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Case No: CL-2020-000802

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 26/07/2021

Before :

THE HONOURABLE MR JUSTICE HENSHAW

Between :

- (1) ROYAL & SUN ALLIANCE INSURANCE PLC
- (2) INTERNATIONAL GENERAL INSURANCE CO (UK)
LIMITED
- (3) HDI GLOBAL SE (formerly HDI Gerling
Verzekeringen NV)
- (4) TT CLUB MUTUAL INSURANCE LTD

Claimants

- and -

- (1) TEXTAINER GROUP HOLDINGS LIMITED
- (2) TEXTAINER LIMITED
- (3) TEXTAINER EQUIPMENT MANAGEMENT
LIMITED
- (4) TEXTAINER EQUIPMENT MANAGEMENT (US)
LIMITED
- (5) TEXTAINER EQUIPMENT MANAGEMENT (UK)
LIMITED
- (6) TEXTAINER MARINE CONTAINERS LIMITED
- (7) TEXTAINER MARINE CONTAINERS II LIMITED
- (8) TEXTAINER MARINE CONTAINERS III LIMITED

(9) TEXTAINER MARINE CONTAINERS IV LIMITED

**(10) TEXTAINER EQUIPMENT MANAGEMENT (S)
PTE LTD**

**(11) TEXTAINER EQUIPMENT MANAGEMENT (US) II
LLC**

Defendants

**Peter MacDonald Eggers QC (instructed by Kennedys Law LLP) for the Claimants
Christopher Smith QC (instructed by BDM Law LLP) for the Defendants**

Hearing date: 16 July 2021

JUDGMENT

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be 26th July 2021 at 2pm

Mr Justice Henshaw:

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(A) INTRODUCTION

1. This judgment follows a Case Management Conference, at which was also listed the Claimants’ application for orders under CPR 19.6(1)(b) that the First Claimant (“**RSA**”) be permitted to act as representative of four other insurers who participated as followers in the Primary Policy in issue in this case, and that RSA also be permitted to act as representative of the only other insurer who participated in the First Excess Policy. As noted below, a further question was raised as to whether the action is properly constituted having regard to CPR 19.3, and that topic is the main subject of this judgment.

(B) KEY FACTS AND ISSUES

2. It is convenient for present purposes to take the basic facts largely from a combination of the Agreed List of Issues and Common Ground, the draft Amended Particulars of Claim and the Defence, as follows.
3. The Claimants (and those they seek to represent) are companies engaged in the business of insurance and reinsurance. The First Defendant and its subsidiaries (“**Textainer**”), the Second to Eleventh Defendants, are (or were) companies engaged in the business of leasing intermodal containers, with more than 3.5 million twenty-foot equivalent units in their owned and managed fleet.
4. Textainer entered into a number of insurance contracts which together represented an excess of loss insurance programme. By these insurance contracts, the subscribing insurers agreed to indemnify Textainer against specified types of loss relating to marine containers, for specified layers up to US\$80,000,000 in excess of the “*Assured’s Retention*” (which was defined to be US\$5,000,000 other than in respect of Off-hire Equipment and the General Average & Salvage Extension) for the period from 1st October 2015 to 30th September 2016. The insurance contracts comprised:
 - i) the Primary Policy, issued by seven insurers led by RSA, subject to a sum insured of US\$5,000,000 in excess of the Assured’s Retention;
 - ii) a First Excess Policy, issued by RSA and XL Insurance Company SE (“**XL**”), subject to a sum insured of US\$5,000,000 in excess of the limits of the Primary Policy;

- iii) a Second Excess Policy, issued by RSA and the Fourth Claimant (“*TT Club*”), subject to a sum insured of US\$5,000,000 in excess of the limits of the First Excess Policy;
- iv) a Third Excess Policy, issued by the Second Claimant (“*IGI*”) and the Third Claimant (“*HDI*”), subject to a sum insured of US\$25,000,000 in excess of the limits of the Second Excess Policy;
- v) a Fourth Excess Policy, issued by XL, subject to a sum insured of US\$10,000,000 in excess of the limits of the Third Excess Policy; and
- vi) a Fifth Excess Policy, issued by a number of insurers led by IGI (“*the Fifth Excess Insurers*”), subject to a sum insured of US\$30,000,000 in excess of the limits of the Fourth Excess Policy.

5. The Primary Policy contained the following Recoveries Condition:

“MARINE INSURANCE ACT 1906

Although not every section of this Policy may relate to a marine adventure, all the terms, conditions and warranties of the Marine Insurance Act 1906 shall apply to the insurance under this policy

...

CLAIMS CONDITIONS

...

SUBROGATION AND MITIGATION

The Assured shall at the Insurers’ request and expense do and concur in doing and permit to be done all such acts and things as may be necessary or reasonably required by the Insurers for the purpose minimising losses under this Policy and/or of enforcing any rights and remedies or of obtaining relief or indemnity from other parties to which the Insurers shall be or would become entitled or subrogated upon the Insurers agreeing to provide an indemnity under this Policy whether such acts and things shall be or become necessary or required before or after the Insurers indemnify the Assured.

RECOVERIES

Following the payment of a claim under this policy and in the absence of an indemnity from any other Policy specified herein any sums recovered from any other source whatsoever as or towards payment of the amount indemnified shall be shared between the Insurers and the Assured as follows:

- i) all sums shall be allocated to the Insurers until the amount paid under this policy (including costs) has been recovered and

ii) all further sums shall inure to the benefit of the Assured.

When sums are received as recoveries in respect of amounts indemnified both under this policy and the other policy(ies) specified herein and the recovered sums cannot be clearly assigned to losses indemnified by any specific policy then the recovered sums shall be allocated to the Insurers and such other insurers in the same proportions as each has borne of the total loss.

Once all the insurers' claims payments (including costs) have been [sic] any further sums recovered shall insure [sic] to the benefit of the Assured.

This Condition shall not apply when recovered sums have been assigned to losses sustained and indemnified by a specific policy ...

Other policy:

Credit Insurance policy with AIG Europe Limited ...”

6. The Excess Policies incorporated the terms of the Primary Policy, including but not limited to the above-quoted Recoveries Condition, as follows:

“All terms and conditions as per the primary insurance ... as amended, and subject to the conditions of this insurance, to follow the settlements of the primary underlying insurance in all respects as far as applicable hereto ...

Unless as otherwise stated, it is understood and agreed that this insurance shall apply on a ‘following form basis’ to all terms and conditions stated in the primary insurance, but insofar as applicable to the insurance terms hereto ...”

7. The Fifth Excess Policy included the above-quoted incorporating language, but the first paragraph read: “... *subject to the conditions of this insurance, to follow the settlements of the primary underlying insurance in all respects as far as applicable hereto, but excluding loss of earnings in respect of this excess layer only*”.
8. Each of the Policies is expressed to be governed by English law.
9. Textainer had leased more than 112,000 containers to Hanjin Shipping Co Ltd of South Korea (“*Hanjin*”). On 31st August 2016, Hanjin applied to the Seoul Central District Court for its receivership. This prompted Hanjin’s default under its various leases with Textainer and Hanjin ceased to perform its contractual obligations under those leases. As a result, Textainer suffered losses of or damage to the containers leased to Hanjin and related loss of earnings. Textainer alleges that it has suffered approximately US\$102 million of losses as at March 2018.
10. Textainer claimed an indemnity in respect of such losses under the Policies. It received indemnity payments from each of the subscribing insurers, and those indemnities

represented payment in full under the Primary Policy and the First, Second, Third and Fourth Excess Policies.

11. With respect to the Fourth Excess Policy, XL paid Textainer's claim. Subsequently, XL and Textainer entered into a settlement agreement in June 2019 which included a promise by Textainer to pay XL US\$1,300,000. The agreement contained the following provisions:

“WHEREAS:

...

(D) Textainer made a formal written presentation of its claim to the underwriters of the container lessee default insurance program. Insurers paid the full limit under the Policy. As a result, Insurers became subrogated to certain rights of Textainer and are entitled to recovery monies received by Textainer. Textainer wishes to make a payment to Insurers in full and final settlement of those rights of subrogation such that Textainer is entitled to retain any sums recovered by Textainer.

NOW IT IS HEREBY AGREED AS FOLLOWS:

1. Textainer will pay the sum of US\$1.3 million ... to Insurers (the “Settlement Funds”) in full and final settlement of all and any rights arising by reason of subrogation under the Policy. If and to the extent that Textainer make any further recovery against Hanjin which would otherwise be payable to Insurers under the Policy, Textainer are entitled to keep such proceeds ...

3. Payment and receipt of the Settlement Funds shall be in full and final settlement of Insurers claim against Textainer under the fourth excess layer of the container default insurance program and the Policy in relation to the Hanjin Claim ... relating in any way to the Hanjin Claim.

4. The Insurers waive any claim that they have or may have in relation to (i) the containers included in the Hanjin Claim, and (ii) any rights of subrogation under the Policy whether in relation to property or other rights insured by the Policy, in favour of Textainer. However, the terms of this Agreement do not compromise or deal with any rights of subrogation of underwriters arising under any other layer of the insurance program ...

10. This Agreement is governed by and construed in accordance with English law ...”

12. With respect to the Fifth Excess Policy, the Fifth Excess Insurers settled Textainer's claim under that Policy pursuant to a settlement agreement in December 2018, by which

the Fifth Excess Insurers agreed to pay Textainer US\$25,100,000 (of a limit of US\$30,000,000). That settlement agreement contained the following provisions:

“WHEREAS:

...

(D) Textainer made a formal written presentation of its claim to the underwriters of the container lessee default insurance program, including the Insurers in September 2017. Subsequently Textainer’s claim against the lead underwriter and the first to fourth excess layers of the container lessee default insurance program were settled in full ...

(F) Textainer and the Insurers wish to settle Textainer’s claim against the Insurers under the fifth excess layer of the container lease default insurance program and the Policy ... on the terms set out in this Agreement ...

NOW IT IS HEREBY AGREED AS FOLLOWS:

...

3. Payment and receipt of the Settlement Funds shall be in full and final settlement of Textainer’s claim against the Insurers under the fifth excess layer of the container default insurance program and the Policy in relation to the Hanjin Claim ...

5. The Insurers waive any claim that they have or may have in relation to (i) the containers included in the Hanjin Claim, and (ii) any rights of subrogation under the Policy whether in relation to property or other rights insured by the Policy, in favour of Textainer. However, the terms of this Agreement do not compromise or deal with any rights of subrogation of underwriters arising under any other layer of the insurance program ...

13. This Agreement is governed by and construed in accordance with English law ...”

13. In October 2019, Textainer entered into a settlement agreement with Hanjin’s bankruptcy trustee, by which it was agreed that the final amount of the Textainer entities’ claim against the estate was US\$25,886,647.60. Textainer say that Textainer has been paid approximately US\$15.5 million from the estate.
14. The Claimants’ claim that, having paid an indemnity under the Policies, each of the subscribing insurers, including the Claimants and those they seek to represent, have rights of subrogation in respect of the recoveries from the Hanjin estate. Those rights are said to arise at law and/or in equity and/or pursuant to section 79 of the Marine Insurance Act 1906. The Claimants say those rights of subrogation are modified by the Recoveries Condition of the Policies, and that the subscribing insurers are thereby

entitled to receive the benefit and payment of the Recoveries. Further or alternatively, the Claimants allege that the subscribing insurers are entitled to receive the benefit and payment of the Recoveries under the terms of the Recoveries Condition of the Policies. They say the allocation of the Recoveries is (further) qualified by the terms of the settlement agreements referred to above concerning the Fourth and Fifth Excess Policies.

15. The Claimants go on to plead their alleged entitlement in more detail, as outlined later, including how the Recoveries are to be shared between the insurers on different layers and Textainer as insured. They further allege that, pursuant to the Recoveries Condition of the Policies, there is an equitable lien over the Recoveries, insofar as they have been paid to Textainer, in favour of the subscribing insurers to the Primary, First Excess, Second Excess and Third Excess Policies, including the Claimants and those they seek to represent.
16. The key issues in dispute include (non-exhaustively) the effect of the settlement agreement concerning the Fifth Excess Policy, and the Recoveries Condition of the policies, and:

“22. Are the Insurers entitled to the benefit of the Recoveries and to be paid the Recoveries upon Textainer’s receipt of the Recoveries, until they are fully reimbursed for the indemnities paid by them under the Policies?”

23. How much, if any, of the Recoveries received or to be received by Textainer from Hanjin’s bankruptcy trustee should be allocated to the Insurers and how much should be retained by Textainer, having regard to:

- (1) The Insures’ rights of subrogation,
- (2) The terms of the Policies, and
- (3) The terms of the settlement agreements relating to the Fourth Excess Policy and the Fifth Excess Policy?

...

25. Are the Insurers entitled to the declaratory relief claimed?

26. Are the Insurers entitled to orders for payment in respect of their shares of the Recoveries received by Textainer from Hanjin’s bankruptcy trustee and interest thereon?”

17. The List of Issues also includes the question raised at the present hearing, namely whether the action is properly constituted having regard to CPR 19.3. Both parties wished that issue to be heard at the present hearing and determined relatively promptly, bearing in mind that the outcome might require another party to be joined to the action.

(C) TEXTAINER'S CPR 19.3 OBJECTION

18. The four following insurers on the Primary Policy whom RSA seeks to represent have consented to RSA doing so, as has the follower on First Excess Policy.
19. Textainer do not object in principle to RSA representing those insurers: and for my part I am satisfied that RSA has the same interest in the claim as those whom it seeks to represent, and that it is appropriate (other things being equal) for RSA to be granted permission under CPR 19.6 to represent them. However, Textainer contends that the action is at present not properly constituted. That is because one following insurer on the Primary Policy, Westfälische Provinzial Versicherung AG (“**WPV**”), is neither a party to the action nor has consented to RSA acting as its representative.
20. Textainer say the Claimants' claim includes remedies to which they (or some of them) are jointly entitled with WPV, so that CPR 19.3 requires WPV to be a party unless court orders otherwise. CPR 19.3 provides:

“(1) Where a claimant claims a remedy to which some other person is jointly entitled with him, all persons jointly entitled to the remedy must be parties unless the court orders otherwise.

(2) If any person does not agree to be a claimant, he must be made a defendant, unless the court orders otherwise.

...”

21. Textainer submit that the current position needs to be rectified in the interests of finality. For example, if the claim fails, then Textainer are entitled to know that they will not be at risk of a further claim from non-participating insurers. If the claim succeeds, they are entitled to know that they will get a good receipt for any money that they are ordered to pay. If the claim succeeds in part, they are entitled to know that the non-participating insurers are bound by that outcome.
22. Further, as to finality, it is open to debate whether the effect of the leading underwriter clause in the Primary Policy would be to bind WPV to the outcome of the court's ultimate decision on these issues were WPV not to be a party to the action:

“CO-INSURANCE

CLAUSE: Notwithstanding anything contained herein to the contrary, insurers hereon ' agree to follow the Lead Insurer in all respects and to be bound by all decisions and agreements made by the Lead Insurer, and to bear their proportion of any expenses incurred, whether legal or otherwise, in the investigation and defence of any claim.

However, insurers are not bound by the decisions and agreements made by the Lead Insurer in connection with the following:

- any increase the policy limits,

- any change of the policy currency,
- any change of the terms of cancellation,

where specific agreements from each participating insurer shall be obtained.

The Lead Insurer has the responsibility in all respects to make decisions in respect of any claims made under this insurance. This responsibility includes but is not limited to any decisions, agreements, payments, settlements, claims surveys, guarantees, salvage, payments on account and claim settlements.

...”

These terms would not, on their face, result in WPV being bound by a ruling by this court in proceedings to which WPV were not a party.

23. It is common ground, and well established, that although the interests of each of the subscribing insurers to a particular policy are the same, their obligations to indemnify are several rather than joint (see, e.g., *Irish Shipping Ltd v Commercial Union Assurance Co Plc* [1991] 2 QB 206, 222, 227-228, 239-240; *Emerald Supplies Ltd v British Airways plc* [2010] EWCA Civ 1284; [2011] Ch 345, § 48; see also Marine Insurance Act 1906 section 24(2): “Where a policy is subscribed by or on behalf of two or more insurers, each subscription, unless the contrary be expressed, constitutes a distinct contract with the assured”).
24. Equally, I understand Textainer to accept that where an insurer is entitled by way of subrogation to recoveries which the insured has made against the loss, the mere fact that other insurers have subscribed to the same particular policy (e.g. the subscribers to the Primary Policy in the present case), and so would have equivalent claims as to their respective percentages, does not mean that the insurer is pursuing a joint claim requiring all insurers on the same policy layer to be joined pursuant to CPR 19.3.
25. The problem arises, Textainer say, from the existence here of the different layers of cover in the present case and the relief sought in the Particulars of Claim, notably §§ 24 and 26 (which I quote below in the currently proposed amended form):

“24. That is, until such full reimbursement is received by the subscribing insurers, the Recoveries shall be allocated in the following proportions, or in such other proportions as the Court may determine:

- (1) To RSA, those they represent and Westfälische Provinzial Versicherung AG under the Primary Policy in the proportions underwritten by each of the subscribing insurers: 10%
- (2) To the subscribing insurers, including RSA and XL, under the First Excess Policy in the proportions underwritten by each of the subscribing insurers: 10%

(3) To RSA and TT Club under the Second Excess Policy in the proportions underwritten by each of the subscribing insurers: 10%

(4) To IGI and HDI under the Third Excess Policy in the proportions underwritten by each of the subscribing insurers: 50%

(5) To Textainer, as the assignee of XL, under the Fourth Excess Policy: 20%

...

26. In the premises, the Claimants and those they represent in the proportions underwritten by each of the subscribing insurers are entitled to the following relief:

(1) A declaration that pursuant to the Recoveries Condition of the Policies, there is an equitable lien over the Recoveries insofar as they have been received by Textainer in favour of the subscribing insurers to the Primary, First Excess, Second Excess and Third Excess Policies, including the Claimants and those they represent, and the said subscribing insurers, including the Claimants and those they represent, are entitled to the benefit of the Recoveries and shall be paid the Recoveries upon Textainer's receipt of the Recoveries, until the said subscribing insurers, including the Claimants and those they represent, are fully reimbursed for the indemnities paid by them under the Policies, and that upon such full reimbursement, Textainer is entitled to the balance of the Recoveries.

(2) A declaration that the Recoveries shall be allocated to the subscribing insurers, including the Claimants and those they represent, under the Primary, First Excess, Second Excess and Third Excess Policies and to Textainer insofar as Textainer is an assignee of XL's rights to the Recoveries under the Fourth Excess Policy, until such subscribing insurers' indemnity payments have been fully reimbursed.

(3) A declaration that until such full reimbursement is received by the subscribing insurers, the Recoveries shall be allocated in the proportions set out in paragraph 24 above, or in such other proportions as the Court may determine.

(4) Pursuant to the Subrogation and Mitigation Condition of the Policies, the Claimants and those they represent are entitled to be informed about and receive accounts relating to the Recoveries received and to be received by Textainer and agreed to be received by Textainer.

(5) If and insofar as Textainer has received the Recoveries, an order that the said Recoveries shall be paid to the subscribing insurers to the Primary, First Excess, Second Excess and Third Excess Policies, including the Claimants and those they represent, until the subscribing insurers are fully reimbursed in respect of the indemnity payments made under the Primary, First Excess, Second Excess and Third Excess Policies, in the proportions set out in paragraph 24 above.

...”

26. As noted earlier, the Fourth and Fifth Excess layers were the subject of settlement agreements between the Textainer and the relevant insurers, containing the waiver provisions quoted above. There is a dispute about how those provisions, and the Recoveries Condition in the policies, impact on the recoveries to which different layers of insurers are entitled. Particulars of Claim § 24 sets out the particular division of entitlements for which the Claimants contend, but is denied by Textainer, who put forward a different approach to the allocation of recoveries. Textainer’s case on this point is that, on a proper construction of the Recoveries Condition and the settlement agreements, all sums recovered by Textainer are to be allocated on a ‘top down’ basis, under which:
- i) Textainer is entitled to retain recoveries up to the amount by which its losses exceeded the total cover provided by all the policies (together with Textainer’s retention);
 - ii) Textainer is thereafter entitled to retain for its own account the sum of US\$4.9 million claimed by Textainer but not in fact indemnified by the Fifth Excess (or any) insurer;
 - iii) Textainer is thereafter entitled to retain any further recovery in respect of losses (other than lost earnings) up to the amount of US\$25.1 million, the amount paid by the Fifth Excess insurer: since, Textainer says, their right to recover that sum was waived in favour of Textainer;
 - iv) Textainer is thereafter entitled to retain any further recovery in respect of losses up to the amount of US\$10 million, the amount paid by the Fourth Excess insurers: since, Textainer says, their right to recover that sum was waived in favour of Textainer; and
 - v) if there were to be any recovery over and above the sums set out above, then the next US\$25 million, being the amount paid by the Third Excess insurers, would be allocated to those insurers.
27. Thus the Claimants’ and Textainer’s cases not only involve a different split in the allocation of recoveries as between the insurers and the insured: they also differ in terms of the allocation as between different layers of insurers. Hence, Textainer submit, each insurer subscribing to a given layer – most relevantly, the Primary Policy – has a joint interest in obtaining the court’s decision (by way of orders for declaratory and/or monetary relief) as to what that split is. For example, if, as the Claimants assert, the Primary Policy insurers are entitled to 10% of the recoveries, then WPV are entitled to

the relief sought in Particulars of Claim § 26(1) jointly with those existing Claimants who subscribed to the Primary Policy. A particular illustration of the point is the Claimants' claim in § 26(1) that they are entitled to an equitable lien over the recoveries. Although individual insurers are entitled to separate liens, insurers in each layer have a joint interest in identifying, via this action, on which amounts the lien bites.

28. Equally, Textainer say they need to know that all insurers – including the currently non-participating primary layer insurer WPV – will be bound by the court's determination as to what percentage of recoveries the Primary Policy insurers are entitled to. There can be only one correct answer to that question, and the answer given for any one layer implicitly affects the answer for any other layer. The Claimants advance a case that defines and circumscribes the entitlement of Primary Policy insurers, who include WPV. If WPV were entitled to bring a separate claim on a different basis, Textainer might find they were liable to pay the same sum twice over to insurers in different layers. The Court of Appeal in *Roberts v Gill & Co* [2008] EWCA Civ 803 § 30 noted that "*The principal reason for joinder of the company, body corporate, trade union, trustees, assignor or joint owner is to bind those persons so that there cannot be any further claim based on the same cause of action.*" Textainer say those considerations apply equally here.
29. A further issue arose from the formulation of the relief sought in Particulars of Claim §§ 26(1), (2) and (5). As currently drafted, some parts of these paragraphs could be read as seeking orders for the payment of money (and/or declaratory relief) that would accrue to benefit of WPV. So long as WPV are not parties to the action, it is difficult to see how WPV could in reality benefit from or be bound by any such relief. Nonetheless, it might be argued that relief granted to the Claimants who subscribe to the Primary Policy but in respect of the entitlements of WPV should be regarded as relief to which WPV have a joint entitlement. (An alternative view might be that there is no joint entitlement because the Claimants are themselves not entitled to relief as regards the entitlements of WPV.) It is not, however, necessary to grapple with this question because counsel for the Claimants made clear during the hearing that the relevant parts of the Particulars of Claim will be further revised so as to avoid relief being purportedly claimed in favour of WPV.

(D) ANALYSIS

30. The White Book contains little commentary on CPR 19.3 and none of relevance to the present case. The parties were unable to find any authority directly shedding light on the point in issue. *Roberts v Gill*, to which I referred earlier, did not concern CPR 19.3, though the following passages might be thought to provide examples of common situations where a joint entitlement for CPR 19.3 purposes would exist:

"29. In the case of a derivative claim brought by a member of a company, body corporate or trade union, the rules specifically provide that the company, body corporate or trade union should be joined as a defendant (CPR 19.9(3)). This does not mean that the company, body corporate or trade union needs to take an active part in the proceedings. On the contrary, because the claimant is the driving force in the litigation, it will only be a nominal defendant. Joinder of the trustees (as nominal defendants) is also the practice where a beneficiary of a trust

brings a derivative claim: see Lewin , para. 45–05 cited in [14] above, or where the beneficiary of a contract brings a claim: *Vandepitte v Preferred Accident Insurance Corporation of New York* [1933] AC 70 at 79 per Lord Wright; *Harmer v Armstrong* [1934] Ch 65 at 88 per Lawrence LJ. Similarly, when an equitable assignee of a chose in action sues to enforce it, then unless there was some reason such as collusion between the debtor and the assignor or that all the parties otherwise agree, the legal owner of the chose in action also had to be joined. By way of further example, where a claimant claims a remedy to which some other person is jointly entitled with him, all persons jointly entitled to the remedy must be parties unless the court orders otherwise (CPR 19.2). Furthermore, in a debenture holder's action, all the trustees must be made defendants if they are not the plaintiffs: see Palmer's Company Precedents Part III, Debentures and Debenture Stock (16th edition) (1952) page 481.

30. The principal reason for joinder of the company, body corporate, trade union, trustees, assignor or joint owner is to bind those persons so that there cannot be any further claim based on the same cause of action. Thus in *Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1 at 14, where the plaintiff society was an equitable assignee suing its own name, Viscount Cave L C. said:

“That an equitable owner may commence proceedings alone, and may obtain interim protection in the form of an interlocutory injunction is not in doubt; and is, I think, the rule of the Supreme Court, that, in general, when a plaintiff has only an equitable right in the thing demanded, the person having the legal right to demand it must in due course be made, a party to the action: Daniells' Chancery Practice (7th ed), Vol 1, p 172. If this were not so, a defendant after defeating the claim the equitable claimant might have to resist like proceedings by the legal owner or by persons claiming under him as assignees for value without notice of any prior equity, and proceedings might be indefinitely and oppressively multiplied. No doubt the rule does not apply to a mortgagor at least since the passing of section 25(6) of the Judicature Act 1873; and there may be special reasons, where, it will not be enforced as in *William Brandt's Sons & Co v Dunlop Rubber Co* [1905] AC 454, where the defendant disclaimed any wish to have the legal owners made parties.”

31. In *Re AMT Coffee Ltd* [2018] EWHC 1562 (Ch), HHJ Paul Matthews (sitting as a Judge of the High Court) said, after quoting CPR 19.3:

“Paragraph 59 35 of Williams Mortimer and Sunnucks on Executors Administrators and Probate exemplifies paragraph (2) of that rule, in saying that:

“Where one of two or more executors or administrators refuses to join as claimant or is unable to join as having an interest in the subject matter inconsistent with his position as claimant, the other or others can still bring the claim making the executor who refuses to join a defendant.” (§ 22)

The judge added that, having regard to CPR 3.10, “*if a cause of action belonging to two or more persons jointly is sued on by one only (or by fewer than all), and the other or others are not made defendants, the proceedings are not invalid (unless the court so orders) and the court may remedy the error if it thinks fit. In other words, it is an irregularity, rather than a nullity*” (§ 24). That was common ground in the present case.

32. Approaching the matter as one of principle, the starting point is that the fact that an insurer who is not a party to legal proceedings has the same interest as a claimant, and so could seek the same relief (declaratory or monetary) as the claimant does against the defendants in relation to the non-party’s own participation in the insurance policy – i.e. the non-party’s own parallel contract of insurance with the insured – does not mean that the claimant is claiming a remedy to which the non-party is “*jointly entitled*”. Further, the possibility of the non-party later bringing a separate action is inherent in any such situation, where a claim is brought by a participant who has taken a line on an insurance policy, but that does not *per se* bring the situation within CPR 19.3.
33. Hence, Textainer accepts that if there were only one relevant layer of insurance in the present case, to which a number of insurers had subscribed, the fact that those insurers had a common interest in some issue being determined as between them and the insured would not mean that they were jointly entitled within CPR 19.3 to the relief sought. Textainer is in my view right to accept that proposition: the Primary Policy subscribers’ legal entitlements are several, and their common interest in seeking a particular remedy to vindicate those entitlements does not mean that they are in any relevant sense jointly entitled to the remedies sought.
34. Equally, the fact that individual insurers on a policy layer may each become entitled, after paying out under the policy, to an equitable lien over recoveries does not give rise to a joint entitlement requiring joinder under CPR 19.3. Each insurer becomes entitled to a separate lien to the extent of its own participation: cf *Dornoch v Westminster International BV (The “WD Fairway”)* [2009] EWHC 889 (Admlty) §§ 58-61 (Tomlinson J), holding that when 85% of the claimants and 77.5% of the primary underwriters paid out in respect of a total loss and elected to take over the vessel, pursuant to 79(1) of the Marine Insurance Act 1906, the electing underwriters became co-owners of the vessel, together with the assured, in their respective proportions.
35. The position seems to me no different where there is an issue not between insurers and insureds, but between insurers on different layers. If, for example, there were only a single insurer on each layer in the present case, and issues arose as to the allocation of recoveries between the insured and the various policy layers (including issues as between the various layers *inter se*), then the insurers could not be regarded as claiming a remedy to which they were jointly entitled. On the contrary, they would have potentially competing entitlements to the same money. The fact that they might share an interest in obtaining a court decision as to how the money should be allocated would not mean that they were jointly entitled to any such remedy. (By way of loose analogy,

where a claim is made to a sum of money held by a stakeholder, to which a competing claim exists, the court may direct that the other potential claimant be joined to the action as a defendant. The claimant is not, however, required to join the competing prospective claimant under CPR 19.3 on the footing of joint entitlement.)

36. The question is then whether it makes any difference that there exist in the present case both (a) issues as to the allocation of recoveries between different layers of insurance and (b) multiple insurers subscribing to the layer to which the existing Claimants have subscribed (relevantly, the Primary Policy). In my view it does not. The position remains that each individual insurer is suing for a several entitlement. The fact that it may have a common interest with non-participating insurers in obtaining a remedy to vindicate its entitlement *qua* subscriber to that layer (vis a vis both the insured, and the insurers on other layers) does not render it jointly entitled to that remedy with the non-participating insurer. It remains no more than a “*same interest*” situation, in which the existing Claimants would be entitled, but not bound, to apply to represent the non-participant under CPR 19.6. In my view, the concept of joint entitlement under CPR 19.3 refers to claims which are jointly held as a matter of law, such as the examples referred to in *Roberts v Gill* and *Re AMT Coffee* of claims by equitable assignees or by executors. There may also be cases of contractual obligations owed to joint promisees. The concept does not in my view to extend to situations where an entitlement to a remedy could be described as ‘joint’ only in the sense that the grant of a remedy, in which a claimant and a non-party share the same interest, would expressly or impliedly delimit and settle their legal positions vis a vis other parties to the proceedings (whether claimants or defendants) or other persons with an interest in the subject-matter of the proceedings.
37. It follows that, whilst there may well be a compelling reason for Textainer to wish to join WPV to the action in the interests of finality and consistency, I do not consider the Claimants’ own failure to do so means that the action is improperly constituted contrary to CPR 19.3.

(E) CONCLUSIONS

38. For these reasons, I conclude that RSA should be granted the permission it seeks pursuant to CPR 19.6; and, further, that (subject at least to the further amendments to the Particulars of Claim mentioned in §29 above) the action is not improperly constituted pursuant to CPR 19.3