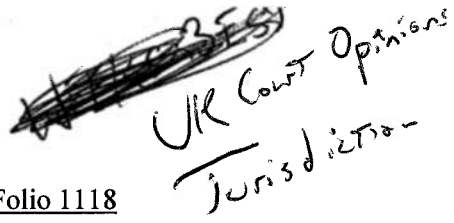

Case No: 2011 Folio 1118

Neutral Citation Number: [2012] EWHC 2427 (Comm)

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

The Rolls Building
London EC4 1NL
Date: 17/09/2012

Before :
MR JUSTICE FIELD

Between :

(1) ACE EUROPEAN LIMITED

(2) HDI-GERLING INDUSTRIE VERSICHERUNG AG

(3) NEW HAMPSHIRE INSURANCE COMPANY

(4) PORTMAN INSURANCE LIMITED

(5) QBE INSURANCE (EUROPE) LIMITE

(6) SWISS RE EUROPE SA — **Claimants**

and –

(1) HOWDEN GROUP LIMITED

(2) HOWDEN NORTH AMERICA INC. (formerly HOWDEN BUFFALO INC.) — **Defendants**

Harry Motavu QC and Craig Morrison (instructed by **Reynolds Porter Chamberlain LLP**) for the **Claimants**
Richard Jacobs QC (instructed by **Covington & Burling LLP**) for the **Defendants**
Hearing dates: 26 & 27 June 2012

Judgment

Mr Justice Field:

1. This is an application by the Second Defendant ("HNA") to set aside the order I made dated 28 September 2011 granting permission to the Claimants to serve the Claim Form and Particulars of Claim on HNA out of the jurisdiction.

2. The Claimants or their predecessors in title are insurance companies which subscribed to various layers of an excess public and products liability insurance programme in favour of the First Defendant ("Howden Group") and its subsidiary companies during the years 1995 to 2002 ("the Howden Insurance Programme"). During these years the Howden Insurance Programme was arranged in layers which provided vertical cover up to an aggregate limit of £100 million for any one occurrence.

3. Each of the 14 policies variously subscribed to by the Claimants[1] that formed part of the Howden Insurance Program was presented to and subscribed by the Claimants (or their predecessors in title) in the London Market. The excess layers were placed by London brokers, namely: Jardine Insurance Brokers International Ltd (1995); Jardine Insurance Services Ltd (1996-1997); Lloyd Thompson Ltd/JLT Risk Solutions Ltd (1997-1999) and JLT Risk Solutions Ltd (2000-2002). To the extent relevant to this application, the coverage provided by the policies was: (i) for sums that the Assured may become legally liable to pay in respect of claims made against them for damages and costs and expenses in respect of or in consequence of personal injury happening during the period stated in the Schedule; and (ii) an indemnity in respect of the Assured's legal liability arising out of faulty, defective or inadequate materials, workmanship, design, plan, specification, formula or advice or any similar cause (irrespective of whether any bodily injury or loss of or damage to material property may have been caused thereby) in respect only of claims made against the Assured during the period of insurance specified in the Schedule or arising out of circumstances of which the Assured became aware during that specified period.

4. The cover provided by the policies was denominated in sterling, and premium and claims are payable in sterling. Claims under the policies have to be notified to the London brokers who placed the relevant policy.

5. Howden Group is an engineering concern with a number of subsidiaries around the world supplying fans, rotary heat exchangers, compressors and gas cleaning equipment globally to power generation, petrochemicals, steelmaking, mining and cement production industries.

6. HNA is now a wholly-owned subsidiary of Anderson Group Incorporated and is a North American licensee of Howden Group. At all material times it was a subsidiary of Howden Group carrying on the business of manufacturing and

[1] The 14 policies are listed in a Schedule to the Particulars of Claim and are referred to hereafter by reference to the number assigned to them in that list.

supplying fans, rotary heat exchangers, compressors and gas handling equipment to utility and industrial markets in Canada, USA and Mexico.

7. HNA has sought to notify claims to excess layers of the Howden Insurance Programme for various years in respect of asbestos-related claims brought by third parties. The claimants in these personal injury actions allege that HNA is liable for bodily injury, sickness and disease caused by their exposure to asbestos products which were manufactured or distributed by HNA or its predecessors, whose liabilities HNA is alleged to have assumed. HNA has, in turn, brought various claims against its insurers, claiming indemnities under insurance policies in place between 1961 and 1986 (when it was a subsidiary of Ampco-Pittsburgh Corporation) and between 1995 and 2002 (when it was a subsidiary of the Howden Group). In 2003, HNA brought claims against its primary layer insurers (the "2003 Pennsylvania Coverage Action"). These claims were settled in 2005. In 2009, HNA brought claims against certain of its excess insurers, including the Second and Third Claimants (respectively "Gerling" and "New Hampshire"), under Policies 1-6 (the "2009 Coverage Pennsylvania Action"). Settlements have been concluded with some of the excess insurers but not with Gerling and New Hampshire and this action continues against them. It is of considerable relevance to this application. Fact discovery is complete, expert reports have been served and the expert phase of the litigation is about to be completed with the taking of depositions.

8. In February 2011, Ampco-Pittsburgh Corporation brought a claim (the "2011 Pennsylvania Coverage Action") against various of its insurers upon policies dating from 1981-1984 (which do not include the Claimants in this action) and against HNA (with whom Ampco-Pittsburgh shares coverage under the 1981 to 1984 policies). In July 2011 HNA joined the Claimants to that action and made claims under policies 7 and 8 which are immediately in excess of and follow form to policy 6. This action is significantly less advanced than the 2009 Pennsylvania Action; discovery is not yet complete.

9. Both the 2009 and the 2011 Pennsylvanian Coverage Actions have been assigned to Judge Conti of the US Federal District Court for the Western District of Pennsylvania.

10. The proceedings in issue in this application were commenced on 21 September 2011, two years after the start of the 2009 Pennsylvania Action. What is sought by the Claimants is not an order dismissing the claims brought against them in the 2009 Pennsylvania Action nor an order declaring that they are not liable on those claims. Instead, the Claimants seek declaratory relief as to the meaning and effect of the policies, including declarations that: (i) the policies are governed by English law; (ii) on a proper construction of the policies the Claimants are not liable for asbestos-related claims where the third-party claimant had not suffered actionable personal injury or loss of or damage to material property which happens or occurs within the policy period or where a claim arising out of faulty materials was not made or notified within the policy period. These declarations are sought against the background of two fundamental differences in the views of the English and Pennsylvania courts as to what triggers liability under policies of the sort in issue. First, under the law of a number of American states, including

Pennsylvania, exposure to a hazardous condition can trigger liability, but this is not so under English law. Second, under English law, but not in Pennsylvania and certain other American states, the period clause is of fundamental importance: the relevant trigger must occur within the policy period.

11. On 6 December 2010, Faraday Reinsurance Co Ltd ("Faraday") issued proceedings in this court against HNA and Howden Buffalo Inc (HNA's previous corporate name). Faraday is a subscriber to three of the same policies in the Howden Group excess layer as are subscribed to by the Claimants (policies 7, 9 and 11) and sought the same declarations as to these policies as the Claimants seek in the present proceedings. On 7 October 2011, HNA applied to have David Steel J's order granting permission for service outside the jurisdiction set aside on the grounds that: (i) Faraday did not have an arguable case that the policies were governed by English law; (ii) England was not the proper forum for the claim; and (iii) the claims for declarations as to the construction of the policies were not justified and/or lacked utility. In a reserved judgement handed down on 1 November 2011 ([2011] EWHC 2837 Comm), Beatson J dismissed all of these grounds and upheld Steel J's order in respect of policy 7. In his view, Faraday had much the better of the argument on the question whether the policy 7 was governed by English law, and given the appropriateness of an English Court determining the applicable law and the questions as to what constitutes "injury" and whether there is a single occurrence, England was the appropriate forum. He also held that the proceedings in respect of policy 7 had sufficient utility to be allowed to proceed because they could assist Judge Conti. This was so whether or not the decision of the English court as to governing law would constitute "issue preclusion" (res judicata) in favour of the successful party. However, in light of HNA's undertaking not to make any demand for coverage under policies 9 and 11 (which contained express English law clauses), Beatson J set aside Steel J's order in respect of those policies.

12. On 21 September 2011, Gerling and New Hampshire filed motions for dismissal in both of the extant Pennsylvania Coverage Actions on *forum non conveniens* grounds[2]. Judge Conti heard the motions on 16 November 2011, by when Beatson J's judgement in *Faraday* had been handed down. In the course of the hearing she announced her decision to dismiss the motions and gave brief reasons therefor. She handed down a detailed written judgement on 21 June 2012. In her reserved judgement, Judge Conti observed that because the underlying policy did not have an express choice of law clause, the court had to determine which law applied to the policy and in doing so would utilise the choice of law rules of Pennsylvania, the forum state. Under those rules, where there was a true conflict between the competing governing laws – here Pennsylvania and England - the court had to determine which jurisdiction had the most significant relationship to the dispute, and the relevant factors to be analysed were those identified in §§ 6 and 188 of the Restatement (Second) of Conflict of Laws (1971). Under § 6 the factors include (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c)

[2] This was Gerling's second motion to dismiss on *forum non conveniens* grounds. The first was filed on 1 February 2010 and was dismissed on 26 May 2010

the relevant policies of the interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basis policies underlying the particular field of law; (f) certainty and predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied. Under § 188 (2), in the absence of an effective choice of law, the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: (a) the place of contracting; (b) the place of negotiation; (c) the place of performance; (d) the location of the subject matter of the contract, and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties. And these contacts are to be evaluated according to their relative importance with respect to the particular issue.

13. Judge Conti considered the relevant factors and concluded that while place of negotiation and making of the contract and the places of business of the parties pointed to the US, it was not entirely clear whether Pennsylvania or some other state's law should be the governing law. She went on:

> It does not appear, however, that English law would apply. It should be noted that the court's analysis pertaining to the applicable law is at this stage a preliminary assessment because the parties did not fully brief the matter. ... It is sufficient for purposes of these motions to conclude that it is unlikely English law will apply and this court must respectfully disagree with the High Court's determination that English law would apply. In any event it appears that, as between Pennsylvania and England, Pennsylvania has a more significant relationship to the disputes than England and a greater governmental interest in seeing its laws enforced.

14. Judge Conti also concluded that even if English law applied, the court could be informed as to the applicable law.

15. On 20 July 2012 the Court of Appeal handed down judgement in HNA's appeal against the decision of Beatson J ([2012] EWCA Civ 980). Permission to appeal had been given only in respect of the judge's decision on utility. Judge Conti's reserved decision dismissing Gerling's and New Hampshire's Motions to Dismiss was given after the oral argument in the appeal but a copy was provided to the Court and the parties put in written submissions in respect thereof.

16. The Court of Appeal dismissed HNA's appeal. The lead judgement was given by Longmore LJ who said that Beatson J had clearly been aware of the need to ensure that the proceedings would serve a useful purpose and had directed himself accordingly. The judge had accepted that it was for Faraday to show that the proceedings did have utility and he had concluded that Faraday had so shown. Longmore LJ cited a passage in the judgement of Phillips LJ (as he then was) in *New Hampshire v Philips Electronic* [1998] CLC 1062 which included these words:

> I do not believe that an appeal in relation to the exercise of discretion on a question of jurisdiction is justified or should be allowed unless the judge has made an error which risks having adverse consequences on the trial of the action that significantly outweigh the prejudice that will inevitably be caused to the proceedings by the appeal process.

In Longmore LJ's view, Beatson J had made no error at all, let alone an error which risks having any adverse consequences on any trial of the action. With the concurrence of the other members of the court, Ward LJ and Sir Stephen Sedley, he dismissed the appeal.

17. The general principles governing the grant of permission to serve out are well established[3]. First, the claimant must satisfy the court that he has a good arguable case ("much the better of the argument") that the case falls within one of the jurisdictional gateways contained in CPR 6.36 and paragraph 3.1 of Practice Direction 6B (see *Canada Trust v Stolzenburg (No. 2)* [1998] 1 WLR 547). Second, the claimant must establish that there is a serious issue to be tried in that the claim has a real prospect of success. Third, the claimant must satisfy the court that in all the circumstances England is clearly the more appropriate forum for the trial of the dispute (see *Spiliada Maritima Corp v Consulex Ltd* [1987] AC 460).

18. Here the claim is for declaratory relief and it is common ground that the approach adopted in the appellate courts when considering the grant of leave for proceedings seeking negative declarations to be served out of the jurisdiction applies equally where non-negative declarations are sought. The relevant authorities include *Camilla Cotton Oil Co. v Granadex SA and Tracomin SA et al [1976] 2 Lloyd's Rep 10* [PC]; *Insurance Corporation of Ireland v Strombus International Insurance Co* [1985] 2 Lloyd's Rep 138 [CA] and *New Hampshire Insurance Co v Phillips Electronics North America Corp* [1998] CLC 1062 [CA]. In *Camilla Cotton* the Privy Council (per Lord Wilberforce) held that the court should apply careful scrutiny to such claims and should enquire whether the grant of such a declaration would be useful. In *Strombus*, Mustill LJ referred to the need for the Court to be "careful not to bring a foreigner here, unless it can be shown that a solid practical benefit would ensue." And in *New Hampshire* the Court of Appeal approved the judgment of Rix J, who had summarised the relevant principles as to justification for the relief as follows:

> 1. There is power to grant a negative declaration in an appropriate case, the fundamental test being whether it would be useful.
>
> 2. However, careful scrutiny will be exercised not only to test the utility, or on the other hand the futility, of seeking to determine the claim by means of a negative declaration in England, but also to ensure that

[3] See *A K Investment CJSC v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7 at [71].

> inappropriate forum shopping is not allowed, let alone encouraged.
>
> 3. A negative declaration will not be appropriate where it is premature or hypothetical, viz where no claim has been made or threatened against the plaintiff.
>
> 4. The existence of imminent or a fortiori current foreign proceedings is always a highly relevant consideration, not only for the purpose of testing the utility of the English claim, but also so as to having in mind the need to avoid the twin dangers of forum shopping and of the vices of concurrent proceedings.

19. In the light of the evidence as to how the risk was placed, HNA concedes for the purposes of this application that the Claimants have a good arguable case that the claims in respect of policies 1 - 8 (which do not have an express English law or an English jurisdiction clause) fall within CPR Part 6.36 and paragraphs 3.1 (6) (a) (contract made within the jurisdiction) and (b) (contract made by or through an agent trading or residing within the jurisdiction) of PD 6B. In my opinion, these claims also plainly fall within paragraph 3.1 (6) (c) (contract is governed by English law) since the fact that these policies were placed in London through London brokers affords a sound basis for concluding that English law is the implied choice of law whether by virtue of Art 3 (1) of the Rome Convention or Schedule 3A of the Insurance Contracts Act 1982; see *DR Insurance Co v Central National Insurance Co* [1996] 1 Lloyd's Rep 74; *Gan v Tai Ping* [1999] Lloyd's Rep. IR 472 and *Stonebridge Underwriting Ltd v Ontario Municipal Insurance Exchange* [2010] EWHC 2279 (Comm).

20. Policies 9 to 14 contain express English law and England jurisdiction clauses and thus the claims made under these policies indisputably fall within paragraphs 3.1 (6) (c) and (d) (contains a jurisdiction clause) of PD 6B, as well as sub-paragraphs (a) and (b).

21. It is not disputed that there is a serious issue to be tried on the merits of the claims. What is disputed is whether the claimants have shown that the grant of the declarations sought would be of sufficient utility and/or that England is the proper forum.

22. Mr Jacobs QC for HNA submitted that the Claimants had failed for the following reasons to establish a good arguable case that the proceedings served a useful purpose:

> 1. The Pennsylvania and English choice of law rules are substantially different and Judge Conti has held that it is unlikely that English law will be determined to be the governing law in the Pennsylvania Coverage Actions.

2. Even if English law were held to apply, the US Federal Court was well able to establish what the relevant English law was and how it impacted on the construction of the policies.

3. No order dispositive of the Pennsylvania Coverage Actions will result from the English proceedings because the declarations are not framed to achieve this outcome and the doctrine of issue preclusion will not apply to the governing law question because the choice of law rules in Pennsylvania and England are different. The Pennsylvania Coverage Actions will therefore continue regardless of whether this court retains jurisdiction, and regardless of whether this court grants the declarations sought.

4. The English proceedings are not an attempt to assist the Federal Court but are an inappropriate exercise in forum shopping.

5. As to policies 9-14 (the post 1999 policies which contain an express English law and England jurisdiction clause) the defendants disavow claims for US asbestos personal injury actions and accordingly the above contentions as to lack of utility apply to these policies *a fortiori*. The court should take the same course as was taken by Beatson J in *Faraday* in respect of the second and third Faraday policies. There, as regards those policies, the defendants gave an assurance that that no claims would be made thereon as regards US asbestos personal injury actions in the light of which Beatson J held that the declarations sought in respect of those policies lacked the necessary utility.

23. Further and in the alternative, Mr Jacobs contended that the claimants had failed to show that England was clearly the appropriate forum. He submitted that Pennsylvania was the appropriate forum for the following reasons:

1. The overall claim for coverage by HNA was being brought in continuing proceedings in Pennsylvania where a dispositive order was being sought. The English proceedings are a fragment of that overall claim. Such fragmentation of litigation, with the possibility of inconsistent judgments and litigation in two places rather than one, is a strong factor which indicates that England is not clearly the appropriate forum.

2. It is far more appropriate for the real dispute between the parties – namely whether the Insurers are required to provide coverage for the actual claims which are being

made in the United States – to be fought out in the context of the existing proceedings in Pennsylvania.

3. It is entirely normal for a US policyholder, faced with mass tort litigation in the United States, to seek recovery against his insurers in the jurisdiction where the litigation is continuing.

4. When the claimant insurers wrote this risk, they knew they were providing liability insurance to US companies in respect of liabilities that would arise in the United States, and the policies contain various references to the United States insureds. If a policy is written in such circumstances, without an English jurisdiction clause, the insurer must surely contemplate the likelihood of litigation on the policy (in the event of dispute) in the United States.

5. It is, in principle, undesirable to have competing actions in two different jurisdictions, with the risk of inconsistent, piecemeal or competing judgments. It is far more efficient to have issues litigated and resolved in one setting. New Hampshire is a Pennsylvania corporation. Gerling has extensive commercial contacts with Pennsylvania.

6. The Claimants' case in the Pennsylvania proceedings includes issues as to whether underlying policies have been properly exhausted by payment of asbestos-related defence and indemnification costs. There are also cross-claims between many of the insurers. Judge Conti is concerned generally with HNA's insurance programme. Recovery under policies other than those immediately in dispute will directly impact on how much money, if any, HNA seeks to recover from the Insurers.

7. In a case involving progressive diseases, where a policyholder's coverage encompasses many policies in effect during many years, the overall insurance coverage is relevant to each insurer's liability; not simply because of potential issues as to when the attachment point is reached, but also because insurers will inevitably seek contribution from each other. This is what has already happened following the joinder of the Insurers to the 2011 litigation.

8. The documentary evidence and witnesses, including defence counsel, the plaintiffs, their counsel, and medical evidence relating to the timing of their injuries and the circumstances surrounding their exposure to asbestos are located exclusively in the United States. If

> the key issue is whether personal injury occurred during the policy period, it will be necessary to examine the medical evidence, including the pathogenesis of the underlying claimants' particular asbestos-related disease, their work history and periods of exposure to different classes of asbestos fibres.

24. Mr Matovu QC for the Claimants submitted that Beatson J's decision in *Faraday,* confirmed as it has been by the Court of Appeal, is of highly persuasive authority and that I should follow it. He also made the following additional submissions:

Utility

> If made, the declarations sought would be sufficiently useful for the court to exercise jurisdiction since:
>
> > 1. Judge Conti had not finally ruled on the issue of choice of law and there was a real prospect that the court in Pennsylvania would ultimately decide that English law was the governing law, in which event the English court's decision would be of undoubted use to the Pennsylvania judge notwithstanding that that decision might not be of preclusive effect. The parties had not made full submissions on the issue in the Motions to Dismiss and Judge Conti said in the course of a hearing on 4 June 2012 in which she held that a report on English law by Mr Bright, an English solicitor, could be admitted in the proceedings, *"English law may or may not be relevant; that's something that certainly could be argued"*[4] and *"I don't know yet whether I'm going to need [Mr Bright's report on English law] or not. I mean that's making me agree with you [HNA's counsel], that English law is absolutely not applicable, and I haven't made that final determination. I haven't been asked to do that yet."*[5]
> >
> > 2. Moreover, there are significant similarities between the English and Pennsylvania approaches to choice of law.
> >
> > 3. If the Pennsylvania Court were to refuse to apply the law expressly or impliedly chosen by the parties, the declarations sought, if made, would nonetheless be

[4] Transcript p.4, lines 17-18.
[5] Transcript p.11, lines 12-16.

extremely useful in allowing the Claimants to protect themselves from attempts to enforce such a Pennsylvania judgement in England, the EU or anywhere else where an English judgement is recognised.

4. As for policies 9 to 14, Mr Greaney of Covington & Burlington LLP, Counsel for HNA in the 2009 Pennsylvania Coverage Action, had represented to Judge Conti that it was not HNA's intention to join in the pending Pennsylvania litigation *any* claim HNA might have under the 1999 and 2000 policies, and, in the absence of an identical undertaking to the English Court which would include asbestos-related property damage claims, there is no reason to dismiss the claim in respect of these policies.

Appropriate forum

1. As a general rule, the English Court is regarded as the natural forum for determining questions of construction of contracts governed by English law, see e.g. *CGU International Insurance plc v Szabo* [2002] CLC 265.

2. The trial of these claims for declaratory relief would largely turn on questions of law and construction and would require very limited factual evidence and no significant investigation into the underlying asbestos proceedings. The trial would therefore be brief and could come on quickly being heard together with *Faraday*.

3. The Claimants' claims will not create unduly fragmented litigation. The policies in issue were entered into separately with HNA and written from year to year without any joint underwriting decision.

4. In the light of the Court of Appeal's judgement in *Faraday*, there is in any event going to be a trial of the declarations sought in those proceedings which will overlap with the Pennsylvania proceedings and give rise to the risk of inconsistent judgements.

5. In accepting jurisdiction in this case, the English Court would not be preventing the Pennsylvania Court from continuing to conduct the 2009 and 2011 Actions as it sees fit.

25. In my judgement, it is not appropriate to decide this application by simply following the decision in *Faraday*. Instead I must apply the relevant principles to the particular facts of this case. Adopting this approach, I have come to the

conclusion that the Claimants have established that the declarations sought in these proceedings in respect of policies 1-8 have sufficient utility for the Court to exercise jurisdiction over those claims. Judge Conti concluded in an interlocutory hearing that it is unlikely that English law will apply, but in my view there remains a real prospect that English law will be held to be the governing law, in which event it is reasonable to assume that the Pennsylvania Court at the very least would find the judgement to be of considerable assistance. As Judge Conti acknowledged, she did not hear full argument on the issue of governing law and, although the full extent of the difference between the Pennsylvania and English choice of law rules cannot be determined in this application, the provisions of §188 (2) of the Restatement (Second) of Conflict of Laws (1971) seem to me to bear an obvious resemblance to the factors an English Court would consider. This latter observation does not stand alone. In *Szabo*, Toulson J held that the choice of law rules in Ohio which, as in Pennsylvania, are based on the Restatement, were similar to those applied in England.

26. I also accept Mr Matovu's submission that the declarations sought would (if made) be useful in resisting enforcement of a judgement that ignores the express or implied choice of law of the parties. Mr Jacobs submitted that I could not conclude that there would be any such benefit because the Claimants have not adduced any evidence asserting this head of utility and it was unlikely given their involvement in the US market that they would in fact resist enforcement of a Pennsylvania judgement. I reject this submission. A similar contention was advanced in the Court of Appeal in an attempt to rebut Faraday's argument that, even if the Pennsylvania Court paid no attention to an English judgement, that judgement might well still be useful in the courts of any country where a Pennsylvania judgement might be sought to be enforced, but that contention was not accepted by the Court of Appeal. It is true that Faraday is a UK company, whereas New Hampshire, Gerling, ACE European Group Ltd and Swiss Re are foreign corporations,[6] but all the Claimants are London market insurers who have a legitimate expectation that the parties to the policies would be bound by their express or implied agreement that the policies were governed by English law.

27. Mr Jacobs submitted that on the question of utility, the Claimants had to show that they had a good arguable case in the sense that they had "much the better of the argument". I have considerable doubt as to the correctness of this submission. Beatson J did not adopt this approach and he was found by the Court of Appeal to have made no error at all in deciding the utility issue as he did. In my judgement, the correct approach is for the court, taking a broad view, to decide whether the party asserting jurisdiction has satisfied it that the declarations sought have sufficient utility to justify the exercise of jurisdiction. However, if I am wrong about this and the threshold that the Claimants must surmount on the issue of utility is "a good arguable case", I find that the Claimants have satisfied this requirement.

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[6] Portman Insurance Company and QBE Insurance (Europe) Ltd. are English subsidiaries of French and Australian conglomerates, AXA S.A. and QBE Insurance Group Ltd, respectively.

28. I am also of the view for the reasons advanced by Mr Matovu that the Claimants have shown that England is clearly the appropriate forum. As Beatson J observed, the general principle that a court applies its own law more reliably than does a foreign court points strongly in favour of England as the appropriate forum. Further, the trial of the claim will be short, say 2 to 3 days, giving rise to a very good prospect of judgement being given before a dispositive judgement is given in the Pennsylvania Coverage Actions.[7] What is more, the trial will involve very limited factual evidence. And the trial will have no significant greater impact on the Pennsylvania proceedings than will the *Faraday* trial which will be proceeding in any event, short of leave to appeal being granted by the Supreme Court, which seems pretty unlikely. There is of course a risk of inconsistent decisions but as Longmore LJ said, "this is a position which the court in each country must accept.''[Para 31]

29. Turning to policies 9 -14, in my view, if HNA undertakes in the terms of the representation made to this court that it will not claim under these policies in respect of any asbestos-related personal injury claims, the court should not exercise jurisdiction over the claims made under these policies. The evidence is that none of the 14,000 odd asbestos-related claims brought against HNA seeks damages arising out of asbestos-related property damage. Further, HNA has never asserted against the Claimants whether in the Pennsylvania Coverage Actions or elsewhere a claim seeking coverage for asbestos-related property liability. I also accept Mr Greaney's evidence that in the US, asbestos-related property damage claims are typically asserted against manufacturers, distributors and installers of building materials, whereas the asbestos-affected products manufactured by HNA's predecessor, Buffalo Forge, were large industrial fans and blowers which are of a quite different nature from building materials. The prospect of non-personal injury asbestos-related claims is therefore, in my judgement, remote. Accordingly, if the specified undertaking is given, the declaratory relief sought in respect of these policies would not in my opinion have the necessary utility for jurisdiction to be exercised, but on the contrary would be hypothetical and speculative.

30. Whatever be the correct interpretation of what Mr Greaney told Judge Conti – he says that given the context he should be taken to have been referring only to personal injury claims – I have to assess the situation that obtains before me and, for the reasons I have given, an undertaking in the terms identified will result in that part of my original order that relates to the claims made under policies 9-14 being set aside. Save as aforesaid, HNA's application fails.

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[7] No dispositive judgement is expected before the Spring of 2013.