposed on Aon Texas a standard of care higher than the ordinary common law standard (that to

be ordinarily expected from a member of the profession) by the following provision (clause 4):

> "Aon Risk Services will provide the services and responsibilities listed and described in Exhibit A to AMOCO as and when reasonably required by AMOCO ("Services"). Additionally, Aon Risk Services shall perform the Services in accordance with broker and risk management standards for companies similar to AMOCO."

40. The Agreement also subjected Aon to express indemnity obligations by the following term (clause 12):

> "Aon Risk Services agrees to hold Amoco and its affiliates harmless against all liabilities, demands, damages, expenses or losses arising from any third party claim related to the Services and Aon Risk Services performance of the Services.
>
> Aon Risk Services hereby agrees to indemnify AMOCO against all loss, damage, costs and other expenses of any nature whatsoever incurred or suffered by AMOCO, its directors, officers and employees or by a third party as a result of any and all representations, statements, tortuous (sic) acts or omissions including negligence or breaches of obligations arising under or in connection with this Agreement by Aon Risk Services to a maximum amount of Aon Risk Services remuneration noted in Clause 6 above except in the case of third parties where Aon Risk Services will be liable for all loss, damage, injury or death to the full extent of their negligence or fault."

41. It further included an Illinois choice of law and exclusive jurisdiction clause (clause 13):

42. This was particularly significant given that it was envisaged that Aon's broking functions were inevitably going to be performed in several jurisdictions having regard to the fact that the Open Cover would be placed in London and Europe as well as the United States and that declarations would also have to be made in several jurisdictions. The effect of clause 13 would thus be to avoid exposure of either party to diverse systems of law and jurisdiction for the determination of disputes relating to the same project/declaration and therefore to the risk of the imposition of diverse standards of care.

43. Against this background Aon submits that there was no assumption of responsibility by Aon London to BP or any of its subsidiaries, because all its activities were carried out pursuant to the contractual framework of the Service Agreement. That Agreement was negotiated between two large and sophisticated commercial organisations with their own in-house legal departments and in the course of negotiations the Agreement went through several drafts. In this connection, whereas by early drafts the Agreement had been expressed to be with "Aon Risk Services Inc and its affiliates worldwide", by its draft of 24 July 1998 Amoco had deleted the reference to

"affiliates" and Aon had by reply inserted "Aon Risk Services of Texas Inc", thereby providing the name of a real corporate entity, which Aon Risk Services Inc was not.

44. Aon further emphasises that even after the Amoco/BP merger and the consequent preference of BP London to have direct dealings with Aon London it was never suggested that Aon London should be made a party to the Service Agreement which had still to be executed.

45. It is further submitted that the consolidation of the rights and obligations of the parties in the Service Agreement with one "carrier" corporation was of advantage to both parties. BP did not need to be concerned with the corporate position in the Aon Group of those who were providing broking services or in the solvency of Aon corporate entities. Under clause 10.2 it was provided as follows:

> "Aon Risk Services shall effect and maintain in force public liability/workers' compensation/professional liability insurance with reputable insurers throughout this Agreement to cover all claims that may at any time be made in respect of or arising out of the Services."

46. Further, BP's obligation to pay for Aon's broking services was to be discharged by paying a single entity in the Aon Group (Aon Texas) without incurring liability even to a company which played a significant part in the placing of the risk or the making of declarations.

47. Aon draws particular attention to clause 12 of the Service Agreement quoted at paragraph 40 above and submits that any reasonable businessman in the position of BP/Amoco would have regarded that term as setting out an exclusive remedy regime applicable if any liability or loss were caused by negligence or fault in performance of the Agreement by Aon no matter which employee or corporate entity was responsible. That understanding would embrace appreciation that the only compensatory regime would be subject to the cap in the second paragraph – "to a maximum amount of Aon Risk Services remuneration noted in Clause 6" – with regard to loss suffered by any BP company, its directors, officers and employees but not with regard to loss suffered by a "third party", that is a party outside BP and its affiliates, such as a co-venturer or a contractor. The reference in the second paragraph to "Amoco" included its affiliates and therefore BP's affiliates since the common intention could not be to confine it to the Amoco holding company, given that, according to the evidence, companies participating in a project such as an oil/gas field would normally be an operating company (affiliate) and not the holding company of an oil and gas group such as BP. Equally the directors, officers or employees who might suffer loss attributable to the representations, statements, tortious acts or omissions or breaches of obligations arising under or in connection with the Service Agreement would be more likely to be those working for an operating company and not for the BP/Amoco holding company. Moreover, BP would be more ready to accept a cap on the indemnity to itself and its own subsidiaries than on the indemnity to "third parties" comprising co-venturers and contractors outside the BP Group.

48. Aon submit that the same construction of clause 12 is arrived at whether one applies English or Illinois rules of construction. Those Illinois rules are examined later in this judgment. Moreover, the indemnity and its cap expressly relate to Aon's tortious as well as its contractual liability.

49. Aon concedes that in carrying out broking services under the Service Agreement it was negligent in two relevant aspects:

    i) failure to draft the Leading Underwriter endorsement so as to achieve the intended effect that declarations made to leading underwriters would be binding on the following market and

    ii) mistakenly believing that the Leading Underwriter endorsement had the intended effect that declarations to the leaders bound the following market.

50. The Leading Underwriter Endorsement was in these terms:

> "Furthermore, it is understood and agreed that all Underwriters subscribing hereto will be subject to all terms, clauses, credits, allowances and wording as agreed by the Leading Underwriters (AIG, Swiss Re and Aegis Insurance Services) and it is agreed to follow automatically all additions and/or deletions and/or amendments and/or alterations of any description whatsoever therein, Underwriters hereon waiving advice hereunder and also to follow all claim settlements made by the Leading Underwriters of this Policy (No. EL9801152) without exception."

51. Aon contends that the omission to make declarations to the following market was not additional negligent conduct but was the natural consequence of the mistaken understanding.

52. Starting from that basis, Aon submit that BP has not established that it relied on Aon London's assumption of responsibility in any relevant respect. In particular, BP had not established that they relied on an assumption of responsibility by Aon London in respect of the drafting and interpretation of the Leading Underwriter Endorsement. According to the evidence of Mr Siebenaler of Amoco, who was responsible for dealing with Aon at the time of the drafting of the Endorsement, he did not know who in the Aon organisation was responsible for preparing the policy wording. Nor did it matter to him where that person was. Even if, contrary to Aon's case, it was necessary to investigate whether there had been reliance by BP on an assumption of responsibility by Aon London in respect of the making of declarations, no such reliance could be established. Mr Siebenaler's evidence was that he was not concerned with the mechanics of how Aon dealt with the insurers under the Open Cover or which part of the Aon organisation carried out the operation of bringing the risks to the market, albeit he did know that the Aon office in London would be going to the market to make declarations. However, he was not concerned with which Aon carried out particular functions for the purposes of the Open Cover. He relied on Aon as a global organisation. Mr Wannell in BP's London office, although well aware that BP dealt with Aon London with regard to the making of the declarations, said that the details of the

mechanics of the making of declarations was not of concern to him. His evidence was that he relied on Aon generally as distinct from Aon London. Mr Mitilier's evidence on behalf of BP was substantially similar.

53. Further, Aon submits that, in view of the existence of the Service Agreement, it would not have been reasonable for BP to rely on any assumption of responsibility by Aon London for that would have been obviously the mutually intended vehicle for rights and obligations in relation to Aon's undertaking of brokerage services.

54. BP challenges these submissions in a manner which goes to the very heart of the way in which the assumption of responsibility methodology is to be applied. Whereas it accepts that the contractual framework within which Aon provided broking services comprised Aon Texas assuming broking obligations under the Service Agreement and discharging those obligations by procuring other Aon companies including Aon London, to perform such functions as the making of declarations, the real substance of the relationship between BP and Aon London was that of principal and agent or head broker and not that of principal and sub-agent or insured and sub-broker.

55. In support of this submission BP relies on various direct contacts between its personnel and Aon London with regard to the operation of the Open Cover. In particular it refers to the fact that on 26 February 1999 there was a meeting in London between BP and Aon representatives one of the purposes of which was to agree procedures for making declarations and reporting incidents. At that meeting, which was attended by six people from Aon London, as well as Mr Cahill of Aon Connecticut, Mr Helfert of Aon Illinois and Mr Young of Aon Texas, agreement was reached that declarations of projects emanating from the BP London office would be made to the London and European leaders by Aon London. Further, thereafter BP London communicated directly with Aon London in respect of projects emanating from BP London. Subsequently, in 2000, BP Chicago would notify Aon London direct of projects to be declared which emanated from BP Chicago rather than notifying Aon Illinois and relying on that office to forward the declaration to Aon London. The rating of such projects was sometimes done by Aon London but sometimes by Aon Illinois (Mr Irle).

56. BP also relies on Aon's perception of the relationship with BP describing it in May 2000 as a "global client", serviced jointly by Aon Illinois and Aon London "with resource/assistance" from Aon Texas. In the litigation against the Frankona Defendants BP, in its Particulars of Claim which were approved by Aon before service, stated that the Open Cover was placed and had at all material times been administered and operated by "BP's brokers", Aon London. That perception was again expressed by Mr Tentinger of Aon Texas in an email of 6 June 2002 regarding issues relating to the Canyon Express project as to which he described BP and its co-venturer Total Fina Elf as clients of Aon London (as distinct from Aon Texas). Finally, there was the statement by Simmons and Simmons in their letter to Herbert Smith of 15 April 2003 that Aon London was the correct Aon Company to be joined by BP as a defendant in the Frankona action, by inference being the Aon company that would at least arguably incur liability if the claims against the

Frankona Defendants failed.

57. On behalf of BP Mr Andrew Popplewell QC submits that, having regard to the judgment of Lord Goff in Henderson v. Merrett, [1995] 2 AC 145 at pp 186-188, Aon's submissions as to the application of the assumption of responsibility test must be rejected because they perpetuated the so-called Tai Hing heresy which had been rejected in Henderson v. Merrett at p188. That refers to the decision of the Privy Council in Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd [1986] AC 80 expressed by Lord Scarman at page 107 in these words:

> "Their Lordships do not believe that there is anything to the advantage of the law's development in searching for a liability in tort where the parties are in a contractual relationship. This is particularly so in a commercial relationship."

which Lord Goff held not to represent the law, preferring the analysis of Oliver J. in Midland Bank Trust Co Ltd v. Hett, Stubbs & Kemp [1979] Ch 384 to the effect that a solicitor could be liable to his client for negligence in both contract and tort, there being no general principle in English law equivalent to the French doctrine of non comul. It is argued by BP that the flaw in Aon's submissions is that they start from the contractual structure created by (i) the Service Agreement and (ii) its performance by Aon Texas through the medium of Aon London and then ask if there is any room for a parallel duty of care in tort. The correct application of the assumption of responsibility principle demands by contrast that one approaches the relationship between BP and Aon London in three stages. First, it is necessary to leave the contract structure entirely out of account, that is to proceed on the hypothesis that there is no binding Service Agreement and no binding implied contract between Aon Texas and Aon London, but merely Aon London's conduct in affirming its willingness to carry out its broking functions and to investigate whether that conduct amounted to an assumption of responsibility for carrying out the relevant tasks. In the present case the relevant question was whether Aon London was saying to BP "you can rely on us to make whatever declarations are necessary for binding all the participating insurers under the Open Cover in respect of each project notified by BP". If that was the effect of Aon London's conduct, the second question was whether the contractual structure binding on Aon London was inconsistent with an assumption of responsibility so as to give rise to a provisional duty of care. In support of this proposition Mr Popplewell relied both on Lord Goff's speech in Henderson v. Merrett and on the judgment of Moore-Bick J. in Riyad Bank v. Ahli United Bank [2005] 2 Lloyd's Rep 409 at p418 para 26.

58. As to the first question, Aon London had represented to BP that it would undertake the task of doing what was necessary to obtain cover for the projects notified to it and would use its expertise as a broker in the London and European markets for that purpose. There was therefore a sufficient assumption of responsibility to give rise to a provisional duty of care. Further, the tasks undertaken by Aon London were such as to give rise to a fiduciary duty owed by it to BP in the sense that, for example, it would be in breach of such duty if it made secret profits out of the operation of the Open Cover. Aon London therefore owed an equitable duty of care to BP. This submission is based on the judgments of Lord Browne-Wilkinson in Henderson v. Merrett, supra

at pp205-206 and in White v. Jones [1995] 2 AC 207 at pp 270-271.

59. As to the second stage, the existence of the Service Agreement and of Aon London's implied obligations to Aon Texas did not take this case into the realm of the building head contract and sub-contract cases, such as Simaan Contracting Co v. Pilkington Ltd (No.2) [1988] 1 QB 758, in which it had consistently been held that the contractual framework excluded an assumption of responsibility by the sub-contractor to the employer. In spite of the contract framework it was, as Henderson v. Merrett demonstrated, perfectly possible for there still to be a duty of care. The features which took this case on to the Henderson v. Merrett side of the line and away from the building sub-contractor cases were these.

i) There was no inconsistency between the standard of care prescribed by clause 4 of the Service Agreement and the standard to be required under the Common Law duty of skill and care, just as there was no inconsistency between the scope of the duty of skill and care implied in Henderson v. Merrett under the Lloyd's byelaw and that required under the Common Law of tort. There was therefore nothing to prevent there being co-extensive duties of care in tort and contract.

ii) The mere fact that BP, Aon Texas and Aon London had created an agency/sub-agency chain did not prevent there being owed by the sub-agent a duty of care in tort direct to BP as well as an implied co-extensive contractual duty to Aon Texas. That was made clear by Lord Goff in Henderson v. Merrett with reference to the managing agent's duty to the indirect names.

iii) Even if it were material to consider the circumstance that the parties had created a contractual chain, there was in this case no such carefully pre-constructed chain as in the building contract cases. Aon undertook its broking function on the basis that BP would have access to the whole team of experts in the energy insurance field available from the Aon Group as a whole and in particular the unincorporated division known as Aon Natural Resources.

iv) The primary purpose of creating the Service Agreement was not to regulate the incidence of liability in the case of disputes but to define the nature and scope of the broking services to be provided, as in Appendix A, and to fix the scale of fees. This was evidenced by the fact that the change of the name of the contracting Aon entity from Aon Risk Services Inc, which did not exist, to Aon Risk Services of Texas Inc went unnoticed by BP and that once the terms of the Service Agreement had been agreed everyone overlooked its execution for several months until April 1999 and even then it was executed in the name of Amoco as in the form of the original draft engendered before the merger.

v) Not only was Aon London not a party to the Service Agreement but its personnel were on the evidence unaware that it existed or at least of its terms. BP's London office first obtained a copy in 2004, long after the Open Cover had expired.

vi) There was no carefully defined contract of sub-agency between Aon Texas and Aon London.

On the evidence, which I accept, the relationship between those affiliates within the Aon Group was not expressed in any formal written agreement, but merely by way of informal arrangements as to the distribution of fees which did not set out to define the scope of Aon London's liability in respect of its sub-broking services. There was thus nothing analogous to a building sub-contract which ordinarily contained provisions limiting or excluding liability of the sub-contractor so that it would be contrary to the sub-contractor's expectation as to the distribution of risk in respect of the works as reflected in the sub-contracts for there to be a supervening duty of care in tort to the employer.

vii) The system of notification by BP to Aon of projects emanating from the London office to be declared to the Open Cover did not involve Aon Texas but rather the direct notification by BP to Aon London which then declared to Swiss Re but did not first refer the project declaration back to Aon Texas in order to obtain its authority as the immediate principal. The same applied where BP Chicago notified Aon London to declare US projects emanating from that office. In both cases Aon Texas was by-passed and the substantial performance of the contract involved the issue by BP of the notification of projects and the receipt and processing of those notifications by Aon London for the purpose of effecting cover, without reference to Aon Texas. Indeed, the documentary confirmations of cover were not issued by Aon Texas, but by Aon Illinois.

viii) The close nexus between BP and Aon London gave rise to a fiduciary relationship by reason of which Aon London owed to BP fiduciary duties and equitable duties of skill and care, just as did the managing agents to the indirect names in Henderson v. Merrett and in distinction to the relationship between a building sub-contractor and the employer.

ix) Seeing that, as BP's brokers, Aon Texas would owe to BP a duty of care in tort in parallel to the duty which it owed under the Service Agreement and Aon London would owe to Aon Texas an implied contractual duty of care as well as a parallel duty of care in tort, there was no obstacle to recognising a duty of care in this case owed by Aon London direct to BP. In the case of building head contractor and sub-contractor there would not normally be any duty of care at each stage of the chain.

x) In the present case the claimants who had suffered loss were not BP but its co-assureds under the Open Cover, namely the BP affiliates and the joint venturers. The affiliates and the joint venturers were not parties to the Service Agreement and had no other contractual relationship with Aon Texas or Aon London. They were thus not involved in any contractual claim involving Aon. The joint venturers had contracts with BP affiliates but those affiliates did not contract to procure cover for them. The joint venturers were simply given an entitlement under the contracts to opt into BP's Open Cover if they wished to do so. They would then request BP to make the necessary arrangements with their insured and BP would so notify Aon.

xi) With regard to the third stage of the test of duty of care by assumption of responsibility, it was necessary to investigate whether the provisional duty of care derived from application of stages

one and two was excluded or modified by an applicable contract. Mr Popplewell QC refers to the following observation of Goff LJ. in Coupland v. Arabian Gulf [1983] 1 WLR 1136 at p1153:

> "In my judgment, on ordinary principles the contract is only relevant to the claim in tort in so far as it does, on its true construction in accordance with the proper law of the contract, have the effect of excluding or restricting the tortious claim."

60. It is common ground that the Service Agreement is governed by Illinois Law. This court has heard expert evidence on the principles of construction which Illinois law would apply to the Service Agreement and in particular to clause 12. Rather than setting out the respective contentions on the relevant principles at this stage I shall consider them later in this judgment. For present purposes BP's arguments can be summarised as follows: The submission by Aon that clause 12 of the Service Agreement should be treated as displacing any provisional duty of care derived from stages one and two should be rejected for the following reasons:

i) Even if on its proper construction clause 12 had the effect of capping the liability of Aon Texas, it had no effect on Aon London, which was not a party to the Service Agreement. Accordingly, it was irrelevant to take it into account in determining whether Aon London owed a duty of care.

ii) Further, clause 12 on its proper construction did not operate to cap the liability of Aon London as a non-party.

iii) Clause 12 was not an exclusive remedy clause whose function was to define all the remedies contractual and tortious against Aon Texas and then to subject them to a cap in respect of Amoco's (BP's) losses. On its proper construction its first paragraph set out at paragraph 40 above conferred rights of indemnity in respect of claims by third parties additional to such rights as BP might have had to recover damages against Aon Texas for breach of Aon's basic obligations under clause 4 to provide the broking services to a particular standard. However, the right of indemnity was not fault-based. The second paragraph of clause 12 also conferred additional rights in two respects. First, it enabled Amoco (BP) itself to recover a wider range of losses than would otherwise be recoverable under Illinois law, such as legal costs and attorney's fees, but those were capped by reference to the maximum amount of BP's remuneration identified in Clause 6. Second, it provided for BP to recover in respect of losses suffered by "third parties", which included affiliates and joint venturers who were co-assureds, but no cap was applied to such recovery. Accordingly, clause 12 did not operate to cap Aon Texas's liabilities for breach of its basic obligations under the Service Agreement but only those liabilities in respect of the additional rights conferred by clause 12 on BP.

iv) If Aon had wanted to exclude Aon London's liability under the Service Agreement, they could have done so by means of the insertion into that contract of an express term to that effect which

under Illinois law could have been relied on by way of defence by a non-party. Alternatively, the Service Agreement could have been entered into not only by Aon Texas but jointly by any other Aon corporate entity such as Aon London. Accordingly, the submission by Aon that the rules of privity of contract prevented the exclusion of Aon London's liability in tort was incorrect.

61. Finally, BP submit that if a sufficient assumption of responsibility could be made out, there was reliance on it by BP, contrary to Aon's submission. The substance of BP's argument is that they were not relying on the individuals in the Aon organisation without reference to their corporate employer, as submitted by Aon, but specifically on Aon London to effect the cover for the individual projects. In this connection, all those individuals in the London office of Aon London such as Mr Wilks and Mr Parry were purporting to act in their dealings with and on behalf of BP on behalf of that company and not on behalf of Aon Texas. This was supported by the fact that all the letters and confirmation of cover written by Aon London staff were issued on Aon London headed paper. Further, it was Aon London alone out of the Aon Group which had the ability to place those risks at Lloyd's and it was from an early stage, before the finalisation of the terms of the Service Agreement, envisaged that the Open Cover would be likely to be placed in part on the Lloyd's market. For that purpose the individual projects could only be declared by an accredited Lloyd's broker and that would necessarily involve Aon London. Accordingly, BP would rely on the company Aon London to effect the cover rather than individual staff members.

62. As to the question of reliance by affiliates and joint venturers, as distinct from BP itself, those in the BP insurance department who were responsible for handling the notification for placement of the individual projects were acting both for BP plc as the main assured and for the affiliates as well as those joint venturers who had requested participation in the Open Cover. There was therefore in substance sufficiently close contact between Aon London and BP's affiliates and joint venturers for there to be reliance by those affiliates and joint venturers on Aon London's assumption of responsibility in respect of the placement of their individual projects.

Aon's Specific Defences

63. Aon concedes that if there was a duty of care owed by Aon London to BP and the other claimants, Aon London was in breach of that duty and is liable in tort subject to three distinct defences. Of these, one relates to the Upton Syndicate, which was one of the Frankona Defendants, one to the declaration of one of the projects, Na Kika, to the London and European markets and one to the measure of loss caused by the breach of the duty of care. These defences are as follows:

i) Aon says that BP agreed by the terms of the settlement entered into with the Frankona Defendants in July 2003 to abandon its claims against all those defendants except to the extent that declarations had been made to them before the end of the period of cover. As regards the Upton Syndicate it was conceded that none of the declarations were binding, since none of them had been made to Upton in time. This point turns on whether Mr Coleman of Aon London made

an effective declaration of projects 8 to 26 when he visited Upton's underwriter, Mr Regan, at Lloyd's on 29 June 2000 and, according to Mr Coleman's evidence, showed Mr Regan three fax messages received from Aon Texas listing those projects and what the effect was of further meetings of him and Mr Jeary with Mr Regan after the expiration of the Open Cover in November/December 2000. Aon London contends the Upton syndicate was clearly bound in respect of all those declarations and that BP should never have conceded otherwise. In the event BP has to this extent caused its own loss. I refer to this as "the Upton Issue".

ii) Secondly, Aon contends that as regards the Na Kika project, as to which the 50 per cent participation of Shell was notified to Aon London for the purpose of declaration on the last day of the period of the Open Cover, the failure of Aon London to make a declaration before expiry of that period was due in part to the contributory negligence of BP. That is said to consist in failing to confirm with Aon London that it had received email instructions sent that day and that it had acted on them by making a declaration to the insurers. I refer to this as "the Na Kika Issue".

iii) The third point arises if and to the extent that it is established that Aon London is liable in the tort of negligence in respect of any of the projects notified to it to be declared. BP's case is that the correct measure of damages is the amount of all losses which it would have been entitled to recover from the Frankona Defendants if Aon London had made declarations to those insurers prior to expiration of the period of cover. Aon contend that the losses are limited to the cost to BP of purchasing alternative insurance in the market together with any shortfall in the indemnity which would have been recoverable under the hypothetical replacement insurance as a result of less favourable terms compared with the indemnity recoverable under the Open Cover if declarations had been effectively made. I refer to this as "the Substitute Insurance Issue".

64. I shall outline in more detail the respective submissions of the parties later in this judgment when considering the substance of these specific defences.

Duty of Care: Basic Principles

65. The focus of the argument of both Mr Popplewell QC on behalf of BP and Mr Leggatt QC on behalf of Aon London was the decision of the House of Lords in Henderson v Merrett Syndicates Ltd [1995] 2 AC 145. The essential questions in that case were whether a managing agent at Lloyd's owed a duty of care in respect of its conduct of the underwriting business of a syndicate to (i) direct names on that syndicate, that is to say those who had entered into an underwriting agency agreement with the managing agent and (ii) indirect names on that syndicate who had entered into an underwriting agency agreement with a names agent who had in turn entered into a managing agency agreement in respect of those names with the managing agents. There was thus no privity of contract between the indirect names and the managing agent. However, the whole underwriting function was thereby delegated by the indirect names via their names agent to the managing agent. The process whereby the name became the member of a syndicate managed by the managing agency involved the application by the name through its names agent to join a

particular syndicate and the specific acceptance of the name by that managing agency as a syndicate member. The forms of agreement in use at all material times were not open to negotiation. Either they were standard forms prescribed by the names agents or managing agents or from 1985 they were prescribed by Lloyd's and made compulsory from 1987. The names had no opportunity to effect amendments to any of the contract provisions. The result was therefore that each indirect name adhered to an inflexible contractual regime under which he or she relied exclusively for the conduct of their entire underwriting business on the skill and care of the managing agency and its underwriting staff by which the whole business of the syndicate was conducted and with which the name had no privity of contract.

66. The material features of the decision in Henderson v. Merrett, supra may be summarised as follows.

i) The principle governing liability in negligence for advice causing pure economic loss is that originating from the speeches of Lord Morris of Borth-y-Gest and Lord Devlin in Hedley Byrne & Co Ltd v. Heller & Partners Ltd [1964] AC 465. It is necessary for present purposes to cite but one passage from the speech of Lord Devlin at pages 528-529:

> "I think, therefore, that there is ample authority to justify your Lordships in saying now that the categories of special relationships which may give rise to a duty to take care in word as well as in deed are not limited to contractual relationships or to relationships of fiduciary duty, but include also relationships which in the words of Lord Shaw in Nocton v. Lord Ashburton [1914] A.C. 932, 972 are 'equivalent to contract,' that is, where there is an assumption of responsibility in circumstances in which, but for the absence of consideration, there would be a contract. Where there is an express undertaking, an express warranty as distinct from mere representation, there can be little difficulty. The difficulty arises in discerning those cases in which the undertaking is to be implied. In this respect the absence of consideration is not irrelevant. Payment for information or advice is very good evidence that it is being relied upon and that the informer or adviser knows that it is. Where there is no consideration, it will be necessary to exercise greater care in distinguishing between social and professional relationships and between those which are of a contractual character and those which are not. It may often be material to consider whether the adviser is acting purely out of good nature or whether he is getting his reward in some indirect form. The service that a bank performs in giving a reference is not done simply out of a desire to assist commerce. It would discourage the customers of the bank if their deals fell through because the bank had refused to testify to their credit when it was good. I have had the advantage of reading all the opinions

> prepared by your Lordships and of studying the terms which your Lordships have framed by way of definition of the sort of relationship which gives rise to a responsibility towards those who act upon information or advice and so creates a duty of care towards them. I do not understand any of your Lordships to hold that it is a responsibility imposed by law upon certain types of persons or in certain sorts of situations. It is a responsibility that is voluntarily accepted or undertaken, either generally where a general relationship, such as that of solicitor and client or banker and customer, is created, or specifically in relation to a particular transaction."

ii) The requirement of a relationship between the party assuming responsibility and the claimant which is "equivalent to contract" in a case where there is no privity of contract or fiduciary relationship can be satisfied by express words or by implication from such circumstances as the fact that the party allegedly assuming responsibility has some special expertise or special knowledge which he must appreciate will be relied upon by the claimant: see Lord Morris at pages 502-503, Lord Goff at page 180 C-E.

iii) The principle extends beyond the giving of advice or information to the performance of other services: see Lord Goff at page 180 E-F.

iv) The test of whether the defendant has in any particular case assumed responsibility for the giving of advice, the supply of information or the provision of services is an objective test: see Lord Goff at page 181 B-C.

v) The claimant must in each case establish reliance on the defendant's assumption of responsibility. That is an essential link between the defendant's failure to exercise reasonable skill and the sustaining by the claimant of economic loss. But reliance may be an inseparable facet of the relationship as where the claimant entrusts a solicitor with the conduct of his affairs in general or in particular or, it is right to add, where an indirect name entrusts his names agent and through him the managing agent of his syndicate with the conduct of his underwriting business: see Lord Goff at page 180 F-G.

vi) The existence of an assumption of responsibility is to be tested in a case where there is a contractual structure to which the defendant is party by asking what it is that the defendant has undertaken to perform within that structure. There is a two stage process. It is first necessary to investigate his obligations to see whether he has undertaken to provide relevant advice, information or services, and if so, whether it is expressly or impliedly provided that he is to exercise reasonable skill and care in so doing. If so, he will owe at least a potential duty of care to his immediate contracting party. The second stage involves asking whether the terms of the contract to which he is party have excluded or limited his liability for failure to perform such

obligations either carefully or at all: see Lord Goff at 194 A-B and Lord Browne-Wilkinson at page 206 E-F. If liability is not thereby excluded or limited there will normally be a duty of care to the immediate contracting party.

vii) The existence of an assumption of responsibility to an immediate contracting party does not preclude an assumption of responsibility to a party to the contractual chain with whom the defendant has no direct contract at all: such as the case of a sub-agent's assumption of responsibility to the principal of the superior agent: see Lord Goff at page 195 B-D, and as was held to be the case in Henderson v. Merrett as between the managing agents and the names.

viii) However, should there be a significant inconsistency between the scope or substance of the duty of skill and care that would normally be engendered by a voluntary assumption of responsibility by a sub-agent to a remote party in the chain when viewed in isolation and the duty expressly or impliedly undertaken by the sub-agent in any contract between the sub-agent and its immediate contracting party, that would often go towards precluding the implication of an assumption of responsibility in tort to the remote party: see Lord Goff at page 196 E-F. However if the disparity in the scope of the defendants' potential duty were not such as to preclude such implication, the terms of the sub-contract could cut down the scope of that for which responsibility was assumed: see Lord Browne-Wilkinson at page 206 E-F.

ix) In a case where, as in the construction industry, there is a chain of contracts reaching down from the building developer/owner through the contractor to the sub-contractor, a voluntary assumption of responsibility by the latter will not be implied because such implication would be inconsistent with the mutual intention of the participants in the claim that claims for compensation between them should only be advanced sequentially as between direct contracting parties: see Lord Goff at pages 195G to 196D.

x) In a case where there is a voluntary assumption of responsibility in respect of the giving of advice or information or the provision of services to an identifiable party giving rise to a claim by that party for pure economic loss, there is no need to investigate whether it would be "fair, just and reasonable" to impose liability, as required under the "threefold test" put forward by the House of Lords in Caparo plc v. Dickman [1990] 2 AC 605, per Lord Bridge at pages 617 to 618. That is because once there has been established the requisite relationship – "equivalent to contract" – between the party assuming the responsibility and the party to whom it was assumed, there is no problem about whether the imposition of a duty of care would expose the defendant to an excessively wide constituency of potential claimants: see Lord Goff at pages 180G to 181F.

67. Immediately before hearing argument in Henderson v. Merrett an identically constituted Appellate Committee of the House of Lords heard the appeal in White v. Jones [1995] 2 AC 207. However, the opinions in that case were not given until 16 February 1995 – some six months after judgment in Henderson v. Merrett. In White v. Jones the issue was whether the intended beneficiaries, who were at the testator's request supposed to be included in his will, had a cause

of action in negligence against the testator's solicitor for having negligently failed to draw up a will in accordance with the testator's instructions by the time of the testator's death. In the event the testator's estate had suffered no loss and there was no contractual relationship between the intended beneficiaries and the solicitor. Absent a duty of care in tort on the part of the solicitor, the beneficiaries could have no remedy.

68. The House of Lords was divided, Lords Goff, Browne-Wilkinson and Nolan concluding that the solicitor did owe a duty of care, whereas Lord Keith and Lord Mustill held that no existing principle of law could be extended to impose such a duty.

69. Lord Goff observed at page 268:

> "Furthermore, for the reasons I have previously given, the Hedley Byrne [1964] A. C. 465 principle cannot, in the absence of special circumstances, give rise on ordinary principles to an assumption of responsibility by the testator's solicitor towards an intended beneficiary. Even so it seems to me that it is open to your Lordships' House, as in the Lenesta Sludge Case [1994] 1 A.C. 85, to fashion a remedy to fill a lacuna in the law and so prevent the injustice which would otherwise occur on the facts of cases such as the present. In the Lenesta Sludge Case supra, as I have said, the House made available a remedy as a matter of law to solve the problem of transferred loss in the case before them. The present case is, if anything, a fortiori, since the nature of the transaction was such that, if the solicitors were negligent and their negligence did not come to light until after the death of the testator, there would be no remedy for the ensuing loss unless the intended beneficiary could claim. In my opinion, therefore, your Lordships' House should in cases such as these extend to the intended beneficiary a remedy under the Hedley Byrne principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor. Such liability will not of course arise in cases in which the defect in the will comes to light before the death of the testator, and the testator either leaves the will as it is or otherwise continues to exclude the previously intended beneficiary from the relevant benefit. I only wish to add that, with the benefit of experience during the 15 years in which Ross v. Caunters has been regularly applied, we can say with some confidence that a direct remedy by the intended beneficiary against the solicitor appears to create no problems in practice. That is therefore the solution which I would recommend to your Lordships.
>
> As I see it, not only does this conclusion produce practical justice as far as all parties are concerned, but it also has the following beneficial consequences.

(1) There is no unacceptable circumvention of established principles of the law of contract.

(2) No problem arises by reason of the loss being of a purely economic character.

(3) Such assumption of responsibility will of course be subject to any term of the contract between the solicitor and the testator which may exclude or restrict the solicitor's liability to the testator under the principle in Hedley Byrne. It is true that such a term would be most unlikely to exist in practice; but as a matter of principle it is right that this largely theoretical question should be addressed.

(4) Since the Hedley Byrne principle is founded upon an assumption of responsibility, the solicitor may be liable for negligent omissions as well as negligent acts of commission: see the Midland Bank Trust Co. Case [1979] Ch. 384, 416, *per* Oliver J. and Henderson v. Merrett Syndicates Ltd [1995] 2 A.C. 145, 182, *per* Lord Goff of Chieveley. This conclusion provides justification for the decision of the Court of Appeal to reverse the decision of Turner J. in the present case, although this point was not in fact raised below or before your Lordships."

70. He thus concluded that although, by reference to the methodology identified in Henderson v. Merrett, there was no assumption of responsibility given to the intended beneficiaries as distinct from the testator, the interests of "practical justice" required that the solicitor's assumption of responsibility to the testator should be treated as if it were an assumption of responsibility to the intended beneficiaries.

71. Lord Browne-Wilkinson again based his reasoning on Nocton v. Lord Ashburton [1914] AC 932 as he had previously done in Henderson v. Merrett and concluded that by accepting instructions from the testator to draw up the will the solicitor had "come into a special relationship" with those intended to benefit under it in consequence of which the law imposed a duty to the intended beneficiary to act with due expedition and care in relation to the task on which he had entered (page 276 E-F).

72. Lord Browne-Wilkinson started from the following proposition at page 274E – 275A.

"The law of England does not impose any general duty of care to avoid negligent misstatements or to avoid causing pure economic loss even if economic damage to the plaintiff was foreseeable. However, such a duty of care will arise if there is a special relationship between the parties. Although the categories of cases in which such special relationship can be held to exist are not closed, as yet only two categories have been identified, viz. (1) where there is a fiduciary relationship and (2) where the defendant has voluntarily answered a question or tenders skilled

advice or services in circumstances where he knows or ought to know that an identified plaintiff will rely on his answers or advice. In both these categories the special relationship is created by the defendant voluntarily assuming to act in the matter by involving himself in the plaintiff's affairs or by choosing to speak. If he does so assume to act or speak he is said to have assumed responsibility for carrying through the matter he has entered upon. In the words of Lord Reid in Hedley Byrne [1964] A.C. 465, 486 he has "accepted a relationship . . . which requires him to exercise such care as the circumstances require," i.e. although the extent of the duty will vary from category to category, *some* duty of care arises from the special relationship. Such relationship can arise even though the defendant has acted in the plaintiff's affairs pursuant to a contract with a third party."

73. He continued at 275B – 277A:

"Has the intended beneficiary a cause of action based on breach of a duty of care owed by the solicitor to the beneficiary? The answer to that question is dependent upon whether there is a special relationship between the solicitor and the intended beneficiary to which the law attaches a duty of care. In my judgment the case does not fall within either of the two categories of special relationships so far recognised. There is no fiduciary duty owed by the solicitor to the intended beneficiary. Although the solicitor has assumed to act in a matter closely touching the economic well-being of the intended beneficiary, the intended beneficiary will often be ignorant of that fact and cannot therefore have relied upon the solicitor. However, it is clear that the law in this area has not ossified. Both Viscount Haldane L.C. (in the passage I have quoted from Nocton v. Lord Ashburton [1914] A.C. 932, 948) and Lord Devlin (in the Hedley Byrne Case [1964] A.C. 465, 530-531) envisage that there might be other sets of circumstances in which it would be appropriate to find a special relationship giving rise to a duty of care. In Caparo Industries Plc. v. Dickman [1990] 2 A.C. 605, 618 Lord Bridge of Harwich recognised that the law will develop novel categories of negligence "incrementally and by analogy with established categories." In my judgment, this is a case where such development should take place since there is a close analogy with existing categories of special relationship giving rise to a duty of care to prevent economic loss.

The solicitor who accepts instructions to draw a will knows that the future economic welfare of the intended beneficiary is dependent upon his careful execution of the task. It is true that the intended beneficiary (being ignorant of the instructions) may not rely on the particular solicitor's actions. But, as I have sought to demonstrate, in the case of a duty of care flowing from a fiduciary relationship liability is not dependent upon actual reliance by the plaintiff on the defendant's actions but on the fact that, as the fiduciary is well aware, the plaintiff's economic

> well-being is dependent upon the proper discharge by the fiduciary of his duty. Second, the solicitor by accepting the instructions has entered upon, and therefore assumed responsibility for, the task of procuring the execution of a skilfully drawn will knowing that the beneficiary is wholly dependent upon his carefully carrying out his function. That assumption of responsibility for the task is a feature of both the two categories of special relationship so far identified in the authorities. It is not to the point that the solicitor only entered on the task pursuant to a contract with the third party (i.e. the testator). There are therefore present many of the features which in the other categories of special relationship have been treated as sufficient to create a special relationship to which the law attaches a duty of care. In my judgment the analogy is close."

74. Lord Nolan agreed with both Lord Goff and Lord Browne-Wilkinson.

75. It is to be observed that the special relationship as so identified which gave rise to the so-called assumption of responsibility for carrying out the task accepted by the solicitor rested upon his acceptance to the testator together with his awareness of the economic consequence to the intended beneficiaries should he fail to carry out the task in question with proper expedition. It is, however, clear from the opinions of both Lord Goff and Lord Browne-Wilkinson that they appreciated that they were recognising a new set of circumstances in which there could be an undertaking of responsibility which gave rise to liability for pure economic loss.

76. Some two years later there came the decision of the House of Lords in Williams v. Natural Life Health Foods [1998] 1 WLR 830. Once again Lord Goff was a member of the Appellate Committee, but the only judgment was given by Lord Steyn with whom, it is important to note, Lord Goff and all other members of the Appellate Committee agreed.

77. The issue was whether the managing director and controlling shareholder of the defendant company was under a duty of care to the claimants who had entered into a franchise contract with that company to open a health food shop in reliance on detailed financial projections for a retail health food business. The managing director, Mistlin, had no material direct dealings with the claimants but he played a prominent part in preparing the projections and the plaintiffs were given a brochure by the first defendants which advertised Mistlin's experience in the health food trade. The business was a failure and the claimants sued at first the company and subsequently, Mistlin alleging that they had been given negligent advice.

78. It was held by the House of Lords, reversing the majority decision of the Court of Appeal, that the managing director was under no duty of care. The relevant methodology explained in the speech of Lord Steyn with which all other members of the Committee agreed, is encapsulated in a passage from his speech at pages 834E-H:

> "In this case the identification of the applicable principles is straightforward. It is

> clear, and accepted by counsel on both sides, that the governing principles are stated in the leading speech of Lord Goff of Chieveley in Henderson v. Merrett Syndicates Ltd. [1995] 2 A.C. 145. First, in Henderson's case it was settled that the assumption of responsibility principle enunciated in Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd. [1964] A.C. 465 is not confined to statements but may apply to any assumption of responsibility for the provision of services. The extended Hedley Byrne principle is the rationalisation or technique adopted by English law to provide a remedy for the recovery of damages in respect of economic loss caused by the negligent performance of services. Secondly, it was established that once a case is identified as falling within the extended Hedley Byrne principle, there is no need to embark on any further inquiry whether it is "fair, just and reasonable" to impose liability for economic loss: p. 181. Thirdly, and applying Hedley Byrne, it was made clear that
>
> "reliance upon [the assumption of responsibility] by the other party will be necessary to establish a cause of action (because otherwise the negligence will have no causative effect)..." (p. 180).
>
> Fourthly, it was held that the existence of a contractual duty of care between the parties does not preclude the concurrence of a tort duty in the same respect."

79. Now the reference to the "extended Hedley Byrne principle" in that passage is clearly a reference to the fact that in Henderson v. Merrett the assumption of responsibility principle was extended to the provision of services and was no longer confined to statements as to information or advice. Further, the description of that extended principle as "the rationalisation or technique adopted by English law to provide a remedy for the recovery of damages in respect of economic loss caused by the negligent performance of services" leaves it in no doubt that the extended assumption of responsibility principle is the only available coherent and rational methodology by the application of which damages can be recovered in the tort of negligence for pure economic loss caused by the negligent conduct of services. Further, the following passage at p835A-C makes it clear that Lord Steyn was not confining the applicability of that methodology to companies and their directors and employees, but was including principals and agents vis-à-vis third parties generally.

> "What matters is not that the liability of the shareholders of a company is limited but that a company is a separate entity, distinct from its directors, servants or other agents. The trader who incorporates a company to which he transfers his business creates a legal person on whose behalf he may afterwards act as director. For present purposes, his position is the same as if he had sold his business to another individual and agreed to act on his behalf. Thus the issue in this case is not peculiar to companies. Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal. But in order to establish personal liability under the principle of Hedley Byrne, which requires the existence of a

> special relationship between plaintiff and tortfeaser, it is not sufficient that there should have been a special relationship with the principal. There must have been an assumption of responsibility such as to create a special relationship with the director or employee himself."

80. That Lord Steyn's analysis was not confined to the relationship between third parties and representatives of companies but was intended to apply generally to agency relationships was subsequently emphasised by Lord Hoffmann in Standard Chartered Bank v. Pakistan National Shipping Corporation [2003] 1 AC 959. The material issue in that appeal was whether the managing director (Mehra) of the seller company who had knowingly misrepresented to the plaintiff bank that the bills of lading were accurately dated was personally liable for the tort of deceit or whether his misrepresentation was exclusively that of the seller company. The Court of Appeal had relied on Williams v. Natural Life, supra, by way of analogy, holding that decision to be based on the separate legal personality of a company to the effect that since Mehta was making the misrepresentation on behalf of the company he was not personally liable. In reversing this decision Lord Hoffmann with whom all other members of the Committee agreed, observed at page 969 that the reasoning of Lord Steyn in Williams "had nothing to do with company law" but "was an application of the law of principal and agent to the requirement of assumption of responsibility under the Hedley Bryne principle." The characterisation of the Williams and Standard Chartered Bank cases by May LJ. In Merrett v. Robb [2001] QB 1174 at 1194, para 45, as dealing with the relationships and circumstances where the principal defendant was a limited company and the question was whether the director of the company had also assumed a personal responsibility so that it was necessary to look for overt dealings between the director personally and the claimant sufficient to give rise to personal liability is clearly factually accurate, but in so far as it suggests that those cases set out principles confined to the position of company directors, it cannot be consistent with the subsequent House of Lords judgment in the Standard Chartered Bank case.

81. However, Lord Steyn's observations at page 837D-E under the heading "Academic criticism of assumption of risk", demonstrate that he acknowledged that the decisions in Smith v. Eric Bush [1990] 1 AC 831 and White v. Jones, supra, could not be accommodated within the methodology which he had identified and could be explained only by a concept of "practical justice" in response to the combined effects of the principles of consideration and privity of contract in English contract law.

82. Further, it is also clear from the following passage at page 835 F to 836E that there has to be an express or implied representation by or on behalf of the agent by words or conduct not only that it is he who will be responsible in fact for preparing the advice or carrying out the services with proper skill and care, but that he personally will accept legal liability if he fails to do so and if the claimant suffers economic loss by reason of his reliance on such assumption of responsibility.

> "The touchstone of liability is not the state of mind of the defendant. An objective

test means that the primary focus must be on things said or done by the defendant or on his behalf in dealings with the plaintiff. Obviously, the impact of what a defendant says or does must be judged in the light of the relevant contextual scene. Subject to this qualification the primary focus must be on exchanges (in which term I include statements and conduct) which cross the line between the defendant and the plaintiff. Sometimes such an issue arises in a simple bilateral relationship. In the present case a triangular position is under consideration: the prospective franchisees, the franchisor company, and the director. In such a case where the personal liability of the director is in question the internal arrangements between a director and his company cannot be the foundation of a director's personal liability in tort. The inquiry must be whether the director, or anybody on his behalf, conveyed directly or indirectly to the prospective franchisees that the director assumed personal responsibility towards the prospective franchisees. An example of such a case being established is Fairline Shipping Corporation v. Adamson

[1975] Q.B. 180. The plaintiffs sued the defendant, a director of a warehousing company, for the negligent storage of perishable goods. The contract was between the plaintiff and the company. But Kerr J. held that the director was personally liable. That conclusion was possible because the director wrote to the customer, and rendered an invoice, creating the clear impression that he was personally answerable for the services. If he had chosen to write on company notepaper, and rendered an invoice on behalf of the company, the necessary factual foundation for finding an assumption of risk would have been absent. A case on the other side of the line is Trevor Ivory Ltd. v. Anderson [1992] 2 N.Z.L.R. 517. This case concerned negligent advice given by a one-man company to a commercial fruit grower. Despite proper application of the spray it killed the grower's fruit crop. The company was found liable in contract and tort. The question was whether the beneficial owner and director of the company was personally liable. The plaintiff had undoubtedly relied on the expertise of the director in contracting with the company. The New Zealand Court of Appeal unanimously concluded that the defendant was not personally liable. McGechan J., who analysed the evidence in detail, said, at p. 532, that there was merely "routine involvement" by a director for and through his company. He said that there "was no singular feature which would justify belief that Mr. Ivory was accepting a personal commitment, as opposed to the known company obligation." That was the basis of the decision of the Court of Appeal. In his 1997 Hamlyn Lecture on "Turning Points of the Common Law," Lord Cooke of Thorndon commented that if the plaintiff in Trevor Ivory Ltd. v. Anderson "had reasonably thought that it was dealing with an individual, the result might have been different:" see "A Real Thing, Taking Salomon Further," p. 18, note 50. Such a finding would have required evidence of statements or conduct crossing the line which conveyed to the plaintiff that the defendant was assuming personal liability."

83. The application of this methodology by Lord Steyn in the passage at page 837H to 838E leaves no doubt that the correct analysis is that stated above.

84. It is right to add, however, that "assumption of responsibility" has been used in two distinct senses in House of Lords decisions. It has been used as the key feature of a relationship "equivalent to contract" which gives rise to a duty of care as indicated by Lord Devlin in Hedley Byrne itself, by Lord Goff in Henderson V. Merrett and by Lord Steyn in Williams. But it has also been used in cases such as Smith v. Bush, supra, White v. Jones, supra, and Phelps v. Hillingdon London Borough Council [2001] 2 AC 619, where the claimant who has received advice or information (Smith v. Bush and Phelps) or for whose benefit services were undertaken by the defendant to be carried out (White v. Jones) was not in a relationship to the defendant "equivalent to contract" but where "assumption of responsibility" has been used in cases based on negligent misstatements upon which the claimant has relied as a convenient label meaning "simply that the law recognises that there is a duty of care". In such cases "it is not so much that responsibility is assumed as that it is recognised or imposed by the law": per Lord Slynn of Hadley in Phelps at .654.

85. The recent decision of the Court of Appeal in Customs and Excise Commissioners v. Barclays Bank [2005] 1 WLR 2082 is another example of a case where the relationship was not equivalent to contract and where there were neither words nor conduct on the part of the defendant bank which "crossed the line" which could amount to an assumption of responsibility in the sense used by Lord Goff in Henderson v. Merrett or Lord Steyn in Williams. Nevertheless, both Lindsay J. at page 2097 and Peter Gibson LJ. at page 2101 were prepared to hold that there had been an "assumption of responsibility". In agreement with Longmore LJ. they concluded that it was appropriate to apply the threefold test on the hypothesis that there was no conduct by the defendant bank which could be said to have "crossed the line" and notwithstanding the case was one involving pure economic loss caused by the failure of the bank to carry out the services requested by the claimant but not the subject of any express or implied assumption by means of any representation by the bank. Gibson LJ. observed at page 2010 that "practical justice" required the recognition of such a duty.

86. In the context of the present case, it emerged as common ground that assumption of responsibility is the applicable test and that the threefold test identified in Caparo, supra, is at least no longer appropriate as a primary test in the light of Henderson v. Merrett and Williams. The question, however, arises whether in applying the assumption of responsibility test it is necessary to confine the methodology to that identified in those two decisions or whether if that test is negative, it is appropriate to cast the net more widely in order to discern whether, by application of the threefold or some other test, "practical justice" requires that a duty of care should be imposed, whether or not labelled "assumption of responsibility".

87. In my judgment, in the context of a commercial relationship between all relevant parties, involving agency and sub-agency and both the provision of advice and the carrying out of

services by the sub-agent the exercise should be confined to an investigation of the nature envisaged in Williams. If in this context that methodology did not indicate a duty of care, it is very hard to envisage any considerations which would nonetheless call for the application of the threefold test to ascertain whether a duty of care should nevertheless be imposed in the interests of "practical justice". For this there are two reasons. Firstly, in the context of agency and sub-agency relationships created by contract, the absence of an assumption of responsibility under the Williams test would necessarily involve the lack of any implied common understanding as between principal and sub-agent, and that would normally be because such common understanding was inconsistent with the contractual framework. If that were so, it is very hard to see how it could be fair, just and reasonable for a duty of care to exist: ex hypothesi it was the common intention of the parties that privity of contract should prevail. The second reason is that if, these considerations notwithstanding, duty of care could be held to exist, the courts would in substance be introducing into an essentially commercial relationship an imposition of duty based on considerations called "practical justice" but incapable of pre-definition and therefore unacceptably uncertain in any developed system of commercial law.

Duty of Care: Authorities relating to Sub-Brokers, Sub-Agents and Sub-Contractors

88. Mr Popplewell QC referred in argument on behalf of BP to a number of authorities which, he submitted, tended to support the proposition that a sub-broker or sub-agent owed a duty of care to the principal.

89. In the early case of Coolee Ltd v. Wing, Heath & Co (1930) 38 Lloyd's Rep 188 which pre-dated Hedley Byrne a claim was made against Nottingham insurance brokers and Lloyd's brokers employed by the claimant to obtain cover at Lloyd's. There was a failure to disclose a material fact. Rawlett J. held that both brokers were successively negligent and further held at p161R that, as both were the claimants' agents, one after the other, both brokers were liable. This judgment is expressed in terms which make it hard to tell whether the liability of the Lloyd's brokers was based upon their being in privity of contract with the claimant assured or upon their owing a duty of care. The former explanation seems more probable, not only from the way in which the judge expressed himself, but also from the almost contemporaneous decision of Wright J. in Calico Printers' Association v. Barclays Bank (1931) 145 LT 51 and in particular his observations at p55L to the effect that unless an agent were authorised to create privity of contract between the principal and the sub-agent, the principal could not in general claim directly against the sub-agent for negligence. Had there at that stage been a recognised liability in tort for economic loss due to negligence, it is inconceivable that as knowledgeable a commercial judge as Wright J. would have made no reference to it.

90. In the more recent case of Mint Security Ltd v. Blair [1982] 1 Lloyd's Rep 188 it was conceded that the Lloyd's brokers who had been instructed by the producing broker did owe a duty of care in tort to the assured. However, the basis of that concession appears to have been that the Lloyd's broker was in a direct contractual relationship with the assured, the duty of care in tort being similar to that arising under the contract: see the following passage from the judgment of

Staughton J. at page 199L:

> "There might have been an interesting question as to whether [the Lloyd's brokers] were true sub-agents, owing a duty to [the producing brokers] only; or whether they were agents of the plaintiffs, appointed as such by [the producing brokers] on the plaintiffs' behalf. However, [the Lloyd's brokers] accept that in the circumstances of this case, and in particular in view of the fact that they issued a brochure jointly with [the producing brokers], they owed a duty of care directly to the plaintiffs, both in contract and in tort. Nobody else has argued otherwise. I am the last to complain that an interesting academic issue does not need to be decided."

91. O'Brien v. Hughes-Gibb & Co Ltd [1995] Lloyd's Rep IR 90 also involved allegations of negligence in respect of a bloodstock policy against a producing agent and a Lloyd's broker. There was a concession by the latter that it owed a duty of care, but it is doubtful whether this was made on the basis of a duty in tort only rather than a duty in both contract and tort. Accordingly, it cannot be relied on in supporting a duty of care where the sub-broker had no direct contract with the assured.

92. In Tudor Jones II v. Crawley Colosso Ltd [1996] 2 Lloyd's Rep 619 producing brokers sued Lloyd's brokers as assignees of the assured's claims for breach of duty of care by such brokers. It was alleged and not disputed by London brokers that they owed a duty of care to the producing brokers and/or the assured. The question whether the duty of care was owed by the London brokers to the assured, as distinct from the producing brokers, was immaterial by reason of the assignment. It follows that here again the concession is of little weight.

93. BP further rely on the decision of the Court of Appeal in Pangood Ltd v. Barclay Brown & Co Ltd [1999] ALL ER (Comm) 460. The issue was whether a producing broker could be entitled to contribution from a sub-broker under the Civil Liability (Contribution) Act 1978 in respect of a claim by the assured against the producing broker on the basis that the sub-broker owed to the assured a duty of care in contract/or tort to advise the assured as to the inclusion of a particular warranty in the cover that had been underwritten. On an application to strike out the producing broker's contribution claim it was held by the Court of Appeal that there was no privity of contract between the assured and the sub-broker. It was further held that there was no general duty of care in tort. Beldam LJ., who gave the only full judgment, observed at p463:

> "Nor do I consider that the circumstances of this case show the existence of a general duty of care owed by the third party to the plaintiff. Any responsibility assumed by the third party was confined to obtaining a quotation and communicating it accurately to the defendant acting on behalf of the plaintiff. This the third party did. On receiving instructions to approach underwriters to effect insurance in accordance with those terms, it did so, obtaining the signed and subscribed slip which it sent to the defendant. The slip was in accordance with the

> terms agreed on behalf of the plaintiff by the defendant. As is well known, the contract of insurance was then complete, and it included the auditorium warranty.
>
> There was, in my view, no assumption of responsibility by the third party to bring the terms of the auditorium warranty to the attention of the plaintiff. Nor can it reasonably be inferred that the plaintiff relied upon the third party to do so. The obvious inference from the facts is that the plaintiff relied upon the defendant. It was within the scope of the defendant's authority to receive notice of the terms of the insurance for which it had sought a quotation and to accept them on the plaintiff's behalf. The third party had no reason to suppose otherwise."

94. It is submitted on behalf of BP that this passage in the judgment does support the proposition that the sub-broker did owe at least a limited duty of care in tort – confined to obtaining a quotation, informing the producing broker, placing the risk, obtaining the signed slip and sending it to the producing broker.

95. But this is reading far too much into that judgment for, having concluded that the sub-broker owed no general duty of care to the assured, the judgment's reference to the only responsibility being assumed by the sub-broker was not expressed as giving rise to a duty in tort to the assured but, read in context, rather to the scope of the mandate given to the placing brokers by the producing broker to whom the undertaking had been given. I therefore cannot accept that this decision supports BP's case. It does, if anything, support Aon's case.

96. In European International Reinsurance Co Ltd v. Curzon Insurance Ltd [2003] Lloyd's Rep IR 793 it was held by the Court of Appeal, affirming Gross J., that an application to strike out a Part 20 claim by a reinsured against placing sub-brokers on the basis that there could be no duty of care owed by the sub-brokers to the reinsured should be refused. Having considered Henderson v. Merrett, supra, and Williams, supra Longmore LJ. observed at para 28

> "It must, moreover, be at least arguable that someone who held himself out as "A Lloyd's Broker" assumes a personal responsibility to the person seeking to use his broking services. He may at the same time say that he is the agent of another broker or broking company but that does not, of itself and without question, negate any liability on his part."

97. This decision going, as it does, no further than the threshold issue of arguability as to a duty of care, does not greatly assist BP. In the face of Henderson v. Merrett it would indeed be a bold decision to strike out as having no realistic prospect of success a claim in tort by an assured against a placing sub-broker at Lloyd's. After all, a significant part of the claim in Henderson v. Merrett was concerned with the managing agents' duties to effect reinsurance of the risks written by indirect names as distinct from direct names.

98. It is further necessary to consider a number of authorities referred to in argument which are concerned with the application of the assumption of responsibility test in the context of a head contractor and sub-contractor relationship.

99. First of these case is Simaan Contracting Co v. Pilkington Ltd (No.2) [1988] 1 QB 758. The issue was whether the claimant main contractor for the construction of building works in Abu Dhabi was owed a duty of care by specialist suppliers of glass units nominated by the employer and who had contracted to supply them to sub-contractors but who had no contract with the employer or the claimant main contractor. It was held that there was no duty of care. The main judgment was delivered by Bingham LJ. and included the following passages at pages 781, references to the Sheikh being to the employer and to Feal being to the sub-contractor who was not a defendant:

> "(3) There is no meaningful sense in which the plaintiffs can be said to have relied on the defendants. No doubt the plaintiffs hoped and expected that the defendants would supply good quality goods conforming with the contract specification. But the plaintiffs required Feal to buy these units from the defendants for one reason only, namely, that they were contractually obliged to do so and had no choice in the matter. There was no technical discussion of the product between the plaintiffs and the defendants.
>
> (4) Where a specialist sub-contractor is vetted, selected and nominated by a building owner it may be possible to conclude (as in the Junior Books Case [1983] 1 A.C. 520) that the nominated sub-contractor has assumed a direct responsibility to the building owner. On that reasoning it might be said that the defendants owed a duty to the Sheikh in tort as well as to Feal in contract. I do not, however, see any basis on which the defendants could be said to have assumed a direct responsibility for the quality of the goods to the plaintiffs: such a responsibility is, I think, inconsistent with the structure of the contract the parties have chosen to make."

100. At page 782 Bingham LJ. observed:

> "However attractive it may theoretically be to postulate a single principle capable of embracing every kind of case, that is not how the law has developed. It would of course be unsatisfactory if (say) doctors and dentists owed their patients a different duty of care. I do not, however, think it unsatisfactory or surprising if, as I think, a banker's duty towards the recipient of a credit reference and an industrial glass manufacturer's duty towards a main contractor, in the absence of any contract between them, differ. Here, the plaintiffs' real (and understandable) complaint is that the defendants' failure to supply goods in conformity with the specification has rendered their main contract less profitable. This is a type of claim against which, if laid in tort, the law has consistently set its face.

> (8) I do not think it just and reasonable to impose on the defendants a duty of care towards the plaintiffs of the scope contended for. (a) Just as equity remedied the inadequacies of the common law, so has the law of torts filled gaps left by other causes of action where the interests of justice so required. I see no such gap here, because there is no reason why claims beginning with the Sheikh should not be pursued down the contractual chain, subject to any short-cut which may be agreed upon, ending up with a contractual claim against the defendants. That is the usual procedure. It must be what the parties contemplated when they made their contracts. I see no reason for departing from it. (b) Although the defendants did not sell subject to exempting conditions, I fully share the difficulty which others have envisaged where there were such conditions. Even as it is, the defendants' sale may well have been subject to terms and conditions imported by the Sale of Goods Act 1979. Some of those are beneficial to the seller. If such terms are to circumscribe a duty which would be otherwise owed to a party not a party to the contract and unaware of its terms, then that could be unfair to him. But if the duty is unaffected by the conditions on which the seller supplied the goods, it is in my view unfair to him and makes a mockery of contractual negotiation."

101. At page 784 Dillon LJ. said:

> "If, however, foreseeability does not automatically lead to a duty of care, the duty in a Hedley Byrne type of case must depend on the voluntary assumption of responsibility towards a particular party giving rise to a special relationship, as Lord Keith held in Yuen Kun Yeu v. Attorney-General of Hong Kong [1988] A.C. 175, 196 (and see also his statement at p. 784 that the Hedley Byrne case [1964] A. C. 465 was concerned with the assumption of responsibility) and as Robert Goff L. J. had earlier held in Muirhead v. Industrial Tank Specialities Ltd. [1986] Q.B. 507, 528 in a passage which would have been before Lord Keith in the Yuen Kun Yeu case.
> But in the present case I can see nothing whatever to justify a finding that the defendants had voluntarily assumed a direct responsibility to the plaintiffs for the colour and quality of the glass panels. On the contrary, all the indications are the other way and show that a chain of contractual relationships was deliberately arranged the way it was without any direct relationship between the plaintiffs and the defendants."

102. It is to be observed that there was no relevant contract between the main contractor and the glass supplier which could found a relationship from which an assumption of responsibility for the suitability of the glass would be implied. Nor was there any reliance by the main contractor on the skill or expertise of the supplier. It was the employer who had imposed the supplier and its product on the main contractor. Further, in view of the existence of the chain of contracts including, as it did, specific exemptions and, by implication, statutory rights, it would seem that it

was not just and reasonable to impose a duty of care. Although this reflects the third element in the threefold test, it is probably true to say that the want of fairness, justice and reasonableness would equally negate the implication of an assumption of responsibility under the Henderson v. Merrett twofold test.

103. Further, reference was made to Norwich City Council v. Harvey [1989] 1 WLR 828, another building case. Here again the contractual relationship between the plaintiff employer and the main contractor and between the defendant sub-contractor and the main contractor in as much as each contract provided for the employer to be exclusively liable for loss by fire, was a relationship inconsistent with the sub-contractor undertaking a duty of care to prevent fire.

104. These two building cases and Pacific Associates v. Baxter [1990] 1 QB 993, which was also relied upon by Aon, can be seen as illustrations of how the contractual background may be such as to preclude an inference that there has been any underlying undertaking of responsibility. That is because an implied representation as to responsibility would be inconsistent with the express conduct of the parties: objectively tested, the claimant would not in all the circumstances understand that representation to be made or understand that he would be entitled to rely upon it.

105. Mr Popplewell QC further relied on the decision of Moore-Bick J. in Riyad Bank v. Ahli United Bank (UK) plc [2005] 2 Lloyd's Rep 409 as illustrative of a case where there was an underlying contractual structure but no direct contractual relationship between the claimant Fund and the defendant technical adviser and yet a duty of care owed by the adviser to the Fund. Having held that in essence the relationship between the advising Bank and the Fund was the same as that between the Lloyd's managing agents and the indirect names in Henderson v. Merrett, supra, (para 27), Moore-Bick J. concluded that the defendant advising Bank did owe a duty of care. At para 64 he said this:

> "64. In the end it is necessary to decide whether this is one of those cases in which the contractual arrangements were intended by the parties to provide the only source of legal rights and obligations, as is usually the case where parties enter into sub-contracts in connection with construction projects, for example, or whether it is one of those cases in which a sub-contractor owes a duty of care under the general law to the person for whose benefit he has agreed to act concurrently with his contractual obligations under the sub-contract. In Henderson v Merrett Lord Goff recognised that in many cases where a person sub-contracts the performance of an obligation with the knowledge and consent of the person to whom he owes that obligation the resulting chain of contracts is intended to provide the sole means by which the sub-contractor can be held liable for any loss that he may cause to parties higher up the chain. In such cases the sub-contractor owes them no separate duty of care sounding in tort. It is also right to say that he seems to have regarded the situation created by the arrangements between Lloyd's Names and their members' and managing agents as unusual. However, in seeking to decide on which side of the line any case falls I think that Lord Goff's speech in Henderson v

> Merrett supports the conclusion that, although one should not approach the matter in a mechanical way, it is appropriate to ask whether the parties to the contractual chain can properly be taken to have intended to exclude any duty of care that would otherwise have arisen under the general law as a result of the relationship between them. That is likely to depend on the general nature of the contractual relationships, as well as their particular terms, and may also be influenced by established practices in the particular field of activity in which the parties are engaged."

106. Having referred to the decision of the Supreme Court of Canada in Edgeworth Constructions Ltd v. N D Lea & Associates Ltd (1993) 107 DLR (4th) 169 in which a duty of care had been held to be owed by engineering consultants who had negligently prepared tender specifications for the employer of the claimant construction company but which had no direct contract with the latter, and had relied on the specifications in entering into the construction contract, Moore-Bick J. observed at para 66-67:

> "66. Two factors may have had a significant bearing on the court's decision in that case. The first is that the province did not warrant the accuracy of the tender documents. That meant that although the design became incorporated into the contract, the contractor had no redress against the province for defects in design affecting the work. Since the terms of contract are an essential part of the tender materials, the engineers as well as the contractor must have been aware of that. Secondly, it appears that the engineers were not engaged to play any role in connection with the execution of the contract works; they were engaged merely to do the design work and to produce the tender documents. They were, therefore, in the position of third parties engaged solely to provide information on which the contractor would base his tender with no recourse to the province if the information were defective. In those circumstances the court held that neither the contractual structure nor the terms of the contract between the province and the contractor negated the existence of a duty of care.
>
> 67. The present problem appears to have troubled the courts mainly in the context of construction projects and operations of a similar nature in which the relationships between the employer, the main contractor and any sub-contractors are regulated by contract and the imposition of liability for purely economic loss through the imposition of common law duties of care is often seen as cutting across the established contractual relationships. In the present case the issue arises in an entirely different context and, moreover, in circumstances in which it was recognised from the outset that the whole purpose of UBK's involvement was to provide the specialist advice that the Fund required to operate effectively. In my view the nature and terms of the contracts governing the parties' relationships are not inconsistent with an assumption of responsibility by UBK to the Fund for the quality of the advice it provided. Moreover, the manner in which much of that

> advice was expected to be, and was, given, namely by the attendance of Mr Weist at meetings of the Fund's board, reinforces the conclusion that it did in fact assume such a responsibility."

107. Although this decision is on facts very different from those in the present case, it does, in my judgment, provide a useful indication of those considerations which may well be relevant in applying the objective assumption of responsibility analysis where there is an underlying contractual construction but there is no privity of contract between the claimant and the defendant adviser. At the end of the day, however, the court has to take into account all the circumstances in order to answer the question whether the implication of an assumption of responsibility in the Williams sense has been established and, amongst such circumstances the nature and terms of the underlying contractual framework are likely to be major, and in some cases the dominant consideration.

108. It is further necessary to refer to an argument advanced by Mr Popplewell QC, albeit as an alternative or buttress to his main submissions on the conceptual basis of duty of care, that, given that Aon London owed fiduciary duty to BP arising from its position as a Lloyd's sub-broker whose responsibility it was to declare the projects to the Open Cover, failure to exercise proper skill and care in the conduct of that duty whereby BP suffered loss would give rise to a distinct right to equitable damages or compensation. In support of that argument Mr Popplewell submitted by reference to the speech of Lord Browne-Wilkinson in Henderson v. Merrett supra, at pages 205-206, that given that a fiduciary relationship existed between the indirect names and the managing agents and that such a relationship gave rise to the managing agents owing equitable duties of skill and care to the indirect names, so also Aon London were in a fiduciary relationship with the claimants, whether as agent or sub-agent, and owed similar duties to the claimants.

109. It is to be observed that Lord Browne-Wilkinson's reference to the existence of equitable duties of skill and care and their basis in a fiduciary relationship was an essential part of his explanation of the conceptual basis of the principle in Hedley Byrne. By reference back to what had been said by Viscount Haldane LC and Lord Shaw in Nocton v. Lord Ashburton, supra, he was demonstrating that it was the particular relationship between the party assuming responsibility and the claimant who relied upon the assumption which was the basis of the liability of the fiduciary for the negligent conduct of his duties which had been recognised in equity before Hedley Byrne. Thus as page 205 E-H be observed:

> "This derivation from fiduciary duties of care of the principle of liability in negligence where a defendant has by his action assumed responsibility is illuminating in a number of ways. First, it demonstrates that the alternative claim put forward by the Names based on breach of fiduciary duty, although understandable, was misconceived. The liability of a fiduciary for the negligent transaction of his duties is not a separate head of liability but the paradigm of the

> general duty to act with care imposed by law on those who take it upon themselves to act for or advise others. Although the historical development of the rules of law and equity have, in the past, caused different labels to be stuck on different manifestations of the duty, in truth the duty of care imposed on bailees, carriers, trustees, directors, agents and others is the same duty: it arises from the circumstances in which the defendants were acting, not from their status or description. It is the fact that they have all assumed responsibility for the property or affairs of others which renders them liable for the careless performance of what they have undertaken to do, not the description of the trade or position which they hold. In my judgment, the duties which the managing agents have assumed to undertake in managing the insurance business of the Names brings them clearly into the category of those who are liable, whether fiduciaries or not, for any lack of care in the conduct of that management."

110. It is thus clear that, although a given relationship which might be characterised as a fiduciary relationship could be such as to give rise to a duty in equity to act with skill and care, it would not follow that, because a fiduciary relationship existed, there necessarily would be a parallel duty of care. Since, as Lord Browne-Wilkinson demonstrated at p206A-B, there might be fiduciary duties of different kinds depending on the relationship between the parties, there could well be cases where the relationship might give rise to some basic fiduciary duty, such as not to make secret profits, but not to the duty of skill and care which might be owed by an express trustee. Reliance of the indirect names in Henderson v. Merrett on breaches of fiduciary duty as such was therefore misconceived: what mattered was the existence of a relationship which involved a relevant assumption of responsibility for management of the underwriting business, whether or not the managing agents were by reason of that relationship fiduciaries.

111. Accordingly, in my judgment, the characterisation of the relationship between Aon London and the claimants as that of fiduciaries adds nothing to the process of analysis required to identify a duty of care.

Duty of Care: the Relevant Facts

112. The functions performed by Aon in relation to the Open Cover comprise two distinct exercises: (1) the placing of the Open Cover with the Frankona Defendant insurers and (2) once the Open Cover had been placed, the management of the insurance of those projects notified to it by or on behalf of BP or its affiliates or joint venturers. Aon having submitted that the real or substantial negligent act was the inadequate wording of the Leading Underwriter Endorsement coupled with Aon's failure to appreciate its true meaning, as distinct from its failure subsequently to make effective declarations to those insurers (see paragraph above), it is necessary to review the relationship between the parties in order to see whether there was a relevant assumption of responsibility in two stages: (1) during the period up to the Frankona Defendants having become bound by the Open Cover wording and (2) during the period from then until the expiration of the Open Cover on 30 June 2000.

113. Before considering the conduct of the parties, it is necessary to describe the structure of BP and Aon respectively.

114. BP plc (previously called BP Amoco plc as from the date of the merger on 31 December 1998) was at all material times the parent company of the BP Group. That Group carries on its main activities which are exploration and production of crude oil and natural gas, refining, marketing, supply and transportation, and manufacture and marketing of petrochemicals through a series of subsidiary operating companies. It is those companies which have direct interests in those three classes of activity and it is some of those operating companies and not BP plc which have proprietary interests in the projects sought to be insured under the Open Cover. Many of these operating companies are incorporated outside the United Kingdom. There is no formal contractual structure between the operating companies and the holding company whereby a chain of liabilities is created. Some of those operating subsidiaries are also operators of the projects in question. As such they may have contractual duties to co-venturers or contractors to procure insurance cover for them in relation to the project.

115. BP Finance was a so-called "function" whose purpose was to manage key financial risks, including insurance. BP's insurance team worked within that function in what was in effect an administrative department of the Group, but the members of that team were employed by various of the operating companies. They were in that department by reason of their experience in that field. As from the time of the merger they included Mr Siebenaler in Chicago and Mr Daniel in London.

116. Aon with its head office in Chicago and over 400 offices throughout the world and a staff of over 30,000 had similar specialist groupings, in particular the Aon Natural Resources Group ("ANR"), an operating unit within Aon Risk Services (ARS"), whose functions included servicing the energy industry, that is to say providing insurance broking services to oil and gas operating companies, such as those subsidiaries of BP plc which are involved with the projects in this case. ANR was staffed by personnel who worked in various different offices, including Houston, New York, London and all major insurance markets. Its staff included construction specialists and were responsible for all aspects of client servicing, including programme design, market-related activities, loss control and claims management.

117. Prior to the merger with BP, Amoco had its own Risk Management and Insurance Division under its director, Terry Mitilier. Working under him were Mr Siebenaler, Mr Canning and Michelle Rawson.

118. Towards the end of 1997 it was decided by Amoco to invite several major insurance brokers to tender for Amoco's worldwide construction and maintenance business. On the basis of experience which those in the Insurance Division had of one previous declaration–based open cover facility placed by Sedgwick, it was seen that such a facility provided important benefits in costs and

administration by comparison with the placing of cover on a project by project basis. Before the commencement of the tender competition Amoco invited the advice of Bill Burke of Aon Texas and Michael Cahill of Aon Los Angeles as to the appropriate parameters for a broker conceptual competition. The approach was made to those two both of whom were members of ANR because they were known by Mr Siebenaler and Mr Mitilier as energy industry specialists within the Aon organisation.

119. Following a response by Mr Cahill to that request for advice, on 16 December 1997 Amoco sent to Mr Burke and Mr Cahill (who by then had moved to Aon Connecticut) a Request for Proposal.

120. On 22 December 1997 Mr Burke sent to Amoco for signature a Confidentiality Agreement in relation to the Request for proposal presented by Amoco under cover of a letter headed Aon Risk Services Natural Resources Group, with the Houston address of Aon Texas. The Agreement was signed by Mr Burke.

121. On 16 January 1998 a request for further information was sent to Amoco by Mr Burke and Mr Canning jointly and on 19 February 1998 Mr Burke sent to Amoco Aon's initial report in response to the invitation to tender. The covering letter was on Aon Texas letter paper. It included under the heading "Global Account Team" the following statement:

> "We have assembled an Aon account management team to respond to the commitment of time, skill and effort necessary to successfully achieve the objectives outlined in the previous sections. This team consists of our most talented US and London construction professionals along with an account management team with working ties to Amoco. In addition to insurance professionals, we include a team of information management professionals to assist in the design and implementation of the Aon Interactive product outlined previously."

122. It further stated:

> "As account directors, Bill Burke, Mike Cahill and Jim Helfert will have the responsibility to oversee all the insurance and risk management services provided by Aon. Bill will be responsible for strategic initiatives, Mike will be responsible for management of specific teams, and Jim Helfert will be responsible for coordinating the national resources.
>
> Working with the Account Directors, the construction team specialists will be responsible for program design, marketing placements, policy documentation, day-to-day service, loss control, and claims management. Team leaders, Kurt Tentinger (onshore), John Young (offshore) and Tim Walsh (OCIP) are industry leaders in their respective fields.

> The teams outlined above will be supported by a fully staffed administrative unit in Houston. This unit will be responsible for management of all documentation, including policies, certificates of insurance, auto ID cards, and premium invoicing."

123. Of the individuals specified Burke, Tentinger and Young worked at Aon Texas, Cahill at Aon Connecticut and Helfert at Aon Illinois. According to the evidence of Mr Tentinger and Mr Burke, which I accept, in putting forward that initial report Aon had relied on advice from Aon London.

124. On 3 March 1998 Aon made an oral presentation as to the report to Amoco in Chicago. This was attended by personnel from Aon Texas, Aon Connecticut, Aon New York and Aon Detroit.

125. Having been selected by Amoco to proceed to the second phase of the tender competition, on 30 April 1998 Mr Cahill sent on Aon Risk Services Natural Resources Group paper, the Phase II Report. Under the heading "Worldwide Resources" the Report stated that those Aon personnel who attended the oral presentation would form the core group responsible to Amoco for the project. It continued.

> "Specifically, Bill Burke will serve as the Chief Strategist in designing the program and Senior Account Director responsible for ensuring management oversight of the Aon team. Mike Cahill as Account Executive will lead the marketing, technical analysis, coordination of Aon's worldwide resources and day to day servicing of the program. John Young and Kurt Tentinger are responsible for offshore and onshore portions, respectively, of brokering, policy development and ongoing consulting services. Roger Backhouse will coordinate all of Aon Group – London, and work with the account team in designing and marketing the program."

126. It is clear from the evidence that the contents of that Report were in part the product of discussions between Aon Texas (John Young) and Aon London (Roger Backhouse), specifically with regard to the rates and deductibles put forward. As Mr Burke said in evidence, Aon was putting forward Mr Backhouse of Aon London as part of the team that would be involved in designing and marketing the global all risks programme because it regarded his expertise in the London market and in North Sea oil and gas installations as a selling point.

127. There was a further oral presentation by Aon in Chicago on 14 May 1998. In addition to Aon's United States, that was also attended by Mr Backhouse from Aon London.

128. On 30 June 1998 Amoco informed Mr Cahill (Aon Connecticut) that Aon had won the Phase II competition.

129. At this time, according to the evidence of Mr Siebenaler, which I accept, Amoco's understanding was that Aon was putting forward an international team of those experienced in that field of

insurance. Amoco did not know the internal corporate structure of the Aon Group and it was of no relevance to them which particular Aon company employed the members of the team. The inclusion of Aon London in the team was seen as necessary for dealing with the London market since the American companies were not authorised to carry on business at Lloyd's.

130. As soon as it had been decided that Aon was to be selected as broker, discussions began as to a service agreement. On 1 July 1998 Aon Los Angeles sent to Mr Siebenaler a draft Insurance Broking and Consulting Agreement. It was expressed to be entered into by "Aon Risk Services Inc" – a non-existent corporation "and its affiliates worldwide" and it contained a Connecticut law and non-exclusive jurisdiction clause.

131. A meeting took place on 14 July 1998 at which one of the main purposes was to negotiate the terms of a service agreement with particular reference to the fees to be charged by Aon and to the scope of work. It was attended by Burke, Cahill, Tentinger and Helfert on behalf of Aon, but by no personnel from Aon London although Mr Backhouse had previously been consulted about fee structures. According to the evidence of Mr Mitilier it was unusual for Amoco to enter into a formal service agreement with a broker. Normally there would be no more than an exchange of letters identifying the services to be provided and the fees to be paid. In the course of that meeting agreement was reached as to the details of the services to be provided by Aon, but not as to the level of remuneration. There was much discussion as to possible insurers – the suggested strategy being first to approach AIG, possibly via Aon London, and Swiss Re and then go to the London market, specifically Lloyd's. Following that meeting, agreement was reached as to fees in the course of a telephone discussion between Mitilier, and Siebenaler and Canning of Amoco and Burke of Aon Texas on 20 July 1998. The agreed structure involved a fee of US$100,000 plus a "bonus" of US$50,000 for placing the Open Cover and a fee of 6.25% of gross premium subject to an agreed maximum and minimum for each project declared.

132. On 16 July 1998 Aon (Mr Cahill) sent to Amoco a broker of record letter for the global construction programme, asking that it be executed and returned "after we finalise the Service Agreement". The letter confirmed that Amoco on behalf of itself and its subsidiaries had "appointed Aon Risk Services, Inc., its exclusive insurance broker" for Amoco's Global Onshore and Offshore Construction Programme. No Aon company of that name was in existence.

133. It continued:

> "Aon Risk Services, Inc. is authorised to negotiate directly with any insurance company or underwriter on matters covered by this appointment."

134. By 20 July all the details relating to Aon's fees had finally been agreed.

135. On 24 July 1998 Mr Canning of Amoco sent to Mr Burke and Mr Cahill an entirely new draft service agreement which had been approved by Amoco's Legal Department. This document was

expressed to be an agreement simply with "Aon Risk Services" and it made no reference to its affiliates worldwide. It also switched the governing law and jurisdiction to that of Illinois. It included an Indemnity Clause in Amoco's favour which, as amended, was to become the basis of the final form of clause 12 and had the effect of Aon assuming a more onerous indemnity obligation, specifically as regards claims by third parties against Amoco and its affiliates than would have been attached to its contractual obligation to perform the broking services.

136. On 29 July 1998 Mr Mitilier returned the broker of record letter signed by him.

137. On 28 August 1998 Aon sent to Mr Canning an amended version of the 24 July draft service agreement. The name of the Aon contracting entity had been changed to Aon Risk Services of Texas Inc. This change had not been discussed with Amoco, but Mr Burke explained in his evidence that he and Aon had formed the impression from their contacts with Amoco that Amoco preferred to have Aon Texas as the lead office because they saw it as the most experienced in energy industry insurance, although Amoco had not expressly requested this. The introduction of that company was not noticed by Mr Siebenaler when he saw the 28 August draft, but Mr Canning's evidence was that he had noticed the change in name but had attached no importance to it and had not appreciated that there was anything wrong with the name which had appeared in the earlier drafts.

138. Eventually the entire substance of the Service Agreement including clause 12, the indemnity clause, was agreed by emails exchanged on 15 and 16 October 1998.

139. It is to be observed that both parties were concerned that the Service Agreement should incorporate a full list of all the major services to be provided by Aon. That was the function of Exhibit A. The agreement did not specify which company in the Aon Group was to carry out which services. It did, however, expressly contemplate that the services would be carried out by Aon offices in the United States or London. Hence the provision in Section 3 of Exhibit A for the use of an Aon office "outside domestic retail/London" as a service to be provided on an ad hoc basis, presumably at an extra fee.

140. Further, in the course of negotiations the formulation in clause 4 of the standard of care to be provided by Aon proved to be a matter of some importance to Amoco. The 24 July 1998 draft tendered by Mr Canning had services to be provided "to the highest broker and risk management industry standards". Aon's draft of 28 August deleted "highest". Amoco (Mr Canning) wanted it reinstated. Eventually a compromise was reached with "broker and risk management standards for companies similar to Amoco". Thus the ultimate wording introduced into the concept of the ordinary standard of reasonable care a specific yardstick by which one could measure what was reasonable.

141. The negotiation of the terms of clause 12 and in particular the cap on Aon's liability expressed in the second paragraph gave rise to some last-minute bargaining. In his message of 29 September

1998 Mr Burke agreed to Amoco's proposed indemnity provisions in the second paragraph but only subject to an over all cap – adding the words "to the maximum amount of Aon's remuneration noted in clause 6 above". Eventually, in the course of a telephone conversation on 15 October 1998, between Mr Canning and Mr Burke, the wording was amended so as to disapply the cap to third party claims. According to the evidence of Mr Canning, he and Mr Siebenaler, who consulted their Legal Department, both saw the cap as limiting Amoco's ability to recover damages or an indemnity from Aon and they therefore regarded the reduction of its scope as a matter or importance.

142. Although the substantive terms of the Service Agreement had been agreed by 15 October 1998, it was not signed by either Aon Texas or BP until April 1999. No satisfactory explanation for this omission has emerged on the evidence. I infer that both parties overlooked the fact that it had not been signed. It had been agreed that Mr Canning (Amoco) would arrange a hard copy for execution but he failed to do so and nothing relating to the wording of its terms passed between the parties until 13 April 1999 when, without explanation for the delay, Mr Helfert (Aon Illinois) sent to Mr Siebenaler the final agreement for execution and asked for three copies of it to be returned so that it could be passed on to Mr Burke (Aon Texas) to execute. This was done on 14 April and Mr Burke sent back to Mr Canning a copy signed by both parties on 19 April 1999.

143. Notwithstanding the delay in execution of the Service Agreement, the parties proceeded as if it had already been binding. Thus, Aon began the relatively difficult exercise of placing the Open Cover both in the United States (with AIG as the leader) and in London and on the Continent (with Swiss Re as leader). Mr Tentinger (Aon Texas) was primarily in charge of dealings with AIG and Mr Brewer and Mr Humfrey (Aon London) were dealing with Swiss Re and other European and London companies and the Lloyd's market. By 12 November 1998 87.5 per cent of the offshore Section of the Open Cover had been placed, of which 65% was in London or on the continent and by 17 November 1998 the placement was complete except that the Copping and Cox syndicates had only written a 12 month line. Following that, there were discussions between Aon and Amoco as to the appropriate fee to be payable by Amoco to Aon Texas. The letter from Mr Cahill (Aon Connecticut) dated 23 November 1998 referred to Aon's entitlement to fees under the Service Agreement and Mr Canning's reply dated 22 December 1999 referred and attached Exhibit B to that agreement which set out the fees to be paid to Aon. I find that Amoco and Aon Texas by their conduct treated the Service Agreement as mutually binding as from 16 October 1998 and they were mutually bound to its terms from that date.

144. On 4 November 1998 Mr Mitilier of Amoco wrote to Mr Helfert (Aon Illinois) summarising an agreement which they and Mr Siebenaler had recently reached to the effect that, whereas Mr Burke (Aon Texas) would continue as Aon's program leader for the Global Construction Program, with Amoco having direct contact with him, "to aid in communication and accountability, a central coordination role will be established in Chicago with you leading that effort". The role would include responsibility for the Aon Line initiative (a computerised method of operation which in the event was never used for the Open Cover) as well as "the overall coordination of Aon's services to Amoco". The letter stated:

> "We expect each of the program leaders to continue to utilise whatever resources within Aon they feel would best serve Amoco's needs for that particular program. An example would be the excellent services provided by Aon's New York and London branches on the Global Construction Program."

and concluded

> "We believe the knowledge and experience that you have of the current Aon programs coupled with the local service capabilities of Aon's Chicago organisation makes your team the ideal choice to perform this task for Amoco."

145. In the meantime, the merger between BP and Amoco having been formally announced on 8 November 1998 took effect on 31 December. Even before that there had been discussions in December between Mr Daniel of BP Insurance and Mr Wilks of Aon London as to the possibility of using the Open Cover for the insurance of BP projects such as the West Delta 143 B Platform in the Gulf of Mexico if the merger went through. Almost immediately after the merger Mr Wannell of BP Insurance was intimating to Amoco that BP wanted the Heat Exchanger on the Schiehallion Project in the North Sea insured under the Open Cover and that he wanted the energy team at Aon London to deal with the cover for that project.

146. On 19 January 1999 Mr Siebenaler, having been requested by Mr Wannell to contact his Aon contacts about insuring the Schiehallion Project under Open Cover, requested Mr Burke (Aon Texas) to check with the underwriters whether they would accept the addition of a BP project such as that. By 22 January 1999 AIG had agreed to BP's projects being declared under the Open Cover provided that declarations were made to it in New York.

147. At an internal meeting and in the course of telephone discussions on 25 January 1999 Aon decided, subject to BP's approval, that Aon London would be responsible for handling declarations emanating from BP London – with Mr Wilks as the contact at Aon whereas Mr Cahill and/or Aon Chicago were to receive declarations emanating from BP/Amoco, Chicago – "presumably using Houston resources as and when required". Further, all marketing (ie. contact with underwriters) was to be handled by Aon London except for AIG, XL and Zurich which were to be the responsibility of "the USA team".

148. Amongst other matters agreed there were listed:

(1) Copy of the agreed wording and slip with AIG was to be provided to Aon London.

(3) Those final slips and wordings were to become the basis for all placings;

(4) "Leaders clause to be drafted for all slips recognising AIG and Swiss Re as leaders". This was

to be done by Mr Parry of Aon London.

(9) A declaration was to be prepared for Schiehallion by Mr Parry, Mr Wilks (Aon London) to send a separate note on rating;

(10) Declarations were to be prepared for the Bruce and West Delta BP projects by Mr Parry.

149. The agreement of the Open Cover underwriters to the acceptance of declarations of BP's heritage projects was formally recorded in the "Name Change/Leading Underwriter" endorsement which was first presented to the market on 28 January 1999. This provided that references to the Named Assured be amended to refer to BP Amoco plc, as distinct from Amoco. The inclusion in this endorsement of a Leading Underwriter Clause had the purpose, according to Mr Parry's witness statement, of avoiding having to make declarations to the following market. The inclusion of such a clause was at his suggestion in the course of that meeting. The clause employed was one found by one Becky Jowett, a junior technician, in Aon London's library of standard wordings. Mr Parry had shown her where in the library such a clause might be found. What she found was in fact a clause normally used for facultative placements for single risks as distinct from open covers. He had not previously attempted to draft a leading underwriter clause specifically for an open cover of the kind in this case. He could not remember whether he had looked at the wording before it was issued by Aon London, but it would be usual for him to do so. In spite of what appeared in his witness statement Mr Parry said this in cross-examination.

> "Q. So did you think on the basis of this wording that it was only necessary to make declarations to AIG and Swiss Re in order for the followers to be bound?
>
> A. I do not think at that particular time we were overly concerned with the manner of actually making declarations. So we passed the clause through to the broking team, the senior members of the broking team, for action to be taken, without considering that point deeply.
>
> Q. So why was it that you had suggested that there needed to be a leading underwriter clause.
>
> A. Because it is common within the subscription market in London to reduce the obligation to revisit all the subscribing underwriters for all the changes that would be made, given that there are some leaders in place who have assumed those obligations.
>
> Q. So what you had in mind was the usual function of a leader clause; to avoid the need to go to the following market with endorsements on the changes to wordings, amendments, deletions, all those normal sorts of things that arise on a facultative placement?

A. Certainly those things, but of course we took the broadest clause that we could find in the hope that it would – and with the intention that it would cover any variation to the contract that could be made. I think we must have assumed that that would include declarations at the time.

Q. You say you think you "must have assumed", did you have your mind on declarations at this stage, or were you just choosing a leading underwriter clause in a standard form to provide the standard functions that it provided for a facultative risk?

A. Yes, we were.

Q. You were doing the latter?

A. The latter.

Q. And not the former? You did not really, at this stage, apply your mind to declarations?

A. No, that is right.

Q. So when it came to making declarations, what was your view about who declarations needed to be made to?

A. It was my view, and the view at the time I think, that the declarations needed to be made to the two named leaders.

Q. And that they did not need to be made to the following market in order to bind the following market?

A. That was our view, yes.

Q. So far as you were concerned, what was that view based on?

A. Based on the fact that the following underwriters had acknowledged the existence of two named leaders and that, if the clause did not allow it, that it certainly would be normal for them to accept a delegation of their rights to those leaders, to a certain extent at least.

Q. So it was based on the existence of this leading underwriter endorsement, was it?

A. It certainly had some bearing, I think, on our general views at the time."

150. On 1 February 1999 Mr Cahill (Aon Connecticut) sent to Mr Mitilier and Mr Siebenaler a copy of the slip and policy wording already signed and stamped by AIG. It appears that this was the earliest communication to BP of the Leading Underwriter Endorsement. By that time, however, Aon London had already shown that Endorsement to Swiss Re and had obtained scratches on it from ACE, Copping Syndicate and Euclidian. Swiss Re signed and stamped the Open Cover slip and wording, including the Leading Underwriter Endorsement on 2 February 1999. The following market was signed up for 100 per cent within the next few weeks, the London and Continental market in response to Aon London and the United States market (Aegis) in response to Aon Connecticut (Mr Cahill).

151. On 29 January 1999 Aon London had made by fax a declaration of the Schiehallion Heat Exchanger project to Swiss Re. This was acknowledged by Swiss Re on 2 February 1999. On 23 February 1999 Aon London declared to Swiss Re and most of the following market projects 2 and 3, namely West Delta and Bruce Booster Compression. Aon London passed on to Aon Illinois those projects to be declared to AIG. All three of these declarations emanated from BP London.

152. On 9 and 26 February 1999 there were held two meetings between Aon and BP in Chicago and London respectively with the purpose of specifying the procedures for the making of declarations and the handling of claims. At the London meeting, which was the more important, there were present three representatives from BP London and Mr Siebenaler and Mr Canning from Chicago together with six representatives of Aon London, Mr Cahill (Aon Connecticut) and Mr Helfert (Aon Illinois). At the last minute it was decided that it should also be attended by Mr Young of Aon Texas who had to be in London on other business. Otherwise he would not have been there.

153. In the course of the London meeting Aon put forward its proposed procedures.

154. It was agreed that BP London would refer all projects for declarations other than of American projects to Aon London to be handled by the London Servicing Team. Aon also put forward a US Servicing Team: Mr Helfert (Aon Illinois) as Account Executive, Mr Cahill (Aon Connecticut) as Marketing Executive backed up by a four-man team, two from Aon Texas and two from Aon New York. In London Mr Wilks was to be the initial recipient of notification of projects for declaration and Mr Parry and Mr Madell were to be responsible for the making of declarations – but only to AIG, Swiss Re and ACE and not to the rest of the following market. BP, however, was dissatisfied with the proposals for the US Service Team. It wanted Mr Helfert (Aon Illinois) as the sole initial contact and Aon Texas as the sole back-up team. That gave rise to continuing discussions in the course of which it was agreed that the process of notifying declarations and rating would be in accordance with the charts at Appendix 1 to this judgment. It is to be observed that, although these charts are entitled "Onshore/US" and "Onshore/UK", the evidence suggests that they set out the agreed procedures applicable also to offshore project declarations. Further,

Mr Helfert (Aon Illinois) was to be the sole initial point of contact for BP and the only part to be played by Aon Texas (Mr Tentinger) was the confirmation that the proposed project fell within the terms of the Open Cover and the calculation of the applicable rate. According to the evidence of Mr Siebenaler, which I accept, these functions were not invariably carried out by Aon Texas: they were sometimes performed by Aon London and sometimes by Aon Illinios. Further, with effect from June 2000 each declaration emanating from BP Chicago would be sent not only to Aon Illinois, but also, simultaneously, to Aon London for declaration to the London and continental lenders (Swiss Re).

155. It was the assumption of both Aon and BP that declarations would be made only to the leaders (AIG and Aegis in the United States and Swiss Re in London/Europe). This facility was confirmed by Aon London to Aon Illinios (Helfert and Irle) and Aon Texas (Tentinger) in a telephone discussion on 19 March 1999.

156. It was the evidence of Mr Siebenaler and Mr Wannell that their perception of the services of Aon at this time was that they were being provided by an international organisation, the various offices of which cooperated as a team to effect cover by whatever were the necessary means, but that the precise mechanics of how declarations were required to be made was a matter for Aon to handle. That said, however, there can be no doubt that Mr Siebenaler and Mr Wannell must have fully appreciated from the outset that BP London projects were to be fed into Aon through the medium of the London office and that BP Chicago projects were to be fed into Aon via Aon Illinois and further that declarations would have to be made to insurers both in the United States and in London and that Aon's offices in those two locations would undertake those tasks. However, very late in the period of the Open Cover BP Chicago came to make notifications direct to Aon London.

157. In the course of discussions on 18 March 1999 it was agreed between Mr Helfert and Mr Wilks that fee income would be split 50/50 between Aon London and other Aon companies.

158. Confirmation of the Open Cover placement and of the first three declarations to it were sent by Aon Illinois to Aon London who on 27 May 1999 sent them on to BP London.

159. Although, the terms of the Service Agreement, as I have described, had been negotiated before the BP/Amoco merger, and although the procedures described above were developed between the parties after the merger, when it came to execution of the Service Agreement, no alteration was made to its terms. In fact, even the name of the insured was left as Amoco Corporation.

160. There can be no doubt, in my judgment, that, as specifically accepted by Mr Siebenaler in answer to questions from the court, Aon's obligations as broker in respect of the Open Cover were the same in respect of projects emanating from BP London as they had been and continued to be in respect of projects emanating from the Chicago office of Amoco and, subsequently, BP. Moreover, if and to the extent that the existence or definition of those duties depended on

information relating to Aon and acquired by Amoco prior to the merger, that information became that of BP at the time of the merger and the impact of Aon's conduct on BP is therefore to be tested by reference to that information as well as after – acquired knowledge. Specifically, in this connection knowledge of the Service Agreement and of what passed between the parties in the course of its negotiation is to be attributed to BP as a whole.

161. Further, the fact that Aon London may have been unaware of the Service Agreement is, in my judgment, irrelevant to any of the issues in this case. In determining whether Aon London owed a duty of care to BP the essential consideration is not the actual state of knowledge of Aon London of a contractual relationship between Aon Texas and BP, but the reasonable perception of BP of the conduct of Aon London judged objectively and having regard to BP's state of knowledge as to Aon, whether directly acquired or acquired derivatively by way of the merger.

162. I accept the submission of Aon that throughout the period of cover the Open Cover was managed on behalf of Aon on a hands on basis by Mr Helfert (Aon Illinois) with the relevant members of the London team at Aon London playing a role that, in terms of line management, was subsidiary to that of Mr Helfert at Aon Illinois.

163. Moreover, whereas Aon Texas initially provided limited technical support by Mr Tentinger in respect of risks emanating from BP Chicago, in the later period of the Open Cover its role in this respect was taken over by Mr Irle at Aon Illinois and/or by Aon London. However, Mr Burke (Aon Texas) continued to be the overall leader of the Aon team but he took very little practical part in the operation of the Open Cover after the execution of the Service Agreement in April 1999. Although Aon Texas was the only Aon entity that was a party to the Service Agreement, it did not issue any confirmation of cover to BP in respect either of the placing of the Open Cover or of the placing of the separate declarations. That was the responsibility of Aon Illinois. Further, although by clause 5 of the Service Agreement BP had agreed with Aon Texas to pay the premium and other monies and by clause 6 Aon Texas was to be remunerated as provided by Exhibit B, BP did not remit funds to Aon Texas, but was required to make remittance to Aon Illinois under whose name invoices were issued. Mr Helfert was then responsible, as internally arranged at Aon, for distributing the apportioned fees 50/50 as between Aon London and the other Aon entities involved.

164. The problem of trying to obtain renewal of the Open Cover by its expiration in June 2000 had by April of that year proved to be insuperable. Aon London had tried without success with Swiss Re. Mr Siebenaler who was in charge of the Open Cover and renewal operation on behalf of BP, decided to abandon the cancel and re-write strategy (see para 17 above) and to endeavour to declare as many substantial projects as possible before expiry of the Open Cover period. There were particular substantial projects in the Gulf of Mexico for which cover was required. Accordingly in the course of discussions with Mr Siebenaler involving Mr Helfert (Aon Illinois) with Mr Parry (Aon London) providing advice, Aon developed, in conjunction with BP, expedited procedures for collating information about such projects which would be required in order to make declarations. As appears from the List of Declarations set out in Appendix 2 to this

judgment, from 1st June to 29 June 2000 as many as 20 declarations were notified to Swiss Re by Aon London. Although before that period declarations had not been confined to Swiss Re but had been made to the majority of the following market, the subsequent cascade of late declarations by Aon London were all confined to Swiss Re while Aon Illinois was making declarations only to AIG and Aegis. The need to declare as many projects as possible before 1 July 2000 was the predominant mutual consideration as between Aon and BP. Timing was very tight. Probably for this reason BP Chicago notified its projects for declaration direct to Aon London as well as to Aon Illinois. It may also explain why Aon London gave up declaring to the following market, although there can be no doubt that those at Aon London were still firmly of the belief that such declarations were not necessary, because of the Leading Underwriter Endorsement.

Duty of Care: Discussion

165. Before coming to consider the existence of a duty of care as between remote parties between whom no contract exists, it is necessary to identify that which gives rise to a duty of care in tort between parties who are in a contractual relationship. One need go no further than Lord Goff's explanation of the underlying principle in Hedley Byrne at pages 178-180 of his speech in Henderson v. Merrett, supra. There must exist a relationship between the parties, which may or may not be contractual, in the course of which one party undertakes to provide advice or information or services based on his special skill or knowledge in such a manner as to show that he can be relied upon in the sense of his assuming responsibility for the advice or information or those services. An assumption of responsibility for the carrying out of services by a professional man

> "may give rise to liability for negligent omissions as much as negligent acts of commission, as for example when a solicitor assumes responsibility for business on behalf of his client and omits to take a certain step, such as the service of a document, which falls within the responsibility so assumed by him."

as recognised by Oliver J. in Midland Bank Trust Co Ltd v. Holt, Stubbs & Kemp [1979] Ch 384 at p416: see Lord Goff in Henderson v. Merrett at p181. On that basis, as recognised by Lord Goff at p182 B, it has been held since before 1964 that an insurance broker owes a duty of care in negligence to his client. In such a case if one were to assume that the broking contract was unsupported by consideration, the conduct of the broker would amount to a sufficient assumption of responsibility for the provision of professional services.

166. What then is the position where there is indeed no contract between the claimant (C) and the defendant because the defendant has sub-contracted with X to provide services to C? Henderson v. Merrett, supra, William v. Natural Life, supra and more recently Riyad Bank v. Ahli United Bank (UK) plc, supra, clearly show that, subject to one qualification, the test is in substance precisely the same: has there been a sufficient assumption of responsibility? Is the conduct of the defendant equivalent to contract in the sense of amounting to a representation to the claimant that

the defendant accepts responsibility for his advice, information or provision of services in the sense that such acceptance can be relied upon? That being the underlying test, the qualification is the need to investigate whether the existence of a contract chain ending with the defendant would, judged objectively, prevent the defendant's conduct from being understood as an undertaking of responsibility in the sense described. In applying this qualification it is, however, essential to keep firmly in mind that the mere existence of a parallel contract, whether or not binding on the defendant, is not in itself normally sufficient to displace what would otherwise be an assumption of responsibility for, as Lord Goff was at pains to emphasise in Henderson v. Merrett, the French doctrine of non cumul does not apply in English law. The presence of a contract or of a contract chain has to have a particular impact. If there is a contract binding between the claimant and defendant, it may exclude liability in tort. If there is no contract binding between them, but instead a chain of contracts by which they are indirectly linked, the existence of the chain and the character of the contracts which comprise it may prevent the defendant's conduct being reasonably understood as the kind of representation necessary to found liability in negligence.

167. In the context of the present case it is important to appreciate that, although the authorities on liability for negligent misstatements have, not surprisingly, concentrated on whether there has been sufficiently direct communication by the defendant to the claimant of an assumption of responsibility for the expert advice or special information or for the provision of professional services as in those passages from Lord Steyn's speech in Williams v. Natural Life, supra, already cited in paragraph 80 above, it is clear from the authorities that the key question is whether the defendant's representation, judged objectively, is such as to amount to the assumption of a personal obligation as explicitly as if he were personally contractually binding himself to provide the advice, the information or the services. This is tellingly illustrated by the decision of the Supreme Court of Canada in Edgeworth Contruction Ltd v. N D Lea & Associates Ltd [1993] 35 CR 206 referred to by Lord Steyn at p836. In that case where the claimant company, in successfully bidding for a road-building contract, had relied on the report to the province of a consulting engineer company and alleged that the report contained errors. The relevant issue was whether the individual engineers employed by the company assumed personal responsibility to the claimants by reason of their having affixed their seals to the drawing. The relevant passage from La Forest J. is at p212.

> "The situation of the individual engineers is quite different. While they may, in one sense, have expected that persons in the position of the appellant would rely on their work, they would expect that the appellant would place reliance on their firm's pocketbook and not theirs for indemnification; see London Drugs, at pp386-387. Looked at the other way, the appellant could not reasonably rely for indemnification on the individual engineers. It would have to show that it was relying on the particular expertise of an individual engineer without regard to the corporate character of the engineering firm. It would seem quite unrealistic, as my colleague observes, to hold that the mere presence of an individual engineer's seal was sufficient indication of personal reliance (or for that matter voluntary

> assumption of risk)."

168. Lord Steyn's comment on this judgment at p837 of his speech is apposite with regard to the present case:

> "This reasoning is instructive. The test is not simply reliance in fact. The test is whether the plaintiff could reasonably rely on an assumption of personal responsibility by the individual who performed the services on behalf of the company. To that extent I regard what La Forest J. said in Edgeworth's case as consistent with English law."

169. By contrast, in Riyad Bank v. Ahli United Bank, supra, Moore-Bick J., whose judgment I have already cited at paragraph 105 above, identified as the significant factors in favour of the sub-contractor technical expert having given an undertaking of responsibility (i) that, as was mutually recognised, the whole purpose of the expert's involvement was to provide specialist advice essential to the effective operation of the claimant investment fund, (ii) that the advice was given direct to the Fund by a representative of the expert sub-contractor who regularly attended board meetings of the Fund and (iii) the nature and terms of contracts governing the three parties' relationship were not inconsistent with an assumption of responsibility by the sub-contractor expert.

170. In the present case it is therefore first necessary to ask whether the conduct of Aon London, judged objectively, amounted to a sufficient undertaking of responsibility in the relevant sense.

171. As to the placing of the Open Cover and the creation of its wording the following considerations are material.

172. The insertion of the Leading Underwriter Endorsement was effected at the suggestion of Aon London. It was not done at BP's request or suggestion. The objective of Aon London that the Endorsement would have a wider effect than it did by enabling declarations made only to the leading underwriter to bind the following market was not achieved, but there is no cogent evidence that inserting an Endorsement having an effect limited in this way was in itself a breach of professional duty. The Endorsement had the perfectly normal function of catering for the binding of the following market by leading underwriters' agreements to wording and policy amendments to the Open Cover, as well as to claim settlements. To have placed the Open Cover with such an Endorsement would not involve any failure to carry out Aon's mandate as brokers for the Global Construction Programme. There is no evidence that an open cover of this kind which does not include a leading underwriter clause having the effect of enabling declarations to be made only to the leading underwriter is an ineffective placement. The facility can be operated perfectly effectively so as to bind the following market to declarations, provided that each one is notified to all the participants in that market. Aon's professional negligence consisted in their omission to do just that, notwithstanding the term of the Open Cover. No doubt that omission

stemmed from their misunderstanding of the scope of the Endorsement which was expressed in the internal telephone conference on 19 March 1999 between Aon London and Mr Helfert, Mr Tentinger and Mr Irle.

173. Nevertheless, given that Aon's duty as brokers was to take such steps as were necessary to obtain insurance binding on each of the participating insurers for the benefit of BP and its co-assured in relation to each project properly notified, its breach of that duty occurred as and when and to the extent that it failed to declare such a project to any participant in the following market. The fact that its misunderstanding of the effect of the Endorsement occurred at an earlier point of time does not mark out the date of the tort. That misunderstanding alone was incapable of amounting to a breach of professional duty: it was only at the moment when Aon should have provided effective broking services, but failed properly to use the policy wording in order to do so, that it was acting in breach of its professional duty.

174. Consequently, the necessary investigation is as to whether there was an assumption of responsibility by Aon London for making declarations to each member of the following market.

175. I begin by considering the relationship between BP and Aon on the hypothesis that the Service Agreement was not binding. This is obviously an artificial starting point but, as appears from the authorities to which I have referred, it is a necessary initial hypothesis given that if there is to be duty of care in tort it arises from the relationship that would exist in the absence of any direct or indirect contractual relationship.

176. Aon, as appears from the facts set out in paragraphs 118-129, presented itself to Amoco for the purposes of winning the appointment competition for the Global Construction Programme as an organisation operating through many different offices located throughout the world and able to draw on expertise in procuring energy industry CAR insurance. In so doing it did not distinguish between its different corporate components. For the purposes of identifying the scope of Aon's duties in order to insert them in Exhibit A of the Service Agreement negotiations with Amoco were conducted on behalf of Aon by Mr Burke (Aon Texas), Mr Cahill (Aon Connecticut), Mr Tentinger (Aon Texas) and Mr Helfert (Aon Illinios). Mr Siebenaler and Mr Canning were the main representatives of Amoco, both operating under the overall management of Mr Mitilier. By 16 October 1998 Aon's duties as brokers had been agreed and incorporated into the draft Service Agreement. They were agreed to be provided by one company in the Aon Group – Aon Texas – but amongst the duties under Programme Design were "knowledge and access to global insurance markets." I find that by the time of the merger with BP those involved in the negotiations on behalf of Amoco would have appreciated that in order fully to place the Open Cover it would be necessary to go to the London and European Continental Markets. It would also have been appreciated that for this purpose Aon's London office would probably be significantly involved in the placing operation, although it is not established that Mr Siebenaler or Mr Canning would have known enough about Aon's internal structure to appreciate that the London office would be in the domain of a corporate entity distinct from any of the United States corporate entities. Up to that time Aon London had not been in direct contact with Amoco, either in connection with drafting

the Service Agreement or with attempting to place the Open Cover.

177. Aon London had commenced its placing operation by a presentation to Swiss Re in Zurich on 14 August 1998 by Mr Brewer and Mr Humfrey. Following the passing on to Mr Tentinger and Mr Young (Aon Texas) of queries raised by Swiss Re and the provision of answers to those queries, Swiss Re agreed to write a 15% line. Having obtained the leaders' line, various brokers in Aon London then approached various members of the following market, including QBE, Reliance, Hannover Re, ACE, Copping, Cox and finally Upton. By November 1998 they had succeeded in placing at least provisionally the greater part of the risk. This became known to Amoco by 23 November 1998 when Mr Siebenaler and Mr Canning received Aon's letter of that date together with a schedule showing the names of the insurers. Aon thereby represented that they had, in part through their London office, provisionally placed the Open Cover. Aon Texas had undertaken to procure the use of Aon's international expertise as a broker in the placing of the risk and were saying that they had accomplished that operation – palpably by delegating an important part of the operation to Aon London.

178. Immediately following the merger at the end of 1998, BP's London office made it clear that it wanted to work with Aon's London office and from then onwards there was an increasingly close relationship between BP and the London office, at first with regard to the declaration of projects emanating from BP London, and, later in 2000, with regard also to projects emanating from BP Chicago. Viewed from BP's perspective Aon's London office would therefore be seen to be taking a vital part in the process of declaring risks to both Swiss Re and the non-US following market. Moreover, I infer that BP London, and therefore BP as a whole, was aware that Aon's London office was operated by an English incorporated company which was a different corporate entity from Aon Texas and Aon Illinois. That was the position from the outset, immediately following the merger, as appears from the name of the addressee on the letter dated 31 December 1998 from Mr David Brown, of BP Insurance, to Mr Wilks of Aon Group Ltd. In other words, by the time of the first declaration – the Schiehallion Heat Exchanger project – BP had been made aware by Aon London that it under the management of Mr Wilks – was to be the Aon entity which was to receive notification of projects emanating from the BP London office and which was to get them covered by declaring to the non-US market. I further find that BP knew that it was the London company which would be responsible for declaring all the projects to the London market. Given that the Open Cover was partly placed at Lloyd's, it was Aon London which, as a Lloyd's broker, would have to make declarations to those Lloyd's underwriters and it was made clear to BP that the London office would also deal with the rest of the non-US following market.

179. As from the discussions at the 26 February 1999 London meeting between Aon and BP representatives and in the course of subsequent discussions the procedures for notification of projects and for their declaration made clear to BP exactly what was to be the role of Aon London. These procedures were operated throughout the period of the Open Cover. I find that had one asked Mr Wilks of BP Insurance at any time during that period which of the Aon entities he understood to be responsible, in the general sense, for making effective declaration to the non-US market he would have answered without hesitation that it was the London office and if he had

been asked what company ran that office, he would have said Aon Group Limited (Aon London), as it was then called.

180. If, therefore, one assumes that Aon Texas had undertaken, otherwise than by a binding contract, to perform all the broking functions of the Service Agreement but had delegated to Aon London those functions which were allotted to it under the agreed procedural flow chart set out at Appendix 1 to this judgment, would there have been such an undertaking of responsibility by Aon London with regard to the proper conduct of those services?

181. Upon such hypothesis, I have no doubt that the answer to that question must be, Yes. There was adopted such a close relationship between Aon London and BP involving repeated direct contact between them that the substance of Aon's representation to BP was that Aon London was to perform such a crucial function in the process of effecting valid cover that in spite of the initial undertaking of Aon Texas to effect cover, Aon London was independently to be responsible for obtaining that cover. For this purpose it is clearly not necessary that there should have been express words to the effect that BP would have a right of action against Aon London. It would be enough if BP were entitled to infer from what was said and done that Aon London was to provide its professional services with regard to declarations and that, independently of Aon Texas or any other Aon entity, it could be relied upon by BP as undertaking responsibility to provide those services in accordance with the proper professional standards of an insurance broker on the London and European markets including Lloyd's.

182. Those circumstances would, in my judgment, fall on the same side of the line as those in Riyad Bank v. Ahli United Bank, supra, and Henderson v. Merrett, rather than on the Edgeworth Construction v. Lea, supra, and Williams v. Natural Life side of the line. That there would in such a case be at least a provisional duty of care in tort would not be unprecedented in the field of insurance brokers. In Punjab National Bank v. De Boinville [1992] 1 Lloyd's Rep 7 there were preliminary issues as to whether insurance brokers, whose function was to place marine cargo policies, were under a contractual duty or a duty of care in respect of an allegedly negligent placing to a bank to which the policies were assigned to secure payment for the cargo. It was held by Hobhouse J. that such a duty of care existed.

183. However, he also held that the two individual brokers, who were both employees of the corporate brokers, personally owed a duty of care to the assignee bank. At p27R, applying what he referred to as "established categories" of duty of care, he said this:

> "Similarly, the liability of the actual employee who is himself involved in the commission of a tort when he is aware of all the facts which give rise to the duty of care owed to the relevant client and is himself the individual through whom the brokerage duties are being carried out likewise falls within established principles. The authority which discussed this point, Ministry of Housing v. Sharp (Sup) has been referred to without disapproval in the later cases. In so far as it will have to be

> reconsidered in the light of the later cases, this will derive from a possible need to reconsider the relationship between involuntary obligations imposed by statute and duties of care in tort, not from any need to adopt a different approach in relation to the position and liability of individuals who are careless in circumstances where an undoubted tortious duty of care is owed by their employer to an identified and known person."

184. In the Court of Appeal his conclusion was upheld, Staughton LJ., who gave the main judgment, having concluded that one of the corporate brokers involved (Wrights) owed a contractual duty of care and the other (Fielding) owed a duty of care in tort to the assignee bank, that being a justifiable increment from cases such as Youell v. Bland Welch & Co Ltd [1990] 2 Lloyd's Rep 431, he went on to hold at p37L:

> "It is not every employee of a firm or company providing professional services that owes a personal duty of care to the client; it depends what he is employed to do: see the judgment of Lord Justice Cross in Ministry of Housing and Local Government v. Sharp, [1970] 2 QB 233 at p291. But here Mr De Boinville and Mr Deere, whether in their employment with Wrights or with Fieldings, were evidently entrusted with the whole or nearly the whole of the task which their employers undertook. Mr Milligan argued that they were more remote from the bank than their employers. On the contrary, I think that in fact their proximity was greater. While they were employed by Wrights I hold that, as professional men, they owed a duty of care to the bank, since the bank was a client or the client of Wrights. While they were employed by Fieldings they owed a duty of care to the bank by justifiable increment of an existing category, until the bank became a client of Fieldings in July when their duty came within an existing category."

185. This decision was referred to by Lord Goff in Henderson v. Merrett at p182 and indeed relied upon, albeit without specific reference to the decision about the duty of care of the employees. In this connection, it is to be noted that Staughton LJ. regarded as determinative the fact that the employees were entrusted with the whole or nearly the whole of the broking exercise and that they had knowledge that the policies were to be assigned to the bank. This being a clear decision that an employee of an insurance broker can owe a personal duty of care to his employer's clients, it is difficult to see why a sub-broker should not by analogy also owe a duty of care to the head broker's clients.

186. I must now consider whether this provisional view should be displaced by the existence of the contractual relationship between the parties.

187. As regards the relationship between Aon London and Aon Texas, the latter had clearly delegated to the former a substantial part of its broking duties under the Service Agreement. There was no express contract between them which was only to be expected given that the London office

personnel were acting as part of a group team drawn from various Aon offices. However, there must have been at least an implied contract to the effect that Aon London would in consideration of its proportion of the fees, carry out the designated broking services, including making declarations to the non-US market, and, by further implication, would exercise the appropriate standard of care.

188. As regards the Service Agreement, Aon Texas, as the only contracting party from the Aon Group, was put forward as the sole vehicle for the carriage of the contract rights and duties of the entire Group. That was the corporate entity to which the premium and the broking fees had to be paid (although Aon Illinois was soon interposed as the medium through which as a matter of convenience payment was to be made). That was the corporate entity that would be contractually liable for failure to exercise proper care either in placing the risk or making the declarations in respect of notified projects.

189. The Service Agreement did, however, also contain clause 12 which I repeat as a matter of convenience:

> "Aon Risk Services agrees to hold AMOCO and its affiliates harmless against all liabilities, demands, damages, expenses or losses arising from any third party claim related to the Services and Aon Risk Services performance of the Services.
>
> Aon Risk Services hereby agrees to indemnify AMOCO against all loss, damage, costs and other expenses of any nature whatsoever incurred or suffered by AMOCO, its directors, officers and employees or by a third party as a result of any and all representations, statements, tortuous (sic) acts or omissions including negligence or breaches of obligations arising under or in connection with this Agreement by Aon Risk Services to a maximum amount of Aon Risk Services remuneration noted in Clause 6 above except in the case of third parties where Aon Risk Services will be liable for all loss, damage, injury or death to the full extent of their negligence or fault."

190. The first point to be observed is that clause 12 does not occur in any contract binding on Aon London. The Service Agreement does not in terms direct itself to the rights or liabilities of any member of the Aon Group except Aon Texas. Accordingly, it does not perform a function equivalent to a sub-contract in the building industry. To the extent if any that it contains a provision such as clause 12 including a cap on liability, that is not expressed to protect Aon London, although under the Law of Illinois by reference to which it must be construed, it could have been drafted to confer protection by way of limiting liability on a third party such as Aon London.

191. At this point, it is necessary to consider the proper construction of clause 12. Although the applicable principles of construction are those of Illinois Law, at least a useful starting point is to

ask what ordinary meaning the words bear.

192. The indemnity in the first paragraph of clause 12 imposes an obligation on Aon Texas and a benefit on Amoco and its affiliates. The latter are not parties to the Service Agreement but they were included as Named Insureds under the Open Cover which identified the Principal Insureds thus:

> "Principal Insured(s):
>
> 1. BP AMOCO PLC (hereafter referred to as BP AMOCO) and/or all subsidiary and/or affiliated and/or associated and/or interrelated companies of every tier as may now or hereafter be constituted and/or their shareholders, directors, officers and employees, but only with respect to their interest in service to and/or employment by such companies.
>
> 2. At the option of BP AMOCO, co-venturers and/or project managers and/or financiers as may now or hereafter exist and as may be declared each underlying declaration.
>
> Other Insured(s):
>
> Any other party as may be declared each underlying declaration, including but not limited to contractors, and/or their sub-contractors of every tier whether named hereunder or not, and/or architects, engineers and consultants, and/or suppliers and/or agents and/or manufacturers and/or vendors and/or licensors in connection with the subject matters of this insurance, and/or any works, activities preparations etc connected therewith shall have benefit of this insurance, but only to the extent, and fully limited to, the Principal Insured's obligations to directly or indirectly assume the liability of, and/or provide insurance such as is afforded by this policy to, such parties."

193. The scope of the indemnity provided by the first paragraph is such that it holds harmless Amoco and its affiliates alone of the Named Insureds on a no-fault basis against in effect all financial consequences arising from third party claims related to Aon's services. In other words, even if Aon Texas is not in breach of contract or duty to BP, it is under an obligation to indemnify BP and/or its affiliates as the case may be. In as much as the clause confers a benefit on the affiliates, they can sue on it for loss suffered by them even if BP itself has suffered no loss. A third party claim is one brought against BP or its affiliate by anyone other than a party to the Service Agreement or an affiliate.

194. Thus Aon Texas accepts a liability to indemnify BP going well beyond the liability which it would incur as a broker, for it covers losses "related to" the services identified in Exhibit A or to

Aon Texas's performance of them whereas but for this provision there would only be liability in damages for breach of its obligations under clause 4 of the Service Agreement which I repeat here as a matter of convenience.

> "Aon Risk Services will provide the services and responsibilities listed and described in Exhibit A to AMOCO as and when reasonably required by AMOCO ("Services"). Additionally, Aon Risk Services shall perform the Services in accordance with broker and risk management standards for companies similar to AMOCO."

195. As to the second paragraph, the sole party entitled to sue was BP (Amoco) but such indemnity was expressed to cover not only losses sustained by BP but also by its directors, officers and employees (they all being included as Principal Insureds under the Open Cover) as well as by a third party. In this context a "third party" means a party other than BP, its directors, officers and employees who sustains any of the financial losses listed as a result of representations, statements, tortious acts or omissions including negligence or breaches of obligations arising under or in connection with the Service Agreement by Aon Texas. This indemnity is therefore one wide enough to cover losses not suffered by BP (Amoco), but suffered by, for example, an affiliate or a co-venturer as a result of the conduct of Aon Texas of the kind described, in relation to which, except for representations and statements, Aon Texas must be at fault. It clearly operates regardless of whether BP (Amoco) is liable to the third party for the losses suffered by that third party. Accordingly, this provision also goes well beyond Aon Texas's liability in damages to BP (Amoco) for any of the conduct, including the fault-based conduct listed. It also covers "costs", that is legal costs which under Illinois law would not be awarded.

196. There is then the limitation on liability expressed by the words "to a maximum amount of Aon Risk Services remuneration noted in Clause 6". This cap however, is then disapplied to losses sustained by such third parties where the loss damage, injury or death is attributable to Aon Texas's negligence or fault.

197. Accordingly, although this indemnity is in many respects wider than the liability for damages which would be incurred by Aon Texas if it were in breach of the Service Agreement, it also includes such otherwise recoverable losses and what it is permitted to recover in respect of those losses is capped by this clause. Consequently, the Service Agreement in its natural meaning unambiguously means that liability to BP (Amoco) for breach of the clause 4 obligations is to be limited in accordance with the cap. Clearly, however, that limitation of liability leaves intact BP's right to be indemnified under the first paragraph of clause 12 in respect of any third party claim. In other words the cap in the second paragraph does not derogate from the scope of the first paragraph indemnity.

198. I am unpersuaded that, as argued by Aon, the second paragraph is to be understood by its reference to Amoco as covering Amoco (BP) companies in addition to the holding company. The

first paragraph expressly refers to "Amoco and its affiliates" as entitled to the indemnity. The second paragraph twice refers simply to Amoco, but omits my reference to its affiliates, although it makes express reference to its directors officers and employees. It is argued that in effect the draftsman has mistakenly twice missed out "and its affiliates" in the second paragraph. It is said that if, as is the case, third party did not include affiliates in the first paragraph, it cannot have been intended to include it in the second paragraph and therefore "Amoco" ought to be read as including affiliates in the second paragraph. It is argued that, given that the Amoco holding company as distinct from its subsidiaries would not be expected to be involved as an operating company participating in any of the projects likely to be insured under the Open Cover, there would be no commercial purpose in confining the indemnity in the second paragraph to a company that was unlikely ever to suffer losses of the kind described.

199. However, I consider that there is greater force in the argument advanced by Mr Popplewell QC on behalf of BP that, whereas the holding company would be unlikely to sustain losses other than its administrative and/or legal costs, the operating companies in the group which were subsidiaries as well as the co-venturer companies, were those that were likely to sustain heavy losses and were therefore those not subject to a cap. If those companies directly involved in the projects and which were supposed to be insured comprised both operating subsidiaries and co-venturers, it made no commercial sense to cap the liability of Aon Texas in respect of the losses of one but not the other.

200. Moreover, the affiliates might comprise operating companies, companies which were only partly owned by Amoco and which for that reason would not ordinarily be regarded as part of Amoco or BP.

201. In considering whether the Service Agreement displaces the provisional duty of care it is necessary to have regard to two further provisions: clause 4 (see para 194 above) and clause 13, the Dispute Resolution Clause.

202. It is submitted by BP that in undertaking "to perform the Services in accordance with broker and risk management standards for companies similar to AMOCO" Aon Texas was assuming a higher professional standard of care than they otherwise would.

203. I cannot accept this proposition. The professional standard of care ordinarily to be expected of a placing broker would be that which was appropriate in all the circumstances for the client in question and the nature of the placing in question. Thus to define the contractually required standard by reference to standards for companies similar to Amoco calls for no more than would, in any event be required, in the absence of an express provision.

204. As to the Dispute Resolution Clause, it contains a non-exclusive jurisdiction clause as between Aon Texas and BP. Its effect is therefore neither to confine claims by BP against Aon Texas to the courts of Illinois nor to legislate as to the venue of claims against any other Aon corporate

entity.

205. Finally, as clauses 17 and 22 of the Service Agreement demonstrate, where the parties wished to include Amoco and its affiliates, they did so expressly. There is nowhere else in the Service Agreement where the parties used Amoco as a compendious term including the affiliates. This was a contract drafted by the parties but with the approval of their respective in-house legal departments. In all the circumstances I am satisfied that the proper construction of the second paragraph is that for which BP contends.

206. Does the application of the principle of construction in Illinois law on which I have heard evidence lead to any different result with regard to the proper construction of clause 12?

207. In their Joint Memorandum the expert witnesses on Illinois Law Mr Belcove (BP) and Mr Carriglio (Aon) agreed on the following propositions:

> 1. "The court's primary objective is to give effect to the intent of the parties at the time the contract was made.
>
> 2. Contracts must be interpreted as a whole giving meaning and effect to each provision thereof.
>
> 3. If the language in the contract is clear and unambiguous, the judge must determine the intention of the parties solely from the plain language of the contract and may not consider extrinsic evidence outside the four corners of the document itself.
>
> 4. Clear and unambiguous contract terms must be given their ordinary and natural meaning.
>
> 5. Under the doctrine of merger and parole evidence rule, a written agreement that is not ambiguous and that is complete on its face supersedes all prior agreements on the same subject matter and bars the introduction of evidence concerning any prior term or agreement on that subject matter.
>
> 6. Under no circumstances will the court consider extrinsic evidence as an aid to construction unless it finds the contract terms to be ambiguous.
>
> 7. A contract term is not ambiguous merely because it is undefined in the contract, nor because the parties can suggest creative possibilities for its meaning. A contract is not rendered ambiguous simply because the parties disagree as to its construction.

8. A contract is ambiguous if it is reasonably susceptible to being interpreted in more than one sense or is obscure in meaning.

9. If a contract is ambiguous, the following types of extrinsic evidence are admissible:

1. Evidence of the parties' course of performance under the contract

2. Evidence of the parties' disclosed statements to each other during negotiations

3. Evidence of the underlying subject matter of the contract

4. Evidence of the relationship of the parties to each other

10. Even if a contract is ambiguous, under no circumstances is evidence of a party's subjective, undisclosed intentions admissible to ascertain the meaning of the parties; nor is evidence of a party's unstated, subjective understanding of the meaning of terms in a contract admissible to ascertain the meaning of the parties.

11. The presence of an integration clause (for example an "Entire Agreement" clause) weighs against the admission of extrinsic evidence.

12. Illinois courts will avoid any absurd or commercially unreasonable interpretation of a contract."

208. The experts also identified two kinds of term to which special rules of construction applied, namely exculpatory clauses and exclusive remedy clauses.

209. As to exculpatory clauses, the relevant principles were stated by the Illinois Supreme Court in Berwind Corporation v. Litton Industries Inc [1976] 532 F 2d 1. Such clauses had the effect of enabling a party to exclude in whole or in part his liability for breach of contract or in tort. The principles of construction applicable to such clauses involved that, as stated by the Supreme Court, three pre-requisites must be met before an exculpatory clause would be deemed to defeat a claim:

a) "The exculpatory clause must be strictly construed;

b) With every intendment against the party who seeks immunity from liability; and

c) The clause must spell out the intention of the parties with the greatest of

particularity."

210. It was further laid down that:

> "Exculpatory contracts or clauses are also subject to the general contract rule that they are construed most strongly against their maker, 'and especially so when printed upon the (maker's) form.'
>
> Despite these strict rules of construction, however, a specific reference to 'negligence' or its cognates is not required."

211. In this connection, I accept BP's submission that, although in Illinois Law the relative bargaining power and sophistication of the parties is relevant to whether an exculpatory clause will be enforced having regard to matters of public policy, those considerations are not taken into account as material to construction.

212. Exclusive remedy clauses have the effect of confining the entitlement of one party to recover, most relevantly, for example, as was argued in Berwind Corp v. Litton Industries, supra, where there is an exclusive remedy for breach of contract and the effect of the clause is to exclude claims in tort. The leading case was Cordiant v. David Cravit & Associates [1997] WL 534308 NDI11. Decisions of the Illinois Appellate Court in Robert Veath v. Speciality Grains [1989] 190 Ill App 3d 787 and Omnitrus Merging Corporation v. Illinois Tool Works [1993] 256 Ill App 3d 31, are also relevant. The relevant principles are that it is open to a party to confine its liability by means of an indemnity agreement. Such a clause is to be strictly construed taking into account the contract as a whole. It must be the only reasonable construction of the contract as a whole that the confinement of liability was intended by the parties. Where that is not indicated the contract allows a cumulative rather than an exclusive effect. The use of the word "exclusive" is not essential for an exclusive remedy effect provided that such is the only reasonable construction of the contract as a whole.

213. In so far as it is material to the background against which the contract is to be construed, in Illinois the weight of authority suggests that an insurance broker owes concurrent duties of care in contract and tort and that its postion falls into that group of cases which are exceptions to the general rule laid down in Moorman Manufacturing Co v. National Tank Co (1982) 91 Ill 2nd 269 that there is no concurrent liability in contact and tort to the effect that the provider of services with whom there is a contract can be sued only under the contract and not in tort. The class of established exceptions includes providers of professional services such as attorneys and accountants but excludes architects and engineers. The conceptual basis for this distinction is not easy to identify. Nevertheless, the Illinois courts have on various different bases held that insurance brokers fall into the same category of professionals as attorneys and accountants and owe a concurrent duty of care in tort: see Allendale v. Bull Data Systems Inc 1994 WL 687579, Kanter v. Deitelbaum (1995) 271 Ill App 3d 750, AYH Holdings, Incl v. Avreco Inc. (2005) 357

Ill App 3d 17.

214. Investigation of those judgments does not support Mr Carriglio's thesis that application of the Moorman principle applies to insurance brokers if the contract under which they are to provide services specifies the scope of their duties and the standard of care to which they must work.

215. To the very limited extent to which this issue is material, I conclude that under Illinois Law Aon Texas did owe to BP a duty of care in tort concurrent with the duty of care that it owed under the Service Agreement.

216. These conclusions on the applicable principles of construction and professional duty in Illinois law do not lead to the result that, there being no ambiguity in clause 12 of the Service Agreement, it should be construed to give any different construction to that which an English court would place on either paragraph of that clause. Therefore, BP can sue Aon Texas for breach of the Service Agreement by Aon Texas, including negligent breach of clause 4 by Aon Texas whether by itself or through any other Aon corporate entity, including Aon London, provided such breach of the Service Agreement has caused loss or damage to BP and/or any affiliate and/or any co-venturer and/or any contractor. In English law only BP can enforce this indemnity, but on behalf of a co-venturer, affiliate or contractor.

217. BP can similarly sue Aon Texas if loss or damage is caused to BP or any affiliate, co-venturer or contractor by any tortious act on the part of Aon Texas. Where BP sues for loss or damage suffered exclusively by itself, its directors, officers or employees, as it does here with regard to the legal costs of the Frankona proceedings, the recoverable indemnity is subject to the cap by reference to the remuneration to Aon Texas provided for in clause 6. However, where BP sues to recover an indemnity in respect of the losses suffered by affiliates, co-venturers or contractors, the cap does not apply. Consequently, the effect of the second paragraph is unambiguously to limit the liability of Aon Texas for loss and damage suffered by BP, its directors, officers or employees by reason of Aon Texas's breach of the Service Agreement. However, since Aon London is not party to the Service Agreement, if the breach has been caused by negligence on the part of Aon London, they could be liable to BP for an uncapped amount of damages.

218. On the basis of that analysis of the Service Agreement, is the provisional duty of care of Aon London to BP displaced by the existence of that Agreement?

219. This can be tested by asking whether the impact of Aon London's conduct on BP would be materially affected by BP's knowledge of the existence of the Service Agreement as between it and Aon Texas.

220. In my judgment, notwithstanding BP's knowledge that, by entering into the Service Agreement, it would be entitled to receive the benefit of work by professional personnel from the Aon Natural Resources team by whatever corporate entity they might be employed, including Aon London, it

would not by its knowledge of that Agreement be materially less likely to believe that Aon London was by its conduct undertaking to accept personal responsibility for the performance of its service as brokers. In this connection, apart from the very close relationship involving direct contact between Aon London and BP from January 1999, there was the fact that, from a commercial perspective, the main protection to be derived from clause 12 of the Service Agreement was not in respect of such losses as BP plc might suffer by reason of breaches of contract by Aon Texas that might be caused by the negligent acts of Aon London for which the indemnity was capped, but was in respect of the losses that might be sustained by operating companies, such as affiliates or co-venturers or contractors which were not capped. Therefore, the Service Agreement was in reality likely to provide Aon Texas with a relatively miniscule level of protection by limitation of loss by comparison with the losses (of affiliates, co-venturers or contractors) which were likely to be recoverable either against it for breach of contract or against Aon London in respect of Aon London's liability in tort. Accordingly, the probability was that the vast majority of claims for which Aon Texas might be liable in respect of losses suffered by affiliates, co-venturers or contractors due to Aon London's negligence could be passed on, uncapped, to Aon London.

221. Moreover, there was in this case no carefully constructed chain of contracts analogous to that in the building cases. Indeed, the only contract between Aon Texas and Aon London was necessarily implied, save in respect of the fee apportionment agreement and the lines of communication of notification of projects for declaration. The duty to exercise proper professional care existed both under that implied contract and under the Service Agreement. Aon London thus owed the same level of duty by implication to Aon Texas as it would owe to BP if there were a duty of care in tort.

222. The submission that one of the reasons why the Service Agreement would be understood by BP as precluding an undertaking of responsibility by Aon was the inclusion in it of the Law and Jurisdiction clause is not persuasive. It was no doubt inserted to provide a body of law which could be deployed in relation to the rights and obligations under the Service Agreement and to provide either party with the option of using the Chicago courts for the purposes of enforcement of that Agreement. That would be a matter of geographical convenience to both sides. These provisions are, however, merely facets of the Agreement which go to its enforcement. They do not, in my judgment, add anything to the existence of the Agreement itself and they do not support the proposition that it would be understood by BP to be an exclusive regime precluding an independent undertaking of responsibility by a non-party such as Aon London.

223. It thus appears that here one has a fundamentally different relationship between BP and Aon London from that encountered in, for example, Williams v. Natural Life, supra, or the building contract cases. Such contractual structure as there is does not preclude Aon London's conduct from amounting to an undertaking of responsibility in tort. Accordingly, I conclude that the provisional duty of care indicated by the first stage of this methodology is not displaced by the existence of the Service Agreement.

224. Finally, it is necessary to ask at the third stage whether anything in any contract to which Aon London was a party protected it from the whole or part of its liability for breach of that duty of care. To this the answer is clearly that there was nothing. The only contract to which Aon London was a party was its implied contract with Aon Texas in which there was no implied term exculpating Aon London from liability to Aon Texas in the tort of negligence or for negligent breach of contract. Aon London's liability in negligence to Aon Texas was thus of similar scope to the liability in negligence which it would incur to BP if it owed BP a duty of care.

225. In these circumstances, I conclude that Aon London did undertake responsibility to BP plc to provide the services of a broker under the Open Cover with proper professional skill and care. Nor can there be any doubt that BP relied on that undertaking. The very essence of the service which BP was entitled to expect Aon London to provide was the provision of complete cover for each notified project and not merely cover from the leading underwriters. On each occasion when Aon London received from BP London or from BP Chicago or from Aon Illinois (in the case of Gulf of Mexico or other American projects) a notification of a project to be declared to the Open Cover Aon London's professional duty of care was engaged. Once it received the instructions its duty attached to that project and it was obliged to take such steps as were reasonably required to procure cover by declaring the project to all the underwriters on the London and continental markets, including all the Frankona Defendants. Its omission to do so would amount to a breach of its professional duty of care in tort.

226. So far I have considered the position of BP plc, the sole client of Aon Texas under the Service Agreement and the only claimant party whose representatives were in direct contact with Aon London. The really significant losses in this case have been suffered by the BP affiliates, co-venturers and contractors. None of them were in a contractual relationship with BP plc or Aon Texas or Aon London. The joint venturers had contracts with BP's affiliates and the contractors had contracts with the affiliates.

227. Under clause 1 of the Open Cover the affiliates were co-assured with BP and would be entitled to sue under the Open Cover in relation to any project in which their interest was declared. The co-venturers (who had contracts with one or other of the affiliates) were given the facility of having cover procured for them by BP plc. Contractors could also be declared in respect of particular projects provided that it was the obligation of the Principal Assured (affiliate or co-venturer) to provide to that contractor insurance cover in relation to the declared project. Thus on each occasion when a notification of a project for declaration was made to Aon London, its continuing undertaking to BP of responsibility for effecting cover would attach to that project and reliance on it would be justifiably placed not only by BP but through BP by those other parties – affiliates, co-venturers and contractors identified in the notification – for whom Aon London had been requested to procure cover by the giving of declarations. Those other parties relied on BP's procurement of cover and its confirmation that such had been obtained which Aon London would obviously appreciate would be passed on to such other parties.

228. Aon argues that it has not been established on the evidence that there was any undertaking of

responsibility by Aon London to the affiliates, co-venturers or contractors concerned or that they relied on any such undertaking.

229. I can accept neither submission. As recognised by Lord Steyn in Williams v. Natural Life, supra, at p835H in the passage from his speech cited at para 82 above, it is sufficient if the assumption of responsibility is indirectly conveyed to the party who relies upon it. The communication to BP plc of that assumption of responsibility by Aon London's continuing to represent itself as the party who could be relied upon to effect cover for other parties who could become insured presents itself to me as a representation to those other parties of its personal responsibility for making sufficient declarations since it would be perfectly obvious to Aon London that those parties would be notified of the cover by Aon Illinois to BP and by BP to the named insured. In such circumstances those other insureds as well as BP would reasonably be entitled to rely on Aon London, just as BP was. I infer that they did so rely, for the inference is unavoidable.

230. It follows that the affiliates and co-venturers have direct rights of action in tort against Aon London for losses caused to them by its failure to declare to the Frankona Defendants. BP plc also has a direct right of action in tort against Aon London, but since it was at no time an operating company with any interest in any part of the projects notified for declaration, its losses are confined to its administrative and legal costs associated with the Frankona action.

231. It is right to add that in the case of three projects notified to Aon London it is accepted by Aon that Aon London owed contractual duties of professional care to co-venturers. In respect of the Keith/Bruce project (declaration 6), the Erskine project (declaration 8) and the Viking BC2 project (declaration 10) Aon London concluded separate brokerage fee agreements with the respect project managers, BHP, Texaco and Conoco respectively. Accordingly these three co-venturers do not need to rely on duty of care in tort.

The Upton Issue

232. The essential issue with regard to the Upton Syndicate, which was one of the Frankona Defendants, is whether, as contended by Aon, the loss in respect of which BP makes claim was caused in part by BP having, as part of the settlement agreement made with the Frankona Defendants in July 2003, conceded that the declarations of projects numbered 8 to 26 inclusive were not made to any of the following market, including Upton, by 30 June 2000 rather than by the negligence of Aon London. More specifically, it is said that:

i) there had in truth been valid declarations of most of those projects as at 30 June 2000 when the Open Cover period expired; or

ii) if those projects were not validly declared by 30 June 2000, Upton was estopped by convention from denying that it was bound by the declarations of those projects to the Open Cover leaders, Swiss Re and AIG; and/or

iii) if no valid declarations had been made by 30 June 2000, Upton agreed to accept declarations of all those projects when on 6 December 2000 its underwriter scratched an endorsement previously scratched by ACE, then requested payment of the premium referable to the declaration of those projects and later signed the necessary premium bordereux and accepted the premium;

iv) had BP taken these points or any of them in its settlement negotiations, it would have obtained more favourable terms of settlement from the Frankona Defendants and to that extent its omission to raise these points is the cause of BP's loss – and not Aon London's breach of duty of care.

233. In this connection, it should be noted that Upton's share of the whole risk under the Open Cover was only a 5 per cent part out of the 42 per cent written by all the Frankona Defendants. Accordingly, the maximum influence that taking this point could have had on the settlement negotiations was but 5 per cent of the whole amount of the loss sustained by insured projects.

234. It is convenient first to set out the facts material to points (i), (ii) and (iii).

235. The participation of Upton in the Open Cover was accomplished by means of a declaration to a facility known as the London Cover. This was an obligatory cover under which Upton and the Spinney Syndicate agreed to accept participations up to a maximum of 10 per cent (5 per cent each) in respect of all Aon Natural Resources Worldwide Business upon which Aon Natural Resources (Houston) (ie. Aon Texas) received instructions to provide coverage. The only qualification to the obligatory nature of the facility was that risks over a period in excess of 12 months without a review clause had to be specifically agreed by Upton and Spinney. The declaration under that facility and specific acceptance of the Open Cover (since its period exceeded 12 months) therefore placed Upton in a similar position vis a vis BP to that of other members of the following market who had specifically agreed to accept a line on the Open Cover. When the declaration of the Open Cover was made to Upton its underwriter, Kevin Regan, scratched the declaration form. That form identified the leader under the Open Cover as Swiss Re.

236. The broker at Aon London whose responsibility it was to operate the London Cover was Richard Coleman. He and Mr Regan worked well together. It was therefore with particular concern that in June 2000 Mr Coleman heard on the market grapevine that underwriters in the energy market who participated in the Open Cover were disturbed about the large number of declarations being made to the Open Cover that month. He assumed that this would also come to the attention of Mr Regan. Consequently, when on 28 June 2000 (two days before the end of the period of the Open Cover) there arrived from Aon Texas three faxes to which were attached the rating worksheets and confirmations of insurance of as many as 21 distinct projects that, according to Aon Texas, had been declared to the Open Cover, Mr Coleman, in consultation with a senior broker at Aon London, Mr Finlay, decided that he ought to go to see Mr Regan and tell him of these risks if only to preserve Upton's goodwill, rather than allow these projects simply to be automatically

injected into the London Cover, leaving it to Mr Regan to hear of them through market gossip or to infer such increased exposure when he eventually received the premium bordereaux which would simply tell him that there had been a huge increase in premium. Such a large addition to the exposure of underwriters under the London Cover was without precedent. Accordingly, on the morning of 29 June 2000 Mr Coleman visited Mr Regan at the box at Lloyd's and showed him the three faxes received the previous day. The faxes did not cover all declarations 8 to 26. They omitted declarations 10, 11, 12, 19 and 20. The meeting, which lasted less than ten minutes, was difficult, according to Mr Coleman's evidence. Mr Regan went through the faxes and then wanted to know whether Swiss Re, as leader, had accepted those declarations. He was adamant that, without the information that Swiss Re had done so, he was not willing to scratch the declarations or to take copies of them. Mr Coleman did not know the answer to this question and he therefore left without Mr Regan having accepted that those projects had been declared.

237. It is to be observed that from the beginning to the end of this meeting neither Mr Coleman nor, I infer, Mr Regan understood that in order for Upton to become bound under the Open Cover in respect of any of those projects notified in the three faxes it was necessary for a declaration to be made to Upton personally and that a declaration to Swiss Re would not in itself bind Upton to the risk.

238. When he returned to his office Mr Coleman ascertained that some declarations had not been accepted by Swiss Re. He reported back to Aon Texas by email asking for efforts to get Swiss Re to accept all those outstanding declarations. No further approach was made to Upton prior to expiration of the Open Cover period.

239. During the period between then and October 2000 there took place negotiations between BP, through Aon, and AIG and Swiss Re which culminated in the Settlement Agreement of October 2000 under which the leaders agreed to accept declarations 8 to 26 on certain conditions.

240. Aon London then tried to persuade the London following market to follow the leaders' settlement. ACE, which was treated informally as the London market leader, agreed to do so and on 26 October 2000 its underwriter scratched an endorsement indicating that they noted those declarations all as agreed by cover leaders.

241. Aon London then approached the rest of the following market including Upton. For this purpose, Mr Jeary of Aon London had a meeting with Mr Regan in late October or November 2000 but did not obtain Mr Regan's scratch. In the course of his meeting with Mr Regan, Mr Jeary told him that he was obliged to follow the leaders, Swiss Re and AIG, but he did not inform Mr Regan that ACE was also a leader. Copies of declarations 8 to 26 stamped by Swiss Re and AIG were produced by Mr Coleman as part of a file which was shown to Mr Regan at a later meeting but Mr Regan insisted on signing the same endorsement as that scratched by ACE so that Upton would be in exactly the same position as ACE. Mr Coleman returned on 6 December 2000 with a copy of ACE's endorsement which Mr Regan then scratched.

242. It should be noted that the exercise in October – December 2000 which culminated in Mr Regan scratching the ACE endorsement was different in kind from the exercise which had been attempted by Mr Coleman during his visit on 29 June. On the later occasion the invitation to Mr Regan to sign the endorsement was not an invitation merely to acknowledge the making of declarations under the Open Cover, but to enter into the settlement agreement already reached by the Leaders and ACE. This involved not only acceptance that Upton was bound by declarations 8 to 26 but that the terms of the settlement agreement applied to the effect that declarations 27 to 30 were withdrawn and that three of the other declarations 18, 24 and 26, were subject to increased premium and increased deductibles.

243. In March 2002, before the trial of the Frankona Action, Aon Law (the in-house legal department in London) agreed with BP's solicitors (Herbert Smith) that, if at the case management conference on 15 March 2002 a split trial was ordered, Aon London would be bound by the court's judgment on all issues in the first part of the trial. Aon confirmed their agreement to be bound on 14 November 2002 following sight of Frankona's draft Amended Defence in which it had raised for the first time the point that declarations had to be made to each insurer participating in the Open Cover.

244. At the trial of preliminary issues Cresswell J. had to decide whether as between BP and the Frankona Defendants four sample projects had been validly declared to the Open Cover. He held that, as regards Upton, none of the four – declarations 5, 12, 14 and 26 had been validly declared. Declarations 5 and 12 were not covered by the three faxes put before Mr Regan on 29 June 2000. Declarations 14 and 26 were included in those faxes. On 5 December 2002 Mr Smith of Aon London had informed Herbert Smith, on behalf of BP, that Upton had been presented with copies of declarations 8 to 26 by Mr Coleman on 29 June 2000 and accepted that Mr Coleman might have to be called as a witness. In the course of the trial of preliminary issues counsel on behalf of BP neither referred to the presentation of the three faxes with the attached declarations to Mr Regan nor called Mr Coleman as a witness, but instead referred to a "schedule of declarations" being shown to Mr Regan, this notwithstanding that on 13 January 2003 Herbert Smith had written to the Frankona Defendants' solicitors informing them that BP relied upon the email of 29 June 2000 sent by Aon London to Aon Houston referring to the "meeting between Kevin Regan and Richard Coleman at which copies of declarations 8 to 26 were presented to Kevin Regan personally at Lloyd's". No satisfactory explanation has been put forward for the failure of those representing BP at the trial to rely on this evidence. Nevertheless Aon accepts that they are bound by the decision of Cresswell J. with regard to these declarations as well as the other two (5 and 12).

245. It is Aon's case that although the decision of Cresswell J. on the preliminary issues precludes it from arguing that the effect of what happened at the Coleman/Regan meeting was that declarations 14 and 26 were validly made on that occasion, it is not precluded by that decision from submitting in this trial that:

i) declarations other than 14 and 26 were validly made on that occasion or

ii) that, if the risks were not validly declared on 29 June 2000, Upton was estopped by convention from denying that it was bound to them or

iii) the effect of Mr Regan scratching the ACE endorsement on 6 December and agreeing to accept the premium was that Upton agreed to accept all such risks.

246. I must now consider the validity of each of the points which Aon say that BP wrongly conceded when they accepted, as part of the settlement with the Frankona Defendants, that declarations 8 to 26 had not been validly made with the effect that Upton did not insure them under the Open Cover.

The Coleman/Regan Meetings of 29 June 2000

247. Cresswell J. held that in order to effect a valid declaration each insurer had to be informed of certain minimum information including the project being declared, the inception date and completed rating worksheet: see [2003] 1 Lloyd's Rep at 555 L to R.

248. It is, however, important to emphasise that the contractual function was, as held by Cresswell J. at p555 L, the acceptance of the standing offer to insure made by underwriters under the Open Cover. Although, therefore, it was an implied term of that offer that certain minimum information had to be provided in conjunction with the identification of a particular project in order for there to be a valid declaration, provided that requirement was complied with, the question whether a declaration had been validly made would depend, subject to one qualification, on whether the declaration had been effectually communicated to the insurer. That question would have to be judged objectively in the sense that it must be tested by reference to the effect which the broker's communication could be expected to have on the mind of a reasonable underwriter in all the circumstances. The subjective intention of the broker or of the underwriter would in principle be nihil ad rem except in the area of mistake. So the issue as to the effect of what was done at the 29 June meeting, given that it is not suggested that the three faxes contained inadequate information, has to be approached by asking whether a reasonable underwriter in the position of Mr Regan would, based on Mr Coleman's words and conduct, regard that which was done by Mr Coleman as the effective tendering of a declaration.

249. In this connection, it is relevant to note that if it were the case that the information provided with a declaration disclosed or suggested that a project were ineligible to be declared because, for example, nothing insurable under the Open Cover would be on risk within the foreseeable future, an underwriter would be entitled to reject the declaration or at least to ask for further information. In so doing he would in effect be asserting that what the broker had purported to declare did not amount to an acceptance of the standing offer or at least that he was not satisfied that it did. In those circumstances however his assertion would not in itself have any bearing on the validity of

the offer, either the project was, objectively, eligible in which case the process of its being communicated would be an effective acceptance of the standing offer, or as it was, objectively, ineligible in which case that which had been communicated would not be a valid acceptance.

250. In this connection, I have no doubt that once effective communication has been made to the underwriter, the validity of the declaration does not depend on whether he has scratched or noted it. His doing so is, as BP's expert, Mr Hallett, accepted in cross-examination, no more than evidence of his receipt of the communication.

251. What then is the correct analysis of what passed at the 29 June 2000 meeting?

252. The starting point is to keep in mind that, although both Mr Coleman and Mr Regan were under the misapprehension that Upton would be bound if there had been valid declarations to the Leading Underwriters, in particular Swiss Re, the question whether there was an effective communication of the declaration has to be judged from the perspective of the reasonable underwriter unaffected by that misapprehension.

253. In being presented and leafing through the documents (the three faxes) which contained the necessary particulars of the projects tendered for declaration Mr Regan was given notice of all the matters necessary to amount to an effective declaration. But did that amount to an acceptance of the standing offer?

254. It is argued by Mr Popplewell QC on behalf of BP that it did not for the following reasons. The visit by Mr Coleman on 29 June 2000 was essentially a public relations exercise and, as accepted by Mr Coleman in cross-examination, was intended neither by him nor Mr Regan to have legal significance as the occasion for the making of declarations under the Open Cover. Further, apart from the actus reus of offer and acceptance, there was no mens rea by way of intention to create legal relations.

255. At the end of the day, the effect of what passed has to be tested by investigating whether the hypothetical reasonable underwriter knowing that he was not entitled to ignore an eligible risk and was not bound by the leading underwriter's acceptance of it would have understood what passed to be the communication to him of the risks covered by the faxes. If he would have been left in doubt as to whether it was the purpose of the broker that the risks communicated should be insured under the Open Cover or he would have been led to believe that for some reason cover should not be immediate but should for some reason be postponed until a later date, he would know that the broker's conduct did not amount there and then to an acceptance of the standing offer. However, where all that has happened is that the broker has promised to obtain some information about the conduct of another insurer in the Open Cover (in this case Swiss Re) it cannot, in my judgment, be seriously suggested that he would be understood as having not declared the risk at all or, having declared it, withdrawn the declaration. The expression by the underwriter of a doubt as to the eligibility or otherwise as to the validity of the project for

declaration could not deprive the communication of its intrinsic validity as an acceptance of the standing offer, even if the broker promised to obtain more information and report back.

256. As to the submission that there was no intention to create legal relations because, subjectively, Mr Coleman's purpose was not to make a declaration and Mr Regan's belief was that he did not need to make one, the parties were dealing with each other against the background of a subsisting commercial contract – the Open Cover – which both are to be taken to have known expired for the declaration on the following day. Mr Regan clearly appreciated that Mr Coleman was giving him information from which Upton could ascertain to what risks it was already bound. The whole purpose of the meeting was therefore to facilitate the operation of the Open Cover and the London Cover in the sense that Mr Regan would know for certain what the increase in the syndicate's overall risk and premium income already was. The submission that because both Mr Coleman and Mr Regan were under the misapprehension that the risks had been declared and therefore already attached vis-à-vis Upton, the process of communication which then occurred was incapable of effecting valid declarations presents itself to me as wholly unrealistic in that commercial context. The communication of the declarations may have been subjectively intended to identify risks which had already been declared and to which Upton was thought already to be bound, but if the subjective intention behind the communication was directed to identify exactly that which in reality the very act of communication, objectively observed, could bring about, the failure of the parties to appreciate that consequence is not to be characterised as the kind of lack of intention to create legal relations which would prevent the creation of a new contract by acceptance of an existing standing offer. This was not a case like Beesly v Hallwood Estates Ltd [1960] 1 WLR 549 where the parties (landlord and tenant), having mistakenly assumed that there was a binding option to renew a lease, proceeded to give effect to the option by executing a new lease. There the parties' common intention was to give effect to the (non-existent) option but not to create a new lease in the absence of that option. In the present case there was at all relevant times a binding standing offer available for acceptance at any time before the end of 30 June 2000. The mistaken assumption that the declarations were already binding on Upton did not deprive Aon of the intention of notifying Mr Regan that such declarations should be binding but merely of the appreciation that it was the very process of communication on 29 June that made them binding. Indeed it was Mr Coleman's evidence that if he had realised that it was necessary to make separate declarations to Upton he would have ensured that all outstanding declarations were made before expiration of the 30 June and would there and then have made further efforts to persuade Mr Regan to retain copies of the declarations and to scratch them.

257. Accordingly, I hold that there is real substance in the point that by reason of the Coleman/Regan meeting Upton was bound by declarations 8 to 26 less the declarations which Aon have conceded were not binding on Upton – namely 12, 14 and 26. Aon also concedes that Upton was not bound by declaration 5.

258. Aon further submits that Upton was estopped by convention from asserting that it was not bound in relation to those declarations.

The Estoppel by Convention Point

259. Aon argues that Mr Coleman and Mr Regan conducted the 29 June meeting on the basis of their shared understanding that it was unnecessary to show declarations to the Upton Syndicate in order for it to be bound provided that declarations had been made to Swiss Re. Mr Regan outwardly manifested that he shared that understanding by his conduct in the course of that meeting. It is said that this manifestation was relied upon by Aon in as much as, had Mr Regan suggested that declarations had to be made to Upton, Mr Coleman would have ensured that all declarations were validly made to it by 30 June.

260. In these circumstances it would have been unconscionable for Upton to deny that it was bound by the declarations made to Swiss Re, that is all 26 of the declarations. Accordingly BP could have sued Upton on those declarations that were made to Swiss Re and Upton would have been estopped from denying the basis of that claim, namely that by its receipt of such declarations Swiss Re had caused Upton to be bound, even in the absence of declarations to Upton.

261. It is submitted on behalf of BP that, had this argument been raised in the settlement negotiations, it would have been rejected out of hand by the solicitors for the Frankona Defendants (Norton Rose).

262. It is said that Mr Regan's conduct was entirely equivocal: even if it was accepted that declarations had to be made to the following market, a member of that market might well wish to know whether the leading underwriter had accepted the declarations for it could be expected that the leader would be likely to have checked up on the rating work sheet and other relevant matters. Accordingly, Mr Coleman would not be entitled to assume from Mr Regan's request for information as to which declarations had been accepted by Swiss Re that he must be treating Upton as bound by declarations to the leader.

263. Secondly, there would be no relevant reliance by Mr Coleman. His evidence was that his belief that declarations did not have to be made to the followers was based on his interpretation of the endorsement to the London Cover regarding providing for premium bearing endorsements. There was no evidence that anything said by Mr Regan went to the reinforcement of that belief.

264. Thirdly, not only BP but also Aon had been unaware of this point until it was first raised in Aon's Defence in these proceedings in November 2004 – months after the July 2003 settlement agreement with the Frankona Defendants.

265. Fourthly, for BP to have asserted a claim against Upton in reliance on this estoppel would have been to use estoppel by convention as a sword and not as a shield, contrary to well-established principle based on statements in Chitty on Contracts, 29 Edn para 3-113 and Spencer Bower, Estoppel by Representation, 4 Edn paras viii 2.1-2.5. Reliance is further placed on the decision of the Court of Appeal in Baird Textile Holdings Ltd v. Marks & Spencer plc [2002] 1 All ER

(Comm) 737 to the effect that estoppel by convention cannot be deployed to provide the basis of a claim for breach of contract. It is only in cases of proprietary estoppel that a claim for equitable relief can be founded on an estoppel.

266. Finally, BP submit that Aon is estopped from running this point because, having been given ample opportunity by BP to raise such an argument in response to the findings by Cresswell J. that the earliest date on which declarations were shown to Upton and Spinney Syndicate was November/December 2000 and that nothing had occurred on 29 June 2000 which amounted to the making of a valid declaration to Upton, Aon had failed to do so and had certainly not raised an estoppel point at any time prior to the conclusion of the July 2003 settlement agreement.

267. Aon's riposte to this submission is that the true analysis of what happens when, as a result of reliance on an estoppel by convention, a party who asserts a contractual right based on facts which the defendant is estopped from denying, seeks to enforce it is to be found in the well-known passage from the judgment of Brandon LJ. in Amalgamated Property & Investment Company v. Texas Commerce Bank [1982] QB 84 at p131 – 132A:-

> "In my view much of the language used in connection with these concepts is no more than a matter of semantics. Let me consider the present case and suppose that the bank had brought an action against the plaintiffs before they went into liquidation to recover moneys owed by A.N.P.P. to Portsoken. In the statement of claim in such an action the bank would have pleaded the contract of loan incorporating the guarantee, and averred that, on the true construction of the guarantee, the plaintiffs were bound to discharge the debt owed by A.N.P.P. to Portsoken. By their defence the plaintiffs would have pleaded that, on the true construction of the guarantee, the plaintiffs were only bound to discharge debts owed by A.N.P.P. to the bank, and not debts owed by A.N.P.P. to Portsoken. Then in their reply the bank would have pleaded that, by reason of an estoppel arising from the matters discussed above, the plaintiffs were precluded from questioning the interpretation of the guarantee which both parties had, for the purpose of the transactions between them, assumed to be true.
> In this way the bank, while still in form using the estoppel as a shield, would in substance be founding a cause of action on it. This illustrates what I would regard as the true proposition of law, that, while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed. That, in my view, is, in substance, the situation of the bank in the present case."

268. In my judgment in Azov Shipping Co v. Baltic Shipping Co [1999] 2 Lloyd's Rep 159 at 175R I attempted to rationalise the objection to using an estoppel to found a cause of action as in Combe v. Combe [1951] 2 KB 215 and relying on an estoppel in support of a claim in the manner in

which, albeit obiter, the Court of Appeal was prepared to allow it to be relied on in Amalgamated v. Texas, as explained by Brandon LJ. in the passage cited above. However, that judgment and that rationalisation was not cited or considered in Baird v. Marks & Spencer, supra, and as the authorities now stand, all that can be said is that there is much uncertainty as to the circumstances in which an estoppel by convention can be deployed as part of the necessary factual or legal background for founding a claim for breach of contract. Indeed, in Baird v. Marks & Spencer it was held that it was not even arguable that the lack of certainty of the assumed terms of an implied contract could be cured by the deployment of an estoppel by convention. Although this was a different case on its facts to Amalgamated v. Texas, it was said both in the judgments of Sir Andrew Morritt VC and Mance LJ. that the Court of Appeal was bound to adhere to the principle in Combe v. Combe, supra, even in an estoppel by convention case, unless and until the House of Lords adopted a wider approach to the employment of an estoppel.

269. Therefore, as the law had developed up to the date of the settlement in July 2003, the authorities at Court of Appeal level contained no satisfactory explanation as to how the dictum of Brandon LJ. in Amalgamated v. Texas, supra, with regard to the facts in that case could stand in relation to estoppel by convention consistently with the Court of Appeal's conclusion in Baird v. Marks & Spencer, supra, that estoppel can only be used to provide a factual basis for a cause of action in cases of proprietary estoppel and not in cases of estoppel by convention: see also in this connection the valuable observations of Prof. Sir Gunter Treitel in Chitty on Contracts, 29 Edn, para 3-098 to 101. Whether conceptual consistency should be sacrificed on the altar of stare decisis remained then, as it does today, to be determined by the House of Lords. Accordingly, for this reason alone, I am not prepared to hold that the estoppel by convention argument would have offered a very significant threat to Upton if BP had taken the point in the course of the settlement negotiations in 2003.

270. There is, however, another reason why this would be so. That is that what "crossed the line" by way of manifestation was extremely unclear and, in my judgment, fell short of the unequivocal assent to the common understanding required for an operative estoppel by convention. When Mr Regan requested information as to whether the declarations that he had been shown had been accepted by Swiss Re more than one inference might be drawn by a broker in Mr Coleman's position. It might be that the question was asked simply to satisfy Mr Regan that declarations to Swiss Re had already automatically bound Upton or it might be that before he noted those declarations he wanted to be satisfied that Swiss Re was satisfied as to their eligibility or with the contents of the rating sheets. These latter two considerations could be as consistent with a belief that the declarations had to be made to Upton as well as to Swiss Re, for any underwriter would be entitled to satisfy himself as to eligibility and premium rating. Accordingly, the factual basis necessary to found an estoppel by convention would not appear to be available.

Mr Regan's scratching the ACE Endorsement on 6 December 2000

271. There can be no doubt that by scratching the ACE Endorsement on 6 December 2000 Mr Regan effectually caused Upton to accept that it was bound to the Open Cover on the terms of

settlement agreed between BP and Swiss Re and AIG. Those terms of settlement involved both acceptance of the decision of Cresswell J. on eligibility and the need for separate declarations to the followers within the Open Cover period, as well as the participant insurers in the settlement being bound to declarations 8 to 26. If one assumes for the purposes of this argument that no effective declarations had previously been made to Upton, it follows that the effect of the settlement was that the insurers promised to accept those declarations without objection as to eligibility or delay. No subsequent underwriting judgment in respect of any declaration was permissible on their part.

272. BP challenge the substance and effect on the settlement of any argument based on the 6 December scratch on the grounds that the settlement with Upton could be effectively challenged on the grounds that it was voidable for mutual mistake and misrepresentation, as pleaded in Upton's Defence in the Frankona proceedings.

273. As to mutual mistake, the evidence supported the proposition, and I accept, that when in late October or November 2000 when Mr Jeary had visited Mr Regan he told Mr Regan that Upton was obliged to follow the leaders' settlement with BP and that such was the belief of both of them. Mr Coleman was of the same view and when he subsequently went to see Mr Regan shared that belief. On this basis BP submit that:

i) Upton could have challenged the assertion that it was bound by the settlement on the grounds that its agreement on 6 December 2000 could be avoided on the grounds of mutual mistake even though the mistake was one of law, having regard to, and by extension from, the recent decision of the House of Lords in Kleinwort Benson v. Lincoln City Council [1999] 1 AC 153 in which it was held that money paid under a mistake of law could be recovered in restitution;

ii) Upton could also have challenged any such assertion on the grounds that it had been induced to enter into the settlement by misrepresentation as to its being bound by Swiss Re having entered into the settlement.

274. With regard to the argument based on mistake, there is a substantial area of doubt as to whether the decision in Kleinwort Benson v. Lincoln City Council, supra, also has the consequence that a contract entered into under mutual or common mistake of law can be treated as void or voidable: see Chitty on Contracts, 29 Edn para 5-043. The decision that Bilbie v. Lumley (1802) 2 East 469 should be overruled suggests that mistake of law could be a basis for avoiding a contract or treating it as void. However, that is only part of the problem, for it would appear necessary also to establish that the mistake was as to some matter fundamental to the contract. This would involve a value judgment as to the relative significance of the matter of law as to which the mistake had arisen, analogous to the evaluation required in cases of frustration or fundamental breach. If that were so, Upton had it taken the point, would have been confronted by the difficulty of having to show that the assumption that Upton was obliged to follow Swiss Re went to the root of the settlement agreement.

275. Further, as regards misrepresentation, Aon argue that, in stating that Upton was obliged to follow the leaders, Mr Jeary and Mr Coleman were doing no more than expressing their honest opinion rather than a fact and accordingly misrepresentation could not have been relied on by Upton.

276. I cannot accept that submission. Both Mr Jeary and Mr Coleman were giving Mr Regan information about a policy which had been drafted by Aon in circumstances in which Mr Regan was entitled to expect that their knowledge was accurate.

277. Accordingly, in my view, the arguments that could have been advanced by BP based on the 6 December scratch would have been likely to encounter a challenge by Upton both on the grounds of mutual mistake and misrepresentation. Whereas, I do not consider that the proposition that there was a fundamental mistake would have been easy to sustain, the challenge based on misrepresentation would have been much stronger and virtually insuperable.

278. Finally, it is necessary, in the light of my evaluation of the available arguments against Upton, to consider what impact, if any, such arguments would have been likely to have on the terms of settlement in July 2003. In particular would the terms probably have been more favourable to BP? If the probability is that the overall terms would have been no more favourable to BP, it could hardly be said that it was unreasonable for BP to fail to take them.

279. In considering whether BP acted unreasonably in failing to take any of these Upton points the following matters have to be born in mind in relation to the relative magnitude of the claims against Upton.

i) The settlement with the Frankona Defendants was negotiated on a market or global basis and not designed to attribute particular terms to particular insurers.

ii) Upton only underwrote a 5 per cent part out of the 42 per cent written by all the Frankona Defendants.

iii) The issue as to whether Upton was bound on 29 June to the projects covered by the three faxes does not relate to declarations 1 to 7 or to 10, 12, 19 or 20 which were not shown to Mr Regan or to declarations 14 and 26 which Cresswell J. held not to be insured by Upton and by which decision Aon have agreed to be bound.

iv) Those declarations not covered by the 29 June Meeting Point include the two biggest claims – Valhall and Na Kika.

v) The total claims against the Frankona Defendants were about US$216 million, whereas, without Valhall (12 and 19) and Na Kika (26), the claims arising from the other declarations amounted only to US$36 million. Consequently, Upton's exposure to those other claims on a 5 per cent line was about 12 per cent or US$4.3 million. That was almost exactly 2 per cent of the

total claims of the $216 million.

vi) The estoppel by convention point applied to all the declarations 1 to 26. Accordingly, it goes to Upton's whole exposure amounting to about US$25 million.

vii) The argument as to the 6 December 2000 meeting goes to declarations 8 to 26 but not to 1 to 7.

280. Accordingly, even if the likely consequence of BP raising these points in the course of settlement negotiations was that they were perceived by the Frankona Defendants to be good points against Upton, the quantitative impact on the overall settlement would have been relatively very small indeed.

281. In assessing whether and if so to what extent the conduct of Aon London caused loss to the claimants represented by the terms of the settlement or whether the Claimants caused their own loss by failing to raise particular defences with the Frankona Defendants, the following considerations apply.

i) The overall question is whether in all the circumstances the settlement was reasonable. In this connection, I repeat two passages from the judgment in General Feeds Inc Panama v. Slobodna Plovidba Yugoslavia [1999] 1 Lloyd's Re 688, where having referred to Biggin & Co Ltd v. Permanite Ltd [1951] 2 KB 314 Comyn Ching & Co (London) Ltd v. Oriental Tube Co Ltd [1979] 17 BLR 56, I said at p691:

> "In other words, when properly analysed, the overall exercise which the Court must do is to consider whether the specified eventuality (in the case of an indemnity) or the breach of contract (in a case such as the present) has caused the loss incurred in satisfying the settlement. Unless the claim is of sufficient strength reasonably to justify a settlement *and* the amount paid in settlement is reasonable having regard to the strength of the claim, it cannot be shown that the loss has been caused by the relevant eventuality or breach of contract. That is not to say that unless it can be shown that the claim is likely to succeed it will be impossible to establish that it was reasonable to settle it. There may be many claims which appear to be intrinsically weak but which common prudence suggests should be settled in order to avoid the uncertainties and expenses of litigation. Even the successful defence of a claim in complex litigation is likely to involve substantial irrecoverable costs. It is thus an everyday event for shipowners or their P. & I. clubs to settle cargo damage claims based on allegations of bad stowage or unseaworthiness for well under 50 per cent. of the claim where the alternative explanation for

> the damage is the inherent condition of the goods or some other cause for which owners are not liable. Unless it appears on the evidence that the claim is so weak that no reasonable owner or club would take it sufficiently seriously to negotiate any settlement involving payment, it cannot be said that the loss attributable to a reasonable settlement was not caused by the breach by reason of which the goods are in a damaged condition."

and at 693

> "As a matter of principle, given that the purpose of the investigation of whether the settling party acted reasonably is to ascertain whether the settlement loss was caused by the breach or by the settling party's decision to enter into the settlement, it must be those facts upon which he could be expected to base his decision to settle rather than facts which later come to light which are material for this purpose. It is the facts available to him at the time by reference to which this question of causation has to be determined."

282. In this connection, the fact that the terms of a settlement were entered into upon legal advice establishes, at least, that those terms were prima facie reasonable. It is then for the defendant to displace that inference by evidence to the contrary, by establishing, for example, that some vital matter was overlooked: see Biggin v. Permanite [1951] 2 KB 314 per Somervill LJ. at page 321. However, the evaluation of the reasonableness of a settlement should not involve the court in arriving at a conclusive judgment on the merits of substantial issues which were contentious in the settled litigation. The court does not need to resolve those issues unless the answer is beyond doubt. The reason for this is that it is testing the reasonableness of the settlement by reference to the perception as to success or failure which the parties would have been expected to hold at the time when the settlement was entered into and the issues remained unresolved: see generally Mander v. Commercial Union Assurance Co plc [1998] Lloyd's Rep IR 93 at p148-149.

283. Further, as Mr Popplewell QC submitted on behalf of BP, it is only necessary for a claimant to establish that the settlement arrived at was at a figure within the range of what would have been reasonable. This may be quite a wide range because the views of experienced commercial lawyers and businessmen as to the particular strength of their party's case relative to the strength of the opposing party's case can differ quite widely. The test is therefore whether the settlement arrived at was, in all the circumstances which the settling party knew or ought reasonably to have known at the time of the settlement, within the range of settlements which reasonable commercial men might have made. To the extent that such settlement was excessive, the settling party cannot recover. However the range would have to be defined by reference to the benefits and detriments of any settlement for all parties to it.

284. In the present case BP had been advised by Herbert Smith and by its Counsel, Jonathan Sumption QC and Roger Masefield, that an appeal from that part of the judgment of Cresswell J. as to the need for declarations to be made by 30 June to all the underwriters concerned would fail. Further the Frankona Defendants, other than Inter Hannover, Upton and Spinney, agreed to accept that declarations 1 to 7 inclusive had been validly made and were not subject to avoidance for misrepresentation or non-disclosure. The losses on those declarations at the time of the settlement were about US$33 million of which the total share of the Frankona Defendants would have been about $15 million. Apart from avoiding the litigation risk and the associated costs of fighting on, the settlement preserved the position taken by Cresswell J. on the criteria for eligibility of declared projects. This represented an important benefit for BP which by July 2003 found itself in a very difficult position arising from the fact that the leaders, Swiss Re and AIG, together with Aegis, ACE and AXA who collectively carried 58 per cent under the Open Cover had abrogated the earlier settlement with them of October 2000 and AIG and Aegis were re-opening the eligibility issue. Indeed, they had raised this very issue in the New York action which they had begun in December 2002.

285. BP therefore had to avoid the risk of losing the eligibility point if the Frankona judgment went to the Court of Appeal for, were the Frankona Defendants to be successful, BP's position vis-à-vis the other insurers would be very seriously weakened. It was therefore of great importance to achieve a settlement with the Frankona Defendants.

286. With these considerations in mind, and having regard to the intrinsic strength and weaknesses of the three Upton points already discussed, is it established that, in spite of BP's failure to raise any of those points in the course of settlement negotiations with the Frankona Defendants, the settlement negotiated with those Defendants was reasonable? The question can be tested by asking whether in July 2003 BP or Herbert Smith on their behalf ought to have raised these points with Norton Rose on behalf of the Frankona Defendants, and whether had they done so that would, as they ought to have appreciated, more probably than not have caused the settlement to be measurably more favourable to BP than it was.

287. In my judgment, whereas the 29 June 2000 meeting point was the strongest of the three Upton points, there would have been available to Upton formidable arguments to the contrary. As to the estoppel by convention point and the 6 December 2000 Endorsement points, I do not consider that either, taken alone or in combination, would have been perceived by Norton Rose to represent a serious threat to Upton. Accordingly, bearing in mind that the first point would have an impact on no more than about 2 per cent of the total claim against all the Frankona Defendants, ie about US$4.3 million, it is, in my judgment, open to considerable doubt whether a challenge to Upton's defence on this point or on either of the other two would have had any impact on the ultimate terms of settlement. If one assumes that the weaknesses in these points would have been appreciated by those advising the Frankona Defendants, I conclude that each point would have been rejected and that Norton Rose would have insisted on including an admission of Upton's liability in the settlement. In all the circumstances, in view of the desirability to BP of achieving the settlement as to eligibility for reasons which I have explained,

I do not consider that it was so unreasonable to fail to raise any of these three points that the ultimate settlement could be said to be unreasonable or unreasonable to the extent of the non-admission of liability by Upton.

The Na Kika Issue

The Facts

288. On 20 June 2000 BP Chicago emailed Aon Illinois, Aon Texas and Aon London instructing them to declare the Na Kika project to the Open Cover. The message stated:

> "For information the partnership interests in the development are 50/50 BPA and Shell is the operator for the project phase. The project insurance is therefore only required for BPA's 50% equity."

289. On 21 June 2000 Mr Irle of Aon Illinois declared 100% of the project to AIG notwithstanding the terms of BP's instructions.

290. On 26 June 2000 Mr Siebenaler (BP Chicago) emailed Aon Illinois, Texas and London informing them that he had just received a call from Shell Risk Management:

> "They have advised me that a final answer will be presented tomorrow on Shell's participation in our insurance program for the Crosby, Nakika, and Holstein projects. As of now, they have stated that the project managers are leaning the following way:
>
> Crosby – No
>
> Nakika – Yes
>
> Holstein – Yes
>
> As soon as I hear the official word on each of these projects, I will pass that information along."

291. On 29 June 2000 at 15.14 Texas time Mr Luyties of Shell emailed Kathy Long of BP accepting on behalf of Shell participation in BP's insurance programme in relation to Na Kika. This was not passed on to Mr Siebenaler in Chicago until 22.37 that evening.

292. On 30 June 2000, the last day of the Open Cover period, at 08.15 Mr Siebenaler emailed Aon Chicago, Houston and London (Mr Madell, Mr Parry and Mr Atkinson) informing them that he

had received formal acceptance by Shell to participate in the Na Kika and Holstein insurance and stating that the projects should be billed on a 100% basis rather than for BP's interest only. The time of receipt by Aon London was therefore be 14.15 BST.

293. In the meantime, Aon London had on 29 June 2000 declared BP's 50 per cent interest in Na Kika to Swiss Re in the belief that declarations need only be made to the Leaders.

294. On 30 June Aon London made no declaration, either to Swiss Re or the following market, of the Na Kika project.

295. It is conceded by Aon that it received Mr Siebenaler's 30 June message and that it failed to make the declaration of Shell's 50 per cent interest. In the result, the Frankona Defendants did not insure that interest under the Open Cover. It is submitted, however, that BP having left the notification until the last afternoon of the Open Cover period ought to have telephoned Aon or put through another message before close of business that day verifying that Aon had received that notification and had acted on it.

Discussion

296. The agreed method of BP's communicating notification of Gulf of Mexico projects, such as Na Kika, for declaration was to inform Aon Illinois. This was normally done by email. It was then for Aon Illinois to inform Aon London. BP had latterly taken to informing both Aon Illinois and Aon London of projects for declaration. This saved time in view of BP's policy of maximising the number of projects to be declared before the end of June 2000.

297. Once Aon London had received notification from Aon Illinois and/or BP of a project to be declared, it was under a duty to exercise reasonable care to carry out the service requested. It is to be inferred that its duty to make the declaration of Na Kika arose no later than its receipt of Mr Siebenaler's message which, allowing for email delays, might have been at about 15.00 at the latest.

298. Aon Illinois did not make any contact with Aon London that day in order to monitor progress in the placement of those declarations. In the course of his cross-examination Mr Helfert of Aon Illinois agreed that Aon Illinios should have done so as a matter of good housekeeping. He also accepted that he would not expect BP to have chased up the notification. Mr Parry of Aon London gave evidence to the same effect, Mr Phillip Hallett, BP's expert broker, did not consider it necessary for BP to follow up a notification sent to so many separate people at Aon by telephoning to check whether the message had been received. Mr Kaye's evidence was as follows:

> "Q. On a Friday afternoon. Obviously this is a pretty urgent matter, the declaration has to be made in effect before close of business in the next three or four hours. I

think, based on your evidence given just before the short adjournment, given the urgency of this communication, you would have wanted to include in an email a request that they confirm receipt and that they were acting upon it?

A. I think that would be prudent.

Q. In the absence of receiving such confirmation, you would have wanted to telephone to make sure that the matter was dealt with?

A. Either that or, looking at the list of eight addresses there, I would have at least expected an acknowledgment, even absent – I would have expected an acknowledgment back from one of these people to say they had received it, even if I did not ask for it. If I had not received that within a couple of hours, I guess shortly before the market closed I think I might have just picked up the phone. I am a bit – I am one of those people who likes to do thinks that way, I would not sleep at night otherwise.

Q. It is important, is it not, to be careful?

A. That could be me. Other people may not take the same view.

Q. Because, if the declaration is not made, then you are uninsured? This is an important matter?

A. Yes, I think so."

299. Aon's expert, Mr Riches had stated in his second report that BP had acted imprudently in failing to follow up the 30 June 2000 email, just to make sure that it had been received. However, in the course of cross-examination he accepted that others who had a more detailed knowledge of the facts than he did took a different view and he bowed to their judgment.

300. In my judgment Aon's criticism of BP's failure to follow up or ask for confirmation of receipt of the 30 June notification is misplaced for the following reasons.

i) Mr Siebenaler could, I infer, have ascertained from his computer whether the message he sent to any of those recipients at Aon London or any other addressees had bounced back and was unreceived. He would probably also have observed whether any of the addressees failed to read the message. It was therefore hardly necessary for him to ask for confirmation of receipt or to telephone to monitor progress.

ii) The greater weight of the expert evidence is that it was not for Mr Siebenaler to monitor Aon's performance of their duty as brokers.

iii) The Aon witnesses did not consider that it was necessary for him to do so.

iv) There was still sufficient time on 30 June 2000 for Aon London to make effective declarations to all the Frankona Defendants.

v) No Aon witness has put forward any explanation for its failure to declare which suggests that its conduct would have been influenced by a request for confirmation to be included in Mr Siebenaler's message. I am not persuaded that any of the addressees troubled to read the message.

vi) Accordingly, I hold that the fault component of responsibility for the loss on the part of BP in respect of the Na Kika project has not been established. However, even if it had been established that there was some fault on Mr Siebenaler's part, the causation component of responsibility for the loss is not made good. Aon's belief was that it need only make declarations to the Leaders and that it was unnecessary to declare to the following market. Accordingly, if Mr Siebenaler had later on 30 June chased up Aon London in order to ascertain whether it had acted on his notification and Aon had not so far declared the project to any of the underwriters, it is to be inferred that his telephone call would have caused Aon London to act in one way only, namely to declare the project to Swiss Re but not to disclose it to any of the Frankona Defendants. BP would therefore have suffered the same loss in any event.

The Substitute Insurance Issue

301. The issue has already been outlined in paragraph 63 above. Put simply, BP's case is that, on the basis that Aon London was in breach of its duty of care in failing to make effective declarations to the Frankona Defendants, the measure of damages is the amount which would have been recovered from those Defendants if effective declarations had been made. Aon's case is that, as regards declarations 5 and 8-26, BP's true loss is not that which it would otherwise have recovered from those Defendants but the cost of taking out alternative insurance to replace that which would have been provided by those Defendants under the Open Cover together with any shortfall in recovery under the replacement insurance. On the basis that there were valid declarations to Upton (see paragraph 241 above) that 5% line did not have to replaced.

302. As pleaded by Aon, its case was put on the proper measure of damages, causation, failure to mitigate and contributory negligence.

303. It is accepted by Aon that in the normal case of a broker negligently having failed to effect cover where an insurer disputes that it is bound after the relevant loss has occurred, the normal measure of damages will be the amount that would have been recoverable from the insurer if the broker had properly performed his duty to obtain valid cover. However, Aon submits that this case is abnormal in as much as the insurers disputed cover before losses occurred. BP's position has the effect that it can recover from Aon even where the losses or some of them occurred several

months after the judgment of Cresswell J. conclusively demonstrated that the insurers could not be liable. Aon argue that once the validity of the declarations to the Open Cover had been challenged and, a fortiori, adjudged to be ineffective, BP could not just sit on its hands and then recover any losses from Aon as damages for negligence, particularly if it abstained from obtaining replacement cover because it took the view that it was in its best commercial interests to self-insure, notwithstanding that replacement cover was available on the London market.

304. Aon further submits that there is little or no evidence as to the taking of the decision not to obtain replacement cover in those cases where the insurable interest was that of a co-venturer and therefore this court cannot make findings of fact necessary to reach any conclusion as to the position in those cases. The Claimants have therefore not discharged the burden of proof of loss.

305. In view of the fact that it is Aon which invites this court to depart from the normal measure of damages for breach of a broker's duty on account of the special facts of this case, I shall first summarise the four ways in which it puts its case.

306. As to measure of damages, Aon submits as follows.

i) The starting point is the well known statement of principle by Lord Blackburn in Livingstone v. Rawyards Coal (1880) 5 App Cases 25 at p39:

> "that sum of money which will put the party who has been injured or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation."

ii) That which BP lost as a result of Aon's negligence was the opportunity to be insured by the Frankona Defendants on the relatively favourable terms of the Open Cover.

iii) That opportunity was lost at midnight on 30 June 2000, the moment when it was too late to make declarations.

iv) Although the general rule is that damages in tort are to be assessed at the date when the breach of duty occurred, there may be cases where another point of time should be taken so as more accurately to reflect the overriding principle of compensation: see County Personnel Ltd v. Alan R Pulver & Co [1987] 1 WLR 916 per Bingham LJ. at p926A.

v) In the present case it is necessary, in order to give effect to the overriding principle of compensation, to identify at what point of time BP ascertained that Aon were in breach of duty. Three possible dates are advanced by Aon as follows:

a) The third quarter of 2000 when it first became apparent that the insurers

challenged the validity of declarations 8 to 26. Thus as early as 30 June 2000 Swiss Re in their fax to Aon London were calling in question the eligibility of "several" of the declarations submitted "on the eve of expiration" of the Open Cover, in particular since 1 June 2000. ACE and Frankona also challenged or reserved their rights in relation to the recent declarations on the grounds that they involved an aggregate exposure for them under the Open Cover which far exceeded that which had been indicated at the time of its placing. On 30 June 2000 AIG rejected outright all 19 declarations made in the previous week on the grounds of ineligibility.

b) The second and third quarters of 2001, at which point it had became clear that the Frankona Defendants would not follow the October 2000 settlement made between BP and Swiss Re and AIG. By a letter dated 27 April 2001 Norton Rose informed Aon that it had been instructed by the Frankona Defendants other than QBE, Upton and Spinney and requested that Aon should enter into discussions directed to providing further and better information about the 19 projects declared at the end of June 2000 so that underwriters could review whether those projects were eligible to be declared. By his letter of 30 April 2001 to Aon London Mr Wannell of BP rejected Norton Rose's request as unacceptable and stated that BP must have contractual certainty and therefore had no alternatives but to explore its legal rights. BP therefore knew by this time that the validity of cover was likely to be challenged and that it would have to test its position by means of legal proceedings.

c) The second quarter of 2002.

> BP issued the claim form in the Frankona action on 21 September 2001. The defence was served on 10 December 2001. In it the Frankona Defendants alleged that they were entitled to avoid the Open Cover and all declarations for misrepresentation and non-disclosure. They challenged the eligibility of declarations 8 to 26, but did not overtly raise the requirement that declarations had to be made to each underwriter and could not bind the following market if only made to the leaders. That argument first clearly emerged in the letter from Norton Rose to Herbert Smith dated 18 April 2002 and then on the following day at the Case Management Conference at which counsel for the Frankona Defendants gave an undertaking to amend their defence to reflect that amongst other new points raised in his skeleton argument. It was on these foundations that I ordered a trial of preliminary issues covering the validity of the declarations. By this date, therefore, it is submitted that BP was well aware that its insurance under the Open Cover was strongly contested.

vi) BP's loss therefore crystallised on one of those three dates, Aon's primary case being during the third quarter of 2000 when BP became aware for the first time that declarations were seriously disputed, with as alternative the other two dates. BP's position by contrast is that its losses crystallised when protection under the Open Cover would have expired if it had been procured as it should have been.

vii) As to causation, Aon submits that the relevant issue is whether there has been a break in the chain of causation between Aon London's negligence and the losses claimed by BP. Further, it is Aon's case that it is unnecessary for severance of the chain of causation that the intervening act should be reckless or even negligent for it is submitted that in the context of a claim for economic loss the injured party may make decisions in its own economic interests which are neither reckless nor negligent but are such as to have such a substantial impact on the consequences of the other party's breach of duty as to sever the link with the loss. In the present case, according to the evidence of Mr Siebenaler and Mr Wannell, BP had decided that due to the increase in market rates and the hardening of available terms by comparison with those of the Open Cover, it was to BP's commercial advantage overall to self-insure rather than pay premium at current rates. If BP thereafter suffered losses that would have been insured under the Open Cover if the relevant projects had been effectively declared, such losses would have been caused by BP's decision not to take out replacement cover in the face of its knowledge that it was uninsured. Were it otherwise, it would be as if Aon had guaranteed to BP that it was insured even if there were no protection under the Open Cover and even if BP decided that in its own commercial interests it would not replace that cover.

viii) As to mitigation, Aon submits that with regard to the dicta of Lord Macmillan in Banco de Portugal v. Waterlow [1932] AC 452, the relevant test is whether BP had acted reasonably in all the circumstances, but this test involves asking whether BP has acted reasonably to mitigate the loss as distinct from acting reasonably exclusively in its own commercial interests. Aon refers to the decision of the Courts of Appeal in Darbishire v. Warran [1963] 1 WLR 1067 in which Harman LJ. stated the principle as follows:

> "The judge here held that the plaintiff was reasonable in having the car repaired notwithstanding that the cost was more than twice the value. It may well be that the plaintiff, so far as he himself was concerned, did act reasonably and that what he got was of more value to him than the damages represented by the value of the car. The plaintiff, however, did not show that he had any special use for which this car alone was suitable, as, for instance, in his business, or anything more than that it was a sound car very well maintained and suited to his ordinary life. In my opinion the judge asked himself the wrong question. The true question was whether the plaintiff acted reasonably as between himself and the defendant and in view of his duty to mitigate the damages."

> BP's decision to self-insure CAR risks might have been reasonable from BP's commercial point of view, but it was not reasonable vis-à-vis Aon because it put Aon into the position of being in effect the insurer of BP if the Frankona Defendants succeeded in their defences on liability. This point was reinforced by the fact that BP had already been advised of their duty to mitigate by alternative insurance by leading counsel, Mr Jeremy Cooke QC, in an opinion in July 2000 and that the additional costs of such insurance would be recoverable from insurers if they were held to be liable under the Open Cover.

ix) Further, when by the second quarter of 2002 it was clear that the Frankona Defendants had a good chance of making good their challenge to cover on the grounds that declarations had not been made to each of them by 30 June 2000, it was clearly unreasonable for BP just to go on as before, it ought to have changed its decision to self-insure and taken out alternative cover.

x) As to contributory negligence that is pleaded as follows:

> "Agreeing to the Consent Order without first giving adequate consideration to whether the GE Frankona Defendants or some of them were bound in respect of the Disputed Declarations."

xi) The evidence of Mr Wannell of BP was that he did not recall giving the advice as to the duty of mitigate great consideration at the time as he was concentrating on the continuing negotiations and on that part of the opinion which was concerned with the project eligibility issue. Mr Baddeley said that he probably never read that section of the opinion.

xii) Further, by the middle of 2002 Herbert Smith, on behalf of BP, appreciated that the Frankona Defendants had a strong defence based on the failure to make timely declarations to each of the following market. However, assuming that this view was communicated to BP, no consideration was given by it at that stage to whether steps ought to be taken to take out alternative insurance.

xiii) BP did not consider taking out alternative cover at any stage even though it must have appreciated that it was in a vulnerable position vis-à-vis the Frankona Defendants because its overriding commercial policy was for self-insurance regardless of the risk of the Open Cover failing to provide cover.

307. BP's case on causation is as follows.

308. Its decision to self-insure reached in April 2001 was arrived at entirely without reference to the dispute with the Frankona Defendants. Indeed, it only applied to projects in relation to which BP was under no contractual obligation to procure insurance. If it were under such an obligation it would procure cover. In relation to projects which ought to have been declared to the Frankona Defendants BP was under obligations to procure cover. For that reason the failure of the Open

Cover would in those cases render BP liable to its co-venturers and/or contractors. Further the self-insure policy was, according to Mr Wannell, whose evidence on this matter I accept, only intended to apply to new projects: it was inapplicable to projects which were under way in mid 2000.

309. The true reason for BP's not taking out replacement cover was, according to Mr Siebenaler, that BP was being advised that it was likely to recover from the Frankona Defendants.

310. In order to break the chain of causation it would not be enough for Aon to show that BP negligently omitted to reduce its loss by taking out replacement insurance. It would have to establish that the decision not to do so was so reckless that it eclipsed or displaced Aon London's own negligent conduct as the cause of BP's loss so as to become a novus actus interveniens. Reliance is placed on the proposition in Clerk & Lindsell, 18th Edn paras 2-51 to 2-52 that if all that can be established is that, when confronted with the defendant's negligence, the claimant negligently failed to avoid its consequences, that is a matter for the apportionment of recoverable loss by way of contributory negligence. In this connection Mr Popplewell QC draws attention to the evidence of Mr Riches, Aon's market expert witness, that he would certainly agree that some risk managers in the position of BP at the material time would not have purchased replacement cover on the market terms available and that it would not have been unreasonable for a risk manager at a company of the size of BP to have taken that view. On that basis it is submitted that not only is there no basis for a break in the chain of causation but there is no basis for contributory negligence either.

311. With regard to failure to mitigate, BP's failure to take out replacement insurance, being a course which some risk managers of very large oil companies might well have taken, could not amount to a failure to mitigate, having regard to the test in Banco Portugal v. Waterlow [1932] AC 452, referred to at paragraph ( ) above.

312. As to the correct measure of damages, the great weight of authority supported the proposition that the correct test with regard to cases of professional negligence by an insurance broker was that amount which the broker's client would have recovered under the insurance which the broker ought to have placed. The approach relied on by Aon in this case was entirely novel and not supported by authority. Departure from that measure could be justified only by application of the same principles as would apply with regard to mitigation. Mr Popplewell QC submitted that, as Mr Leggatt QC accepted in opening, the rules applicable to measure of damages overlap with the rules about mitigation of loss as exemplified in the rules as to the measure of damages in the field of sale of goods. The measure of damages thus takes account of what can reasonably be expected of a buyer or seller where the opposite party has respectively failed to deliver or reject the goods and there is an available market. Similarly, the market price would be fixed by reference to a date by which it could reasonably be expected that the party not in breach could have gone out into the market and replaced the undelivered goods. Where there was no market for goods of an identical nature, the approach was to take the market price of similar goods provided that the buyer might reasonably have replaced by purchasing goods having those similar characteristics.

313. Accordingly, given that Aon submitted that the conventional measure of damages should be departed from, it was for it to prove in effect that BP had failed to mitigate, that is to say that it had not acted reasonably in all the circumstances. On the evidence, this could not be established. In particular both market experts, Mr Kaye and Mr Riches (Aon) were of the view that the available market cover was not attractive. It was impossible to purchase an equivalent open cover and consequently any replacement would have to be on a facultative basis and, in view of the rise in the market rates, at significantly higher premiums and with much larger deductibles. The effect of that was that some risk managers of large oil companies would not consider such cover worth buying.

314. Further, Aon at no time before service of its defence in this action on 29 November 2004 suggested to BP that it should take out replacement insurance, even though this matter had been raised in Aon's presence by Mr Jeremy Cooke QC in conference in May 2001. At that time Aon was aware of BP's view, which they appear to have shared, that alternative insurance would be expensive, time-consuming and hard to place and might indicate a sign of weakness to the Frankona Defendants.

315. BP also emphasise the fact that it was only at the case management conference in April 2002 that the Frankona Defendants raised the timing of declarations point (that declarations had to be made to each insurer by 30 June 2000). It was only in May 2002 that Herbert Smith (and therefore BP) were informed by Aon that declarations had not been made to each of the Frankona Defendants by the final date. Up to that stage BP and Herbert Smith had been working on the basis that the Frankona Defendants were relying by way of defence on the ineligibility point and the avoidance of the Open Cover or declarations to it on the grounds of misrepresentation/non-disclosure. Accordingly, given that BP reasonably anticipated that it would succeed on those points, but that it was, as it appreciated, in a much weaker position on timing of declarations, the earliest date by which the claim would be seen as representing a serious threat of loss to BP which replacement insurance, if available, might have avoided, was May 2002.

316. However, by that time, nearly two years after most of the projects had got under way, it would have been very difficult to make facultative placements even on the unattractive terms then available. The evidence from Mr Parry of Aon London was that it would have taken a considerable amount of time, given the amount of information that brokers would have to present to underwriters, for each single partially-completed project to be placed. Assuming that BP had arranged to take legal advice on the new defence, it would also have had to work out the extent of its vulnerability by ascertaining from Aon exactly which projects had not been declared to which underwriters by 30 June 2000. It was only in July 2002 that Aon provided precise details of the declarations. If a decision were then taken to place substitute insurance, it would be necessary to consult some of the affiliates, joint venturers and also the contractors in order to obtain the necessary placing information. That would have been likely to take until the autumn of 2002 at the earliest. In the meantime, losses had been incurred on many of the projects and were

continuing to be incurred. Indeed, 22 out of the 25 losses pleaded in Schedule 3 of the Re-Amended Particulars of Claim had already occurred.

Discussion

317. There is strong authority for the proposition that the normal measure of damages for breach of an insurance broker's duty to procure insurance for the principal is the amount which the insurance would have paid to the assured but for the broker's breach less the cost of the premium: see Dunbar v. A & B Painters [1998] Lloyd's Rep IR 93 per Rix J. at p146-147. If that measure of damage is to be departed from it can only be on the grounds that the whole or part of the principal's loss has not been caused by the broker's breach. If, due to the broker's negligence, the insurers are not liable to pay the principal, the question arises whether, in principle, there are any circumstances in which the broker should be entitled to expect the principal to take steps to protect himself from future losses by purchasing replacement cover. To this question the answer can only be that there are. If, on a day when heavy rain is threatening to start at any moment, I employ an agent to go to the nearest shop to buy an umbrella and other goods and he returns with the other goods having forgotten to buy the umbrella, whereupon, there being no taxis in sight, I embark on a long journey by foot without an umbrella, passing another umbrella shop on the way but not bothering to delay while I buy an umbrella, and shortly afterwards getting soaked in heavy rain which ruins a new suit, it would hardly be open to me to recover as damages for the agent's negligence, the cost of replacing the suit. That is because the agent's negligent omission cannot be said to have caused my loss, but rather my decision to forego the opportunity of avoiding the risk of damage by purchasing an umbrella. Commonsense suggests that my failure to take the opportunity of avoiding the risk of damage was so unreasonable that my decision and not his negligent amnesia caused the loss. However, in this context to characterise my conduct as "so unreasonable" is in substance to evaluate it as completely departing from the conduct that would normally be expected from one in my position with equivalent knowledge who perceived the same risk of damage. The measure of any recoverable loss does not include the value of the suit but may in some circumstances include the amount by which, had I stopped to purchase an umbrella, it would have been more expensive than any type of umbrella my agent could have purchased at the other shop.

318. I have used this broad analogy because it strongly suggests that there is every reason why in principle the measure of damages recoverable from the negligent broker may in some circumstances differ from that which is the conventional measure, particularly in a case where no loss has been sustained at the date of the breach. If on learning that cover is unavailable from one policy which is unenforceable due to the broker's negligence, it is ascertained that a replacement policy which would replace the whole of the ineffective cover can readily be purchased for a reasonable premium, and yet the assured declines to take out another policy, it might be said with force that such conduct on his part so completely departed from what could be expected from one in his position and knowing the facts that he knew that the measure of his loss should not include losses that would have been paid under the original policy had it been enforceable but which could have been recovered under a replacement policy. Such losses would not have been caused

by the breach of duty and the measure of damages would have excluded them. To characterise the assured's conduct as a failure to mitigate would simply be a way of expressing his interruption of the chain of causation. For these reasons, it is, in my judgment, unhelpful in a case with facts such as this to divide up the relevant analysis into the separate compartments of causation, mitigation and measure of loss.

319. Against that background it is clear that the following are considerations directly relevant to this issue.

i) At what point of time did BP ascertain that the declarations to the Open Cover did not protect it against project losses?

ii) At that point of time what alternative cover in respect of those projects was available on the market?

iii) To what extent and at what cost would any such alternative cover have protected the assured, including the joint venturers and contractors, if it had then been placed?

iv) Having regard to (i), (ii) and (iii) would the omission of the assured to purchase such replacement cover at that time represent a complete departure from the conduct that could reasonably be expected from an oil company in that position knowing the information which it had?

320. Only if the answer to (iv) is Yes, might it be correct to depart from the conventional measure of damages for an insurance broker's negligence.

321. As to (i), the earliest point of time at which BP could reasonably ascertain that it could not recover under the Open Cover against the Frankona Defendants, with the possible exception of Upton, was when Cresswell J. handed down his judgment on 27 February 2003. At that point, although BP had substantially succeeded on eligibility, it had failed on the timing of declarations. Only if it could successfully appeal that decision as to timing could it have a real hope of being able to recover its losses. However, it was advised by Counsel and by Herbert Smith that an appeal would be likely to fail. That point of time was nearly one year after the third and latest point of time relied on by Aon: see paragraph 306 above.

322. Prior to that time the knowledge of BP with regard to the risk that the Open Cover might not protect against losses went through a number of stages.

323. Immediately following expiration of the Open Cover period – on 14 July 2000 - instructions to advise were sent to Mr Jeremy Cooke QC, as he then was. A conference took place on 18 July 2000 attended by Mr Wannell of BP and various personnel from Aon London. In an opinion which Mr Cooke provided on the same day he wrote:

> "If Insurers continue to reject the declarations, the Insured could simply maintain that cover exists and proffer premium, which would be rejected. The insured could make claims on the basis that cover existed and be met with the argument that it did not. The risk of exposure on this is too great to bear and, in practice, if the Insurers maintain their position, they will be in repudiatory breach of a contract for insurance [the open cover] and will be liable in damages for the recoverable consequences of any breach. With a refusal to insure, the Insured, in mitigation would be expected to find alternative insurance, so that the measure of damages would be the cost of such alternative cover and any claim lost as a result of any difference in conditions where such part of the loss was reasonably uninsured.
>
> It may be possible to get alternative cover with the existing insurers on a basis that is without prejudice to the claim to be entitled to insurance under the open cover. Whether this is possible or wise, I cannot say, but it could have some advantages in helping to reach a commercial solution later, if none is possible now."

324. That opinion was not concerned with the timing of declarations point but with the problem of eligibility which Mr Cooke advised was ultimately likely to turn on expert evidence of market practice.

325. It is further to be observed that the advice as to placing alternative cover was predicated on the acceptance by BP of an anticipatory repudiatory breach by the insurers. But that is not what BP did. Instead, it aimed at negotiating a settlement first with the leaders and then with the following market. At that stage the timing of declarations point had not been raised and eligibility and misrepresentation were everything. Moreover, BP had not been advised that they were likely to lose on either ground, although there was clearly a real risk that they would, at least as regards some projects.

326. Further, to attempt to terminate the Open Cover for repudiatory breach would have been wholly impracticable for the obvious reason that it would imperil recoverability in respect of losses on projects properly declared. Instead, BP followed the sensible strategy of trying to settle first with the leaders and then with the following market.

327. Against this background the suggestion that in the latter part of 2000 BP wholly departed from what could normally be expected of a party in those circumstances presents itself to me as quite unrealistic. Market premium rates had risen far above those under the Open Cover. Indeed, they would be 5 to 10 times the rates under the Open Cover. There were practically no known losses. Analysis of the chances of success on eligibility was incomplete and there were reasonable prospects of success on that point on most of the declarations. Since there are few secrets on the London market, there is substance in the submission that the taking out of replacement cover might have sent the wrong message to the insurers and thereby damaged BP's position in the negotiations. Further, the terms available on the market were by that time confined to facultative

placements on the so-called WELCAR terms offered by Wellington Syndicate 2020 and they involved significantly higher deductibles than those under the Open Cover. Each project would have had to be placed separately with the disclosure of detailed information about the project and its progress as well as IBNRs.

328. Mr Robin Kaye, a very experienced insurance expert with 30 years experience of risk management in the oil and gas sector, who was called by BP, expressed the view that, given the premium levels and coverage limitations which were operating in the CAR market at the time, it would have been entirely reasonable for BP not to have replaced its cover at any point from the early part of 2000 onwards even if it was clear that the Open Cover was not going to respond. He stated in his report:

> "It would be surprising, and in my view uneconomic, for BP to have done so in response to an unresolved dispute as to whether the cover would respond. Indeed, in my experience, in cases where the solvency of an insurer is doubtful, the question of buying replacement cover only arises when the insurance company is in liquidation, not just when there is a risk that it might become insolvent. I would be surprised if any risk manager would consider buying alternative insurance when a settlement with insurers seemed likely."

329. In his Supplementary Report Mr Kaye stated as follows:

> "In my opinion, the level of premiums (being 5-10 times higher than the Open Cover), higher deductibles and significantly restricted coverage terms (in particular the lack of cover for faulty parts) all made the purchase of CAR cover uneconomic as a general proposition. For a company in BP's position – where an existing, inexpensive and broad form of coverage was already in place in the form of the Open Cover and it was simply unclear as to whether it would respond – it would, in my opinion, have been surprising for a risk manager to commit very substantial sums to the purchase of potentially redundant replacement insurance."

330. In this connection, the proposition that BP's conduct has to be judged by reference to its "duty" to diminish the loss in the interests of Aon in priority to its own economic interests cannot be accepted as a general principle. It was entitled to respond to the consequences of Aon's breach of duty by proceeding to conduct its business in the ordinary course of that business. Whereas it would not be entitled to close its eyes to the risk of avoidable losses, it would not necessarily be obliged to insure against them primarily to save Aon the risk of a damages claim in case losses arose in future. If BP did no more than oil companies in its position could reasonably be expected to do in the ordinary course of business in order to protect themselves, that was a response that Aon, with its self-professed experience of CAR cover in the energy industry, must be taken reasonably to have foreseen, thereby negating any foundation for a novus actus interveniens defence.

331. Nor, in my judgment, could it make any difference at all that BP might have recovered as damages from Aon the cost of alternative cover even if, in the event, there were no losses and the cover therefore proved needless. There was at this stage no certainty as to Aon's liability in negligence and BP would therefore have been paying away premium for replacement cover not only in circumstances in which they would not have considered it worth purchasing had they been without any claim against Aon but also where they had no certainty that they would ever be able to recover the cost in damages. The total amount of premium which according to the figures produced by Aon's broking expert, Mr Paul Riches, in his Supplementary Report, would have had to be paid away to cover projects covered by declarations 8 to 26 would range from about US$18 million in July 2000 to US$31 million immediately after the judgment of Cresswell J. in 2003. I infer that no broker in Aon's position could have failed, if it had thought about it, reasonably to foresee that BP would not be likely to pay out premium of this order of magnitude in the circumstances which had occurred.

332. That this conclusion must be right is strongly evidenced by the conduct of Aon itself following July 2000. It appears never to have occurred to Aon to recommend to BP that, in view of the doubts about the enforceability of the Open Cover declarations against the Frankona Defendants, BP should take out replacement cover. Yet Aon was an expert in CAR cover and was well acquainted with the market rates and terms available. From the meeting which Mr Parry and Mr Jeary had on 4 January 2001 with Mr Morgan of G E Frankona, by then the unofficial leader of the following market, Aon were virtually certain that the Frankona Defendants would continue to refuse to accept the later declarations.

333. As to the second point of time relied on by Aon (see paragraph 306 above) the second/third quarters of 2001, Frankona itself tendered return of premium on 6 March 2001. On 24 April 2001 Hannover Re rejected liability. On 27 April Norton Rose informed Aon on behalf of Frankona, Hannover, Cox, Cotesworth, Howell and Euclidian that underwriters were going to review all the information to see whether the declarations 8 to 26 had been effective. That appeared again to leave in very substantial doubt the ultimate attitude of the underwriters.

334. On 11 May 2001 there was a further consultation with Mr Jeremy Cooke QC attended by Wannell, Daniel and Paul Baddeley of BP and Stow and Parry of Aon. Mr Cooke advised that the Frankona Defendants were bound by the settlement of October 2000 with the Leaders. He identified various courses open to BP, including accepting those Defendants' repudiation and taking out replacement absolute or contingent insurance and suing to recover the net losses together with the additional cost of the premium. However, it was stated at the meeting, either by or with the tacit assent of the Aon representatives, that this was not a preferred option as it did not provide certainty and would be difficult, costly and time-consuming to achieve. It might also suggest weakness in BP's argument. Mr Parry explained in the course of his evidence that replacement cover would have been difficult to achieve:

> "A. … by the fact that the projects were already partly completed, to achieve

certainty in the mind of underwriters about the exact nature of risk they would be bearing would have been quite hard.

Q. Underwriters would be resistant to take on risks that were part-way through?

A. They certainly would have found it hard to make precise judgments about the nature of that risk, I agree with that.

Q. Mr Wannell mentioned that he had, at least in his mind, that they might for example require IBNR executions; would that have been so?

A. That would have been a fear, yes, and quite common to expect it.

Q. It is also right to say, is it, that BP were pretty unpopular in the market at this time because they were perceived as not taking out operational insurance and only taking out insurance on business that was more likely to be loss-making?

A. That was certainly one view. They actually had made a strategic decision in that respect some years before.

Q. Yes, and that had made them not particularly popular in the market, had it not?

A. That is right."

335. No progress was made in persuading the Frankona Defendants to accept the settlement and on 24 September 2001 BP's Claim Form and Particulars of Claim were served on them.

336. By that time the alternative cover available on the market was substantially the same as that a year earlier and was certainly no more attractive to a hypothetical would be assured in BP's position. The premium cost, according to Mr Riches' calculations, would be in the region of US $27 million. In my judgment, the submission that, in these circumstances of failing to take out the replacement cover in the second and third quarter of 2001 is no stronger than that in relation to the latter part of 2000. Indeed, it is in certain respects even weaker because BP now had the benefit of professional advice from Aon as to the problems likely to be encountered in obtaining such insurance and the unsuitability of what was available. Again, it is to be emphasised that at this stage the Frankona Defendants had not yet taken the timing of declarations point and although some uncertainty attached to the strength of underwriters' defences to the claim as then advanced, leading counsel had advised that the Frankona Defendants were bound by the October 2000 settlement.

337. I am not persuaded that BP's conduct in failing to take out replacement cover at this stage comes anywhere near total departure from what could normally be expected of a party in its position. BP

was then entitled to take the view that it had a reasonably good chance of recovering from the Frankona Defendants and that expenditure of many millions of dollars on premium for the purchase of replacement cover could not be justified. The same held true when the Defence was served on 10 December 2001 for it contained no mention of the timing of declarations point.

338. In relation to the third point of time identified by Aon, namely the second quarter of 2002, after it had first clearly emerged on 18 April 2002 that the timing of declarations point was to be relied on, it then became necessary for BP and Aon to investigate the factual circumstances relating to declarations. In particular, it became necessary to ascertain from Aon which projects had been declared to which insurers and when. This information did not fully emerge until on 12 July 2002 when Mr Smith of Aon London sent to Mr Oddy of Herbert Smith a spread sheet showing the dates of declarations to the Frankona Defendants, mostly after the expiration of the Open Cover. It is to be observed that by their covering message Aon maintained that it was sufficient that declarations had been made to the leaders within the Open Cover period. The evidence is that if, having absorbed that detailed information, it had been decided to place alternative insurance for each separate project for which no timely declaration had been made, it would have been necessary to provide the new underwriters with detailed information as to each project and to satisfy them that there were no IBNRs. The placing process would not have been completed until towards the end of September 2002, and all the losses the subject of claims under declarations 8 to 26 except for declaration 13 (Nam Con Son Upstream – notified 22 October and 2 December 2002) and declaration 26 (Na Kika – losses on 19 October 2002 and 20 December 2002) would have occurred before replacement cover could be placed. Further, many of these projects were substantially completed and had little remaining construction work to be done.

339. It is thus improbable that an oil company in BP's position would have embarked on a major insurance replacement exercise to cover projects with a relatively short period of time to run when losses had already been sustained. The precise amount of the more recent losses would have to be broadly estimated. One such loss – in relation to declaration 12, the Vahall project – ultimately in the amount of US$133 million would have involved a considerable charge on BP by way of self-insurance. Other losses, amounting to an estimate of nearly US$ 36 million, would also have been sustained by mid-September 2002, thereby adding further to the amount which would unavoidably be carried by self-insurance if the Frankona Defendants were not liable. It is, in my judgment, extremely unlikely that any oil major in a similar position would have thought it worth paying away substantial amounts of premium at that stage, having already sustained self-insured losses of US$169 million and taking into account (i) the much reduced period of exposure to insurable perils during the construction period and (ii) the more limited protection under the WELCAR terms.

340. Aon draws attention to the absence of evidence as to the relationship between BP and its operating affiliates on the one hand and co-venturers and contractors on the other and submits that, in the absence of disclosure of documents and other evidence it is not possible to draw my conclusion as to whether BP suffered its loss by reason of Aon's negligence or by reason of having failed to take out replacement insurance, the burden of proof of loss would therefore not

be discharged by BP. In support of this argument Aon relies on answers given by Mr Kaye in response to questions by the Court to the effect that whether replacement cover were taken out would depend on discussions between the operating company and its co-venturers under the joint operating agreement. His evidence was that it would be very dangerous for the operating company to decide to do without replacement cover without the agreement of the co-venturers and it would not be reasonable to proceed without consulting them. Aon draws attention by way of illustration in this connection to the course taken by BP's affiliate, BP Amoco Norge AS in relation to Aker Stord, the main contractor on the Valhall project. The main contract was signed only on 6 April 2001, 9 months after the end of the Open Cover period and it included a provision under which the operating company was under an obligation to procure CAR Cover. The Valhall project was then in its early stages and no losses had been sustained. Prior to signature of the contract, on 14 February 2001, Mr Holmen of BP Amoco Norge asked Mr Mangino of BP Finance for advice as to CAR insurance for Valhall, in particular whether it was necessary to investigate alternative policies and, if so, whether they ought to be budgeting on the basis of a substantial increase in premium by comparison with that payable under the Open Cover. No document in reply was disclosed by BP. However Aon submit that given that the project was still in its early stages, that BP was then aware that six of the Frankona Defendants were disputing the declaration of the Valhall project and soon after became aware that all those Defendants were disputing it and that, as Mr Wannell conceded in cross-examination, Aker were probably not informed of the fact that the insurance was subject to dispute, BP's failure to attempt to take out alternative insurance cover was the true cause of their liability to Aker: they could not in April 2001, when their affiliate entered into the contract with Aker, have been relying on protection for the Valhall project provided by the Open Cover and derived from the disputed declaration.

341. By April 2001 BP was in the position where it had settled with the leaders' market and rejection of liability or at least queries as to liability had been raised by participants' lines totalling 22 per cent of 100 per cent from amongst the Frankona Defendants. BP was reasonably confident that those Defendants were unlikely to succeed on the defences so far raised, which did not include the timing of declarations point. It was continuing to negotiate with Norton Rose in order to attempt to pick off those Defendants by settlement: failure to do so was not yet apparent. In these circumstances BP's position was that it might well reach a settlement with the Frankona Defendants which would be on similar lines to that already arrived at with Swiss Re and AIG but that, if that could not be accomplished, it had a reasonable chance of enforcing the Open Cover against the Frankona Defendants in court. In these circumstances, taking into account the increased premium rates and the relatively disadvantageous terms of the WELCAR policy, the decision not to take out alternative cover in April 2001 was not, in my judgment, so substantial a departure from what an oil company in BP's position could reasonably be expected to do, as to break the claim of causation. More specifically, the entering into of the contract with Aker cannot logically add weight to the submission that BP ought then to have taken out replacement cover. It simply presented a specific additional reason for needing to insure but it could not detract in any way from BP's decision not to do so.

342. I therefore conclude that BP's omission to take out alternative insurance was not in all the circumstances at any stage before the pleaded losses were sustained so great a departure from what could reasonably be expected from an oil company in its position as to break the chain of causation or to represent conduct so unreasonable as to amount to a failure to mitigate.

343. Had I decided that BP ought to have taken out replacement cover, it would have been necessary to decide at what point of time it should have done so, whether in respect of all projects the subject of declarations or only of some and how much it would have cost to do so. This is an exercise which is not practicable to conduct on a hypothetical basis because it would involve various permutations of fact depending on the factual foundation for the conclusion that BP's conduct was unreasonable. For that reason, the sensible course is not to devote further time to that exercise but to invite a higher court, if any, to remit this case if it differs from my conclusion on this issue.

Conclusions

344. My conclusions can be summarised as follows:

i) Aon London owed a duty of care in tort to BP to make effective declarations to the Frankona Defendants under the Open Cover in respect of projects notified to it up to 30 June 2000 (see paragraphs 65- 231 above).

ii) Aon London was in breach of that duty as and when it failed to make such timely declaration to each of the Frankona Defendants (see paragraphs 149- 155 and 171 - 174).

iii) In the course of the settlement negotiations between BP and the Frankona Defendants and by the terms of the settlement of July 2003 BP conceded that the Upton Syndicate was not bound by declarations 8 to 26, whereas in truth, BP had a strong case that Upton was bound by declarations 8, 9, 13 to 18 and 21 to 26 (see paragraphs 235 - 258 above).

iv) In the course of those settlement negotiations BP did not challenge the Frankona Defendants on the grounds that Upton was estopped by convention from denying that it was bound by declarations 8 to 26. BP did not thereby concede a strong point. To the contrary, had the point been raised it would have been regarded by those advising the Frankona Defendants as a weak point (see paragraphs 259 - 270).

v) The argument, not raised by BP in those settlement negotiations, that Upton had become bound to the terms of the settlement with the leading underwriters by Mr Regan's scratching the ACE endorsement on 6 December 2000 was one which faced a substantial challenge on the grounds of misrepresentation as to the effect of the Leading Underwriter endorsement and possibly mistake (see paragraph 271 - 277).

vi) If, in the course of those negotiations, BP had raised any or all of the points on the Upton declarations referred to at (iii), (iv) and (v) it is improbable that the terms of the settlement with the Frankona Defendants would have been more favourable to BP than was the case. The terms of the settlement arrived at were not unreasonable (see paragraph 278 - 287).

vii) There was no contributory negligence on the part of BP with regard to the failure of Aon London to declare the Na Kika project to the Frankona Defendants (see paragraph 300)

viii) BP's failure to take out replacement insurance as a substitute for the Open Cover was not conduct which broke the chain of causation between Aon London's negligent failure to make declarations to the Frankona Defendants and the loss suffered by BP. Nor did it represent a failure by BP to mitigate its loss. The measure of damages is accordingly to be based on the amounts that would have been recovered from the Frankona Defendants if valid declarations had been made to them (see paragraph 288 - 343).
