

Neutral Citation Number: [2021] EWHC 225 (Comm)

Case No: CL-2020-000871

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

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

Date: 2 February 2021

Before :

Mr Justice Calver

Between :

AXIS Corporate Capital UK II Limited & Ors

Claimant

- and -

ABSA Group Limited & Ors

Defendant

**Peter MacDonald Eggers QC and Sandra Healy (instructed by Reynolds Porter
Chamberlain LLP) for the Claimant**

Hearing dates: **2nd February 2021**

APPROVED JUDGMENT

Mr Justice Calver
(3.32 pm)

Tuesday, 2 February 2021

Judgment by **MR JUSTICE CALVER**

The Applications

1. This is an application by the claimants ("the Reinsurers") for three things: (1) an interim anti-suit injunction; (2) permission, insofar as it is necessary to obtain permission, to serve the claim form and other associated documents on the defendants out of the jurisdiction; and (3) permission to serve the claim form and other documents on the defendants by alternative means. Mr MacDonald Eggers QC and Ms Sandra Healy appear for the claimants on these applications.
2. The application for an anti-suit injunction is made on an urgent basis and formally without notice; in fact, five days ago, on 28 January 2021, the Reinsurers notified the defendants' South African solicitors, Allen & Overy, by email of this application, invited them to attend this hearing and enclosed the claim form, particulars of claim and the application documents. Allen & Overy replied on behalf of the defendants on 29 January, but they declined the invitation to attend, in view of what they termed the complex jurisdictional issues and the scope of the issues before the court. Allen & Overy stated that the defendants nonetheless fully intended to oppose the relief sought in due course.
3. The Reinsurers say that the application is urgent, because they will have to file a defence and application to challenge jurisdiction by 12 February 2021 in proceedings which are being pursued by the defendants against them in South Africa. If the injunction is granted and complied with by the defendants, then the Reinsurers say they will be spared the costs of the South African proceedings.
4. I consider the procedure adopted by the claimants to have been entirely appropriate, and that their application was indeed made promptly.
5. As Lord Justice Christopher Clarke stated in *Ecobank v Tanoh* [2015] EWCA Civ 1309 at paragraph 133:

6. "Injunctive relief may be sought (a) before any foreign proceedings have begun; (b) once they have begun; (c) within a relatively short time afterwards; (d) when the pleadings are complete; (e) thereafter but before the trial starts; (f) in the course of the trial; (g) after judgment. The fact that at some stage the foreign court has ruled in favour of its own jurisdiction is not per se a bar to an anti-suit injunction ... But, as each stage is reached more will have been wasted by the abandonment of proceedings which compliance with an anti-suit injunction would bring about. That being so, the longer an action continues without any attempt to restrain it the less likely a court is to grant an injunction and considerations of comity have greater force."
7. The Reinsurers also make an application for permission to serve out of the jurisdiction, which is necessarily made without notice, and they also seek an order for alternative service on the defendants because they say if that is not granted, there will be significant and unnecessary delay until the application notice is formally served in South Africa, it taking up to 12 months to formally serve documents in South Africa.
8. Finally, the particulars of claim have been amended prior to service in order to make minor corrections to CPR 17.1. As a result of the amendments, the amended particulars of claim are now 26 pages. I give permission to exceed the limits stated in the Commercial Court guide, paragraph C1.2(a).
9. So those are the applications before me.

Factual background to the applications

10. The background to these applications is as follows.
11. The Reinsurers reinsured ABSA Manx, and ABSA Manx, a captive insurer, insured ABSA Group, ABSA Bank and ABSA Nominees under primary, first excess, second excess and aggregate retention policies of reinsurance for the 2008-2009 year and the 2009-2010 year, reinsuring professional indemnity risks.

12. I am told by Mr MacDonald Eggers QC that the retention was 30 million rand; the primary layer, 100 million, excess of 30 million; the first excess, 250 million, excess of 100 million; and the second excess, 650 million, excess of 350 million rand. In the proceedings in South Africa, which I will come on to, 527 million rand is claimed and therefore the claim clearly impacts the second layer.
13. ABSA Bank was at all material times trustee and/or custodian of CMM Cash Management Fund ("the CMF"), forming part of a collective investment scheme originally called the M Cubed Unit Trust Scheme, which was later named the Ayanda Collective Investment Scheme.
14. During the period that ABSA Bank acted in that role, Corporate Money Management Pty Limited ("CMM"), the portfolio manager of the CMF, invested monies in illiquid promissory notes. ABSA Bank and/or ABSA Investor Services repeatedly raised concerns about the management of the Ayanda management company, particularly with regard to there being little or no compliance at Ayanda and in relation to CMM's investment in non-rated promissory notes.
15. By 1 April 2009, the claimants say that ABSA Bank was warned that the CMF was 85% invested in illiquid securities in the form of promissory notes, very substantially in excess of the limits imposed by the relevant regulatory framework that governed the CMF. ABSA Bank reported this irregularity to the Financial Services Board of South Africa on 1 April 2009. On 3 April 2009, the CMF was closed and shortly thereafter Ayanda applied to the Financial Services Board to wind up the CMF.
16. Since then, claims have been made by investors against ABSA Bank for loss and damage suffered as a result of ABSA Bank's negligence and/or breach of statutory duty in its role as trustee and/or custodian of the CMF. Those are the underlying claims.
17. The ABSA defendants allege that each of the underlying claims has been settled, and they now seek an indemnity from the Reinsurers in respect of those settlements, as is apparent from the particulars of claim in the South African proceedings.

18. In pre-action correspondence in June 2019, the defendants gave the impression that they would sue the claimants in England; in particular, on 30 May 2019, Allen & Overy sought confirmation that the claimants' solicitors, RPC, were instructed to accept service on behalf of the claimants, the Reinsurers, but no mention was made of the jurisdiction concern. In response, on 13 June 2019, the Reinsurers' solicitors confirmed that it was "instructed to accept service of proceedings issued before the English High Court in accordance with the jurisdiction agreements in the policies".
19. Despite that, some 18 months later, on or about 23 November 2020, the defendants in fact commenced proceedings in South Africa against the Reinsurers, seeking an indemnity and declarations of entitlement to indemnity under certain of the reinsurance contracts in respect of liabilities and costs allegedly incurred by them in respect of the underlying claims. The Reinsurers were made aware of the South African proceedings on 4 December 2020, according to the first witness statement of Mr Gold, paragraph 46, and his first witness statement is before me on this application.
20. I should at this point just refer to what Mr Gold says in paragraph 47 of his witness statement, served on behalf of the Reinsurers on this application, which is as follows:
21. "There are two points to note regarding the defendants named in the South African proceedings. First, the party name in respect of each of the Lloyd's syndicate Reinsurers is stated to be the syndicate itself, and details of the managing agents are stated in the summons and particulars of claim. However, for these defendants, the affected defendant is in fact the entity named in these proceedings, i.e. the members of the syndicate suing on their own behalf alone or on behalf of themselves and on behalf of other members of the syndicates. I am informed by the Reinsurers' South African solicitors, Clyde & Co, whom the Reinsurers appointed shortly after I received the South African proceedings on 4 December 2020, that the correct defendants, i.e. the entities named as claimants in respect of the Lloyd's Reinsurers in these proceedings, are likely to be substituted in due course, either by agreement or with the leave of the court."

22. In South Africa, the defendants have simultaneously served a summons and particulars of claim. The Reinsurers have served a notice of intention to defend, which I am told does not amount to a submission to the jurisdiction. The date for filing the defence is 12 February 2021, which is also the date by which any challenge to the jurisdiction of the South African court must be made.
23. On 30 December 2020, the Reinsurers commenced these proceedings before the English court, seeking declarations that they are not liable to indemnify the defendants under the reinsurance contracts. The basis for these declarations is set out in the amended particulars of claim, paragraphs 68 to 71. In essence, it is as follows.
24. Firstly, the Reinsurers are not liable to indemnify the defendants, or any of them, under the 2009/2010 reinsurances, as alleged in the South African proceedings, and/or under the 2009/2010 aggregate retention reinsurance ("the ARR"), by reason of the operation of general exclusion 1(c), which excludes cover for losses or claims where a designated person was aware of a circumstance or occurrence which would cause a reasonable person to assume that a third-party claim covered by the reinsurances could be made, and if they were not disclosed to the Reinsurers at inception.
25. Secondly, the Reinsurers are not liable to indemnify the defendants, or any of them, under the 2008/2009 reinsurances, as alleged in the South African proceedings, and/or under the 2008/2009 ARR, because the underlying claims were not first made and are not deemed to have been first made during the policy year of the 2008/2009 reinsurances and the 2008/2009 ARR.
26. In addition to the negative declaratory relief that I have just referred to, the Reinsurers also seek a final anti-suit injunction intended to make permanent the anti-suit injunction that they seek on an interim basis on this application, as well as a declaration with respect to jurisdiction for any disputes between the Reinsurers and the defendants arising in relation to the reinsurance contracts.
27. Coming first to the application for interim anti-suit relief, the Reinsurers' application for an interim anti-suit injunction is made pursuant to the court's power to grant such relief under section 37(1) of the Senior Courts Act 1981 and/or under the court's inherent jurisdiction. It is the Reinsurers'

primary case here that the South African proceedings are in breach of exclusive jurisdiction agreements contained in the reinsurance contracts, and that an interim anti-suit injunction ought to be granted because there are no strong reasons not to grant such relief.

28. I should mention at the outset that if it is established by the claimants that the reinsurance contracts contain jurisdiction agreements within the scope of article 25 of the Brussels Regulation, such as an English choice of court clause, then the English court is bound to entertain jurisdiction. This remains the case after the UK's exit from the EU in respect of claims commenced before 11 pm on 31 December 2020, and these proceedings were issued on 30 December 2020.

The legal principles

29. Coming to the legal principles in contractual cases, the court has the power under section 37(1) of the 1981 Act to grant an anti-suit injunction restraining foreign proceedings where they are issued in breach of an exclusive jurisdiction agreement: see *The Angelic Grace* [1995] 1 Lloyd's Rep 87 and *AES Ust-Kamenogorsk v Ust-Kamenogorsk JSC* [2013] UKSC 35.

30. The burden rests upon the claimant to satisfy the court, on the material adduced at the interlocutory hearing, that there is a high degree of probability that there is a binding and applicable exclusive jurisdiction agreement: see *Emmott v Michael Wilson & Partners Ltd* [2018] EWCA Civ 51. If the claimant can do so, the court will ordinarily exercise its discretion to grant an anti-suit injunction to restrain a party from commencing or continuing with foreign proceedings in breach of the exclusive jurisdiction agreement, unless the defendant can show strong reasons why the injunction should not be granted. Again, *The Angelic Grace* and the *AES* cases are authority for that proposition. It follows that the burden falls at that stage upon the defendant to prove strong reasons.

31. Where an anti-suit injunction may result in a material injustice to the injunction respondent, that may amount to a strong reason not to grant the injunction, but only in circumstances where the material injustice arises from a matter which is not a foreseeable consequence of the exclusive

jurisdiction agreement. Cases where such a material injustice has amounted to a strong reason in the face of an exclusive jurisdiction agreement include, by way of illustration, those where the respondent's substantive claims would be time barred before the contractual forum, but only where the respondent has acted reasonably in not commencing in the contractual forum proceedings before the time bar.

32. In contractual cases, forum conveniens considerations are irrelevant to the exercise of the discretion to grant an anti-suit injunction. Those sorts of considerations are not sufficient to amount to strong reasons against the grant of an injunction, because the parties can be taken objectively to have foreseen considerations of relative convenience or inconvenience of forums for dispute resolution at the time of contracting, and they are therefore encompassed by the parties' agreement.
33. Furthermore, comity has little, if any, role to play where the court is considering whether to exercise its discretion in contractual cases, save of course for considerations of any delay in seeking the anti-suit relief. The court's concern is always in such cases to uphold the parties' bargain, absent strong reasons to the contrary.
34. If, contrary to the Reinsurers' primary case, there is no exclusive jurisdiction agreement in the reinsurance contracts, or some of them, then the Reinsurers submit that an interim anti-suit injunction ought to be granted nonetheless on grounds that the South African proceedings are vexatious, oppressive and/or unconscionable. Where there is no exclusive jurisdiction agreement, an anti-suit injunction will generally be granted to restrain foreign proceedings where the following three requirements are met: (1) the foreign proceedings are vexatious, oppressive or unconscionable; (2) the English court is the natural forum for the trial of the action; and (3) it is in the interests of justice to grant the anti-suit injunction.

Application of legal principles to the facts of this case

The proper construction of the jurisdiction clauses

35. Coming to the reinsurance contracts in this case, each of the reinsurance contracts is expressed to be governed by English law, and indeed that, as Mr MacDonald Eggers showed me in oral argument, appears to be accepted by the defendants in the South African proceedings. However, the provisions regarding jurisdiction are not identical across the three reinsurance contracts and are somewhat poorly worded; apparently by Aon, the broker for the reinsurances.

36. The primary reinsurances contain the following provision:

"Any disputes concerning the interpretation of the terms, conditions, limitations and/or exclusions contained in this policy is understood and agreed by both the Reinsured and the Reinsurers to be subject to England Wales Law. Each party agrees to submit to a worldwide jurisdiction and to comply with all requirements necessary to give such court jurisdiction."

37. The excess reinsurances contain the following provision:

"Any dispute concerning the interpretation of the terms, conditions, limitations and/or exclusions contained in this policy is understood and agreed by both the insured and the insurers to be subject to England and Wales. Each party agrees to submit to the jurisdiction of England and Wales to comply with all requirements necessary to give such court jurisdiction. In respect of claims brought against the Insured and indemnified under this policy, as more fully described herein, the choice of law applicable is Worldwide and the choice of jurisdiction is Worldwide."

38. Thirdly, the ARR contains the following two provisions:

"Supplemental Clauses ...

"Policy Interpretation, Jurisdiction and Service of Suit Clause."

And then:

"Choice of Law and Jurisdiction."

"Any dispute concerning the interpretation of the terms, conditions, limitations and/or exclusions contained in this policy is understood and agreed by both the (re)insured and the (re)insurers to be subject to England and Wales. Each party agrees to submit to the jurisdiction of Worldwide to comply with all requirements necessary to give such court jurisdiction."

39. The policy interpretation, jurisdiction and service of suit clause, which is specifically referred to as a supplemental clause, provides as follows and was contained in a schedule:

"Any dispute between the Reinsured and the Reinsurer alleging that payment is due under this reinsurance shall be referred to the jurisdiction of the courts of the England and Wales and the meaning of this reinsurance policy shall be decided by such courts in accordance with the law of England and Wales."

40. The claimant submits that, on the proper construction of the reinsurance contracts, the defendants were obliged to submit to and to submit any dispute arising under or in connection with any of the reinsurances contracts to the exclusive jurisdiction of the English courts.

41. On this application, the claimants have satisfied me, on the material adduced at this interlocutory hearing, that there is indeed a high degree of probability that there is a binding and applicable exclusive jurisdiction agreement in favour of the courts of England and Wales in respect of each of the reinsurances.

42. It is important to appreciate that the court is here concerned with a reinsurance programme, or a tower of reinsurances, consisting of the primary, excess and aggregate retention reinsurances. The excess reinsurances and the aggregate retention reinsurances effectively sandwich the primary reinsurances.

The ARR

43. Taking them in turn, so far as the ARR jurisdiction clause is concerned, that clause contains the clearest wording in favour of the jurisdiction of the English courts, albeit that there is no claim being made under those reinsurances in South Africa.

44. So far as the choice of law and jurisdiction wording of the ARR is concerned, that, it seems to me, certainly appears objectively to be intended to ensure that the English court has jurisdiction over any dispute under the reinsurance and that all courts worldwide should ensure that that is so.
45. In any event, the policy interpretation, jurisdiction and service of suit clause, which the parties specifically added as a supplemental clause, makes clear, in my judgment, that the parties intended the jurisdiction of the English courts to apply to their disputes.
46. There is a strong case, in my judgment, for saying that here the parties have expressly addressed their minds to the question of which court has jurisdiction over any disputes under the ARR, and that the express requirement for disputes to be referred to the courts of England and Wales creates a positive obligation to pursue claims exclusively before the courts of England and Wales: see *Generali Italia SpA v Pelagic Fisheries Corporation* [2020] EWHC 1228.
47. The policy interpretation, jurisdiction and service of suit clause, it seems to me, can be read perfectly consistently with the choice of law and jurisdiction clause. In any event, even if that were not so, I consider that the service of suit clause has the higher contractual status, as Mr MacDonald Eggers submits, and, accordingly, effect should be given to it.

The Excess Reinsurance

48. Secondly, the excess reinsurance jurisdiction clause. In my judgment, there is also a strong case for finding that the excess reinsurances contain exclusive English jurisdiction agreements, even though the word "exclusive" is not used. I do consider, on the materials that I have seen, that that is the proper construction of the excess reinsurance jurisdiction clause.
49. The language of the relevant clause is in transitive or positive terms, in that it can connote a sense of obligation to sue in the jurisdiction of England and Wales, rather than merely an agreement not to object to that jurisdiction. That sense, it seems to me, and I agree with the claimants on this, is

conveyed by the placement of the sentence containing the jurisdiction agreement immediately after the sentence containing the choice of law agreement, which is express to apply to:

"Any dispute concerning the interpretation of the terms, conditions, limitations and/or exclusions contained in this policy is ... to be subject to England and Wales."

50. The reference to England and Wales must be a reference to English and Welsh law.
51. That is significant for two reasons: first, there is a sense of obligation in rendering any dispute subject to English law; secondly, the jurisdiction agreement which follows immediately after that sentence indicates that it will be applicable to such disputes, and that such disputes must be subject to English jurisdiction. In that sense, the parties agree to submit to English jurisdiction.
52. Secondly, the requirement for the parties to comply with all requirements necessary to give the court jurisdiction, which is the second sentence of the clause, again indicates an intention to go beyond a requirement merely not to object to the court's jurisdiction.
53. So far as the third sentence of the clause is concerned, which the defendants appear to have put some weight upon in South Africa, that reads as follows:
- "In respect of claims brought against the Insured and indemnified under this policy, as more fully described herein, the choice of law applicable is Worldwide and the choice of jurisdiction is Worldwide."*
54. I agree with Mr MacDonald Eggers that that clause, as I presently see it, in fact supports the Reinsurers' argument, in terms of its contrast with the second sentence. As he submits, the juxtaposition of the submission of the parties to the jurisdiction of England and Wales in the second sentence, and then the carve-out of worldwide jurisdiction, which is non-exclusive, for claims brought against the insured and indemnified under the excess reinsurances which we see in the third sentence, suggests to me that the intention was for all other claims -- that is, those which are within the scope of the second sentence -- to be subject to the exclusive jurisdiction of England and Wales.

55. In any event, the fact that English law has been chosen as the governing law of the excess reinsurances is a strong indication that the parties intended that the express choice of English jurisdiction would indeed be exclusive. Mr MacDonald Eggers took me to a number of authorities to make that point good. It is only necessary to refer to *Sohio Supply v Gatoil (USA)* [1989] 1 Lloyd's Reports 588, 591-592; *British Aerospace Plc v Dee Howard* [1993] 1 Lloyd's Reports 368, 375; and *CSAV v Hin-Pro International Logistics Ltd* [2015] EWCA Civ 40 [63].

56. Of course, independently of those points, article 25.1 of the Brussels Regulations Recast creates a presumption on current English authority that a jurisdiction clause falling within its scope is an exclusive jurisdiction, because it provides that the jurisdiction granted by that provision shall be exclusive unless the parties have otherwise agreed. I agree with the approach adopted by Mr Justice Foxton in the *Pelagic Fisheries Corporation* case, where at paragraph 92, the learned judge said this:

"The Jurisdiction Condition would ordinarily have the effect of conferring exclusive jurisdiction on the English courts, providing a single and certain jurisdiction in which all parties were required to bring claims."

57. I should say that the clause in that case read:

"English Jurisdiction. Subject to English Law and practice."

58. Continuing with the quotation, Mr Justice Foxton said:

"This is so both because of the presumption of exclusivity arising under Article 25 of Brussels I Recast ... and because the choice of English law in conjunction with the reference to English jurisdiction is a powerful factor in favour of construing the choice of English jurisdiction as exclusive (Global Maritime Investments Cyprus Limited v OW Supply & Trading ...)."

The primary reinsurances

59. Thirdly, coming to the primary reinsurances, as I have mentioned, in view of the jurisdiction provisions in the excess reinsurances and the aggregate retention reinsurances, which policies effectively sandwich the primary reinsurances, I accept the argument that, upon the true construction of the primary reinsurances, where a claim has impacted or would impact the excess reinsurances and/or the aggregate retention reinsurances as well as the primary reinsurances, the Reinsurers and defendants are obliged to submit to and to submit any dispute arising under or in connection with the primary insurances to the exclusive jurisdiction of the courts of England and Wales, and/or in the same jurisdiction in which any proceedings relating to the excess reinsurances and the aggregate retention reinsurances are legitimately brought; that is, within the exclusive jurisdiction of the courts of England and Wales.
60. Mr MacDonald Eggers QC puts his case also on the basis of an implied term, which is certainly arguable, although in my judgment the right analysis would be to find that this is so upon the true construction of the primary reinsurances, on the basis that that must have been the objective intention of all parties, applying business common sense, at the time when the tower of cover was put in place.
61. The consequence of this analysis is that the defendants are obliged to submit to and to submit any dispute arising under or in connection with the reinsurance contracts to the exclusive jurisdiction of the English courts. Indeed, once it is established that the reinsurance contracts, or any of them, contained jurisdiction agreements within the scope of article 25.1 of Brussels Recast, then, as I have said, the English court is bound to entertain jurisdiction.
62. The last point in this respect that I should mention is that ABSA Group, ABSA Bank and ABSA Nominees' claims in the South African proceedings are brought as contractual claims under the 2009/2010 reinsurances, alternatively the 2008/2009 reinsurances, and then alternatively under section 1 of the Contracts (Rights of Third Parties) Act 1999. On each of these bases, they are

effectively seeking to exercise the rights of the reinsured, ABSA Manx. On any of these bases, the jurisdiction agreements are enforceable against the defendants. They cannot take the benefit of those contracts without also subjecting themselves to the exclusive jurisdiction clauses.

63. Similarly, if the defendants have rights as third parties to the reinsurance contracts derived from the 1999 Act, they are bound by the jurisdiction clauses within the reinsurance contracts when they assert rights under those contracts, which they have done by commencing suit in South Africa.

England is in any event the clearly the proper forum

64. Assuming for present purposes that the primary reinsurances do not contain exclusive jurisdiction clauses, although I consider on the materials that I have seen that they do, then there is in any event, it seems to me, a strong case for finding that England is clearly the more appropriate forum for the trial of the disputes under the reinsurance contracts, and each of them, than any other jurisdiction. The following factors support this conclusion.

65. Firstly, the reinsurance contracts are indisputably, it seems to me, governed by English law. As Lord Justice Christopher Clarke said in the *CSAV v Hin-Pro* case at paragraph 66:

"... there is obvious sense in making both English law and English jurisdiction mandatory. Whilst foreign courts may (but will not necessarily) apply English law if that is what the parties have agreed, England is the best forum for the application of its own law."

66. That is the particularly strong consideration, in my judgment, in the present circumstances, as this dispute concerns reinsurance contracts written predominantly on the London market, brokered by London brokers, Aon.

67. Furthermore, the issues raised in this dispute, at least to date, concern the proper construction of those contracts, in particular general exclusion 1(c) and general condition 5(c). Those sort of arguments about the construction of those clauses will clearly benefit from consideration by a

jurisdiction which is the most familiar with existing authority on the interpretation of contracts of that type.

68. I also agree that it strongly appears on the evidence before this court that the excess reinsurances and/or the ARR are subject to exclusive English jurisdiction agreements, requiring the parties to submit their disputes to the English court and the English court is bound to accept jurisdiction over those disputes.

69. An important factor is that it would obviously be convenient if all disputes under the reinsurance contracts are dealt with and determined in one jurisdiction, rather than being fragmented over two jurisdictions. That is particularly so where the claim here impacts the excess reinsurances, as I have described. The English court is bound to accept jurisdiction over the disputes under the excess reinsurances and/or the ARR, and the English court is entitled, even if not bound, to accept jurisdiction over the disputes under the primary reinsurances. England is the only forum where all of the disputes may be tried together without there being a breach of the exclusive jurisdiction agreements in the excess reinsurances and/or the ARR.

70. Of course, I do not overlook the fact that ABSA Group, ABSA Bank and ABSA Nominees are South African entities and the facts of the underlying claims concern events in South Africa; nor that it is also argued by the defendants that the Reinsurers subscribing to the primary reinsurances have submitted to the jurisdiction of the South African courts because of the wording of the relevant jurisdiction clause and its reference to:

"Each party agrees to submit to a worldwide jurisdiction and to comply with all requirements necessary to give such court jurisdiction", albeit that that sentence is itself ambiguous, as the reference to "such court" may be a reference back to the courts of England and Wales; it is not clear.

71. Not have I overlooked the fact that there is a service agent resident in South Africa for the Reinsurers under the excess reinsurances.

72. However, I consider the claimants have a strong case for saying that none of these factors are sufficiently significant to outweigh the factors that I have identified in support of England as the natural forum.
73. The South African proceedings concern claims, as I have said, under the primary and excess reinsurances; and on the analysis which I have summarised so far, those proceedings, so far as the excess reinsurances at least are concerned, appear to be in breach of the exclusive jurisdiction agreements contained in those reinsurances.
74. I am told that the defendants have given no explanation for the breach of the exclusive jurisdiction agreements in the excess reinsurances. Indeed, the relevant paragraphs of the particulars of claim in the South African proceedings do not even refer to the existence of the exclusive jurisdiction agreements: see in particular paragraphs 21 and 41 of those particulars of claim. Instead, the defendants have simply pleaded that:
- "The excess layer underwriters did not submit to worldwide jurisdiction, but there are sufficient connecting factors to confer jurisdiction on [the South African court]."*
75. The defendants' claims in South Africa, as I have explained, do impact upon the excess reinsurances; and accordingly the practical effect of the course which the defendants have adopted in South Africa is that it compels six of the Reinsurers, that is the primary Reinsurers who are also Reinsurers under the excess reinsurances to litigate in two jurisdictions because they are entitled, and indeed bound, to submit any disputes arising under the excess reinsurances to be determined in England and Wales.
76. That imposes an unnecessary and substantial cost burden on the Reinsurers and, of course, it gives rise to the risk of inconsistent judgments in the two jurisdictions. It may lead to an ugly rush to get one action decided ahead of the other, in order to create a situation of res judicata or issue estoppel, as was foreshadowed in *The Abidin Daver* [1984] AC 398 at 423H to 424A.

77. The claimants contend that the vexatious, oppressive and/or unconscionable nature of the South African proceedings is further supported by the following three factors, which I consider also support the conclusion that England is clearly the more appropriate forum for the determination of this dispute..
78. Firstly, that the reinsurance contracts and each of them is expressed to be governed by English law.
79. Secondly, if there is a judgment against the Reinsurers in the South African proceedings, it would potentially be possible to enforce part of that judgment against a fund in South Africa which is maintained by Lloyd's. Accordingly, although at least part of the judgment could not be enforced in England, and that is of course any judgment in respect of the excess reinsurances, it having been obtained in breach of an exclusive English jurisdiction agreement, it could still be enforced against the Lloyd's Reinsurers in South Africa.
80. Thirdly, it is said that in South African proceedings, it is possible that interest will be applied, pursuant to South African law, at a rate of 7% to any sum that may be awarded to the defendants from the date of demand or the date of the summons, whichever is earlier; whereas in England, of course, interest would be considerably lower, in line with commercial banking rates which are at the moment less than 1%.
81. In all the circumstances, I am satisfied on this interim ex parte application that the claimant has established to a high degree of probability that there is an exclusive jurisdiction agreement under each of the reinsurances which governs the dispute in question, and that the court should grant an interim anti-suit injunction to restrain the South African proceedings or any other brought in breach of those exclusive jurisdiction agreements in the reinsurance contracts.
82. I am aware of no strong reasons or other discretionary factors why the English court should not grant an interim anti-suit injunction to restrain the South African proceedings and/or any other proceedings, other than proceedings in England and Wales.

83. I should make clear that even if (contrary to my conclusion at the stage of this application) it be the case that there is no exclusive jurisdiction agreement in the *primary reinsurances*, I am nonetheless satisfied that an interim anti-suit injunction ought to be granted, on grounds that the Reinsurers have established to the requisite standard the following:
84. Firstly, that there is an exclusive English jurisdiction agreement in the excess reinsurances and Reinsurers have commenced proceedings in respect of excess reinsurances in England.
85. Secondly, that the South African proceedings are vexatious, oppressive and/or unconscionable, in that they were brought in breach of the exclusive English jurisdiction agreements in the excess reinsurances. If there is no exclusive English jurisdiction agreement in the primary reinsurances, the result of allowing the proceedings to continue in South Africa would be to allow concurrent proceedings relating to the same subject matter in two different jurisdictions, and would expose the parties to the risks of inconsistent judgments and likely complications with regard to recognition and enforcement of judgments. I am satisfied that granting the injunction has the potential to secure the continuation of only one set of proceedings taking place, which is clearly desirable.
86. Thirdly, that England is the natural forum for the determination of these disputes (for the reasons I have already given). The English proceedings will continue, in any event, pursuant to the exclusive jurisdiction clause.
87. Fourthly, in all the circumstances, it is in the interests of justice, in my judgment, to grant an interim anti-suit injunction.

Comity / delay

88. Finally, I consider that there are no comity considerations or other discretionary factors in this case which should prevent an anti-suit injunction from being granted. The application has been made at a very early stage of the proceedings, before the South African proceedings are significantly advanced. In particular, the South African court has not yet made any rulings on the jurisdictional issues before it; even less the substantive issues before it.

Damages are not an adequate remedy; the cross-undertaking

89. So far as whether damages would be an adequate remedy, damages, in my judgment, would not be an adequate remedy for the Reinsurers, in circumstances where the defendants are acting in breach of, certainly at least, the exclusive jurisdiction agreements in the excess reinsurances; and obviously without the relief sought, the Reinsurers will be required to litigate in two jurisdictions, giving rise, as I have said, to significant extra cost and a risk of inconsistent judgments.
90. If an injunction is granted and if the defendants comply with it, there will be proceedings in only one jurisdiction: namely England.
91. The Reinsurers will have to give a cross undertaking in damages to compensate the defendants in the event that the anti-suit injunction may cause loss or damage, but they are substantial and well-known London-based Reinsurers, with the exception of the seventh claimant; and in those circumstances I do not consider it necessary that they should fortify their cross undertaking by means of a guarantee or otherwise.
92. Finally, in accordance with the Reinsurers' duty to give full and frank disclosure, Mr MacDonald Eggers has identified, in paragraphs 66 to 73 of his and Ms Healy's skeleton argument, the contrary arguments that might be made by the defendants against the grant of the relief sought as follows:
- "66. In accordance with the Reinsurers' duty to give full and frank disclosure, they have identified in this section contrary arguments that might be made by the Defendants against the grant of the relief sought. The purpose of this section is not only to identify such contrary arguments but also to briefly state why those arguments should not avail the Defendants.
- "67. First, it might be argued that the jurisdiction agreement in the Excess Reinsurances (or the ARR) is not an exclusive jurisdiction agreement in favour of England and Wales because the word 'exclusive' is not used and/or the language of the agreement is not sufficient to create a positive obligation to submit any disputes to the courts of England and Wales. It is fair to point out that there were some decisions in the 1980s and 1990s where the court has interpreted a jurisdiction

clause which does not refer to 'exclusive' jurisdiction as being a non-exclusive jurisdiction clause, but it is submitted that such an argument would not prevail and that such earlier decisions cannot stand in light of later or other more authoritative decisions and indeed article 25 of Brussels Regulation Recast.

"68. The use of the word 'exclusive' is not determinative of whether a jurisdiction agreement will be construed as exclusive or not. Further, for the reasons set out at paragraphs 43 and 45 above, on a true and proper construction, the jurisdiction agreements in the Excess Reinsurances and the ARR are exclusive.

"69. Second, it might be argued that the provisions in the ARR regarding jurisdiction are in conflict and that the provision set out in the Schedule, which provides for worldwide jurisdiction, ought to prevail. For the reasons set out at paragraph 44 above, it is submitted that the better construction of those provisions is that the Policy Interpretation, Jurisdiction and Service of Suit Clause ought to prevail.

"70. Third, it might be argued that the Primary Reinsurances contain a non-exclusive jurisdiction and that no anti-suit injunction should be granted where it was always foreseeable that proceedings might be commenced in South Africa. There are two answers to any such argument. First, there is in truth no non-exclusive jurisdiction agreement in the Primary Reinsurance of a conventional kind, given that no individual or even a group of jurisdictions have been selected. Any jurisdiction in the world has been selected. Second, this argument ignores the very obvious implications of suit not only under the Primary Reinsurances, but also under the Excess Reinsurances (and the ARR). In that event, the only credible, commercial solution which would have been obvious to the parties was that any dispute should be submitted to the jurisdiction of the English courts to allow the determination of all claims and disputes in a single jurisdiction, being the most appropriate jurisdiction for the application of English law (as the Reinsurances require).

"71. Fourth, it might be argued that any point taken by the Reinsurers regarding the fragmentation of the proceedings cuts both ways in that if the anti-suit injunction is not granted it may actually reduce the likelihood of duplicative proceedings and/or fragmentation of the proceedings. However, any such argument is undermined by the Reinsurers' evidence that they are unlikely to be dissuaded from pursuing the claims under the Excess Reinsurances even if the anti-suit injunction is not granted. Furthermore, if the injunction is granted and complied with (and there is no reason to suppose it would not be complied with), only the English proceedings will be pursued.

"72. Fifth, it might be argued that South Africa is the more appropriate forum because the underlying facts giving rise to the claims against the Defendants took place in South Africa. There are two answers to this argument. First, the defences relied on by the Reinsurers relate to the operation of a policy exclusion in the 2009/2010 Reinsurances and the fact that no claim was made or deemed to have been made under the 2008/2009 Reinsurances. These matters relate only tangentially to the underlying facts. Second, the choice of English law in each of the Reinsurances - which is not in dispute - renders England the most appropriate forum. Third, where the Reinsurance Contracts or some of them contain an exclusive English jurisdiction clause, factors such as those that might be relied upon by the Defendants are not a relevant consideration in respect of the court being required to entertain jurisdiction and not a major or a relevant consideration in respect of the grant of an anti-suit injunction.

"73. The Reinsurers have sought to identify the arguments which might be made against their application insofar as they have conceived of them, but it is submitted that, on analysis, none of such arguments referred to above should deter the court from granting the application for an interim anti-suit injunction."

93. There are a couple of additional points that have been made by Mr MacDonald Eggers orally, which will be reflected on the transcript. One concerns the high rate of interest in South Africa. The second was by reference to the *Deutsche Bank* judgment at paragraphs 50 and 64.

94. Those were the two main additional oral points that Mr MacDonald Eggers made.

95. I agree that none of these factors are of sufficient weight to displace the findings that I have made.

Application to serve out of the jurisdiction

96. So far as the other applications are concerned, the application to serve out of the jurisdiction, I accept Mr MacDonald Eggers' submission that there is no need for permission to serve the claim form and other documents in these proceedings out of the jurisdiction, on the basis that the reinsurance contracts contain exclusive jurisdiction clauses in favour of the courts of England and Wales. In any event, that is the case, even if the reinsurance contracts have non-exclusive English jurisdiction agreements under CPR 6.33(2)(a), (b)(5) and (2A).

97. But if permission had been required, I would have granted it, in any event, pursuant to CPR 6.36, that is for the claim form, and 6.38 for the other documents, by reason of the fact that the requirements set out in CPR 6.37(1) are satisfied, with each of the reinsurance contracts being expressed to be governed by English law.

98. The claim has a reasonable prospect of success and England is the proper forum in which to bring the claim.

Service by alternative means

99. Finally, I come to the application for service by alternative means. The Reinsurers applied for permission to serve the claim form and other documents in this claim on the ABSA Group, ABSA Bank and ABSA Nominees by alternative means, pursuant to CPR 6.15(1) and/or CPR 6.37(5)(b)(i).

100. Firstly, the Reinsurers wish to deliver the claim form and any other documents in this claim at the registered address of ABSA Manx on the Isle of Man. That is the same method that will be used to serve ABSA Manx, against whom no order for alternative service is sought, pursuant to CPR

6.42(3), which provides that where a party wishes to serve a claim form or other document in the Isle of Man, the party or the party's agent, "must effect service direct".

101. In circumstances where service by these means is required under CPR 6.42(3), I am told that it is not contrary to the Isle of Man law.

102. Secondly, the second alternative means is by leaving the claim form and any other documents in this claim, marked for the attention of Ms Widaad Ebrahim and Mr Gerhard Rudolph, who I understand are the attorneys for the defendants in South Africa, at the registered address of Allen & Overy (South Africa) in London, which is number 1 Bishops Square, London E1 6AD. Service by those means is not contrary to English law.

103. Thirdly, by emailing the claim form and any other documents in this claim to Ms Widaad Ebrahim and Mr Gerhard Rudolph of Allen & Overy (South Africa). I am told that service by those means is not contrary to South African law.

104. I grant this application. There is good reason for such service to be permitted, because service of proceedings in South Africa could, I am told, take up to 12 months. Where an interim anti-suit injunction is justified and obtained on an *ex parte* basis as here, because the court is making a number of coercive orders with the risk of committal for contempt as well as the claimant giving an undertaking in damages, it is important that the proceedings should be constituted formally as soon as possible.

105. Accordingly, I grant the order sought for (1) an interim anti-suit injunction; (2) permission, insofar as it is necessary to obtain permission, and I do not consider that it is, to serve the claim form and other documents on the defendants out of the jurisdiction; and (3) permission to serve the claim form and the other documents on the ABSA Group, ABSA Bank and ABSA Nominees by alternative means.

106. Finally, Mr MacDonald Eggers referred to the fact that the Reinsurers, would like to make amendments to their particulars of claim; for example, he mentioned that they may seek to claim

damages for breach of the exclusive jurisdiction agreement; and the question arises as to whether or not service of the amended particulars of claim, as they stand, should be served now and amendments made subsequently, or whether the 14-day period should be granted to make those further amendments.

107. I think, in view of the alternative service order that I have been willing to grant, on the basis that service should take place as soon as possible, the right course is that the Reinsurers should serve now the draft amended particulars of claim that they have, and then subsequently amend to bring in any further claims. It is likely that that will not prove problematic, in view of the very early stage at which these proceedings are constituted.