No. 22-1938

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

Plaintiff-Appellant,

v.

ZURICH AMERICAN INSURANCE COMPANY,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (Civil Action No. 21-cv-11530-ADB)

UNITED POLICYHOLDERS' MOTION FOR LEAVE TO FILE AN AMICUS BRIEF

Martin C. Pentz (First Cir. #16168)
Creighton K. Page (First Cir. #1157875)
K. Neil Austin (First Cir. #96289)
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
Tel.: (617) 832-1000
Fax: (617) 832-7000
mpentz@foleyhoag.com
cpage@foleyhoag.com
naustin@foleyhoag.com

Attorneys for United Policyholders

NOW COMES, United Policyholders ("UP"), by and through the law firm of Foley Hoag LLP, and hereby moves for leave to file an amicus brief in support of the position taken by Plaintiff/Appellant President and Fellows of Harvard College, pursuant to Federal Rule of Appellate Procedure 29.

UP conferred with all parties regarding the filing of this amicus brief. Harvard, through counsel, consented to this motion; counsel for Zurich did not consent.

UNITED POLICYHOLDERS HAS AN INTEREST IN THIS MATTER

UP is a highly respected non-profit 501(c)(3) organization. Since its founding in 1991, UP has been a dedicated advocate and information resource for individual and commercial insurance consumers. UP assists consumers purchasing a policy or pursuing a claim. UP hosts a library of publications and videos related to personal and commercial insurance products, coverage, and the claims process at http://www.uphelp.org. Grants, donations, and volunteers support UP's work, which is divided into three program areas: Roadmap to Recovery (disaster recovery and assistance), Roadmap to Preparedness (insurance and financial literacy; disaster preparedness), and Advocacy and Action (helping facilitate loss indemnification and advancing pro-consumer laws and public policy). Public officials, state insurance regulators, academics and journalists routinely seek UP's input on insurance and

legal matters. UP's Executive Director has been appointed to twelve consecutive terms as an official consumer representative to the National Association of Insurance Commissioners. In that role, UP works with regulators on matters related to policy sales, claims, and consumer rights. UP also serves on the Federal Advisory Committee on Insurance, which briefs the Federal Insurance Office and the Treasury Department.

In furtherance of its mission, UP carefully chooses cases and regularly appears as amicus curiae in courts nationwide to advance the policyholder's perspective on insurance cases likely to have widespread impact. UP has been advocating for policyholders' rights in the courts for decades and has submitted amicus briefs in more than 500 cases. UP's amicus briefs have been cited in the opinions of multiple state supreme courts as well as the U.S. Supreme Court. *See Humana Inc. v. Forsyth*, 525 U.S. 299, 314 (1999); *Sproull v. State Farm Fire & Cas. Co.*, 2021 IL 126446, ¶ 17, 184 N.E.3d 203; *Julian v. Hartford Underwriters Ins.*, 35 Cal. 4th 747, 760, 110 P.3d 903 (2005), *as modified* (May 5, 2005); *Cont'l Ins. v. Honeywell Int'l, Inc.*, 234, N.J. 23, 64, 188 A.3d 297 (2018); *Allstate Prop. & Cas. Ins. v. Wolfe*, 629 Pa. 444, 451-52, 105 A.3d 1181 (2014). UP seeks to fulfill the classic role of amicus curiae by supplementing the efforts of counsel and drawing the Court's attention to law that may have escaped consideration. As commentators have stressed, an amicus is often in a superior position to "focus the court's attention on the broad implications

of various possible rulings." R. Stern, E. Greggman & S. Shapiro, *Supreme Court Practice*, 570-71 (1986) (quoting Ennis, *Effective Amicus Briefs*, 33 Cath. U.L. Rev. 603, 608 (1984)).

UNITED POLICYHOLDERS' BRIEF IS DESIRABLE AND RELEVANT TO THIS APPEAL

This dispute arises out of an all-too-common fact pattern with claims-made insurance policies. A policyholder notifies the insurer of a claim, only to have the insurer deny coverage for an alleged defect in notice. Here, the claim at issue consisted of a highly publicized lawsuit and an investigation related to allegations that Harvard's admissions policy is unconstitutional. When Harvard provided written notice to Zurich, one of its excess insurers, Zurich denied coverage, contending that notice was untimely—a contention that Harvard disputes. Denials for allegedly defective notice arise in all manner of contexts and affect all types of policyholders. Indeed, professional liability insurance is now offered almost exclusively on a claims-made basis, subjecting insured professionals to significant risk of forfeiture for failing to comply strictly with policy notice provisions. UP is concerned about judicial decisions, like the one issued by the District Court in this matter, that increase this risk of forfeiture based on an overly restrictive interpretation of case law governing a policyholder's notice and reporting obligations.

As discussed in the Amicus Brief respectfully submitted herewith, the District

Court's ruling erroneously failed to consider a variety of relevant factors in evaluating (1) Harvard's compliance with the notice and reporting requirements in the Zurich policy, and (2) the consequences of a technical breach of those requirements (if any). For example, the District Court should have considered: (i) whether the Zurich excess policy unambiguously incorporated all, or only some, of the primary policy's notice and reporting requirements; (ii) whether a requirement that a claim be "reported to" an insurer can be satisfied in ways other than a writing from the policyholder; (iii) whether any alleged breach of the notice and reporting obligations was material; (iv) the insurer's knowledge of the claim, notwithstanding the policyholder's alleged late notice; and (v) the insurer's use of such knowledge in setting rates for subsequent policy renewals. UP is concerned that the District Court's approach, which is not mandated by Massachusetts law, will perpetuate the risk of forfeiture for policyholders while creating opportunities for insurers to disclaim coverage and reap a financial windfall based on technical requirements that, in many cases, have no bearing on the insurer's ability to set rates.

In the thirty years since the Supreme Judicial Court decided *Chas. T. Main, Inc. v. Fireman's Fund Ins. Co.*, 406 Mass. 862, 551 N.E.2d 28 (1989), one of its earliest cases concerning notice under claims-made policies, the insurance industry has experienced a seismic shift in which claims-made policies have become the most prevalent form of professional liability insurance coverage, and such insurance for

many businesses and individual professionals is *only* available in the claims-made form. The District Court's ruling, if not reversed, will lead to more denials of coverage based on technicalities, will give rise to more risk and uncertainty for insureds, and will create perverse incentives for insurers *not* to follow up with insureds when they are on inquiry notice of a claim.

CONCLUSION

For the above-stated reasons, UP requests the Court accept its amicus brief, attached as Exhibit A, for consideration.

Dated: February 28, 2023

/s/ K. Neil Austin
Martin C. Pentz (First Cir. #16168)
Creighton K. Page (First Cir. #1157875)
K. Neil Austin (First Cir. #96289)
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
Tel.: (617) 832-1000
Fax: (617) 832-7000
mpentz@foleyhoag.com
cpage@foleyhoag.com
naustin@foleyhoag.com

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because, excluding the parts of the documents exempted by Fed. R. App. P. 32(f), this document contains 1,004 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

FOLEY HOAG LLP

/s/ K. Neil Austin
K. Neil Austin

Attorneys for *Amicus Curiae* United Policyholders

CERTIFICATE OF SERVICE

I, K. Neil Austin, hereby certify that on February 28, 2023, I electronically filed the foregoing document, United Policyholder's Motion For Leave To File An Amicus Brief, with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that I served all parties or their counsel by the CM/ECF system on this 28th day of February 2023.

FOLEY HOAG LLP

/s/ K. Neil Austin
K. Neil Austin

Attorneys for *Amicus Curiae* United Policyholders

No. 22-1938

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

***Plaintiff-Appellant*,**

v.

ZURICH AMERICAN INSURANCE COMPANY,

***Defendant-Appellee*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS (Civil Action No. 21-cv-11530-ADB)

UNITED POLICYHOLDERS' BRIEF OF AMICUS CURIAE IN SUPPORT OF THE PLAINTIFF-APPELLANT AND REVERSAL OF THE DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Martin C. Pentz (First Cir. #16168)
Creighton K. Page (First Cir. #1157875)
K. Neil Austin (First Cir. #96289)
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
Tel.: (617) 832-1000
mpentz@foleyhoag.com
cpage@foleyhoag.com
naustin@foleyhoag.com

Attorneys for United Policyholders

CORPORATE DISCLOSURE STATEMENT

United Policyholders ("UP") is a federal 501(c)(3) tax-exempt non-profit organization founded in 1991. UP is not publicly held and does not have any public company affiliates.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Foreign Authorities

Other Authorities

STATEMENT OF INTEREST OF THE AMICUS

United Policyholders ("UP") submits the attached brief to address the question of whether an insured under a claims-made insurance policy forfeits coverage by failing to provide notice of a claim within the policy period, notwithstanding the fact that the insurer knew during the policy period of the claim *and* utilized that information in setting rates for future policies it issued to the insured.

UP is uniquely qualified to address these questions because it has been engaged in and monitoring the property and casualty claim and coverage ecosystem for over three decades. UP is a not-for-profit information resource and voice for individual and commercial insurance consumers throughout the United States. Its work is supported by grants, donations, and volunteers. It focuses on three programmatic areas: Roadmap to Recovery (disaster recovery and assistance), Roadmap to Preparedness (insurance and financial literacy; disaster preparedness), and Advocacy and Action (helping facilitate loss indemnification and advancing pro-consumer laws and public policy). UP provides a consumer-oriented voice based on its institutional experience and perspective, which helps to fill a gap that otherwise would exist between the well-organized insurance industry on the one hand and insurance consumers on the other.

UP has assisted Massachusetts residents in connection with home and commercial insurance matters throughout our thirty-two years in operation, and coordinates with the Division of Insurance through the proceedings of the National Association of Insurance Commissioners ("NAIC"). Its Executive Director has been appointed for thirteen consecutive terms to represent consumers at the NAIC and serves on the Federal Advisory Committee on Insurance which briefs the Federal Insurance Office and in turn, the U.S. Treasury Department.

Since its inception in 1991, UP has filed *amicus curiae* briefs in numerous federal and state courts. It has submitted *amicus curiae* briefs in matters before this Court as well as before the Supreme Judicial Court of Massachusetts. The U.S. Supreme Court and state appellate courts have favorably cited United Policyholders' *amicus curiae* briefs. These briefs are invaluable because insurers are "repeat players" in insurance coverage litigation, but individual policyholders are not.

STATEMENT PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(A)(4)(E)

Undersigned counsel for *amicus curiae* state that no counsel for the parties authored this brief in whole or in part, and no party, party's counsel, or person or entity other than *amicus* and their counsel contributed money that was intended to fund the preparing or submitting of this brief.

SUMMARY OF THE ARGUMENT

This dispute arises out of an all-too-common fact pattern with claims-made insurance policies. An insured notifies the insurer of a claim, only to have the insurer deny coverage for an alleged defect in notice. Here, the claim consists of a lawsuit and investigation related to allegations that Harvard's admissions policy is unconstitutional. The lawsuit drew immense public interest and widespread coverage in the press. Harvard contends it took steps to have its broker notify all its insurers, but apparently Zurich did not receive written notice—even though AIG (the primary insurer) did and began to actively associate with Harvard in the defense. Importantly, though Zurich had not received formal notice of the claim from Harvard, evidence developed in the case suggests that Zurich had in fact received actual notice of the lawsuit against Harvard and had even taken that information into consideration when setting rates for insurance coverage for subsequent years. When Harvard realized that Zurich had not received its original formal notice, it provided written notice promptly. But Zurich denied coverage, claiming that the notice was late.

The District Court erred in entering summary judgment in favor of Zurich in three key ways. First, it erred by conflating the requirements in AIG's primary policy concerning when and how Harvard must provide "written notice" of the claim with the separate requirement that the claim be "reported to" the insurer no later than

90 days after the policy period. *See* Section I.a., *infra*. Even assuming that the "reported to" language in the primary policy notice condition is incorporated into the Zurich excess policy, the claim was reported to Zurich during the policy period by the media, and, if discovery had not been foreclosed, the evidence might have shown that the claim was reported to Zurich through other means as well. *See* Section I.b., *infra*. Second, the District Court erred because any alleged breach was not material, and thus, did not justify a complete forfeiture of coverage. *See* Section II, *infra*. Third, it erred in ruling that Zurich's knowledge of the claim is irrelevant to determining whether coverage exists. None of the controlling Massachusetts cases relied upon by the District Court require automatic forfeiture as a result of late notice, irrespective of the relevant facts and circumstances or equitable considerations. The District Court's ruling invites a proliferation of forfeitures by stripping insureds of the ability to present evidence that such a result would be disproportionate and unjust. *See* Section III, *infra*.

The Court's ruling also raises a number of public policy concerns. In the thirty years since the SJC decided *Chas. T. Main, Inc. v. Fireman's Fund Ins. Co.*, 406 Mass. 862, 551 N.E.2d 28 (1989), one of its earliest cases concerning notice under claims-made policies, the insurance industry has experienced a seismic shift in which claims-made policies have become the most prevalent form of liability insurance coverage, and professional liability insurance for many businesses and

individual professionals is *only* available in the claims-made form. The District Court's ruling, if not reversed, will lead to more denials of coverage based on technicalities, give rise to more risk and uncertainty for insureds, and create perverse incentives for insurers *not* to follow up with insureds when they are on inquiry notice of a claim. *See* Section IV, *infra*.

ARGUMENT

I. THE DISTRICT COURT ERRED IN RULING THAT HARVARD BREACHED THE ZURICH POLICY'S REPORTING / NOTICE REQUIREMENTS.

According to the District Court, Harvard had to give "written notice" to Zurich of the lawsuit filed against Harvard by Students for Fair Admissions on November 17, 2014 (the "SFFA Action") no later than January 30, 2016, 90 days after expiration of the Policy, as a condition precedent to coverage. Finding that Harvard failed to do so until May 2017, when it sent a letter providing formal notice and updating Zurich on the status of the SFFA Action, the Court held that Harvard forfeited coverage for breach of the notice condition. This was error because the Zurich policy includes no requirement that notice be given to Zurich (whether by Harvard or anyone else) within 90 days of the policy period. And the "written notice" requirements that are incorporated into the Zurich policy were satisfied under the facts here.

a. Harvard gave timely "written notice" to Zurich within the meaning of the Zurich policy; no additional "reporting" was required.

There are only two provisions in the Zurich policy that speak to the required reporting or notice of Claims. First, in the capitalized and bolded wording at the top of the Declarations, the Zurich policy provides that Claims must be "reported to the

Underwriter pursuant to Subsection III.A." [A27].[1] This wording imposes no requirements other than those set out expressly in Subsection III.A. Subsection III.A (titled "Reporting and Notice"), in turn, provides that "the Policyholder shall give the Underwriter written notice of any claim . . . in the same manner required by the terms and conditions of the Followed Policy [i.e., the AIG policy]." [A29]. The Zurich policy thus incorporates the terms of the AIG policy regarding the "written notice" that must be given by Harvard to its insurers.

The question thus becomes what requirements are imposed by the AIG policy for "written notice" of Claims? The AIG policy provides that "[t]he Insureds shall, as a condition precedent to the obligations of the Insurer under this policy, give written notice to the Insurer of any Claim made against an Insured … as soon as practicable…." [A102]. However, "the Insured shall not be required to give written notice of a Claim until the earliest occurrence of the following: (i) the Claim is or is sought to be certified as a class action; or (ii) total Loss (including Defense Costs) of the Claim is reasonably estimated . . . to exceed 50% of the applicable retention

[1] Citations to "A___" are to the Joint Appendix. In certain instances, UP is unable to cite to specific factual evidence in the record because parts of the record are under seal. In those instances, UP relies on Harvard's characterization of what those sealed records show and cites to Harvard's brief. Citations to "HB___" are to Harvard's brief.

amount for such Claim." [*Id*.] These (and these alone) are the "written notice" requirements that are incorporated into the Zurich excess policy.

In addition to its "written notice" requirements, the AIG policy includes a separate requirement that "in all events, all Claims … must be *reported to* the Insurer no later than ninety (90) days after the end of the Policy Period…" (emphasis added). [A102]. Unlike the "written notice" clause, which uses the active voice (i.e., "The Insureds shall … give written notice") and specifically refers to "written" notice, the "reported" language in the AIG policy uses passive voice (i.e., "Claims must be reported") and does not refer to a writing or specify who may give the required report. The AIG policy thus clearly distinguishes between "written notice" of a Claim and "reporting" of a Claim, imposing different requirements as respects each. And critically, the Zurich policy's "Notice and Reporting" requirements speak only of the manner and timing by which the Insured must give "written notice"; the Zurich policy does not incorporate the AIG policy's separate "reporting" requirement, nor does the Zurich policy include any "reporting" requirement of its own. The plain language of the Zurich policy makes clear that any "reporting" required thereunder is satisfied by Harvard's giving of "written notice" to Zurich in the same manner required by the primary policy. These differences in primary and excess policy wording are significant, and the District Court's decision ignores them.

The District Court's decision assumes that all claims-made policies – even excess policies – necessarily require notice or reporting of the Claim within the policy period or shortly thereafter. But that is not true. Indeed, many excess policies expressly provide that notice of a Claim need not be given until the total loss for the Claim appears likely to reach the threshold for the excess policy's coverage, even if the primary policy requires notice of claims immediately and within the policy period. *See, e.g., Lexington Ins. Co. v. Newell Health Care Sys*., 1999 Mass. Super LEXIS 328, *8-11, 10 Mass. L. Rep. 406 (1999) (denying summary judgment for excess insurer of claims-made policy based on allegedly late notice given four years after suit was filed, where excess policy required notice "of all claims that are reserved at 50% of the self-insured retention or underlying limit of liability and/or verdict potential of 75% of the self-insured retention or underlying limit of liability" and the primary insurer valued the claim at a fraction of its $2 million underlying limits); *Hoechst Celanese Corp. v. National Union Fire Ins. Co*., 1994 Del. Super LEXIS 570, *7 (Del. Super. Ct. Mar. 16, 1994) (excess claims-made policies only required notice "of any claim or claims to which this Policy applies which may exceed 25% of the applicable amount set forth in the attached Schedule of Underlying Amounts" and thus fact issues precluded summary judgment on insurer's late notice defense, even though notice was given years after underlying suits were filed); *Friends Provident Life and Pensions Ltd v. Sirius Int'l Ins. Corp*.

[2005] Lloyd's Rep IR 135 (Moore-Bick J), *appeal dismissed by* [2005] 2 Lloyd's Rep 517 (Court of Appeal) (excess claims-made policies required notice of claims only "if it appears likely that such claim(s) or loss(es) may exceed the indemnity available under the policy/ies of the primary and underlying excess insurers").

There are good reasons why excess insurers often do not require notice within the policy period, at the same time notice is given to the primary insurer. Here, for example, Zurich's coverage obligations are not implicated until Harvard's total Loss exceeds $27.5 million. An excess insurer in Zurich's position has little interest in wasting resources monitoring or participating in the defense of a Claim in its infancy, when the primary insurer is fully engaged (and thus protecting the excess insurers' interests), and the Claim could be resolved before the excess insurers are ever called upon to perform under their policies. While there is less authority regarding the differing roles and responsibilities of primary and excess insurers in American jurisprudence, English case law has taken such "market practice" into account for many years. *See*, *e.g.*, *Friends Provident*, [2005] Lloyd's Rep IR 135 (Moore-Bick J), *appeal dismissed by* [2005] 2 Lloyd's Rep 517 (Court of Appeal).[2]

[2] In *Friends Provident*, as here, the excess insurer argued that notices of claims (or circumstances likely to give rise to claims) were required to be given to both the primary and the excess insurers during the policy period by virtue of the excess policy's incorporation of the terms of the primary policy. In construing the relevant policy provisions, and rejecting the insurer's argument, the Commercial Court

At bottom, however, courts are bound to enforce the plain language of the policies concerning the timing and nature of notice that must be provided to trigger coverage, irrespective of the expectations one may have regarding the "typical" notice requirements of claims made policies, whether primary or excess. Here, the Zurich excess policy simply does not require that Claims be reported to it (as opposed to AIG, the primary insurer) within 90 days of policy expiry, so long as Zurich receives written notice from the Insured once it appears that the Loss will exceed 50% of the applicable retention amount or coverage threshold – i.e.,

---

accepted evidence that "the market would not normally expect the excess layer insurers to be notified of claims, or circumstances likely to give rise to claims, unless and until there is reason to think that the loss may exhaust the underlying layers." [2005] Lloyd's Rep IR 135, ¶ 26. Based on "the nature of the relationship between the excess layer and the primary layer," it was clear to the Court that, until the claim appeared likely to reach the excess layer, "the excess layer underwriters are content to leave it to the primary layer underwriters to handle the matter, no doubt because they have the assurance that the claim is subject to the terms of the underlying policy which to that extent operates for their benefit also and whose terms are, as far as appropriate, incorporated into their own policy." *Id*. at ¶ 27.

The Court of Appeal affirmed. *See* [2005] 2 Lloyd's Rep 517, ¶ 12 ("[I]t does not seem in any way incongruous that excess layer insurers should have been prepared to accept that the only notice they would receive was of circumstances, claims or losses likely to impact their layer, and that, unless and until that situation arose, any circumstances, claims or losses should be notified to and handled by primary insurers.").

$13,750,00. [HB46-47].[3] And at the time Harvard gave formal written notice to Zurich in May 2017, the total Loss was still "tens of millions of dollars away" from reaching the Zurich coverage threshold. [A841, A873, HB16]. Harvard thus complied with its "written notice" requirements under the Zurich policy, and no additional "reporting" was required to trigger Zurich's coverage obligations.

b. Even insofar as the SFFA Action must have been "reported to" Zurich within 90 days of the policy period, that requirement was satisfied by Zurich's actual knowledge of the Claim.

Even assuming the Zurich policy incorporates the AIG policy's "reported to" requirement, that condition was satisfied. The natural meaning of "reported to" could reasonably include means of communication beyond formal written correspondence from the insured. While not every case will involve a claim being "reported to" the insurer through media coverage, claims are frequently reported to insurers in a manner other than written notice from the insured, and courts routinely find such notice sufficient. *E.g., Newell Health Care Sys*., 1999 Mass. Super LEXIS 328, *10-11 (insurer's receipt of notice through loss run reports created fact issue precluding summary judgment on late notice). Moreover, if Harvard is permitted to pursue discovery, it might uncover additional instances of the claim being "reported

[3] Citations to Harvard's brief use the page numbers applied by the ECF filing system at the top of each page. *See* footnote 1, *supra*.

to" Zurich during the policy period (or within 90 days thereafter), including through communications with AIG and other excess insurers.[4] After all, Harvard contends that it sought to have its broker notify all insurers within days of the SFFA Action being filed, that AIG accepted the claim, and that Zurich actually knew about and was monitoring the SFFA Action through its underwriting function, including through review of loss run data. [HB15-19]. On these facts, an inference can be drawn that Zurich did receive a report of the claim in one form or another, and since the policy does not require that the report come from Harvard specifically, those facts would satisfy the terms of the policy.

II. ANY "BREACH" OF THE NOTICE PROVISION WAS NOT MATERIAL.

Under Massachusetts law, "[a] party to a contract generally is relieved of his obligations under that contract only when the other party has committed a material breach"—that is, a breach of an essential and inducing feature of the contract. *See, e.g., Duff v. McKay*, 89 Mass. App. Ct. 538, 547, 52 N.E.3d 203 (2016) (finding that specific deadline by which settlement payment was due was not a material term and that payor's demand for three extra weeks was not a material breach). Where, as

[4] The facts may show, for example, that Harvard reported the claim to AIG and that AIG, in turn, reported the claim to Zurich—all within the policy period.

here, Zurich seeks to be relieved of its obligations to pay out on the claim, only a material breach will suffice.

The Restatement (Second) of Contracts provides five factors to consider when determining whether a breach is material: "(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; and (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing." Restatement (Second) of Contracts, § 241; *see also DiBella v. Fiumara*, 63 Mass. App. Ct. 640, 646-47, 828 N.E.2d 534 (2005) (applying Restatement (Second) of Contracts, § 241).

Even assuming that the Zurich policy does incorporate the AIG "report" requirement, and that the actual "reporting" Zurich received does not satisfy it, the breach (if any) could not have been material. As discussed above, the Zurich policy does not explicitly mention the reporting obligation that Harvard allegedly breached, and instead provides only that Harvard must comply with the "written notice" provisions of the AIG policy. On that basis alone, it is apparent that any requirement

that the claim be "reported to" Zurich within the policy period is not "an essential and inducing feature of the contract." If reporting within the policy period had been an essential feature of the Zurich excess policy, it would unambiguously require it, as the AIG policy did. Instead, all that is required under the Zurich policy is that "written notice" be provided thereunder in "the same manner required" by the AIG policy, which means that written notice to Zurich was not required to be given until the total loss estimate exceeded 50% of Zurich's $27.5 coverage threshold (the equivalent of AIG's "retention amount"). Harvard gave formal written notice to Zurich well in advance of that time, at which point Zurich already knew about the SFFA Action. If there was any breach of the Zurich policy's notice and reporting requirements (which there was not), it could only be a technical one, not a material breach.

None of the Restatement factors mandate that any technical breach of a policy condition, no matter how central it is to the contract, must result in forfeiture. Factors (a) and (b) focus on whether the non-breaching party received the "benefit which he reasonably expected." Here, Zurich received "the benefit which [it] reasonably expected," in that it was apparently able to account for the SFFA Action in setting Harvard's rates for subsequent policy periods. *See Chas. T. Main*, 406 Mass. 862, 864, 551 N.E.2d 28 (1980) (noting that fairness in rate setting is the purpose behind provisions in claims-made policies requiring reporting during the

policy period). By contrast, factor (c) focuses on the extent to which the allegedly breaching party would suffer forfeiture—which in the circumstances presented here is a complete forfeiture of up to $15 million of coverage. Factors (d) and (e) also favor Harvard because any technical breach clearly was cured by (1) reporting of the claim to Zurich through means other than a written communication from Harvard, and (2) Harvard's formal written notice to Zurich well before Zurich's coverage threshold was implicated. Moreover, nothing about Harvard's conduct failed to comport with standards of good faith and fair dealing.[5]

Accordingly, even assuming that Harvard breached a Zurich policy reporting requirement, that breach was not material, and thus, does not warrant a complete forfeiture of coverage.

III. THE DISTRICT COURT ERRED IN NOT CONSIDERING EVIDENCE THAT ZURICH HAD ACTUAL KNOWLEDGE OF THE SFFA ACTION.

Harvard alleged and sought to prove that Zurich *knew* about the SFFA Action notwithstanding the alleged late reporting. According to Harvard, Zurich personnel

[5] By contrast, Zurich failed to raise with Harvard the absence of formal written notice within the policy period when, according to Harvard, Zurich not only knew about the claim but was also actively monitoring it and using that information in its underwriting process for Harvard's renewal policies. [HB17-19]. An insurer with actual notice of a claim during the policy period should not be permitted to effectively induce its insured into a technical breach of a policy condition by remaining silent.

assigned to the Harvard account were knowledgeable and up-to-date about current events and developments concerning Harvard [A16], attended meetings with Harvard [*id.*], and had knowledge of the SFFA Action as early as late 2014 [*id.*]—precisely when Harvard took steps to notify its insurers. Through discovery, Harvard adduced additional evidence supporting these allegations, including internal Zurich "Deal Memos" suggesting that Zurich not only knew about the SFFA Action, but it took the litigation into consideration in setting Harvard's rates. [HB17-19].

In granting Zurich's motion for summary judgment, the District Court ruled that whether Zurich knew about the claim is irrelevant. *See* [A877]. As discussed below, that ruling is erroneous for several reasons.

a. Massachusetts law does not foreclose insureds under claims-made policies from putting on evidence regarding the facts and circumstances of alleged late notice.

In general, Massachusetts law takes a policyholder-friendly approach when it comes to disputes regarding late notice. The legislature amended G.L. c. 175, §112 in 1977 to make clear that: "An insurance company shall not deny insurance coverage to an insured because of failure of an insured to seasonably notify an insurance company of an occurrence, incident, claim or of a suit founded upon an occurrence, incident or claim, which may give rise to liability insured against unless the insurance company has been prejudiced thereby." Shortly thereafter, the SJC followed suit, abandoning the strict policy that treated the notice provision as a

"condition precedent" that, if breached, would defeat coverage, and holding that any time an insurer seeks to disclaim coverage based on late notice, it bears the burden of proving late notice and prejudice. *Johnson Controls, Inc. v. Bowes*, 381 Mass. 278, 282, 409 N.E.2d 185 (1980).[6] Thus, Massachusetts law treats "late notice," in general, as an affirmative defense to be raised by insurers in coverage disputes, with proof of prejudice as an essential element of that defense. *See, e.g., Employers' Liab. Assur. Corp. v. Hoechst Celaese Corp.*, 43 Mass. App. Ct. 465, 472, 684 N.E.2d 600 (1997) ("In raising a 'late notice' defense, the plaintiff insurers assumed the burdens of establishing that the defendant insured was in breach of the notice provisions of the several policies and, further, that the breach resulted in prejudice to them as insurers.").

While the SJC has created an exception to this general prejudice requirement for claims-made policies (i.e., specifying that insurers do not carry the burden of proving prejudice with respect to alleged late notice in a claims-made policy), *see Chas. T. Main,* 406 Mass. at 866*,* that exception does not mean that the consequence of a technical notice breach is always automatic forfeiture, as the District Court held,

[6] The SJC made clear in *Johnson Controls* that its decision was guided, in part, by a concern about forfeitures. *Id.* at 280-83 (relying on trend "to eschew such technical forfeitures of insurance coverage unless the insurer has been materially prejudiced by virtue of late notification" in announcing prospective change in approach).

irrespective of equitable considerations. Specifically, in *Chas. T. Main*, the SJC held that the unique nature of insuring claims as opposed to occurrences justifies relieving insurers of the burden of proving prejudice resulting from late notice because "[i]f a claim is made against an insured, but the insurer does not know about it until years later, the primary purpose of insuring claims rather than occurrences is frustrated." *Id.* at 865. Thus, in addressing the "only issue" before the court – i.e., "whether the [insurers] are required to demonstrate prejudice resulting from the untimeliness of notice" – the SJC declined to impose such a requirement. *Id*. at 863, 866; *see also Gargano v. Liberty Int'l Underwriters*, 572 F.3d 45, 51 (1st Cir. 2009) ("We reject out of hand Gargano's assertion that the insurance companies must demonstrate prejudice from his untimely notice in order to escape liability.").

However, the SJC has not foreclosed *insureds* from putting on evidence regarding the facts and circumstances of notice—including evidence that the insurer had actual knowledge of the claim, that the insurer had an opportunity to take account of the claim in setting the renewal premium, or that the alleged breach of the notice condition was not material. If it had, failure to provide notice within 90 days of the policy period would effectively operate like a strict liability offense: the consequence would always be an automatic forfeiture of coverage, even if that result would be profoundly unfair under the relevant facts and circumstances. Fortunately, none of the cases cited by the District Court go that far. *See infra* at III.c. To the

contrary, Massachusetts law disfavors the very forfeitures that the District Court's ruling would require.

b. The District Court's ruling facilitates disproportionate forfeitures.

Massachusetts courts disfavor forfeitures and seek to avoid them whenever possible, including through the exercise of their equitable powers. *See, e.g., Howard D. Johnson v. Madigan,* 361 Mass. 454, 458-59, 280 N.E.2d 689 (1972) (providing equitable relief from forfeiture in context of commercial lease); *Enos Sys. Inc. v. Enos,* 311 Mass. 334, 338, 41 N.E.2d 17 (1942) (weighing equitable factors and declining to provide relief from forfeiture in context of license agreement due to hardship on non-breaching party). *See also* Restatement (Second) of Contracts, § 229, cmt. b (1981) ("In determining whether to forfeiture is disproportionate, a court must weigh the extent of the forfeiture by the obligee against the importance to the obligor of the risk from which he sought to be protected and the degree to which that protection will be lost if the non-occurrence of the condition is excused to the extent required to prevent forfeiture."). In the context of insurance coverage disputes, Massachusetts generally seeks to avoid them by asking whether the breach of a policy requirement frustrated the purpose of that requirement. *See, e.g., Augat, Inc. v. Liberty Mut. Ins. Co.,* 410 Mass. 117, 123, 571 N.E.2d 357 (1991); *Darcy v. Hartford Ins. Co.,* 407 Mass. 481, 490, 554 N.E.2d 28 (1990); *Johnson Controls,*

381 Mass. at 282. If the answer is no, forfeiture (i.e., a denial of coverage) would be inappropriate.

Here, Harvard sought to put forward evidence relevant to these equitable considerations that, as a matter of Massachusetts law, must be considered before imposing a complete forfeiture. Specifically, Harvard sought to show that any alleged breach of the notice provision did not frustrate the purpose of that provision because Zurich knew about the SFFA Action as early as November 2014, when the suit was filed. Importantly, Massachusetts law has defined the purpose of claims-made notice provisions as "fairness in rate setting"—i.e., allowing the insurer to set rates for subsequent policies without any surprise claims on old policies once new rates have been set. *See Chas. T. Main*, 406 Mass. at 866. If Zurich knew about the claim and took it into account in setting rates, then its interests were not frustrated by the purported late notice. The Court erred in holding that evidence of Zurich's knowledge was irrelevant and in denying Harvard an opportunity to obtain further discovery regarding what Zurich knew and when.

c. The case law cited by the District Court does not support an automatic forfeiture rule.

The District Court relies on a handful of Massachusetts and First Circuit cases in its order, but those cases do not support a rule of automatic forfeiture when insureds provide allegedly late notice under a claims-made policy. All but one of the

cases cited by the District Court involve insurers who apparently did not know about the underlying claim prior to the insured's formal notice. *See Chas. T. Main*, 406 Mass. at 865 ("If a claim is made against an insured, but the insurer does not know about it until years later, the primary purpose of insuring claims rather than occurrences is frustrated."); *Tenovsky v. Alliance Syndicate,* 424 Mass. 678, 681, 677 N.E.2d 1144 (1997) (quoting same language from *Chas. T. Main*; no evidence of actual knowledge); *Gargano*, 572 F.3d at 49-50 (no evidence of actual knowledge); *Catlin Specialty Ins. Co. v. Am. Superconductor Corp.* 2014 Mass. Super LEXIS 22, 32 Mass. L. Rep. 93 (Jan. 29, 2014) (same).

The only case cited by the District Court in which an insurer actually *knew* about the claim (because the plaintiff in the underlying action notified the insurer and its authorized broker) is distinguishable because the insured in that case identified the lawsuit in a renewal application and wrote, "no claim will be made" – i.e., coverage will not be pursued. *See Fanaras Enters. v. Law Offices of Roger Allen Doane*, 1993 Mass Super LEXIS 293, *9-11, 1 Mass. L. Rep. 145 (Sept. 7, 1993). In fact, the Superior Court's approach in *Fanaras* highlights the District Court's error. In *Fanaras*, where the insurer had actual knowledge of the underlying claim, the Court did not ignore that evidence, but rather evaluated it to see if the underlying purpose of the notice provision was frustrated. *Id.* at *10-11 (noting that fairness in rate-setting is the purpose of the requirement that notice of a claim be given within

the policy period and that it would be "patently unfair" to provide coverage in light of the insured's statement in a renewal application that he did not intend to seek coverage for the claim). If the law in Massachusetts required automatic forfeiture as a consequence of late notice (which it does not), there would have been no reason for the Court to consider "fairness" and whether the rate-setting purpose of the notice condition had been frustrated.

Finally, the District Court failed to cite any Massachusetts authority for the proposition that an insurer's actual knowledge of the underlying claim can never constitute "notice" or "reporting" of the claim for purposes of the notice condition, instead relying entirely on cases from other jurisdictions. [A877]. In *Atlantic Health Systems, Inc. v. National Union Fire Ins. Co. of Pittsburgh*, an unpublished opinion applying New Jersey law, the Third Circuit Court of Appeals affirmed a district court order granting summary judgment to the primary insurer where the insured failed to provide formal written notice to the correct address but nevertheless provided notice of the claim in a renewal application.[7] 463 F. App'x 162, 167-68 (3d Cir. 2012).

[7] The District Court cites the opinion for the proposition that an insured must give notice of a claim, in part, "to facilitate the claims-handling process." [A877]. To the extent that requirement of New Jersey law is applicable here, we note that Harvard provided written notice to Zurich at a time when the total Loss was still "tens of millions of dollars away" from reaching the Zurich coverage threshold, well before Zurich had any interest in participating in claims-handling or the

However, unlike Massachusetts law, which provides that the purpose for requiring notice within the policy period for claims-made coverage is "fairness in rate setting," New Jersey law takes a strict view that the purpose of such notice is "to invoke coverage." *See, e.g., American Casualty Co. v. Continisio*, 819 F. Supp. 385, 398 (D.N.J. March 30, 1993) (noting that "under New Jersey law, the purpose of sending notice under a claims-made policy is to invoke coverage"). The district court in *Continisio* thus held that disclosure of the claim in the renewal application did not fulfill the purpose of the policy's notice provision, which the Court characterized as "imposing a duty on the insured to give some kind of formal, written notification" to invoke coverage. *See id* at 398. Accordingly, the decision demonstrates the importance of considering all the facts and circumstances, including whether the purpose of the allegedly breached notice condition has been frustrated, before imposing a forfeiture. Had the District Court here engaged in such an analysis (as it should have have), Zurich would not have been entitled to summary judgment.

The District Court's reliance on *Heritage Bank of Commerce v. Zurich American Ins. Co.* is similarly misplaced. [A877]. There, the insured disclosed the claim to an underwriter during the renewal process, but not to the claims department,

---

defense. [A841, A873, HB16, HB18, HB36]. Thus, there was no impairment to Zurich's claims-handling process.

as required by the policy. Finding that "insurers' underwriting departments should not have to decide what parts of renewal applications to forward on to claims departments," the Court granted the insurer's motion to dismiss. *Heritage Bank of Com. v. Zurich Am. Ins. Co.*, 2022 U.S. Dist. LEXIS 150720, *8 (N.D. Cal. Aug. 17, 2022). But that is not the law in Massachusetts. Indeed, in *Lexington Ins. Co. v. Newell Health Care Systems*, Judge Botsford specifically rejected an insurer's argument that, as a matter of law, the notice requirement cannot be satisfied by an insurer's knowledge of a claim through loss run reports utilized in underwriting. 1999 Mass. Super LEXIS 328, *10-11. The Court found there was a factual dispute about the sufficiency of notice that precluded summary judgment for the insurer. *Id*. That is exactly the result that Harvard and UP seek here.

Moreover, insofar as the Court's decision in *Heritage Bank* was grounded in a determination that the notice given in that case (to the underwriting department) did not fulfill the purpose of the policy's notice requirement (i.e., to invoke coverage or facilitate claim handling), the decision actually supports Harvard's position that courts must consider whether the purpose of the notice requirement has been fulfilled before ordering a forfeiture of coverage. And here, the purpose of the Zurich policy's notice requirement was fulfilled, since Zurich actually knew about the SFFA Action and utilized that information in setting rates for Harvard's renewal policies.

IV. THE DISTRICT COURT'S APPROACH RAISES PUBLIC POLICY CONCERNS.

Of particular concern to United Policyholders are the potential public policy ramifications of the District Court's ruling. In the three decade since the SJC decided *Chas. T. Main*, one of its earliest cases addressing claims-made policies, the prevalence of such policies has increased significantly, and for many small businesses and professionals, claims-made policies are the only policies available for certain lines of liability insurance. *See* Massachusetts Liability Insurance Manual § 5.2.2 (2017 & Supp. 2020) (noting that "nearly all professional liability insurance policies issued since 1990 have been claims-made policies"). This is notable because many of the early decisions requiring strict adherence to notice provisions in claims-made policies justified the requirement on the basis that the insureds *could have chosen* an occurrence-based policy instead. *See, e.g., National Union Fire Ins. Co. v. Baker & McKenzie*, 997 F.2d 305, 306 (7th Cir. 1993) (noting that insurance companies now offer claims-made policies: "The coverage is less, but so, therefore, is the cost.") *DiLuglio v. New England Ins. Co.*, 959 F.2d 355, 358 (1st Cir. 1992) ("The premiums on 'claims-made' policies can be set appreciably lower than comparable 'occurrence' policy premiums."); *Livingston Parish School Board v. Fireman's Fund American Ins. Co.*, 282 So. 2d 478, 482-3 (La. 1973) (noting that the variety of coverage obtainable reinforces the requirement of strict adherence to

claims-made notice provisions: "In effect, the insured received what he paid for."). But the marketplace now is different for professional liability insurance (and many other types of liability insurance), virtually all of which is written on a claims-made rather than occurrence basis. There is no real choice available to policyholders to procure such coverage on an occurrence basis at a lower cost. Accordingly, those earlier decisions that were based on the availability of such a choice are less persuasive today. And as a result of the changed marketplace, the District Court's ruling could have much more of a far-reaching effect than it anticipated.

Sanctioning a rule that permits automatic forfeiture whenever an insured under a claims-made policy provides "late" or otherwise objectionable notice is bad public policy for a number of reasons. First, it introduces unnecessary risk into a purchase that is intended to *reduce* risk and provide insureds with peace of mind. Second, it encourages inequitable conduct by insurers—for example, disincentivizing them from following up with insureds when they learn independently of a claim, or when an insured attempts to provide notice but does so in a manner that does not technically satisfy the policy requirements. And most importantly, it often results in devastating financial losses for insureds. Foreclosing insureds from proving that insurers had actual knowledge of a claim and that the purpose of the notice provision was therefore not frustrated will punish insureds and result in a windfall to insurers.

CONCLUSION

For all of these reasons, the Court should reverse the judgment and the District Court and remand the case for further proceedings.

Dated: February 28, 2023

/s/ K. Neil Austin
Martin C. Pentz (BBO #394050)
1st Cir. #16168
Creighton K. Page (BBO #674640)
1st Cir. #1157875
K. Neil Austin (BBO #657204)
1st Cir. #96289
FOLEY HOAG LLP
155 Seaport Boulevard
Boston, MA 02210
Tel.: (617) 832-1000
mpentz@foleyhoag.com
cpage@foleyhoag.com
naustin@foleyhoag.com

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,440 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-Point Times New Roman.

/s/ K. Neil Austin
K. Neil Austin

Attorney for United Policyholders

Dated: February 28, 2023

CERTIFICATE OF SERVICE

I, K. Neil Austin, hereby certify that on February 28, 2023, I electronically filed the foregoing document, United Policyholders' Brief Of Amicus Curiae In Support Of The Plaintiff-Appellant And Reversal Of The District Court For The District Of Massachusetts, with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that I served all parties or their counsel by the CM/ECF system on this 28th day of February 2023.

/s/ K. Neil Austin
K. Neil Austin

ADDENDUM

Index

QUEEN'S BENCH DIVISION
COMMERCIAL COURT

22 July 2004

FRIENDS PROVIDENT LIFE AND PENSIONS LTD
v
SIRIUS INTERNATIONAL INSURANCE CORPORATION

[2004] EWHC 1799 (Comm)
Before Mr Justice MOORE-BICK

Insurance (professional indemnity) - Primary layer policy imposing condition precedent that claims be notified as soon as possible during period of insurance - Excess layer policies incorporating terms of primary layer policy - Effect of incorporation - Whether extended cover under first layer policy incorporated into excess layer policies - Whether notification to brokers appointed by primary layer insurers was also given to excess layer policies - Whether notification clause a condition precedent to liability - Effect of breach of notification clause if not a condition precedent.

The present case was the trial of preliminary issues arising out of excess layer professional indemnity insurance in favour of the claimant and subscribed to by the defendant insurance companies.

The claimant, FPLP, was the purchaser of the business of LMA, which included giving advice to individuals in relation to personal pension plans. The defendants were insurance companies which provided professional indemnity insurance to LMA for the period 1 February 1993 to 31 January 1994. The insurance was in the form of a primary layer in respect of losses up to £1 million, and an excess layer of £4 million in excess of £1 million. Both layers were placed by brokers Bowrings and were written on a claims made basis, providing an indemnity against losses arising from claims made against LMA during the period of the policy.

The primary layer policy excluded liability arising out of any circumstances or occurrence known to the assured prior to inception. The General Conditions of the policy stated that:

2. The assured shall as a condition precedent to their right to be indemnified under this policy give to the underwriters notice as soon as possible during the period of this policy as set forth in the Schedule:

2.1 Of any circumstance of which the assured shall become aware which may give rise to a claim or loss against them or any of them.

2.2 Of the receipt of notice from any person whether written or oral of an intention to make a claim against them or any of them.

Such notice having been given to underwriters the assured shall give to the underwriters as soon as possible full details in writing of the circumstances which may give rise to a claim or loss against them or any of them. Any claim or loss to which that circumstance has given rise which is subsequently made after the expiration of the period specified in the First Schedule shall be deemed for the purposes of this policy to have been made during the subsistence hereof.

The leading excess layer policy, known as the "Co-insurance policy", was underwritten by Lloyd's Syndicates and incorporated the A W G S Excess Wording. The insuring clause provided that the policy was:

To indemnify the assured for claim or claims which may be made against the assured during the period of insurance

Clause 5 was as follows:

Any claim(s) made against the assured or the discovery by the assured of any loss(es), or any circumstances of which the assured becomes aware during the subsistence hereof which are likely to give rise to such a claim or loss, shall, if it appears likely that such claim(s) or loss(es) may exceed the indemnity available under the policy/ies of the primary and underlying excess insurers, be notified immediately by the assured in writing to the underwriters hereon.

By clause 7 the Co-insurance policy was subject to the same terms and conditions as the primary layer policy.

The first to fourth defendants subscribed to the excess layer on a policy form issued by the London Insurance & Reinsurance Market Association Ltd, and contained a Co-insurance clause under which it was warranted that the policy was subject to the same terms and conditions as the Co-insurance policy. The fifth defendant issued its own policy which was similarly stated to be subject to the same terms and conditions as the Co-insurance policy.

On 28 January 1994 in the context of negotiations for the renewal of cover for the year beginning 1 February 1994 Mr Harvey of LMA, wrote to Lloyd's underwriters at the address of Bowrings in Exeter and confirmed that he knew of no circumstances likely to give rise to a claim under the policy other than in respect of pension misselling.

FPLP sought to recover its loss of some £9 million in respect of pensions misselling from the underwriters for the 1993-94 year on the grounds that, although the claims themselves had not been made during that year, they arose out of the circumstances described in Mr Harvey's letter of 28 January 1994 and were therefore to be treated as having occurred during the period of cover. The Lloyd's Syndicates accepted liability under the primary and excess layer policies, but the defendants declined liability. By orders made on 25 February 2004 and 30 April 2004 directions were given for the trial of a number of preliminary issues relating to the construction and effect of the excess layer policies.

1. Whether the cover provided under the excess policies:

(1) included the extension of cover contained in General Condition 2 of the primary policy in respect of claims made after the policy period arising out of circumstances notified within the policy period; or

(2) Only provided cover in respect of claims made within the policy period.

2. Whether, in the event that cover provided under the excess policies included the extension of cover referred to above:

(1) The notice required in order to extend cover to the claims arising out of the circumstances thus notified had only to be given to the insurers subscribing to the primary policy; or

(2) It was necessary for such notice to be given to the insurer on the particular policy in the excess layer in question.

3. Whether the provision of Schedule 1 to the primary policy identifying Bowring as the person to whom claims were to be notified was incorporated, expressly or by implication, into the excess policies with the result that, in the event that the excess policies incorporated the extension of cover referred to above but that the relevant notice needed to be given within the policy period to the insurers subscribing to the excess policies, this requirement was satisfied by the giving of notice to Bowring.

4. Whether LMA's letter of 28 January 1994 constituted notice of the circumstances identified therein to

(1) the insurers subscribing to the primary policy; and

(2) the insurers subscribing to the excess policies.

5. In the event that cover provided under the excess policies included the extension of cover referred to above and the requisite notice of the relevant circumstances was given within the policy period, what (if any) further requirements as to the giving of notice were imposed on LMA by

(1) General Condition 2 of the primary policy (to the extent that it was incorporated into the excess policy); and/or

(2) Clause 5 of the Co-insuring policy.

6. Whether any such further requirements as to the giving of notice as may be identified in answer to question 5 above was

(1) a condition precedent to liability under the excess policies;

(2) an innominate term, breach of which might if sufficiently serious excuse the insurers subscribing to the excess policies from liability; or

(3) a term breach of which gives rise to a right to damages only.

7. Without prejudice to the above, whether, on the true construction of the excess policies, the provisions of the excess policies extend to claims in respect of which the claimant seeks an indemnity.

8. Whether, in the event that clause 5 of the Co-insuring policy is an innominate term and assuming that LMA (or the claimant) has committed a repudiatory breach of clause 5 by failing to notify claims to the defendants in accordance with its provisions

(1) the defendants have a defence to the claims the subject of such repudiatory breach irrespective of whether or not they have accepted such breach; or

(2) the defendants have a defence to the claims the subject of such repudiatory breach provided that they have accepted such breach; or

(3) the defendants have a defence to the claims the subject of such repudiatory breach provided that they have accepted such breach and that the losses the subject of such claims occurred after such acceptance.

-*Held*, by QBD (Com Ct) (MOORE-BICK J) that the preliminary issues would be answered as follows:

(1) The cover provided by the excess of loss policies extended to claims arising out of circumstances notified during the policy period;

(a) In construing commercial documents it was important to have regard to all the background knowledge reasonably available to the parties at

the time. Two aspects of the general practice of the insurance market in relation to the underwriting of professional indemnity risks were relevant. The first was the almost invariable practice for underwriters to issue policies that gave cover on a "claims made" basis, which provided the assured with an indemnity against losses arising from claims made against him, as opposed to events occurring, during the policy period, including a term extending cover to losses arising from circumstances that might give rise to a claim in the future provided that they had been notified to the underwriters during the period of cover. Claims made policies could hardly work on any other basis. The second was that, where substantial risks were covered by the use of primary and excess layers of insurance it was generally assumed in the market, in the absence of any indication to the contrary, that the scope of the cover provided under the excess layer was intended to be the same as that provided under the primary layer, apart from the individual policy limits (*see* paras 13 and 14);

-*Investors Compensation Scheme Ltd* v *West Bromwich Building Society* [1998] 1 WLR 896, *Rothschild Assurance plc* v *Collyear* [1999] 1 Lloyd's Rep IR 6, applied;

(b) Condition 2 of the Primary Layer policy was incorporated into the Co-insurance policy. It was germane to the risk as it provided an extension of cover with substantive effect and was not merely a notice clause which was collateral to the risk, and it was not inconsistent with the express terms of the excess layer policies. Either the whole of General Condition 2 was incorporated into the excess layer policies or none of it was incorporated (*see* paras 16, 17 and 19);

-*HIH Casualty and General Insurance Ltd* v *New Hampshire Insurance Co* [2001] 2 Lloyd's Rep 161, referred to.

(2) It was sufficient that notice of the circumstances giving rise to the claim was given to the primary layer insurers. It was the intention of the parties that General Condition 2 should be incorporated into the excess layer policies in order to provide the same scope of cover as afforded by the primary layer policy and that it could be incorporated so as to make sense in the context of those policies with only a modest and acceptable degree of verbal manipulation by construing the reference to "the underwriters" as a reference to the primary layer underwriters. On this basis there was no inconsistency with clause 5 of the A W G S Excess Wording. Accordingly, notice to the primary layer underwriters of circumstances that might give rise to a claim, if given within the period of the policy, was sufficient to bring any claim arising out of those circumstances within the scope of the excess layer policies (*see* para 30).

(3) Notice to Bowrings was not sufficient to constitute notice to the defendants. If it was assumed (contrary to the above findings) that the excess layer policy required notice to be given to the excess layer underwriters of circumstances that might give rise to a loss if any resulting claim made after the end of the policy period is to be covered, such notice would only be effective if given to the excess layer underwriters themselves or to an agent authorised to accept notice on their behalf. In the schedule to their policy the primary layer underwriters appointed Bowrings to accept notice of claims on their behalf. That provision was not germane to the risk and was purely a matter of administration in relation to which each set of underwriters might quite properly wish to make their own arrangements. It was not, therefore, incorporated into the Co-insurance policy (*see* para 32).

(4) The letter of 28 January 1994 was sufficient to constitute notice to the Lloyd's underwriters on both the primary and excess layers but did not constitute notice to the defendants;

(a) The letter was addressed to the prospective insurers for the 1994-95 policy year, but that did not prevent it from providing adequate notice of the matters to which it referred for the purposes of the current policy to the extent that the same underwriters were involved. What the insurers required was prompt notification of any circumstances that might give rise to a claim. Provided they were given the information required by General Condition 2 in a form that made it clear that they were being notified of circumstances that the insured thought might give rise to a claim, it was immaterial that the information was contained in a letter directed to renewal of cover. Since the prospective insurers at Lloyd's for the ensuing year were the same as for the expiring year, this letter was capable of constituting notice to them of the circumstances described in it. Further, there was no reason why the letter could not be both notification of circumstances that might give rise to a loss and an assurance that the assured was not aware of any other circumstances that might do so (*see* paras 38 and 39);

(b) The letter could not be construed as directed either to Bowrings personally or to any insurers other than the relevant Lloyd's underwriters (*see* para 36).

(5) The claimant was obliged to give notice to the defendants of claims and circumstances in accordance with clause 5 of the A W G S Excess Wording (*see* para 40).

(6) The obligation to give notice to the excess layer underwriters was an innominate term breach of which, if sufficiently serious, entitled the defendants to reject liability for the relevant claim. General Condition 2 made it clear that giving notice to the primary layer underwriters of circumstances which might give rise to a claim was a condition precedent to the assured's right to recover in respect of any claim arising out of those circumstances, but it did not expressly provide that the obligation to give written details was of the same order. Moreover, the final sentence did not make it entirely clear whether, in order for a claim made after the end of the policy period to be deemed to have been made during that period, it was sufficient for notice of the relevant circumstances to have been given to the underwriters, or whether the insured must also have provided them with full details in writing. Whether an obligation was to be regarded as a condition precedent depended on the construction of the term which gave rise to it, but where the same clause expressly characterised some obligations as conditions precedent and others not, it was generally fair to assume that the parties did not intend to attribute the same significance to those other obligations. It would have been simple in the present case to have made the provision of written details an express condition precedent to the insured's right to an indemnity, but the parties had not chosen to do so and it would be wrong to construe that obligation as if they had (*see* paras 41 and 42).

(7) No separate answer was required to Question 7.

(8) If the claimant had committed a serious breach of clause 5, the defendants were entitled to treat it as equivalent to a failure to comply with a condition precedent and had a defence to the claim without the need for any formal acceptance of the breach and regardless of when the claim was made or the loss occurred;

(a) The principles relating to discharge by breach were not directly applicable to a situation of the present kind. The principle was that breach of a claims condition could have different consequences depending on its gravity. This did not involve importing from the law on repudiation the necessity for the insurer to "accept" the breach as terminating his liability to pay. Further the principle that the discharge of a contract by repudiation had no effect on the parties' accrued rights, was inapplicable: the argument that the claimant' right to be indemnified had accrued before any attempt was made to reject the claim on those grounds, and could therefore not be defeated in that way, would be rejected. A serious breach of clause 1(a) had the same consequences as a failure to comply with a condition precedent, no "acceptance" was necessary; the insurer was simply entitled to reject the claim on that ground (*see* para 51);

-*Alfred McAlpine Plc* v *BAI (Run Off) Ltd* [2000] 1 Lloyd's Rep 437, applied;

(b) The submission that in the present case the claimant already had an accrued right to be indemnified by the defendants at the time when they decided to reject the claim for failure to comply with the notification requirements proceeded on the assumption that that right was unconditional. In fact, however, it was conditional on the claimant complying, at least substantially, with the requirements of clause 5. If the claimant failed to comply with clause 5 in a manner that was sufficiently serious to entitle the defendants to reject the claim, its right to be indemnified remained at best conditional until the underwriters elected not to rely on their rights or in some other way lost their right to reject the claim on those grounds. However, neither of those events occurred (*see* para 51).

The following cases were referred to in the judgment:

Alfred McAlpine Plc v *BAI (Run Off) Ltd* [2000] 1 Lloyd's Rep 437;

Banting v *Niagara District Mutual Fire Insurance Co* (1866) 25 UCQB 431;

HIH Casualty and General Insurance Ltd v *New Hampshire Insurance Co* [2001] 2 Lloyd's Rep 161;

Hiddle v *National Fire and Marine Insurance Co of New Zealand* [1896] AC 372;

Hongkong Fir Shipping Co Ltd v *Kawasaki Kisen Kaisha* [1962] 2 QB 26;

Investors Compensation Scheme Ltd v *West Bromwich Building Society* [1998] 1 WLR 896;

Rothschild Assurance Plc v *Collyear* [1999] 1 Lloyd's Rep IR 6;

Weir v *Northern Counties of England Insurance Co* (1879) 4 LR Ir 689.

Tom Weitzman QC, instructed by Herbert Smith, for the claimant; Christopher Hancock QC, instructed by Norton Rose, for the defendants.

22 July 2004

JUDGMENT

Mr Justice MOORE-BICK:

Background

1. The claimant in this case, Friends Provident Life and Pensions Ltd, is the purchaser of the business, and successor to the rights and obligations, of London & Manchester Assurance Co Ltd ("LMA"). The defendants are insurance companies which provided professional indemnity insurance to LMA for the period 1 February 1993 to 31 January 1994.

2. LMA's professional indemnity insurance for the 1993-94 year took the form of a primary layer providing cover in respect of losses of up to £1 million any one claim and in the aggregate (subject to various deductibles) and an excess layer providing cover of £4 million in excess of £1 million any one claim and in the aggregate. The primary layer was underwritten by Syndicate No. 657 at Lloyd's through an agent, Resource Underwriting Ltd. The first excess layer was underwritten in part by a group of Lloyd's Syndicates, including Syndicate 657, and in part by the defendants, all of whom were members of the London companies' market. Both layers were placed by the brokers Bowring Marsh & McLennan Ltd ("Bowrings") and were written on a "claims made" basis, that is, the policies were expressed to provide an indemnity against losses arising from claims made against the insured during the period of the policy.

3. The business of LMA included giving financial advice to individuals in relation to personal pension plans. On 28 January 1994 in the context of negotiations for the renewal of cover for the year beginning 1 February 1994 Mr Harvey, the Legal Services Manager of LMA, wrote to Lloyd's underwriters at the address of Bowrings in Exeter in the following terms:

> I confirm that after due enquiry I know of no circumstances likely to give rise to a claim under the Group's Professional Indemnity Policy save as follows:
>
> 1. Matters which are currently under investigation but are not likely to exceed the deductible under the policy.
>
> 2. Pensions transfers and opt outs which are a matter of public record and relate to all pensions providers. Detailed investigation will be conducted into pensions related transactions in accordance with any SIB/LAUTRO guidelines and notification of any potential claims given to underwriters in the usual way.

4. The reference to "pensions transfers and opt-outs" was a general reference to LMA's involvement in giving financial advice to employees who were considering whether to transfer from, (or, in the case of new employees, opt out of), private pension schemes run by their employers in favour of personal pension plans available in the market. By the latter part of 1993 the regulatory bodies had expressed concern that the advice given to many clients by their financial advisers was inadequate and had led to what was later to become known as "pension mis-selling". They had already indicated their intention to conduct an investigation, but its precise nature and scope had yet to be determined. In the event, as a result of those investigations LMA was required to pay sums totalling over £9 million to various clients by way of compensation.

5. Clause 2 of the General Conditions forming part of the primary layer policy obliged the insured to notify the underwriters as soon as possible of any circumstances that might give rise to a claim. It also provided that any claim arising from circumstances notified to the insurers in accordance with that clause should be deemed to have been made during the period of the policy. Accordingly, the claimant sought to recover its loss from the underwriters for the 1993-94 year on the grounds that, although the claims themselves had not been made during that year, they arose out of the circumstances described in Mr Harvey's letter of 28 January 1994 and were therefore to be treated as having occurred during the period of cover. The Lloyd's Syndicates have accepted liability in respect of those claims, both under the primary and excess layer policies, but the defendants have declined to do so on the grounds (among others) that their policies only cover claims actually made within the policy period and that even if they do extend to claims arising out of circumstances notified during the policy period, LMA failed to notify them of any such circumstances within that time.

6. By orders made on 25 February 2004 and 30 April 2004 directions were given for the trial of a number of preliminary issues relating to the construction and effect of the excess layer policies. Before identifying those issues, however, it is necessary to set out the material terms of the various policies.

The policies

7. The material parts of the primary layer policy provided as follows:

> Now we, the underwriters, to the extent and in the manner hereinafter provided, hereby agree:
>
> 1. To indemnify the assured against any claim or claims first made against them during the period of insurance set forth in the First Schedule

in respect of any civil liability whatsoever or whensoever arising

EXCLUSIONS

The policy shall not indemnify the assured against any claim or loss:

2. Arising out of any circumstances or occurrence which were known to the assured prior to the inception of this policy

GENERAL CONDITIONS

2. The assured shall as a condition precedent to their right to be indemnified under this policy give to the underwriters notice as soon as possible during the period of this policy as set forth in the Schedule:

2.1 Of any circumstance of which the assured shall become aware which may give rise to a claim or loss against them or any of them.

2.2 Of the receipt of notice from any person whether written or oral of an intention to make a claim against them or any of them.

Such notice having been given to underwriters the assured shall give to the underwriters as soon as possible full details in writing of the circumstances which may give rise to a claim or loss against them or any of them. Any claim or loss to which that circumstance has given rise which is subsequently made after the expiration of the period specified in the First Schedule shall be deemed for the purposes of this policy to have been made during the subsistence hereof.

8. The leading excess layer policy was underwritten by the Lloyd's Syndicates and was known as the "Co-insurance policy" because it was referred to by that name in each of the other excess layer policies. It incorporated a set of clauses known as the A W G S Excess Wording which provided as follows:

To indemnify the assured for claim or claims which may be made against the assured during the period of insurance

and contained the following clauses:

1. Liability to pay under this policy shall not attach unless and until the underwriters of the underlying policy/ies shall have paid or have admitted liability or have been held liable to pay, the full amount of their indemnity.

2. It is a condition of this policy that the underlying policy/ies shall be maintained in full effect during the currency of this policy.

3. If by reason of the payment of any claim or claims by the underwriters of the underlying policy/ies during the period of this Insurance the amount of indemnity provided by such underlying policy/ies is:

(a) Partially reduced, then this policy shall apply in excess of the reduced amount of the underlying policy/ies for the remainder of the period of insurance;

(b) Totally exhausted, then this policy shall continue in force as underlying policy until expiry hereof.

5. Any claim(s) made against the assured or the discovery by the assured of any loss(es), or any circumstances of which the assured becomes aware during the subsistence hereof which are likely to give rise to such a claim or loss, shall, if it appears likely that such claim(s) or loss(es) may exceed the indemnity available under the policy/ies of the primary and underlying excess insurers, be notified immediately by the assured in writing to the underwriters hereon.

7. Except as otherwise provided herein this policy is subject to the same terms, exclusions, conditions and definitions as the policy of the primary insurers. No amendment to the policy of the primary during the period of this policy in respect of which the primary insurers require an additional premium or a deductible shall be effective in extending the scope of this policy until agreed in writing by the underwriters.

9. The first to fourth defendants' proportions of the excess layer cover was written on the policy form issued by the London Insurance & Reinsurance Market Association Ltd ("LIRMA"). It described the interest insured as

Excess Professional Indemnity Insurance in accordance with the policy referred to in the Co-insurance clause below.

The Co-insurance clause provided as follows:

It is warranted that this policy shall run concurrently with and be subject to the same terms, provisions and limitations as are contained in Policy No. 509/QF404093 issued by certain Lloyd's underwriters covering the identical subject matter and risk.

10. The fifth defendant issued its own policy by which it agreed to indemnify the claimant against

Loss as more fully set forth in the policy detailed in the said Schedule covering the identical subject matter and risk (hereinafter called the "Co-insuring Policy") Provided that:

(1)

(2) the policy shall be subject to the same terms, provisions, conditions and limitations as are contained in the Co-insuring Policy.

The Co-insuring Policy was identified in the schedule as Lloyd's Policy No. 509/QF404093.

11. Thus each of the defendants' policies purported to incorporate the terms of the Co-insurance policy which, by virtue of clause 7 of the A W G S Excess Wording, purported in turn to incorporate the terms of the primary layer policy.

The preliminary issues

12. Directions were given for the trial of the following preliminary issues:

1. Whether the cover provided under the excess policies:

(1) included the extension of cover contained in General Condition 2 of the primary policy in respect of claims made after the policy period arising out of circumstances notified within the policy period; or

(2) Only provided cover in respect of claims made within the policy period.

2. Whether, in the event that cover provided under the excess policies included the extension of cover referred to above:

(1) The notice required in order to extend cover to the claims arising out of the circumstances thus notified had only to be given to the insurers subscribing to the primary policy; or

(2) It was necessary for such notice to be given to the insurer on the particular policy in the excess layer in question.

3. Whether the provision of Schedule 1 to the primary policy identifying Bowring as the person to whom claims were to be notified was incorporated, expressly or by implication, into the excess policies with the result that, in the event that the excess policies incorporated the extension of cover referred to above but that the relevant notice needed to be given within the policy period to the insurers subscribing to the excess policies, this requirement was satisfied by the giving of notice to Bowring.

4. Whether LMA's letter of 28 January 1994 constituted notice of the circumstances identified therein to

(1) the insurers subscribing to the primary policy; and

(2) the insurers subscribing to the excess policies.

5. In the event that cover provided under the excess policies included the extension of cover referred to above and the requisite notice of the relevant circumstances was given within the policy period, what (if any) further requirements as to the giving of notice were imposed on LMA by

(1) General Condition 2 of the primary policy (to the extent that it was incorporated into the excess policy); and/or

(2) Clause 5 of the Co-insuring policy.

6. Whether any such further requirements as to the giving of notice as may be identified in answer to question 5 above was

(1) a condition precedent to liability under the excess policies;

(2) an innominate term, breach of which might if sufficiently serious excuse the insurers subscribing to the excess policies from liability; or

(3) a term breach of which gives rise to a right to damages only.

7. Without prejudice to the above, whether, on the true construction of the excess policies, the provisions of the excess policies extend to claims in respect of which the claimant seeks an indemnity.

8. Whether, in the event that clause 5 of the Co-insuring policy is an innominate term and assuming that LMA (or the claimant) has committed a repudiatory breach of clause 5 by failing to notify claims to the defendants in accordance with its provisions

(1) the defendants have a defence to the claims the subject of such repudiatory breach irrespective of whether or not they have accepted such breach; or

(2) the defendants have a defence to the claims the subject of such repudiatory breach provided that they have accepted such breach; or

(3) the defendants have a defence to the claims the subject of such repudiatory breach provided that they have accepted such breach and that the losses the subject of such claims occurred after such acceptance.

Issue 1: Do the excess policies cover claims arising out of any circumstances notified to the underwriters during the policy period?

13. It is now well established that when construing commercial documents of this kind it is important to have regard to all the background knowledge reasonably available to the parties at the time: see *Investors Compensation Scheme Ltd* v *West Bromwich Building Society* [1998] 1 WLR 896 per Lord Hoffmann at page 912. In the present case it was

not in dispute that among the background knowledge available to the parties was the general practice of the insurance market in relation to the underwriting of professional indemnity risks and the insuring of large risks by means of primary and excess layer policies. Two aspects of that practice, as described by Mr Carey who gave evidence for the claimant, are relevant to the present dispute. The first concerns the practice of the market in relation to liability insurance. It is now almost invariable for liability underwriters in general, and professional negligence underwriters in particular, to issue policies that provide cover on what is known as a "claims made" basis, that is, which provide the insured with an indemnity against losses arising from claims made against him, as opposed to events occurring, during the policy period. This has an advantage for underwriters in that they are less exposed to unforeseen losses arising long after the period of cover has expired, but it poses a serious problem for any insured who becomes aware during the policy period of circumstances that may give rise to a claim in the future. When seeking insurance for the following year he would be bound to disclose the existence of any circumstances, but might well find it impossible to obtain insurance in respect of that potential loss at a commercially acceptable premium, if indeed at all. As a result the practice has grown up of including in "claims made" policies a term extending cover to losses arising from circumstances that may give rise to a claim in the future provided that they have been notified to the underwriters during the period of cover. So significant are these factors that in *J Rothschild Assurance Plc* v *Collyear* [1999] 1 Lloyd's Rep IR 6, 22 Rix J expressed the view that a "claims made" policy could hardly work on any other basis. Mr Hancock suggested that Rix J put the matter too high, but having regard to the current practices of the market I do not think that he did and I respectfully endorse his view. It is worth noting that the primary layer policy in this case expressly excluded liability in respect of any claim or loss arising out of any circumstances known to the insured prior to its inception.

14. The second matter of background knowledge that was reasonably available to the parties at the time is that where substantial risks are covered by the use of primary and excess layers of insurance it is generally assumed in the market, in the absence of any indication to the contrary, that the scope of the cover provided under the excess layer is intended to be the same as that provided under the primary layer, apart, of course, from the individual policy limits. Although a material difference between the scope of the primary and excess layers might not render the cover wholly unworkable, the insured would inevitably bear a greater part of the risk himself if the scope of the cover provided by the excess layer were more limited than that provided by the primary layer. That is sufficiently unusual for there to be a broad assumption that the scope of the cover provided by the different layers is intended to be the same.

15. With these matters of background in mind I turn to the policies themselves. Each of the policies issued by the defendants provided (albeit in slightly different language) that it was subject to the same terms as the Co-insurance policy which in turn provided that it was subject to the same terms as the policy of the primary insurers. In each case general words of incorporation were used and Mr Hancock QC was right, therefore, to remind me of the care that must be taken when seeking to determine which of the terms of the contract to which reference is made the parties can be taken to have intended to incorporate by the use of such general language. He submitted that General Condition 2 of the primary layer policy was not effectively incorporated into the Co-insurance policy, and therefore not into the other excess layer policies, for two principal reasons: first, because the parties can be taken to have intended only to incorporate those clauses that are germane to the risk and General Condition 2 is not of that kind; secondly, because General Condition 2 is inconsistent with the express terms of the excess policies.

16. The first of these arguments is based on the fact that the bulk of the condition deals with the insured's obligation to notify the insurers of circumstances which may give rise to a claim, a matter which Mr Hancock submitted was essentially collateral to the definition of the risk. In many cases it may well be appropriate to regard a notice clause as dealing with matters collateral to the risk, though where (as here) the giving of notice is expressed to be a condition precedent to the insured's right to be indemnified under the policy it differs little in its effect from a substantive limitation on the scope of cover. In the present case, however, the fact that the extension of cover is tucked away at the end of the clause tends to disguise its substantive effect. Mr Hancock accepted that if the last sentence of General Condition 2 had formed a separate clause it would clearly be germane to the risk and would therefore have been apt for incorporation into the excess layer policies by general words of this kind. I am sure that is right, but it makes it impossible to reject the condition as a whole on the grounds that it is concerned only with matters collateral to the risk. Clearly it is not. I am therefore unable to accept that part of his submission.

17. The next question is whether General Condition 2 is inconsistent with the express terms of the excess layer policies. Mr Hancock submitted that it

is inconsistent with the insuring clause in the Co-insurance policy which provides an indemnity only against claims made against the insured during the period of the insurance, but that fails to take account of the language of the condition itself or its obvious purpose. The insuring clause in the primary layer policy is worded in the same way and is itself sufficient to explain the terms of General Condition 2 whose purpose is both to impose certain obligations upon the insured coupled with restrictions on his right to obtain an indemnity and to extend the scope of cover. It achieves the latter object by deeming certain claims, which would otherwise fall outside the period of cover, as falling within it. The clause must therefore be understood as supplementing, rather than contradicting, the insuring clause and does not give rise to an inconsistency of the kind that would render it unsuitable for incorporation into the excess layer policies. Indeed, there are strong grounds for concluding that the parties to the excess layer policies intended that it should be incorporated into those contracts, since a failure to do so would give rise to the very difficulty for the insured.

18. Mr Hancock also submitted, however, that the provisions of General Condition 2 are inconsistent with clause 5 of the A W G S Excess Wording and it is certainly necessary to consider how these two clauses can be read together if General Condition 2 is incorporated into the excess layer policies. The question arises in a more acute form under issue 2, but since it has a direct bearing on the issue of incorporation it is necessary to consider it in this context.

19. The final sentence of General Condition 2 forms an integral part of the clause as a whole; it assumes the existence of the preceding provisions from which it cannot easily be divorced. In my view it is therefore not possible to treat the final sentence as a separate clause for the purposes of incorporating it into the excess layer policies; either the whole clause is incorporated, or none of it is. The usual starting point when deciding whether a clause can be effectively incorporated by reference is to construe it as if it were written out in full in the contract into which it is said to be incorporated. It will then become apparent whether it makes sense in that context (with or without an acceptable degree of verbal manipulation) and whether it is consistent with the other clauses of the contract. If it does not, it must be rejected: see *HIH Casualty and General Insurance Ltd* v *New Hampshire Insurance Co* [2001] EWCA Civ 735; [2001] 2 Lloyd's Rep 161.

20. General Condition 2 contains provisions relating to the insured's obligation to notify the underwriters of any notice of intention to make a claim and of any circumstances which may give rise to a claim or loss. Not surprisingly, the insured is bound to notify the underwriters of any of these matters as soon as possible in order to inform them of a potential liability and to enable them to make appropriate arrangements for handling any claim if it has not already been made. The corresponding provisions of the excess layer policies are to be found in clause 5 of the A W G S Excess Wording. This reflects the different position and interests of the excess layer underwriters who will not be affected unless the loss ultimately exceeds the indemnity available under the primary layer policy. The insured is not required to notify them until it becomes apparent that that may happen. Moreover, unlike General Condition 2, clause 5 does not make compliance with its terms a condition precedent to the insured's right to recover under the policy. The question then is whether General Condition 2 can be read in the context of the excess layer policies in a way which makes sense and is not inconsistent with clause 5 of the A W G S Excess Wording. This depends on how one is to construe the word "underwriters" when reading the clause in the context of the excess layer policies. It is the question raised by the second of the preliminary issues to which it is convenient to turn at this point.

Issue 2: Was notice to the primary layer underwriters sufficient to bring the claim within the excess layer policies?

21. This issue turns on the construction of General Condition 2 and proceeds on the assumption that it is effectively incorporated into the excess layer policy. However, I think Mr Hancock was right in saying that in reality it has a direct bearing on the issue of incorporation itself. Mr Weitzman QC submitted that it was sufficient for LMA to give notice to the underwriters of the primary layer policy of circumstances that might give rise to a claim in order to bring any subsequent claim within the excess layer policies.

22. General Condition 2 simply requires that notice of the relevant circumstances be given to "the underwriters". In the context of the primary policy that expression can only mean the underwriters of that policy, but it does not follow that when read in the context of the excess layer policies it should still be read as referring to the primary layer underwriters rather than the excess layer underwriters. Mr Hancock submitted that in the context of the excess layer policies the expression "the underwriters" naturally refers to the underwriters of the policy in question, that is, the relevant excess layer policy, not to the underwriters of the primary policy and as a matter of the ordinary use of language I think that is right, but there may be considerations pointing in another direction. Mr

Weitzman submitted that it should be read as referring to the primary layer underwriters because that is its meaning in the primary layer policy from which it was drawn and verbal manipulation was not permissible in this case, but that argument would only assist him if the clause referred in terms to "the primary layer underwriters", not simply to "the underwriters". The fact that words of a general nature take on a different meaning in a different context does not involve manipulation of any kind; it is simply the result of reading them in their new context. On the face of it, therefore, I would accept that if incorporated verbatim into the excess layer policies the clause would naturally require notice to be given to the excess rather than the primary layer underwriters.

23. If General Condition 2 were incorporated into the excess layer policies without any manipulation at all, therefore, it would in my view be in conflict with clause 5 of the A W G S Excess Wording. That does provide an argument for rejecting its incorporation altogether, of course, despite the strong grounds for concluding that the parties intended to incorporate the extension of cover into the excess layer policies, but Mr Weitzman submitted that to read the reference to "the underwriters" in the context of the excess layer policies as referring to the underwriters of those policies would lead to a result that is uncommercial and contrary to the intention of the parties.

24. The main plank of his submission was that to construe the clause as referring to the excess layer underwriters would require the insured as a condition of its right to an indemnity to notify those underwriters of circumstances that might give rise to a claim (and give full details in writing as soon as possible) at a time when there might be no reason to think that the loss would exceed the indemnity available under the primary layer. That would be of no advantage to the excess layer underwriters since the handling of the claim would remain with the primary layer underwriters until cover was exhausted and would be contrary to the expectation of the market that notices of that kind will only be given to excess layers when there are grounds for thinking that their interests may be affected.

25. Under General Condition 2 the provision of cover in respect of claims arising outside the period of the policy is dependent upon notification to the underwriters during the policy period of the circumstances which eventually give rise to them. From the point of view of the primary layer underwriters this limitation serves at least two valuable purposes: it provides a clear line of demarcation between losses attributable to different policy years and it enables them to make a provisional assessment of their potential liability and to take steps as necessary towards dealing with any claim that may emerge. The first of these would also be of interest to excess layer underwriters, but it is apparent from clause 5 of the A W G S Excess Wording that it is not information which they need to be given as soon as the insured becomes aware of circumstances that may give rise to a claim. As to the second, any assessment of potential exposure would necessarily be much more conjectural as far as the excess layer underwriters are concerned. Not only could they not know whether a claim would be made; it would often be impossible to tell from the nature of the information they received whether any claim was likely to exhaust the underlying layer.

26. I am satisfied that there would be no practical difficulty in giving notice to the excess layer underwriters at the same time as it is given to the underwriters of the primary layer. Usually the insured will notify the broker who could without difficulty give notice to all interested underwriters at the same time. Mr Carey's evidence suggests that the market would not normally expect the excess layer insurers to be notified of claims, or circumstances likely to give rise to claims, unless and until there is reason to think that the loss may exhaust the underlying layers, but that is no more than a general expectation. The insured's obligation in this respect is governed by the terms of the policy rather than by any market expectation. In the present case clause 5 of the A W G S Excess Wording reflects the market expectation which Mr Carey described.

27. In my view the key to this question is to be found in the nature of the relationship between the excess layer and the primary layer as set out in the A W G S Excess Wording. Clauses 1 and 2 of that wording oblige the insured to maintain the primary layer policy in effect during the currency of the excess layer policy and render liability under the excess layer policy dependent upon liability being established under the primary policy. If one ignores for a moment the final sentence of General Condition 2, one can see that the purpose of that clause is to ensure that the primary layer underwriters are informed at the earliest possible moment of any claim and of any circumstances that may give rise to a claim. However, the terms of clause 5 of the A W G S Excess Wording show that the excess layer underwriters are not concerned to receive such notification until it appears that their interest may be affected. That applies as much to claims actually made within the policy period as it does to circumstances that may give rise to a claim. In effect, the excess layer underwriters are content to leave it to the primary layer underwriters to handle the matter, no doubt because they have the assurance that the claim is subject to the terms of the underlying policy which to that extent operates for their benefit also and whose terms are, as far as appropriate, incorporated into their own policy.

28. The effect of clause 3 of the A W G S Excess Wording is that when the primary layer is exhausted the excess layer "drops down" so as to become in effect the primary layer. In those circumstances it is important for the insured to retain cover against claims arising out of circumstances notified during the period of the policy and for the underwriters to obtain the benefits of prompt notification. It might not become apparent for some time whether the indemnity available under the underlying policy had been exhausted, but if that situation were to occur early in the life of the cover, the excess layer underwriters in their capacity as primary layer underwriters would no doubt wish to receive prompt notification of further claims and circumstances as provided for in General Condition 2.

29. In my view these considerations, coupled with the strong presumption that the parties to the excess layer policies intended the scope of cover provided by them to be the same as that afforded by the primary layer, all point to the conclusion that the reference to "the underwriters" in General Condition 2 is to be construed as referring to the primary layer underwriters even when read in the context of the excess layer policies. Reading the clause in that way requires little manipulation and promotes the commercial object of the excess layer policies by defining the scope of cover under them by reference to the scope of cover under the primary layer policy and the obligations owed by the insured to the primary layer underwriters for the time being. The reference to "this policy" in the last sentence of General Condition 2 is quite capable on this basis of referring to the excess layer policy into which the clause as a whole has been incorporated. This construction also has the consequence that there is no conflict between General Condition 2 and clause 5 of the A W G S Excess Wording. Mr Hancock objected that to read the clause in this way involves imposing an additional liability on the excess layer underwriters in respect of claims arising out of circumstances notified within the policy period without giving them the corresponding benefit of prompt notice of those circumstances, but in my view that is entirely consistent with the philosophy underlying the excess layer policy that whether a claim is to be treated as falling within the terms of the policy depends on whether it falls within the terms of the primary layer policy. If it does, the excess layer insurers are content to accept it as falling within the scope of the excess layer policy as well and do not require notice to be given to them unless and until it becomes apparent that their policy may be affected.

30. For these reasons I am satisfied that it was the intention of the parties that General Condition 2 should be incorporated into the excess layer policies in order to provide the same scope of cover as afforded by the primary layer policy and that it can be incorporated so as to make sense in the context of those policies with only a modest and acceptable degree of verbal manipulation by construing the reference to "the underwriters" as a reference to the primary layer underwriters. I am satisfied, therefore, that General Condition 2 is effectively incorporated into the excess layer policies and that notice to the primary layer underwriters of circumstances that may give rise to a claim, if given within the period of the policy, is sufficient to bring any claim arising out of those circumstances within the scope of the excess layer policies.

Issue 3: Was notice to Bowrings notice to the excess layer insurers?

31. In view of the conclusions to which I have come on issues 1 and 2 this issue does not arise in relation to the extension of cover, but since it was fully argued and since it may in any event arise in relation to other issues it is appropriate for me to express my view on it.

32. It is necessary for present purposes to assume that the excess layer policy requires notice to be given to the excess layer underwriters of circumstances that may give rise to a loss if any resulting claim made after the end of the policy period is to be covered. In those circumstances notice would only be effective if given to the excess layer underwriters themselves or to an agent authorised to accept notice on their behalf. In the schedule to their policy the primary layer underwriters appointed Bowrings to accept notice of claims on their behalf and Mr Weitzman submitted that that provision was incorporated into the excess layer policies. I am unable to accept that. The appointment of an agent to accept notice of claims is not a matter that is germane to the risk. It is purely a matter of administration in relation to which each set of underwriters may quite properly wish to make their own arrangements. Although as a matter of convenience the excess layer underwriters may be prepared to treat the insured's broker as their agent for this purpose, I can see no compelling reason why they should do so and no need therefore to construe the general words of incorporation as extending to this part of the primary layer policy. Notice to Bowrings, therefore, did not in my view constitute notice to the excess layer underwriters.

Issue 4: Did the letter of 28 January constitute notice of the circumstances referred to therein to the primary and excess layer underwriters?

33. There was some doubt about the precise scope of this issue, in particular whether it encompassed the question whether LMA's letter of 28

January 1994 was capable of amounting to notification of circumstances that might give rise to a claim. However, since that question lies at the heart of the dispute between the parties, and since both counsel were fully prepared to deal with it, I thought it right to hear argument on it.

34. Mr Hancock made two submissions in relation to the letter of 28 January: that it was not a notice of claims or potential claims at all; and that even if it was, it was not directed to the defendants. It is convenient to deal with the latter point first.

35. The letter is addressed to Lloyd's Underwriters c/o Bowrings. On the face of it, therefore, it is not directed to the present defendants, all of whom are part of the companies' market. Mr Weitzman recognised that difficulty, but he submitted that if notice could be given to Bowrings as agents for the excess layer underwriters, the letter could, and should, be construed as being addressed to them in their capacity as agents for those underwriters as well.

36. Since I have already held that Bowrings were not appointed as agents to receive notification of claims and circumstances on behalf of the excess layer underwriters, nothing turns on this point. I should say, however, that having regard to the way it was addressed, I find it difficult to construe this letter as being directed either to Bowrings personally or to any insurers other than the relevant Lloyd's underwriters. I would hold that the letter was not directed to the defendants and it is common ground, for what it is worth, that they were not informed of its contents at the time, if at all.

37. Mr Hancock also submitted that the letter was not addressed to the underwriters for the then current policy year but to underwriters who were contemplating providing cover for the following year. There had been discussions a few weeks earlier between LMA, Bowrings and representatives of the primary layer underwriters concerning the renewal of the cover. Problems over pension mis-selling had surfaced only recently and the notes of those discussions show that one of the matters giving rise to concern was LMA's potential liability for losses arising out of pensions business in circumstances where it was still unclear what the regulatory bodies would require by way of investigation. Those discussions provide the background to the letter of 28 January in which LMA confirmed that it knew of no circumstances likely to give rise to a claim other than matters already under investigation and its involvement in pensions transfers and opt-outs which would be the subject of investigation in accordance with guidelines issued by the regulatory bodies.

38. I think Mr Hancock was right in saying that this letter was addressed to the prospective insurers for the 1994-95 policy year, but I do not think that prevented it from providing adequate notice of the matters to which it refers for the purposes of the current policy to the extent that the same underwriters were involved. What the insurers required was prompt notification of any circumstances that might give rise to a claim. Provided they were given the information required by General Condition 2 in a form that made it clear that they were being notified of circumstances that the insured thought might give rise to a claim, it was immaterial that the information was contained in a letter directed to renewal of cover. Since the prospective insurers at Lloyd's for the ensuing year were the same as for the expiring year, this letter was in my view capable of constituting notice to them of the circumstances described in it.

39. Finally Mr Hancock submitted that the letter was not a warning that claims might be forthcoming but an assurance that they would not and so did not amount to notification of circumstances that might give rise to a claim. The fact that the letter was addressed to the prospective insurers for the ensuing year inevitably meant that it was directed as much to the risk of claims being made during the period of that policy as to the notification of circumstances that might give rise to claims that would fall under the current policy. The two were directly related. I see no reason, therefore, why the same letter should not be capable of satisfying both objects where the same underwriters are involved. In my view the letter was both notification of circumstances that might give rise to a loss and an assurance that the insured was not aware of any other circumstances that might do so. The underwriters could therefore proceed on the basis that any claims arising out of those circumstances would fall within the expiring policy and could be excluded from the ensuing policy.

Issue 5: Was the insured under any further obligation to give notice of claims or circumstances to the excess layer insurers?

Issue 6: What is the nature of any such obligation?

40. It is convenient to deal with these two issues together. It follows from what I have said already that the excess layer policy extended to claims arising out of circumstances notified by the insured to the primary layer underwriters during the policy year in accordance with the terms of General Condition 2. The insured was also obliged to give the primary layer underwriters as soon as possible full details in writing of circumstances that might give rise to a claim. It was also obliged under clause 5 of the A W G S excess Wording to notify the excess

layer insurers of claims, or circumstances that might give rise to a claim, as and when it appeared likely that the loss might exceed the indemnity available under the primary layer policy.

41. General Condition 2 makes it clear that giving notice to the primary layer underwriters of circumstances which may give rise to a claim is a condition precedent to the insured's right to recover in respect of any claim arising out of those circumstances, but it does not expressly provide that the obligation to give written details is of the same order. Moreover, the final sentence does not make it entirely clear whether, in order for a claim made after the end of the policy period to be deemed to have been made during that period, it is sufficient for notice of the relevant circumstances to have been given to the underwriters, or whether the insured must also have provided them with full details in writing.

42. Whether an obligation is to be regarded as a condition precedent depends on the construction of the term which gives rise to it, but where the same clause expressly characterises some obligations as conditions precedent and others not, it is generally fair to assume that the parties did not intend to attribute the same significance to those other obligations. It would have been simple in the present case to have made the provision of written details an express condition precedent to the insured's right to an indemnity, but the parties have not chosen to do so and I think it would be wrong to construe that obligation as if they had. That being so, the contract itself points to the conclusion that it is the notification to the underwriters of circumstances that may give rise to a claim rather than the subsequent provision of details in writing that is of primary importance and that in turn provides a strong indication that notification of circumstances is sufficient to bring any claim subsequently arising out of them within the scope of the cover.

43. Mr Hancock submitted that, if giving notice of circumstances to the primary layer underwriters is sufficient to bring a subsequent claim within the scope of the excess layer policy, compliance with clause 5 of the A W G S Excess Wording should be construed as a condition precedent because it is only on receipt of such a notice that the excess layer underwriters will be made aware of the existence of the claim. This argument faces two difficulties, however. In the first place, compliance with clause 5 is not expressed to be a condition precedent to the insured's right to be indemnified under the excess layer policies. That is not fatal to the argument, of course, if it is clear from the language of the clause as a whole or the nature of the contract that that is what the parties intended, but in the present case there is nothing that points clearly to that conclusion. Clause 5 is designed to operate both in those cases where the claim is made within the policy period and in those where it arises out of circumstances notified within the policy period. There is no compelling reason to construe clause 5 as giving rise to a condition precedent in relation to claims made during the policy period and the fact that the extension of cover under the excess layer policy depends on notice of circumstances being given promptly to the primary layer underwriters does not in my view provide any additional reason for construing the requirement as a condition precedent in relation to claims arising after that period out of circumstances previously notified. I am satisfied that clause 5 should not be construed as giving rise to a condition precedent to the insured's right to recover under the excess layer policy.

44. That leaves for consideration the precise nature of clause 5. In *Alfred McAlpine Plc* v *BAI (Run Off) Ltd* [2000] 1 Lloyd's Rep 437 the Court of Appeal held that a similar kind of notice clause was to be construed as an innominate term, a breach of which, if sufficiently serious, would entitle the insurer to defeat the claim. It will be necessary at a later stage to consider in more detail the precise nature of a clause of this kind, the circumstances in which a failure to comply with its requirements will result in the loss of the right to an indemnity and the principles which underlie the insurer's right to reject the claim. For present purposes, however, it is sufficient to say that the nature of clause 5 of the A W G S Excess Wording is essentially the same as that considered by the court in *McAlpine* v *BAI* and that in my view it should be construed in the same way.

Issue 8: If compliance with clause 5 is not a condition precedent, does a repudiatory breach of the clause by the insured provide the insurers with a defence in any, and if so what, circumstances?

45. This issue was added by the order of Morison J in April this year and it is convenient to deal with it next. It arises out of the decision of the Court of Appeal in *McAlpine* v *BAI* and because the dispute turns mainly on the precise language used by Waller LJ in reaching his conclusion about the nature of the notice clause in that case, it is necessary to quote the material parts of his judgment in full. However, it is first necessary to describe as briefly as possible the background to this part of the court's decision.

46. Under the policy in question the insurer had agreed to indemnify the insured against all sums which it became liable to pay as compensation arising from bodily injury to persons other than its own employees. Clause 1(a) in the section headed "Claims Conditions" required the insured to give

notice to the insurer as soon as possible in the event of any occurrence which might give rise to a claim under the policy. On 1 May 1991 an accident occurred as a result of which a workman suffered serious injury in respect of which he was likely to, and eventually did, make a claim against the insured. The insured failed to give notice of the accident as soon as possible, or indeed at all prior to June 1992. The judge at first instance held that the insured had wholly failed to satisfy the requirements of the notice clause, but that compliance with the clause was not a condition precedent to its right to an indemnity. He held that the insurers were liable under the policy. On appeal there was no challenge to the judge's conclusion that compliance with clause 1(a) was not a condition precedent to the insured's right to be indemnified under the policy. The Court of Appeal held that it was an innominate term, breach of which, however serious, would be unlikely to result in the repudiation of the policy as a whole, but that a breach which demonstrated an intention not to pursue a claim or which had very serious consequences for the insurer would entitle the insurer to reject the individual claim.

47. The relevant passage in the judgment of Waller LJ (with whom Peter Gibson and Buxton LJJ agreed) is to be found at pages 443-445. He said this:

26. I do not myself think that the choice should necessarily lie between a construction which would involve condition 1(a) being a condition precedent, and condition 1(a) simply giving rise to a claim for damages. It seems to me that once a condition such as condition 1(a) is construed as something less than a condition precedent, it will still be important to ascertain precisely what its contractual effect is intended to be and what the effect of a breach of that term will be. For example, if no details of the incident in relation to which RCCL was making its claim were ever supplied, despite the insurers' requests for them, would BAI still be bound to pay, and simply be left with a remedy in damages for breach of the condition? Certainly if the consequences for BAI were that they had been seriously prejudiced, it seems to me unreasonable that that should be so. Accordingly it seems to me one should consider the possibility that a breach of condition 1(a) might in some circumstances be so serious as to give a right to reject the claim albeit it was not repudiatory in the sense of enabling BAI to accept a repudiation of the whole contract. The very fact that condition 1(a) is aimed at imposing obligations in relation to individual claims which BAI might be obliged to pay, ought logically to allow for the possibility of a "repudiatory" breach leading simply to a rejection of a claim.

27. I accept, I should say, that it is possible for the terms of a policy by express language to be clearer than this term as to what its intended effect should be. The authorities supplied to us by Mr. Walker following argument demonstrate that point. *Hiddle* v *National Fire and Marine Insurance Co of New Zealand* [1896] AC 372 and *Banting* v *Niagara District Mutual Fire Insurance Co* (1866) 25 UCQB 431 are examples of terms being conditions precedent. *Weir* v *Northern Counties of England Insurance Co* (1879) 4 LR IR 689 is an example of a term not being a condition precedent, but on its language being a term which, until it is complied with, entitles the insurer not to meet the claim. Condition 1(a) does not expressly provide for either of the above consequences and one must consider where in the spectrum it falls

32. I see no reason however why condition 1(a) should not be construed as an "innominate" term as per *Hongkong Fir Shipping Co Ltd* (*supra*) where the consequences of a breach may be so serious as to entitle BAI to reject the claim albeit the breach is not so serious as to amount to a repudiation of the whole contract. It seems to me that the payment of individual claims are severable obligations and that where an insured is bound to carry out one obligation in order to receive the benefit of the insurer's obligation by implication the insured is accepting that if he fails in a serious way to carry out his part of that bargain he will not receive what he has bargained for.

33. Thus the correct analysis of condition 1(a) I would suggest should be as follows. Compliance with condition 1(a) is not by the policy made a condition precedent to liability, thus it is not enough for BAI to establish a failure to supply full details as soon as possible in order to resist the claim. That much is conceded.

34. Condition 1(a) is however an innominate term. Breach of it, however serious, would be unlikely to amount to a repudiation of the whole contract of insurance. Furthermore, it is not a term the breach of which, or any breach of which, would entitle the insurer not to pay the claim because that would simply make it a condition precedent. But, in my view, a breach which demonstrated an intention not to continue to make a claim, or which has very serious consequences for BAI, should be such as to entitle BAI to defeat the claim. If a term is a condition precedent to liability, any breach defeats liability but does not lead to a repudiation of the whole contract. I see no reason why although a term is not a condition precedent so that any breach

defeats liability, it cannot be construed as a term where a serious breach defeats liability.

35. It has not in fact been pleaded in this case that there was a breach with serious consequences entitling BAI to reject the claim as opposed to accept repudiation of the whole contract. However during argument some attention was focused on this aspect and it may be said that it formed part of the argument based on Taylor. On a proper understanding of Taylor it was however bound to fail unless BAI could demonstrate that there was a serious breach of condition 1(a) which had serious consequences and that in reliance on such a breach the claim had been rejected. In my view the breach of condition 1(a) in this case was very limited in that BAI had sufficient details to enable them to investigate the claim. Furthermore, by the time BAI had at least some details of the claim they had not suffered any irremediable prejudice. It was BAI's choice not to pursue the liquidator for details in June, 1992, and again in June, 1994. I am also doubtful whether BAI's conduct in 1992 or 1994 could be said to amount to a final rejection of the claim, but if it did, it was not justified.

48. In the present case the defendants were not given notice of the claims or of the possibility that there might be claims arising out of pension mis-selling by LMA at any stage and did not learn about them until the spring of 2002 when the matter was brought to their attention by the solicitors acting for another party. However, in the light of the decision in *McAlpine* v *BAI* Mr Weitzman submitted that they could not rely on any failure on the claimant's part to comply with the requirements of clause 5 of the A W G S Excess Wording to reject the claim because they had not formally accepted that breach as discharging their obligation to indemnify the insured. Moreover, he submitted that even if they had done so, the claimant's right to be indemnified had accrued before any attempt was made to reject the claim on those grounds and could therefore not be defeated in that way, it being well established that discharge of a contract by repudiation has no effect on the parties' accrued rights.

49. It will be seen at once that Mr Weitzman's argument depends on the application in this context of the ordinary principles applicable to repudiation and the discharge of contracts by breach. Mr Hancock submitted, however, that despite using the language of repudiation Waller LJ was simply recognising that a serious failure to comply with a notice provision such as clause 1(a) in that case was capable of being treated as a failure to comply with a condition precedent and that his choice of language was simply a succinct way of describing the kind of breach that could properly be treated as having that consequence.

50. The issue considered by the court in *McAlpine* v *BAI* concerned the essential nature of the obligation to which clause 1(a) gave rise. Having accepted in paragraph 33 that compliance was not a condition precedent to the insurer's liability, in the sense that any failure on the part of the insured to give notice would defeat the claim, Waller LJ concluded in paragraph 34 that the nature of the term was such that a serious breach would defeat liability and entitle the insurer to reject the claim. This appears most clearly from the final two sentences of that paragraph in which he contrasted the nature of a condition precedent, any breach of which releases the insurer from liability, with the nature of a term such as that under consideration, a breach of which will only release the insurer from liability if it is sufficiently serious. It is true that in paragraph 35 Waller LJ used language reminiscent of the principles of discharge by breach, in particular by referring to the need for BAI to demonstrate that there had been a serious breach with serious consequences and that the claim had been rejected in reliance on that breach, but I do not think that detracts from what he had said in the earlier paragraphs. What he was seeking to do, as I understand it, was to identify and explain the nature of the obligation contained in clause 1(a), which is essentially a matter of construction.

51. In my view Mr Hancock was right in saying that the principles relating to discharge by breach are not directly applicable to a situation of the kind that arises in this case. As I understand the passages from his judgment quoted earlier, Waller LJ was drawing on those principles by analogy to explain how the breach of a term such as that contained in clause 1(a) could have different consequences depending on its gravity. I do not understand him to be importing from the law on repudiation the necessity for the insurer to "accept" the breach as terminating his liability to pay, much less the principles governing accrued rights. If, as paragraphs 33 and 34 suggest, a serious breach of clause 1(a) has the same consequences as a failure to comply with a condition precedent, no "acceptance" is necessary; the insurer is simply entitled to reject the claim on that ground. Moreover, there is another reason why I am unable to accept Mr Weitzman's argument. The submission that in the present case the claimant already had an accrued right to be indemnified by the defendants at the time when they decided to reject the claim for failure to comply with the notification requirements proceeds on the assumption that that right was unconditional. In fact, however, it was conditional on its complying, at least substantially, with the requirements of clause 5. If the claimant failed to comply with clause 5 in a manner that was sufficiently serious to entitle the

defendants to reject the claim, its right to be indemnified remained at best conditional until the underwriters elected not to rely on their rights or in some other way lost their right to reject the claim on those grounds. However, neither of those events occurred.

52. For all these reasons I have reached the conclusion that if the claimant has committed a "repudiatory", that is a serious, breach of clause 5, the defendants are entitled to treat it as equivalent to a failure to comply with a condition precedent without the need for any formal "acceptance" of the breach and are relieved of liability regardless of when the claim was made or the loss occurred.

Issue 7: Do the provisions of the excess policies extend to claims in respect of which the claimant seeks an indemnity?

53. It was agreed that this issue adds nothing of substance to the other issues and I need say no more about it.

Summary

54. For the reasons given earlier in this judgment I hold that the questions raised by the preliminary issues should be answered as follows:

Question 1: The cover provided by the excess of loss policies extends to claims arising out of circumstances notified during the policy period.

Question 2: It is sufficient that notice of the circumstances giving rise to the claim was given to the primary layer insurers.

Question 3: Notice to Bowrings was not sufficient to constitute notice to the defendants.

Question 4: The letter of 28 January 1994 was sufficient to constitute notice to the Lloyd's underwriters on both the primary and excess layers but did not constitute notice to the defendants.

Question 5: The claimant was obliged to give notice to the defendants of claims and circumstances in accordance with clause 5 of the A W G S Excess Wording.

Question 6: The obligation to give notice to the excess layer underwriters is an innominate term breach of which, if sufficiently serious, entitles the defendants to reject liability for the relevant claim.

Question 7: No separate answer required.

Question 8: If the claimant has committed a serious breach of clause 5, the defendants are entitled to treat it as equivalent to a failure to comply with a condition precedent and have a defence to the claim without the need for any formal acceptance of the breach and regardless of when the claim was made or the loss occurred.

_____

COURT OF APPEAL

24 May 2005

FRIENDS PROVIDENT
LIFE & PENSIONS LTD
v
SIRIUS INTERNATIONAL INSURANCE

[2005] EWCA Civ 601

Before Lord Justice WALLER,
Lord Justice MANCE and Sir WILLIAM ALDOUS

Insurance (professional indemnity) - Primary layer policy imposing condition precedent that claims be notified as soon as possible during period of insurance - Excess layer policies incorporating terms of primary layer policy - Effect of incorporation - Whether extended cover under first layer policy incorporated into excess layer policies - Whether notification to brokers appointed by primary layer insurers was also given to excess layer policies - Whether notification clause a condition precedent to liability - Effect of breach of notification clause if not a condition precedent.

The claimant, FPLP, was the purchaser of the business of LMA, which included giving advice to individuals in relation to personal pension plans. The defendants were insurance companies which provided professional indemnity insurance to LMA for the period 1 February 1993 to 31 January 1994. The insurance was in the form of a primary layer in respect of losses up to £1 million, and an excess layer of £4 million in excess of £1 million. Both layers were placed by brokers Bowrings and were written on a claims made basis, providing an indemnity against losses arising from claims made against LMA during the period of the policy.

The primary layer policy excluded liability arising out of any circumstances or occurrence known to the assured prior to inception. The General Conditions of the policy stated that:

> 2. The assured shall as a condition precedent to their right to be indemnified under this policy give to the Underwriters notice as soon as possible during the period of this policy as set forth in the schedule:
>
> 2.1 Of any circumstance of which the assured shall become aware which may give rise to a claim or loss against them or any of them.
>
> 2.2 Of the receipt of notice from any person whether written or oral of an intention to make a claim against them or any of them.
>
> . . .
>
> Such notice having been given to Underwriters the assured shall give to the Underwriters as soon as possible full details in writing of the circumstances which may give rise to a claim or loss against them or any of them. Any claim or loss to which that circumstance has given rise which is subsequently made after the expiration of the period specified in the First Schedule shall be deemed for the purposes of this Policy to have been made during the subsistence hereof.

The leading excess layer policy, known as the "Co-insurance policy", was underwritten by Lloyd's Syndicates and incorporated the AWGS Excess Wording. The insuring clause provided that the policy was:

> To indemnify the assured for claim or claims which may be made against the assured during the period of insurance . . .

Clause 5 was as follows:

> Any claim(s) made against the assured or the discovery by the assured of any loss(es), or any circumstances of which the assured becomes aware during the subsistence hereof which are likely to give rise to such a claim or loss, shall, if it appears likely that such claim(s) or loss(es) may exceed the indemnity available under the policy/ies of the primary and underlying excess insurers, be notified immediately by the assured in writing to the Underwriters hereon.

By clause 7 the Co-insurance policy was subject to the same terms and conditions as the primary layer policy.

The first to fourth defendants subscribed to the excess layer on a policy form issued by the London Insurance & Reinsurance Market Association Ltd, and contained a Co-insurance clause under which it was warranted that the policy was subject to the same terms and conditions as the Co-insurance policy. The fifth defendant issued its own policy which was similarly stated to be subject to the same terms and conditions as the Co-insurance policy.

On 28 January 1994, in the context of negotiations for the renewal of cover for the year beginning 1 February 1994, Mr Harvey of LMA wrote to Lloyd's underwriters at the address of Bowrings in Exeter and confirmed that he knew of no circumstances likely to give rise to a claim under the policy other than in respect of pension misselling.

FPLP sought to recover its loss of some £9 million in respect of pensions misselling from the underwriters for the 1993-94 year on the grounds that, although the claims themselves had not been made during that year, they arose out of the circumstances described in Mr Harvey's letter of 28 January 1994 and were therefore to be treated as having occurred during the period of cover. The Lloyd's Syndicates accepted liability under the primary and excess layer policies, but the defendants declined liability. By orders made on 25 February 2004 and 30 April 2004 directions were given for the trial of a number of preliminary issues relating to the construction and effect of the excess layer policies. The questions, and the answers given by Moore-Bick J, were as follows:

Issue 1: "Whether the cover provided under the excess policies:

(1) included the extension of cover contained in General Condition 2 of the primary policy in respect of claims made after the policy period arising out of circumstances notified within the policy period; or

(2) only provided cover in respect of claims made within the policy period."

The judge's answer was that the cover provided by the excess policies extended to claims arising out of circumstances notified during the policy period.

Issue 2: "Whether, in the event that cover provided under the excess policies included the extension of cover referred to above:

(1) the notice required in order to extend cover to the claims arising out of the circumstances thus notified had only to be given to the insurers subscribing to the primary policy; or

(2) it was necessary for such notice to be given to the insurer on the particular policy in the excess layer in question."

The judge's answer was that it was sufficient that notice of the circumstances giving rise to the claim was given to the primary layer insurers.

Issue 3: "Whether the provision of Schedule 1 to the primary policy identifying Bowring as the person to whom claims were to be notified was incorporated, expressly or by implication, into the excess policies with the result that, in the event that the excess policies incorporated the extension of cover referred to above but that the relevant notice needed to be given within the policy period to the insurers subscribing to the excess policies, this requirement was satisfied by the giving of notice to Bowring."

The judge's answer was that notice to Bowrings was not sufficient to constitute notice to the excess layer underwriters.

Issue 4: "Whether LMA's letter of 28 January 1994 constituted notice of the circumstances identified therein to:

(1) the insurers subscribing to the primary policy; and

(2) the insurers subscribing to the excess policies."

The judge's answer was that the letter was sufficient to constitute notice to the Lloyd's underwriters on both the primary and excess layers.

Issue 5: "In the event that cover provided under the excess policies included the extension of cover referred to above and the requisite notice of the relevant circumstances was given within the policy period, what (if any) further requirements as to the giving of notice were imposed on LMA by:

(1) General Condition 2 of the primary policy (to the extent that it was incorporated into the excess policy); and/or

(2) Clause 5 of the Co-insuring policy."

The judge's answer was that the respondents were obliged to give notice to the defendants of claims and circumstances in accordance with clause 5.

Issue 6: "Whether any such further requirements as to the giving of notice as may be identified in answer to question 5 above was:

(1) a condition precedent to liability under the excess policies;

(2) an innominate term, breach of which might if sufficiently serious excuse the insurers subscribing to the excess policies from liability; or

(3) a term breach of which gives rise to a right to damages only."

The judge's answer was that the obligation to give notice to the excess layer underwriters was an innominate term breach of which, if sufficiently serious, entitled the defendants to reject liability for the relevant claim.

Issue 7: "Without prejudice to the above, whether, on the true construction of the excess policies, the provisions of the excess policies extend to claims in respect of which the claimant seeks an indemnity."

The judge said that no separate answer was required.

Issue 8: "Whether, in the event that clause 5 of the Co-insuring policy was an innominate term and assuming that LMA (or the claimant) had committed a repudiatory breach of clause 5 by failing to notify claims to the defendants in accordance with its provisions

(1) the defendants had a defence to the claims the subject of such repudiatory breach irrespective of whether or not they had accepted such breach; or

(2) the defendants had a defence to the claims the subject of such repudiatory breach provided that they had accepted such breach; or

(3) the defendants had a defence to the claims the subject of such repudiatory breach provided that they had accepted such breach and that the losses the subject of such claims occurred after such acceptance."

The judge's answer was that if the claimants had committed a serious breach of clause 5, the defendants were entitled to treat it as equivalent to a failure to comply with a condition precedent and have a defence to the claim without the need for any formal "acceptance" of the breach and regardless of when the claim was made or the loss occurred.

The defendants appealed against the rulings on issues 2, 4 and 6. The claimant served a notice seeking, if necessary, to uphold the answer on issue 2 on a different basis and appealing against the answers on issues 3 and 4, if the appellants' appeal on issue 2 succeeds, and in any event against the answers on issues 6 and 8.

-*Held*, by CA (WALLER and MANCE LJJ and Sir WILLIAM ALDOUS) that the appeal and cross-appeal would be dismissed.

(1) Although there was no appeal against the judge's answer to issue 1, that answer was based on sound reasoning. The alternative proposition would have been uncommercial and improbable and would have rendered the scheme incoherent. The primary policies would have provided cover in respect of claims made within the policy period and claims made in a subsequent period arising from circumstances notified within the policy period. The excess policies would, in contrast, only have covered claims made within the policy period. This would have meant that, if any circumstances which might have given rise to a claim on them had become known during that period, any

claim arising therefrom would not have been covered under the excess layer insurance for that period, and the (quite possibly different) excess layer insurers for the next period might well have declined to refuse to renew insurance on a basis including it. Further, clauses 1 and 2 of the excess policy appeared to be unworkable unless the primary and excess layers of any claim all fell within the same insurance year. Finally, the requirement in clause 5 of the excess policy that "any circumstances of which the assured becomes aware during the subsistence hereof which are likely to give rise to such a claim or loss" be notified immediately if it appeared likely that such claim or loss might exceed the indemnity available under the primary and any underlying excess insurance indicated that this was intended to be part of a conventional claims made insurance, with the familiar extension to cover claims or losses arising from circumstances notified during its period (*see* para 5).

(2) The judge's answer to issue 2 would be upheld.

(a) Clause 5 dealt expressly with claims notification to excess insurers. It required immediate notification in writing of claims made against LMA only if it appeared that the claims might exceed the indemnity available under the primary insurance cover. This suggested that excess insurers were interested only in matters that were likely to affect their layer, and, unless and until such a situation arose they were prepared to leave the handling of lesser matters to primary insurers, even though there was always a risk, as clause 5 acknowledged, that such matters might later escalate and concern the excess layer (*see* para 8).

(b) General Condition 2 was only concerned with the giving of notice of circumstances of which LMA became aware during an insurance period, which might mature into "a claim or loss against them". A primary purpose of general condition 2 consisted in its further role as a trigger to the extension of cover, bringing within one insurance period any claim or loss arising after that period from circumstances thus notified during that period. There was nothing in general condition 2, or elsewhere, to require any notification to excess insurers of any claim or loss, other than under clause 5 a claim or loss which appeared likely to impact on the excess layer. The position would, on the defendants' case, be quite different if the claim against LMA happened to have been preceded by prior awareness on LMA's part during the original insurance period of the circumstances later giving rise to the claim. Experience indicated that such prior awareness far from always existed. On the defendants' suggested interpretation of general condition 2, there would again be a considerable incongruity in the suggested scheme of the primary and excess insurances (*see* para 11).

(c) The importance attaching to the role of the primary insurance and primary insurers was evident from the terms of the excess policy wording. It did not seem in any way incongruous that excess layer insurers should have been prepared to accept that the only notice they would receive was of circumstances, claims or losses likely to impact their layer, and that, unless and until that situation arose, any circumstances, claims or losses should be notified to and handled by primary insurers (*see* para 12).

(3) It was unnecessary to consider the correctness of the judge's answer to issue 3, and no opinion would be expressed on it (*see* para 15).

(4) As regards issue 4, the judge's reasoning would be upheld. Although the letter was addressed to prospective insurers for the 1994-95 policy year, that did not prevent it from providing adequate notice of the matters to which it referred for the purposes of the current policy. Further, there was no reason why the same letter should not be capable of anounting both to notification of circumstances that might give rise to a loss and an assurance that the insured was not aware of any other circumstances that might do so (*see* paras 16 and 17).

(5) As regards issues 6 and 8, the defendants had no right to reject individual claims

(a) Compliance with clause 5 could not and should not be construed as an implied condition precedent to excess insurers' liability for any claim, loss or circumstances to which such non-compliance related. The excess wording was a standard market wording. It was used by and between professionals in the market, who were or should be taken to be well aware of the various possibilities open to insurers. They were able, if they needed to, to take advice to make such wordings either more or less stringent. Where the wording intended to introduce a condition precedent, it showed itself well capable of doing so expressly. There was a difference between a provision requiring notice as soon as possible to primary insurers of circumstances which might give rise to a claim, and a provision like clause 5 which looked to a potentially different stage when excess insurers had to be involved (*see* para 28).

(b) It was possible to proceed on the basis that clause 5 could be regarded as an innominate term, although it was not easy to conceive of a breach of such an ancillary term in an insurance like the present as going to the root of the whole contract, and, even if this was conceivable, there would be further questions as to whether such a breach could, if accepted, enable insurers to reject liability for any claim accrued by the time of such acceptance, including any to which the breach related. But no such breach was suggested in this case (*see* para 29).

(c) (Waller LJ dissenting) A claims notification clause like clause 5 was an ancillary provision. Breach of such a provision was capable of sounding in damages. But it was not possible to find as a matter of construction or implication in clause 5 any provision that insurers would be be free of liability in the event of a serious breach and/or a breach with serious consequences. Even if it was assumed that it might or would have been reasonable for the parties to agree such a provision, reasonableness was not the test for implying a term, and an implied term could not be set out with sufficient precision. Nor was there any basis for creating a new rule of construction or law which would impose such a provision on these parties. A test of "serious breach" and/or "serious consequences" might have some drastic and unfair consequences. Suppose a year's delay, in consequence of which insurers lost the opportunity to make or (eg because of insolvency) to recover a reinsurance claim or a subrogation claim worth £50,000. That would be a breach serious in

nature and consequences. But suppose the insurance claim was itself for £1 million or £100,000 or even £75,000. Why should insurers have the right to reject the whole claim? There were cases where it might be said that the consequences were too intangible to measure in precise financial terms, although, where an insured's breach caused this difficulty, courts should incline to a quantification favourable to insurers. But that difficulty was no justification for the introduction, whether as an implied term or as a rule of law or by a previously unknown extension of the doctrine of repudiatory breach or on any other basis, of a novel form of protection for insurers. If insurers considered that they want or need such protection, they could and should try to express it in their insurance contracts and see if insureds and the broking market would accept it (*see* paras 32, 33 and 35);

-dicta in *Alfred McAlpine plc v BAI (Run-Off) Ltd* [2000] 1 Lloyd's Rep 437, disapproved; *K/S Merc-Skandia XXXXII v Certain Lloyd's Underwriters, The Mercandian Continent* [2000] LIoyd's Rep IR 694, *Glencore International AG v Ryan (The Beursgracht)* [2002] Lloyd's Rep IR 335, considered; *Bankers Insurance Co Ltd v South* [2004] Lloyd's Rep IR 1, doubted; dicta in *Scandinavian Trading Tanker Co AB v Flota Petrolea Ecuatoriana (The Scaptrade)* [1983] QB 529, applied.

(d) *Per* Waller LJ: a clause which provided that notice of a claim must be given "as soon as possible" might not be a condition precedent, but might, if it was breached in a way which seriously prejudiced the insurer, give a right to reject a claim rather than leave the insurer simply with a claim for damages. The serious prejudice was that the insurer had simply had no chance to examine the circumstances of the claim and was as a result simply unable to say whether some action could have been taken to defeat the claim. In such a case a set-off for the damages for "loss of a chance" was illusory as a remedy (*see* paras 38 and 40).

The following cases were referred to in the judgments:

Alfred McAlpine plc v BAI (Run-Off) Ltd (CA) [2000] 1 Lloyd's Rep 437;

Axa General Insurance Ltd v Gottlieb (CA) [2005] EWCA Civ 112;

Bankers Insurance Co Ltd v South [2004] Lloyd's Rep IR 1;

Glencore International AG v Ryan (The Beursgracht) (CA) [2002] Lloyd's Rep IR 335;

K/S Merc-Skandia XXXXII v Certain Lloyd's Underwriters (The Mercandian Continent) [2000] LIoyd's Rep IR 694;

Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd [1985] 2 Lloyd's Rep 599;

Reid & Co v Employers' Accident & Live stock Ins Co (1899) 1 F 1031;

Scandinavian Trading Tanker Co AB v Flota Petrolea Ecuatoriana (The Scaptrade) (HL) [1983] QB 529, [1983] AC 694;

Taylor v Builders Accident Insurance Ltd [1997] PIQR P247;

Trans-Pacific Insurance Co (Australia) Ltd v Grand Union Insurance Co Ltd (1989) 18 NSWR 675.

This was an appeal and cross-appeal against the decision of Moore-Bick J, [2005] Lloyd's Rep IR 135, determining a series of preliminary issues arising out of excess layer professional indemnity insurance in favour of the claimant and subscribed to by the defendant insurance companies.

Tom Weitzman QC, instructed by Herbert Smith LLP, for the claimant; Christopher Hancock QC, instructed by Morgan Lewis & Bockius, for the defendants.

The further facts are stated in the judgment of Mance LJ.

Tuesday, 24 May 2005

JUDGMENT

Lord Justice MANCE:

1. This is an appeal from the determination by Moore-Bick J by judgment dated 22 July 2004 of preliminary issues directed to be tried in proceedings brought by the respondents, Friends Provident Life and Pensions Ltd, against the appellant insurers. The respondents are successors to London & Manchester Assurance Co Ltd ("LMA"), to whom the appellants provided excess layer professional indemnity insurance cover on a claims made basis for the period 1 February 1993 to 31 January 1994. The preliminary issues relate to the incorporation, nature and effect of notification provisions in the insurance, the respondents' compliance with them and the consequences of any non-compliance.

2. The background giving rise to the issues, the relevant terms of the policies and the preliminary issues are as set out in the following paragraphs taken from the judge's judgment:

2. LMA's professional indemnity insurance for the 1993-94 year took the form of a primary layer providing cover in respect of losses of up to £1 million any one claim and in the aggregate (subject to various deductibles) and an excess

layer providing cover of £4 million in excess of £1 million any one claim and in the aggregate. The primary layer was underwritten by Syndicate No. 657 at Lloyd's through an agent, Resource Underwriting Ltd. The first excess layer was underwritten in part by a group of Lloyd's Syndicates, including Syndicate 657, and in part by the defendants, all of whom were members of the London companies' market. Both layers were placed by the brokers Bowring Marsh & McLennan Ltd ("Bowrings") and were written on a "claims made" basis, that is, the policies were expressed to provide an indemnity against losses arising from claims made against the insured during the period of the policy.

3. The business of LMA included giving financial advice to individuals in relation to personal pension plans. On 28 January 1994 in the context of negotiations for the renewal of cover for the year beginning 1 February 1994 Mr Harvey, the Legal Services Manager of LMA, wrote to Lloyd's underwriters at the address of Bowrings in Exeter in the following terms:

> I confirm that after due enquiry I know of no circumstances likely to give rise to a claim under the Group's Professional Indemnity Policy save as follows:
>
> 1. Matters which are currently under investigation but are not likely to exceed the deductible under the policy.
>
> 2. Pensions Transfers and Opt Outs which are a matter of public record and relate to all pensions providers. Detailed investigation will be conducted into pensions related transactions in accordance with any SIB/LAUTRO guidelines and notification of any potential claims given to underwriters in the usual way.

4. The reference to "pensions transfers and opt-outs" was a general reference to LMA's involvement in giving financial advice to employees who were considering whether to transfer from, (or, in the case of new employees, opt out of), private pension schemes run by their employers in favour of personal pension plans available in the market. By the latter part of 1993 the regulatory bodies had expressed concern that the advice given to many clients by their financial advisers was inadequate and had led to what was later to become known as "pension mis-selling". They had already indicated their intention to conduct an investigation, but its precise nature and scope had yet to be determined. In the event, as a result of those investigations LMA was required to pay sums totalling over £9 million to various clients by way of compensation.

5. Clause 2 of the General Conditions forming part of the primary layer policy obliged the insured to notify the underwriters as soon as possible of any circumstances that might give rise to a claim. It also provided that any claim arising from circumstances notified to the insurers in accordance with that clause should be deemed to have been made during the period of the policy. Accordingly, the claimant sought to recover its loss from the underwriters for the 1993-94 year on the grounds that, although the claims themselves had not been made during that year, they arose out of the circumstances described in Mr Harvey's letter of 28 January 1994 and were therefore to be treated as having occurred during the period of cover. The Lloyd's Syndicates have accepted liability in respect of those claims, both under the primary and excess layer policies, but the defendants have declined to do so on the grounds (among others) that their policies only cover claims actually made within the policy period and that even if they do extend to claims arising out of circumstances notified during the policy period, LMA failed to notify them of any such circumstances within that time.

6. By orders made on 25 February 2004 and 30 April 2004 directions were given for the trial of a number of preliminary issues relating to the construction and effect of the excess layer policies. Before identifying those issues, however, it is necessary to set out the material terms of the various policies.

The policies

7. The material parts of the primary layer policy provided as follows:

> Now we, the underwriters, to the extent and in the manner hereinafter provided, hereby agree:
>
> 1. To indemnify the assured against any claim or claims first made against them during the period of insurance set forth in the First Schedule in respect of any Civil Liability whatsoever or whensoever arising . . . . . .
>
> . . . . . .
>
> EXCLUSIONS
>
> The policy shall not indemnify the assured against any claim or loss:
>
> . . . . . .
>
> 2. Arising out of any circumstances or occurrence . . . . . which were known to the assured prior to the inception of this policy
>
> . . . . . .
>
> GENERAL CONDITIONS
>
> . . . . . .

2. The assured shall as a condition precedent to their right to be indemnified under this policy give to the Underwriters notice as soon as possible during the period of this policy as set forth in the schedule:

2.1 Of any circumstance of which the assured shall become aware which may give rise to a claim or loss against them or any of them.

2.2 Of the receipt of notice from any person whether written or oral of an intention to make a claim against them or any of them.

. . . . . .

Such notice having been given to Underwriters the assured shall give to the Underwriters as soon as possible full details in writing of the circumstances which may give rise to a claim or loss against them or any of them. Any claim or loss to which that circumstance has given rise which is subsequently made after the expiration of the period specified in the First Schedule shall be deemed for the purposes of this policy to have been made during the subsistence hereof.

8. The leading excess layer policy was underwritten by the Lloyd's Syndicates and was known as the "Co-insurance policy" because it was referred to by that name in each of the other excess layer policies. It incorporated a set of clauses known as the AWGS Excess Wording which provided as follows:

To indemnify the assured for claim or claims which may be made against the assured during the period of insurance . . . . .

and contained the following clauses:

1. Liability to pay under this policy shall not attach unless and until the Underwriters of the underlying policy/ies shall have paid or have admitted liability or have been held liable to pay, the full amount of their indemnity.

2. It is a condition of this policy that the underlying policy/ies shall be maintained in full effect during the currency of this policy.

3. If by reason of the payment of any claim or claims by the Underwriters of the underlying policy/ies during the period of this insurance the amount of indemnity provided by such underlying policy/ies is:

(a) Partially reduced, then this policy shall apply in excess of the reduced amount of the underlying policy/ies for the remainder of the period of insurance;

(b) Totally exhausted, then this policy shall continue in force as underlying policy until expiry hereof.

. . . . . .

5. Any claim(s) made against the assured or the discovery by the assured of any loss(es), or any circumstances of which the assured becomes aware during the subsistence hereof which are likely to give rise to such a claim or loss, shall, if it appears likely that such claim(s) or loss(es) may exceed the indemnity available under the policy/ies of the primary and underlying excess insurers, be notified immediately by the assured in writing to the Underwriters hereon.

. . . . . .

7. Except as otherwise provided herein this policy is subject to the same terms, exclusions, conditions and definitions as the policy of the primary insurers. No amendment to the policy of the primary during the period of this policy in respect of which the primary insurers require an additional premium or a deductible shall be effective in extending the scope of this policy until agreed in writing by the Underwriters."

9. The first to fourth defendants' proportions of the excess layer cover was written on the policy form issued by the London Insurance & Reinsurance Market Association Ltd ("LIRMA"). It described the interest insured as

Excess Professional Indemnity Insurance in accordance with the policy referred to in the Co-insurance clause below.

The Co-insurance clause provided as follows:

It is warranted that this policy shall run concurrently with and be subject to the same terms, provisions and limitations as are contained in Policy No. 509/QF404093 issued by certain Lloyd's underwriters covering the identical subject matter and risk.

10. The fifth defendant issued its own policy by which it agreed to indemnify the claimant against

Loss as more fully set forth in the policy detailed in the said schedule covering the identical subject matter and risk (hereinafter called the "Co-insuring policy") . . . . . Provided that:

(1) . . . . . .

(2) the policy shall be subject to the same terms, provisions, conditions and limitations as are contained in the Co-insuring policy.

The Co-insuring policy was identified in the schedule as Lloyd's Policy No. 509/QF404093.

11. Thus each of the defendants' policies purported to incorporate the terms of the Co- insurance policy which, by virtue of clause 7 of the AWGS Excess Wording, purported in turn

to incorporate the terms of the primary layer policy.

The issues

3. The preliminary issues arise from the respondent excess layer insurers' contention that, although LMA became aware during the policy year 1993-94 of circumstances which might give rise to a claim against LMA relating to the pension transfers and opt-outs problem, no notice was given to excess insurers, or to anyone authorised to receive notice on their behalf, of any such circumstances or claim until 2002. We were given a brief explanation of the background in which this may have occurred, but it is unnecessary for present purposes to go into it. The preliminary issues were directed and were answered by Moore-Bick J in these terms:

Issue 1: "Whether the cover provided under the excess policies:

(1) included the extension of cover contained in General Condition 2 of the primary policy in respect of claims made after the policy period arising out of circumstances notified within the policy period; or

(2) Only provided cover in respect of claims made within the policy period."

The judge's answer was that the cover provided by the excess policies extends to claims arising out of circumstances notified during the policy period.

Issue 2: "Whether, in the event that cover provided under the excess policies included the extension of cover referred to above:

(1) The notice required in order to extend cover to the claims arising out of the circumstances thus notified had only to be given to the insurers subscribing to the primary policy; or

(2) It was necessary for such notice to be given to the insurer on the particular policy in the excess layer in question."

The judge's answer was that it is sufficient that notice of the circumstances giving rise to the claim was given to the primary layer insurers.

Issue 3: "Whether the provision of Schedule 1 to the primary policy identifying Bowring as the person to whom claims were to be notified was incorporated, expressly or by implication, into the excess policies with the result that, in the event that the excess policies incorporated the extension of cover referred to above but that the relevant notice needed to be given within the policy period to the insurers subscribing to the excess policies, this requirement was satisfied by the giving of notice to Bowring."

The judge's answer was that notice to Bowrings was not sufficient to constitute notice to the appellants.

Issue 4: "Whether LMA's letter of 28 January 1994 constituted notice of the circumstances identified therein to

(1) the insurers subscribing to the primary policy; and

(2) the insurers subscribing to the excess policies."

The judge's answer was that the letter was sufficient to constitute notice to the Lloyd's underwriters on both the primary and excess layers, but did not constitute notice to the appellants.

Issue 5: "In the event that cover provided under the excess policies included the extension of cover referred to above and the requisite notice of the relevant circumstances was given within the policy period, what (if any) further requirements as to the giving of notice were imposed on LMA by

(1) General Condition 2 of the primary policy (to the extent that it was incorporated into the excess policy); and/or

(2) Clause 5 of the Co-insuring policy."

The judge's answer was that the respondents were obliged to give notice to the appellants of claims and circumstances in accordance with clause 5.

Issue 6: "Whether any such further requirements [sic] as to the giving of notice as may be identified in answer to question 5 above was

(1) a condition precedent to liability under the excess policies;

(2) an innominate term, breach of which might if sufficiently serious excuse the insurers subscribing to the excess policies from liability; or

(3) a term breach of which gives rise to a right to damages only."

The judge's answer was that the obligation to give notice to the excess layer underwriters is an innominate term breach of which, if sufficiently serious, entitles the defendants to reject liability for the relevant claim.

Issue 7: "Without prejudice to the above, whether, on the true construction of the excess policies, the provisions of the excess policies extend to claims in respect of which the claimant seeks an indemnity."

The judge said that no separate answer was required.

Issue 8: "Whether, in the event that clause 5 of the Co-insuring policy is an innominate term and

assuming that LMA (or the claimant) has committed a repudiatory breach of clause 5 by failing to notify claims to the defendants in accordance with its provisions

(1) the defendants have a defence to the claims the subject of such repudiatory breach irrespective of whether or not they have accepted such breach; or

(2) the defendants have a defence to the claims the subject of such repudiatory breach provided that they have accepted such breach; or

(3) the defendants have a defence to the claims the subject of such repudiatory breach provided that they have accepted such breach and that the losses the subject of such claims occurred after such acceptance"

The judge's answer was that if the respondents have committed a serious breach of clause 5, the appellants are entitled to treat it as equivalent to a failure to comply with a condition precedent and have a defence to the claim without the need for any formal "acceptance" of the breach and regardless of when the claim was made or the loss occurred.

4. The appellants appeal with respect to the judge's answers on issues 2, 4 and 6. The respondents have served a notice seeking, if necessary, to uphold the answer on issue 2 on a different basis and appealing against the answers on issues 3 and 4, if the appellants' appeal on issue 2 succeeds, and in any event against the answers on issues 6 and 8.

5. In these circumstances issue 1 no longer arises. The appellants accept the judge's answer, which was based on sound reasons with which I entirely concur. The alternative proposition, for which the appellants contended before the judge, would have been uncommercial and improbable. The scheme would have been incoherent. The primary policies would have provided cover in respect of claims made within the policy period and claims made in a subsequent period arising from circumstances notified within the policy period. The excess policies would, in contrast, only have covered claims made within the policy period. This would have meant that, if any circumstances which might give rise to a claim on them had become known during that period, any claim arising therefrom would not have been covered under the excess layer insurance for that period, and the (quite possibly different) excess layer insurers for the next period might well have declined to refuse to renew insurance on a basis including it. Further, clauses 1 and 2 of the excess policy would appear to be unworkable unless the primary and excess layers of any claim all fall within the same insurance year. Finally, the requirement in clause 5 of the excess policy that "any circumstances of which the Assured becomes aware during the subsistence hereof which are likely to give rise to such a claim or loss" be notified immediately "if it appears likely that such claim(s) or loss(es) may exceed the indemnity available" under the primary and any underlying excess insurance indicates that this was intended to be part of a conventional claims made insurance, with the familiar extension to cover claims or losses arising from circumstances notified during its period.

6. Issue 2 is the first main issue arising before us. The appellants, in challenging the judge's answer, submit that, once it is accepted that general condition 2 of the primary policy is incorporated into the excess policy by clause 7 of that policy, then, read in that context, general condition 2 obliges LMA to give notice to their excess insurers of "any circumstances of which [they] shall become aware which may give rise to a claim or loss against them or any of them", as a condition precedent to any right to be indemnified by excess insurers in respect of any such claim or loss subsequently arising. The judge rejected this submission, holding that general condition 2 of the primary policy continues, even in the context of the excess policy, to require notice only to the primary insurers, although notice so given operates as a relevant trigger for cover under the excess (and not merely the primary) insurance.

7. Mr Hancock QC for the appellants supports their appeal on this issue by submitting that the natural meaning of "the Underwriters", once general condition 2 is read in the context of the excess insurance, is to refer to the excess insurers. He points out that, where the excess wording wants to refer to the "primary insurers", it does so. But that point is of little weight, when dealing with a condition incorporated only by reference by the general words of clause 7 of the excess layer. Mr Hancock makes more powerful points when he refers to the benefits that could attach to notice being received by the excess layer insurers at the same time as the primary insurers under general condition 2. There could he submits be all sorts of benefits by way of the opportunity to take an interest in the development and handling of the circumstances, or of any claims or losses arising from them, or to make appropriate reserves or reinsurance arrangements. That might be so, but on the other hand, if notice of any circumstances which "may give rise to a claim or loss" on the part of "the assured" (ie LMA) must in every case to be given to excess layer insurers, followed "as soon as possible by full details in writing", then excess layer insurers could well be receiving a volume of notifications and a great deal of information in which they would, being excess insurers, never realistically be interested. Mr Hancock further points out that, if the wording of general condition

2 as incorporated into the excess insurance is manipulated, in the way the judge did, to make it continue to refer to notice to the primary insurers, it adds little if anything to excess insurers' protection, since the effect of clauses 1 and 2 of the excess wording will anyway be that they will not be liable unless the conditions precedent to liability under the primary insurance have been met. Again, however, that point seems to me of limited weight, when one is dealing with a condition incorporated only by the general reference in clause 7.

8. In my view, the judge was right in the answer he gave on this issue. First, clause 5 deals expressly with claims notification to excess insurers. It requires immediate notification in writing of "any claim(s) made against [LMA] or the discovery by [LMA] of any loss(es), or any circumstances of which [LMA] becomes aware during the subsistence hereof which are likely to give rise to such a claim or loss" only "if it appears likely that such claim(s) or loss(es) may exceed the indemnity available" under the primary insurance cover. This on its face suggests that excess insurers are interested only in matters that are likely to affect their layer, and, unless and until such a situation arises, are prepared to leave the handling of lesser matters to primary insurers, even though there is always a risk, as clause 5 acknowledges, that such matters may later escalate and concern the excess layer.

9. Mr Hancock observes, rightly, that there is nothing to prevent an insurance requiring successive or overlapping notices or notifications. But, in considering whether this is what the present excess insurance contemplated, it is relevant to bear in mind that clause 5 is a specific part of a standard excess wording, while general condition 2 is only incorporated by the general terms of clause 5. That neither provision was drafted with the other expressly in mind is fairly obvious, when one compares their language ("circumstances. . .which may give rise to a claim or loss" against LMA in general condition 2 and "circumstances. . .which are likely to give rise to such a claim or loss" in clause 7).

10. Mr Hancock suggested at one point that the language of general condition 2 might be manipulated or understood so that it too only encompassed circumstances "likely" to give rise to such a claim or loss. But there would be no basis for doing that to general condition 2 in the context of the primary insurance, and so further incongruity would result if it were done to general condition 2 in the context of the excess insurance. The suggestion was not however an essential part of Mr Hancock's argument; but the difference between the language in which the two provisions address a similar subject-matter does underline the point that they cannot be read as if they were both express provisions of a unitary contract prepared by a single draftsman. Moreover, clause 7 provides that "Except as otherwise provided herein" the excess policy is subject to the same terms, conditions and definitions as the primary insurance. Although general condition 2 is incorporated, it should be read in a sense consistent with the general tenor of the express language of the excess wording.

11. Second, general condition 2 is only concerned with the giving of notice of circumstances of which LMA becomes aware during an insurance period, which may mature into "a claim or loss against them". A primary purpose of general condition 2 consists in its further role as a trigger to the extension of cover, bringing within one insurance period any claim or loss arising after that period from circumstances thus notified during that period. There is nothing in general condition 2, or elsewhere, to require any notification to excess insurers of any claim or loss, other than under clause 5 a claim or loss which appears likely to impact on the excess layer. A claim may be made against LMA and notified to primary layer insurers in one insurance period which appears to have no prospect of impacting on the excess layer. The prospect of its impacting on the excess layer may only appear years later. A duty to notify it to excess insurers will then for the first time arise under clause 5. But the position will, on the appellants' case, be quite different if the claim against LMA happens to have been preceded by prior awareness on LMA's part during the original insurance period of the circumstances later giving rise to the claim. Experience indicates that such prior awareness far from always exists. Claims are made out of the blue. So, on Mr Hancock's suggested interpretation of general condition 2, there would again be a considerable incongruity in the suggested scheme of the primary and excess insurances.

12. Third, the importance attaching to the role of the primary insurance and primary insurers is evident from the terms of the excess policy wording. Clauses 1, 2, 3 and 4 all underline it. The second sentence of clause 7 points a contrast, in requiring excess insurers' consent to any amendment of the primary insurance "in respect of which the primary insurers require an additional premium or a deductible". In the light of this importance and the previous two points, it does not seem in any way incongruous that excess layer insurers should have been prepared to accept that the only notice they would receive was of circumstances, claims or losses likely to impact their layer, and that, unless and until that situation arose, any circumstances, claims or losses should be notified to and handled by primary insurers. There was also before the judge uncontradicted market evidence from a former underwriter, Mr Carey, to the effect that there

was nothing surprising or uncommercial about such a situation.

13. Reference was made to clause 3 of the excess wording. It has no application on the facts of this case. But, in a case where the primary layer was exhausted during the insurance period, so that clause 3(b) applied, Mr Hancock submits that, on the judge's interpretation of general condition 2, notice of circumstances would still only need to be given to primary insurers, even though they no longer had any interest. I do not think that that follows. The excess insurers would under clause 3(b) have become the primary insurers, and would as such be entitled to the benefit of general condition 2.

14. For these reasons, and those given by the judge, with which I fully concur, I agree with the judge's answer to issue 2.

15. In these circumstances, it is unnecessary to consider the correctness of the judge's answer to issue 3, relating to adequacy of notice to the brokers to constitute notice to excess insurers, and I express no opinion on it. I turn to the judge's answer to issue 4, relating to the letter of 28 January 1994, the terms of which appear in paragraph 2 above. There were two sub-issues below, one whether the letter could be regarded as directed to and as notice to excess layer underwriters, the other whether it amounts, within general condition 2 of the primary layer policy, to notice to the primary layer underwriters of circumstances which might give rise to a claim or loss against LMA at all. The former sub-issue does not arise in view of the answers given above to issues 1 and 2. The latter remains relevant, since, if the letter was not such a notification, the potential trigger to excess layer cover provided by the answer to issue 2 could not exist. Mr Hancock submits that the letter was not a notice of circumstances which might give rise to claims; and that it was not addressed even to the primary layer underwriters on the 1993-94 policy year. Rather, he submits, it was a reassurance to potential underwriters on the next policy year that there were no problems to take into account when fixing the premium and terms for renewal cover. He points out that in prior correspondence the brokers, Bowrings, had communicated to Resource Underwriting Limited, agents for Lloyd's syndicate 657, which underwrote 100 per cent of the primary layer and were the leading Lloyd's syndicate on the excess layer, that LMA involvement in pensions transfers was very much at the bottom end of the scale and they had very little exposure, and should not cause any financial problem.

16. The judge dealt with this aspect of issue 4 as follows:

38. I think Mr Hancock was right in saying that this letter was addressed to the prospective insurers for the 1994-95 policy year, but I do not think that prevented it from providing adequate notice of the matters to which it refers for the purposes of the current policy to the extent that the same underwriters were involved. What the insurers required was prompt notification of any circumstances that might give rise to a claim. Provided they were given the information required by General Condition 2 in a form that made it clear that they were being notified of circumstances that the insured thought might give rise to a claim, it was immaterial that the information was contained in a letter directed to renewal of cover. Since the prospective insurers at Lloyd's for the ensuing year were the same as for the expiring year, this letter was in my view capable of constituting notice to them of the circumstances described in it.

39. Finally Mr Hancock submitted that the letter was not a warning that claims might be forthcoming but an assurance that they would not and so did not amount to notification of circumstances that might give rise to a claim. The fact that the letter was addressed to the prospective insurers for the ensuing year inevitably meant that it was directed as much to the risk of claims being made during the period of that policy as to the notification of circumstances that might give rise to claims that would fall under the current policy. The two were directly related. I see no reason, therefore, why the same letter should not be capable of satisfying both objects where the same underwriters are involved. In my view the letter was both notification of circumstances that might give rise to a loss and an assurance that the insured was not aware of any other circumstances that might do so. The underwriters could therefore proceed on the basis that any claims arising out of those circumstances would fall within the expiring policy and could be excluded from the ensuing policy.

17. The arguments presented by Mr Hancock before us mirrored those presented to and rejected by the judge in these paragraphs. We did not find it necessary to call on Mr Weitzman to respond to them. In the circumstances, I need only say that I agree with the judge's reasoning, and would answer issue 4 in the same terms as he did.

18. There is no appeal on issue 5. Issue 7 was regarded by the judge as covered by other issues, and does not arise before us. That brings me to issues 6 and 8, which I take together and which involve points of general interest concerning the nature and effect of a provision such as clause 5. The points fall to be considered in the particular light of a judgment given by my Lord, Waller LJ, in

Alfred McAlpine plc v BAI (Run-Off) Ltd [2000] 1 Lloyd's Rep 437.

19. In that case my Lord identified a possibility that a claims notification provision such as clause 5 might be neither a condition precedent to liability for the claim nor a clause all breaches of which sounded simply in damages. It might be an innominate term, the consequences of which, he said, might be so serious as to entitle an insurer to reject the claim albeit that the breach was not so serious as to amount to a repudiation of the whole insurance contract. This argument had not been pleaded by the insurer (*BAI*), and Waller LJ had, therefore, some doubt whether it was open. But, apart from that, he said (in paragraph 35) that

> it was, however, bound to fail unless BAI could demonstrate that there was a serious breach of condition 1(a) which had serious consequences and that in reliance on such a breach the claim had been rejected.

In his view the breach of the claims notification clause, condition 1(a), "was very limited in that BAI had sufficient details to enable them to investigate the claim" and that "Furthermore, by that time BAI had at least some details of the claim they had not suffered any irremediable prejudice". Waller LJ was also doubtful whether BAI's conduct could be said to amount to a final rejection of the claim, but, if it did, he said, it was not justified. Any defence which was open to BAI was therefore not available. It follows from these passages that Waller LJ's statements about the possible nature and effect of a claims notification clause were obiter.

20. In order fully to appreciate Waller LJ's reasoning it is appropriate to summarise and set out further extracts from his judgment. First, I note that there was no challenge before him to the conclusion of the judge (Colman J) that condition 1(a) (which provided that "In the event of any occurrence which may give rise to a claim under this policy the insured shall as soon as possible give notice to the Company in writing with full details") was not a condition precedent. Waller LJ also agreed with Colman J that it was not easy to contemplate that a failure to comply with an ancillary provision relating to one claim under a policy could amount to a repudiatory breach of the whole contract of insurance (paragraph 22). He considered *Taylor v Builders Accident Insurance Ltd* [1997] PIQR P247, a decision in which HHJ Byrt QC contemplated that a breach of a claims notification provision might be "a fundamental breach of an important term in the contract" such as to "enable the insurance company to repudiate notwithstanding the condition breached is not stated to be a condition precedent". That reasoning, as Waller LJ observed, does not clearly address any possibility of a breach allowing rejection of the claim without repudiation of the whole contract.

21. But Waller LJ went on:

> 26 I do not myself think that the choice should necessarily lie between a construction which would involve condition 1(a) being a condition precedent, and condition 1(a) simply giving rise to a claim for damages. It seems to me that once a condition such as condition 1(a) is construed as something less than a condition precedent, it will still be important to ascertain precisely what its contractual effect is intended to be and what the effect of a breach of that term will be. For example, if no details of the incident in relation to which RCCL was making its claim were ever supplied, despite the insurers' requests for them, would BAI still be bound to pay, and simply be left with a remedy in damages for breach of the condition? Certainly if the consequences for BAI were that they had been seriously prejudiced, it seems to me unreasonable that that should be so. Accordingly it seems to me one should consider the possibility that a breach of condition 1(a) might in some circumstances be so serious as to give a right to reject the claim albeit it was not repudiatory in the sense of enabling BAI to accept a repudiation of the whole contract. The very fact that condition 1(a) is aimed at imposing obligations in relation to individual claims which BAI might be obliged to pay, ought logically to allow for the possibility of a "repudiatory" breach leading simply to a rejection of a claim.
>
> 27. I accept, I should say, that it is possible for the terms of a policy by express language to be clearer than this term as to what its intended effect should be.. . ..

22. He then examined an Australian case, *Trans-Pacific Insurance Co (Australia) Ltd v Grand Union Insurance Co Ltd* (1989) 18 NSWR 675; (1990) 6 ANZ Insurance Cases 60-949. Giles J was there concerned with breach of a clause requiring co-operation in relation to claims, including such reporting of claims as was necessary to fulfil that requirement. The clause applied to a particular cession under a facultative/obligatory reinsurance which Giles J regarded as bringing into existence a separate contract of reinsurance. Giles J held that, although there had been tardiness and a breach in supplying information under the clause, the insured had not "evinced an intention no longer to be bound by the reinsurance contract. . .or showed that it intended to fulfil the contract only in a manner substantially inconsistent with its obligations". But, as Waller LJ noted, Giles J referred in the course of his reasoning to a brief passage in *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd* [1985] 2 Lloyd's Rep 599, [1988] QB 216,

241, where Hobhouse J, in the context of another fac/oblig treaty described an implied duty on the insured to exercise due care and skill in the conduct of its business as involving an innominate term or terms and said that "therefore the consequences of any breach for any particular cession or any individual claim or, indeed, for the contracts as a whole, must depend on the nature and gravity of the relevant breach or breaches".

23. Waller LJ continued:

32. I see no reason however why condition 1(a) should not be construed as an "innominate" term as per *Hongkong Fir Shipping Co Ltd* (*supra*) where the consequences of a breach may be so serious as to entitle BAI to reject the claim albeit the breach is not so serious as to amount to a repudiation of the whole contract. Mr Lynagh submits there is no support in the judgment of Giles J for the proposition that the consequences may be so serious as to give a right to reject the claim. I accept that Giles J took the view that there was a separate contract of reinsurance in relation to the risk the subject matter of that case, and thus did not decide the point. But I do think the inference to be drawn from the passage quoted at 702F-703A of the judgment of Giles J supports the view that I take. I accept Mr Walker's submission in this regard. It seems to me that the payment of individual claims are severable obligations and that where an insured is bound to carry out one obligation in order to receive the benefit of the insurer's obligation by implication the insured is accepting that if he fails in a serious way to carry out his part of that bargain he will not receive what he has bargained for.

33. Thus the correct analysis of condition 1(a) I would suggest should be as follows. Compliance with condition 1(a) is not by the policy made a condition precedent to liability, thus it is not enough for BAI to establish a failure to supply full details as soon as possible in order to resist the claim. That much is conceded.

34. Condition 1(a) is however an innominate term. Breach of it, however serious, would be unlikely to amount to a repudiation of the whole contract of insurance. Furthermore, it is not a term the breach of which, or any breach of which, would entitle the insured not to pay the claim because that would simply make it a condition precedent. But, in my view, a breach which demonstrated an intention not to continue to make a claim, or which has very serious consequences for BAI, should be such as to entitle BAI to defeat the claim. If a term is a condition precedent to liability, any breach defeats liability but does not lead to a repudiation of the whole contract. I see no reason why although a term is not a condition precedent so that any breach defeats liability, it cannot be construed as a term where a serious breach defeats liability.

24. There is some subsequent authority. The statements in *BAI* were considered in *K/S Merc-Skandia XXXXII v Certain Lloyd's Underwriters (The Mercandian Continent)* [2000] LIoyd's Rep IR 694; [2001] 2 Lloyd's Rep 563, by Aikens J and the Court of Appeal. The insured was in breach of a clause requiring the assured to keep the underwriters fully advised. Aikens J held that the approach suggested by Waller LJ involved considering whether underwriters had in fact been seriously prejudiced, which he concluded that they had not been. The Court of Appeal dismissed an appeal relating to this conclusion of fact. Longmore LJ said, again obiter, that in *BAI* "this court decided that, at any rate in insurance cases, there was a further category of term in addition to the three categories identified above, namely a term a breach of which was so serious for underwriters that it would give them a right to reject the claim without having to accept the breach of contract as being a repudiation of the contract as a whole". I have already said why I read the reasoning on this aspect in *BAI* as obiter. Further, as I understand Waller LJ's reasoning, one should re-phrase the last part of Longmore LJ's statement so that, instead of reading "without having to accept. . .." it would read "without necessarily either having a right to or having to. . ..".

25. In another case, *Glencore International AG v Ryan (The Beursgracht)* [2002] Lloyd's Rep IR 335, the Court of Appeal was concerned with a risk which was automatically insured under an open cover, and with a failure subsequently to declare the risk. HHJ Hallgarten QC, whose decision was upheld on this aspect, concluded that the duty to declare a risk did not operate as a condition precedent to liability in respect of a claim on it. Tuckey LJ giving the sole reasoned judgment in this court said:

> If underwriters had felt that the commercial considerations which Mr Saloman has referred to were so important to them, they could easily have made the making of declarations a condition of the cover.

Applying the reasoning in *BAI*, HHJ Hallgarten and this court then considered whether the breach was so serious that underwriters were "entitled to avoid liability, not for the whole cover, but for that risk". Both held that it was not. Whether the reasoning in *BAI* was or is binding or correct was evidently not argued and was not considered or decided.

26. The reasoning in *BAI* has only been applied to enable insurers to avoid liability for a particular claim in one case to which we were referred, the first instance decision of Buckley J in *Bankers Insurance Co Ltd v South* [2004] Lloyd's Rep IR 1, by which we are again not bound. That was a case where the insured riding a jet ski was in July 1997 in collision with another jet ski, whose driver was seriously injured. The insured failed to comply with claims notification provisions requiring him to give insurers notice for some three years. Buckley J held that the breaches were manifestly serious, and that, while it did "not necessarily follow that such serious delay would have serious consequences for Bankers, the position here. . .is that by the time the question of cover is resolved Bankers will have lost some three and a half years". He drew inferences that some significant further fading of memories would have occurred and that some of the witnesses would probably be more difficult to trace and some probably unwilling to assist after so long. He granted insurers a declaration that they were not liable to indemnify the insured.

27. The first question is whether clause 5 is a condition precedent with respect to the particular claim so that any breach of its provisions means that insurers are not bound to meet the claim. This question cannot be entirely separated from the reasoning in *BAI*. The reasoning in *BAI* offers an alternative remedy, which if available might disincline a court from treating a clause such as clause 5 as a condition precedent. If the innominate analysis with the consequences suggested in *BAI* is not available, then it may be the court would be more favourably inclined to construe clause 5 as a condition precedent.

28. Accepting that, even if the reasoning in *BAI* is rejected I cannot accept that compliance with clause 5 can or should be construed as an implied condition precedent to excess insurers' liability for any claim, loss or circumstances to which such non-compliance relates. The excess wording is, we are told and as its title (AWGS Excess Wording) suggests, a standard market wording. It is used by and between professionals in the market, who are or should be taken to be well aware of the various possibilities open to insurers. They are able, if they need to, to take advice to make such wordings either more or less stringent. Very probably, such a wording, either in its drafting or in its use, reflects a general appreciation, on the part of the market professionals using it, of what will be acceptable and/or attractive to each other. Where the wording intends to introduce a condition precedent, it shows itself well capable of doing so expressly: see the language of clause 1 and in my view clause 2 as well as clause 4 and the second sentence of clause 7. For reasons I have already given, I do not think that it is realistic to try to construe clause 5 by way of a close comparison with general condition 2, but, if one were to do so, the result would be to underline the difference between on the one hand the clearly worded condition precedent in the first part of general condition 2 and on the other hand clause 5. Even in general condition 2 there is a contrast between the condition precedent in the first part and the absence of any provision making its subsequent provision requiring full details in writing as soon as possible a condition precedent. Finally, I observe that there is a difference between a provision requiring notice as soon as possible to primary insurers of circumstances which may give rise to a claim, which means that the primary insurers will have the opportunity to investigate and handle the matter, and a provision like clause 5 which looks to a potentially different stage when excess insurers have to be involved. It follows that I agree with the judge in so far as he held that clause 5 was not a condition precedent.

29. This brings me to issue 8. If clause 5 is not a condition precedent, is it an innominate term and may it then have the consequences suggested by Waller LJ's reasoning in *BAI*? For my part, I am prepared to proceed on the basis that clause 5 may be regarded as an innominate term, although I agree with Waller LJ in *BAI* that it is not easy to conceive of a breach of such an ancillary term in an insurance like the present as going to the root of the whole contract, and, even if this is conceivable, there would be further questions as to whether such a breach could, if accepted, enable insurers to reject liability for any claim accrued by the time of such acceptance, including any to which the breach related. But no such breach is suggested in this case. What is suggested, relying on the reasoning in *BAI*, is that what is described as a repudiatory breach arising from the failure to give notice for some years may mean that insurers could deny liability for the particular claim or claims relating to the pensions transfers and opt-outs problem to which such failure related.

30. Moore-Bick J accepted this. He did so on the basis that Waller LJ was enunciating a conclusion on construction. He was "simply recognising that a serious failure to comply with a notice provision such as clause 1(a) in that case was capable of being treated as a failure to comply with a condition precedent" and was seeking "to identify and explain the nature of the obligation contained in clause 1(a), which is essentially a matter of construction". Moore-Bick J went on:

> In my view Mr Hancock was right in saying that the principles relating to discharge by breach are not directly applicable to a situation of the kind that arises in this case. As I understand the

passages from his judgment quoted earlier, Waller LJ was drawing on those principles by analogy to explain how the breach of a term such as that contained in clause 1(a) could have different consequences depending on its gravity. I do not understand him to be importing from the law on repudiation the necessity for the insurer to "accept" the breach as terminating his liability to pay, much less the principles governing accrued rights. If, as paragraphs 33 and 34 suggest, a serious breach of clause 1(a) has the same consequences as a failure to comply with a condition precedent, no "acceptance" is necessary; the insurer is simply entitled to reject the claim on that ground. Moreover, there is another reason why I am unable to accept Mr Weitzman's argument. The submission that in the present case the claimant already had an accrued right to be indemnified by the defendants at the time when they decided to reject the claim for failure to comply with the notification requirements proceeds on the assumption that that right was unconditional. In fact, however, it was conditional on its complying, at least substantially, with the requirements of clause 5. If the claimant failed to comply with clause 5 in a manner that was sufficiently serious to entitle the defendants to reject the claim, its right to be indemnified remained at best conditional until the underwriters elected not to rely on their rights or in some other way lost their right to reject the claim on those grounds. However, neither of those events occurred.

31. Mr Hancock supports the judge's reasoning. He submits that the correct reading of *BAI* is that it reflects the parties' implied understanding that, in the event of a serious breach (which is what he submits that the parties would, like the judge in his declaration, probably have concentrated on, rather than serious consequences), the insurers would be free of liability. He disclaims any submission that Waller LJ was basing himself on a rule of law. However, as I read *BAI*, the reasoning was based on a concept of repudiatory breach of the particular claim, requiring both proof of "a serious breach. . .which had serious consequences" and proof "that in reliance on such a breach the claim had been rejected" (*see* paragraph 19 above). As to this, a particular contract may be severable into separate parts. For example, a failure under a contract for sale by instalments to make due delivery of one instalment within the contractually stipulated time may be accepted as repudiatory of that instalment, but does not necessarily mean that the whole contract comes to an end (cf *Benjamin on Sale of Goods* (2002) paragraphs 8-073 to 8-076). But that is a very different position from the present. The present insurance is a composite contract. The primary *quid pro quo* for insurers' obligation to pay claims under the insurance is the premium, which is incapable of being severally allocated to any particular risk or claim. The common rule whereby fraud in pursuit of a claim may forfeit the whole of the particular claim (cf *Axa General Insurance Ltd v Gottlieb* [2005] EWCA Civ 112) derives from policy considerations present in the case of fraud, which have no real parallel in the present context. No authority was cited to us, apart from *BAI* and its successor cases, in which any court has suggested that a party to a contract may be relieved from a particular obligation under a composite contract such as the present, by reason of a serious breach with serious consequences relating to an ancillary obligation, absent some express or implied condition precedent or other provision to that effect. Either some conditional link can, as a matter of construction, be found between performance of the two obligations or it cannot. Where such a link cannot be found as a matter of contractual construction, I see no basis for a new doctrine of partial repudiatory breach to, in effect, introduce one.

32. A claims notification clause like clause 5 is an ancillary provision. Breach of such a provision is capable of sounding in damages. But I am unable as a matter of construction or implication to find in clause 5 any provision that insurers will be free of liability in the event of a serious breach and/or a breach with serious consequences. Even if one assumes that it might or would have been reasonable for the parties to agree such a provision, reasonableness is not the test for implying a term. Nor do I see any basis for creating a new rule of construction or law which would impose such a provision on these parties. Representing opposite sides of the market with opposing interests on the point, they must, as I have said, be taken to be fully aware of the possibilities of agreeing whatever they could, acceptably to each other and in accordance with any other constraints (practical or legal, as to which I say nothing), negotiate. For my part, I do not think that it is obvious that the broking and underwriting sides of the market would regard even as reasonable a provision such as suggested in *BAI*, and I do not see any reason why the court should impose it on them. A test of "serious breach" and/or "serious consequences" might have some drastic and unfair consequences. Suppose a year's delay, in consequence of which insurers lost the opportunity to make or (eg because of insolvency) to recover a reinsurance claim or a subrogation claim worth £50,000. That would be a breach serious in nature and consequences. But suppose the insurance claim was itself for £1 million or £100,000 or even £75,000. Why should insurers have the right to reject the whole claim? Further, if the test in *BAI* is applied, insurers must prove serious consequences,

as well as a serious breach. If they can prove serious consequences, then these will often be capable of quantification, in one way or another, even if only as losses of a chance or opportunity, and can be set off against the claim.

33. Of course, there are cases, like the *Bankers Insurance* case decided by Buckley J, where it may be said that the consequences are too intangible to measure in precise financial terms, although, where an insured's breach has caused this difficulty, courts should incline to a quantification favourable to insurers. But the difficulty is anyway no justification for the introduction, whether as an implied term or as a rule of law or by a previously unknown extension of the doctrine of repudiatory breach or on any other basis, of a novel form of protection for insurers. If insurers consider that they want or need such protection, they can and should try to express it in their insurance contracts and see if insureds and the broking market will accept it. In a passage quoted in Lord Diplock's speech in *Scandinavian Trading Tanker Co AB v Flota Petrolea Ecuatoriana (The Scaptrade)* [1983] QB 529, 540-541; [1983] AC 694, Robert Goff LJ said, in relation to a submission that the court could relieve against the supposed unfairness that might result from withdrawal of a vessel under a time-charter for a single late payment of a hire instalment: "Parties to such contracts should be capable of looking after themselves". That thought is equally applicable here. English insurance law is strict enough as it is in insurers' favour. I see no reason to make it stricter. I would therefore disagree with the reasoning suggested in *BAI*, and answer issues 6 and 8 by declaring that the giving of notice in accordance with clause 5 was not a condition precedent to liability, and that, even in the event of a serious breach of clause 5 having serious consequences, the insurers have no such defence or defences as mentioned in issue 8(1), (2) and (3). Since all that Mr Hancock has sought to establish in these proceedings is a right to reject the particular claims, it is unnecessary to say more about the classification of clause 5 in response to issue 6.

Sir William ALDOUS:

34. I agree with the judgement of Mance LJ.

35. After reading in draft the judgement of Waller LJ, I prepared a short judgement on issue 8. Having read the judgement of Mance LJ, I have concluded that he has expressed in better terms than I had the reasons why Mr Hancock's submissions should not succeed. My view was and is that the principle suggested in the *Alfred McAlpine* case has no basis in the law of contract unless an appropriate term can be implied into the contract. That appeared to be the view of Mr Hancock who sought to support the conclusion of the judge upon the basis that the contract should be construed so as to imply an appropriate term. That submission fails as there is no need to imply such a term and in any case it did not appear possible to set out with sufficient precision the term.

Lord Justice WALLER:

36. There is only one aspect of the appeal on which I would like to express some views. It is the aspect which calls for consideration of what I said in my judgment in *Alfred McAlpine plc v BAI (Run-Off) Ltd*.

37. I am not concerned to establish whether what I said in that case in a judgment with which Peter Gibson LJ and Buxton LJ agreed was *ratio decidendi* or simply *obiter*. I am concerned to seek to demonstrate that the view I expressed is not as heretical as my lords, according to their judgments would imply, and should be welcomed rather than rejected.

38. What I was suggesting in relation to the contract of insurance in *BAI* was that a clause which provides that notice of a claim must be given "as soon as possible" may not be a condition precedent, but may, if it is breached in a way which seriously prejudices the insurer, give a right to reject a claim rather than leave the insurer simply with a claim for damages.

39. That the law should recognise that possibility seems to me to accord with what the parties would have contemplated where the insured has agreed to provide details "as soon as possible" and where an inexcusable delay in so doing has caused serious prejudice. It also incidentally in my view accords with justice.

40. The serious prejudice I had in mind in that case was that the insurer had simply had no chance to examine the circumstances of the claim and was as a result simply unable to say whether some action could have been taken to defeat the claim. In such a case a set-off for the damages for "loss of a chance" is illusory as a remedy. By the nature of things it may be difficult if not impossible for the insurer to say whether there were circumstances which would have enabled him to defeat the claim, or what his chances of so doing were.

41. There are various aspects to considering this question. First is a term requiring notice of a claim "as soon as possible" which is not a condition precedent, the type of term the breach of which could ever give a right to the insurer to assert that the obligation to pay claim has not arisen or that the contract as a whole has been repudiated? Second if it could be construed as such a term, is the obligation to pay one claim a severable obligation, which could be discharged by some failure to comply with the notice clause in relation to that claim? Third what kind of failure will discharge this

latter obligation? Fourth is the answer to any of these questions an answer that depends on construction of the contract or is it provided by some rule of law?

42. I accept that a breach of a notice clause would be unlikely to amount to a repudiation of the contract as a whole, but, I suggest, it is not impossible that it could in extreme circumstances of consistent breach over a number of claims. More likely is a situation in which the insured has details of a claim to the knowledge of the insurer and the insured refuses even on request to supply the details. It is likely that in such a situation the term will at the very least be construed as suspensive disallowing the claim until details are provided. The question is whether if there has been a failure to notify the insurer in any way of a claim when obliged to do so "as soon as possible", there should ever come a stage where the delay in informing insurers or supplying details is such that the insurer should be entitled to say, he is so prejudiced by the lack of information that he should be entitled to reject the claim. Can, in other words, such a term be construed as an innominate term the consequences of a breach of which depends on the nature and gravity of the breach?

43. It is not unknown to the law of contract that in relation to severable obligations a failure in some respect may give rise to a right to "reject" simply and only the particular counterpart of the severable obligation. Thus in an instalment contract, a breach of condition in relation to a particular instalment, may give rise to a right to reject the particular instalment, and only the particular instalment [*see* Benjamin para 8-083, and the cases cited in the note]. It is of some interest that Benjamin later draws attention to the fact that there can be a difference between the right to "reject", and the right to "treat the contract as at an end" [*see* 12-025].

44. In the insurance context in Scottish law it seems that a fraudulent claim simply gives the insurer the right to reject "that" claim and not any right to have the contract discharged as a whole [see Macgillivray para 19-61 supported by *Reid & Co v Employers' Accident & Live stock Ins Co* (1899) 1 F 1031, 1036]. In English law the fraudulent claim gives a right to avoid the contract as a whole, but it has been questioned whether that means "*ab initio*" or whether it is as from the date of avoidance [*see* the same paragraph of Macgillivray, and the reference to the "tentative view" of Mance LJ in *Agapitos v Agnew* [2002] 1 All ER (Comm) 714 at 730].

45. As I pointed out in *BAI* furthermore Hobhouse J in *Phoenix General Insurance Co of Greece SA v Halvanon Insurance Co Ltd* [1985] 2 Lloyd's Rep 599 at 614 when holding that a term should be implied into facultative/obligatory reinsurance contract that the reassured should conduct his business in accordance with market practice and with due diligence in certain respects including the maintenance of records and accounts, the acceptance of risks and the investigation of claims, stated: "The term or terms are all innominate and therefore the consequences of any breach for any particular cession or any individual claim [my emphasis] or indeed for the contracts as a whole, must depend on the nature and gravity of the relevant breach or breaches". He therefore expressly contemplated that the consequence of a breach might be confined to an individual claim and, within that context, depends upon the gravity of the breach.

46. Conceptually there is, as I would see it, no difficulty in construing an obligation to pay a claim as a severable obligation. Strictly the obligation on the insurer is to pay damages, but it is precisely to that severable obligation that a "condition precedent" provision applies. It is precisely to that obligation that the suspensive effect of the clause applies. Conceptually accordingly, I can see no difficulty in construing a notice provision as being an innominate term which provides the insurer with a right to reject the claim if there is a breach of sufficient gravity ie a breach which has seriously prejudiced the insurer.

47. Mr Hancock was pressed in argument to suggest that some form of implied term is called for. I do not accept that. The question is whether the term is one which if breached seriously i.e. in a way that seriously prejudices the insurer, gives a right to reject the claim. In addition I do not accept that Mr Weitzman is right in suggesting that in some way the whole concept of repudiation, and acceptance has to be built into the operation of such a term. Indeed in relation to the absence of notice prejudicing the insurer, it would be strange if someone who does not know that he has not had notice of a claim, should be disentitled from rejecting the claim because he has failed to accept some repudiation about which he knew nothing.

48. If the clause is of the requisite type, it works I suggest on the basis that for a serious breach ie a breach which has caused the insurer serious prejudice, the insurer has an entitlement to reject the claim.

49. I should add that the position that was under consideration in *BAI* was quite different from the position being considered in the instant case. For one thing there is an express condition precedent which is intended to protect against the prejudice that we were concerned with in *BAI*. I doubt whether that prevents condition 5 being an innominate term because, albeit very unlikely, there could

be a refusal to provide details despite requests which might have a consequence for which damages would not be the appropriate remedy. What is clear to me is that the excess underwriters having agreed that notice of circumstances should be given to the primary layer underwriters, would have little chance of demonstrating serious prejudice. But because we are dealing with preliminary issues, that would have to be for another day.

50. If the above is heretical then so be it. But it is of some comfort that Macgillivray paragraph 10-13 expresses the view that "the increased flexibility in remedy which the introduction of such a term gives to the courts is welcome. . ." adding I accept "though the legal basis for the term is perhaps open to question", and I have endeavoured to deal with that latter point. Other leading text books Professor Clarke's *The Law of Insurance Contracts*, Section 26-2G, *Colinvaux's Insurance Law* 7th edn, 2nd Supplement, paragraph 9.02, and *Butler and Merkin on Reinsurance Law*, sections B-0006 to B-0011 refer to the principle without adverse comment.

51. As Macgillivray suggest in para 10-13, the decision in *BAI*, has been followed in the Court of Appeal in *K/S Merc-Skandia v Certain Lloyd's Underwriters* [2001] 2 Lloyd's Reports 563. Longmore LJ with whose judgment Robert Walker LJ (as he then was) and Carnworth J (as he then was) agreed, referred to and applied *BAI* without any adverse comment. They upheld the judge Aikens J it is right to say in ruling that no serious consequence had been shown.

52. Tuckey LJ with whose judgment Jonathan Parker LJ agreed also applied *BAI* again without adverse comment in *The Beursgracht* [2002] Lloyd's Rep IR 335, in the slightly different context of "declarations" under a floating policy, and in doing so were upholding the application thereof by Judge Hallgarten QC. They upheld that judge also in ruling that serious consequences had not been established.

53. The principle has been applied by Buckley J in *Bankers Insurance Company v South* [2004] Lloyd's Rep IR 1. He did hold that the insurers in that case were so seriously prejudiced that they should be entitled to reject the claim.

54. I would differ from my lords on their answer to issues 6 and 8. Otherwise I agree with the judgment of Mance LJ.