Neutral Citation Number: [2022] EWHC 1870 (Comm)

Case No: CL-2020-000871

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2022

Before :

CHARLES HOLLANDER QC
sitting as a Deputy Judge of the High Court

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Between :

(1) AXIS CORPORATE CAPITAL UK II LIMITED
(suing on its own behalf and on behalf of the other underwriting members of Lloyd's Syndicate 2007 for the 2008 and/or 2009 years of account)
and Others — **Claimants/ Respondents**

- and -

(1) ABSA GROUP LIMITED
(sued on its own behalf and on behalf of all other Original Insureds identified in the Reinsurance Contracts referred to herein)
(2) ABSA BANK LIMITED
(3) ABSA NOMINEES PROPRIETARY LIMITED
(4) ABSA MANX INSURANCE COMPANY LIMITED — **Defendants/ Applicants**

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PETER MACDONALD EGGERS QC and MS. SANDRA HEALY (instructed by **RPC**) for the **Claimants/Respondents.**
BEN LYNCH QC and MS. LEONORA SAGAN (instructed by **Allen & Overy LLP**) for the **Defendants/Applicants.**

Hearing dates: Monday 20th June 2022

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Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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CHARLES HOLLANDER QC SITTING AS A DEPUTY JUDGE OF THE HIGH COURT

CHARLES HOLLANDER QC :

JUDGMENT ON STAY

1. This is an *ex tempore* judgment in relation to an application I have heard this morning. These proceedings concern a dispute over coverage under primary, first and second excess reinsurance contracts entered into with the claimant reinsurers, in respect of professional indemnity in South Africa. ABSA is a South African bank and the losses were incurred in South Africa. The dispute on the primary reinsurances is also proceeding before the South African courts.

2. ABSA seeks an order staying the English proceedings on the primary reinsurances on a permanent basis on the ground that those proceedings are duplicative of the South African proceedings, they also request a stay of the English proceedings on the excess reinsurances on a temporary basis until the liability under the primary reinsurances is decided in South Africa. As is common ground, liability under the primary reinsurances is a necessary precondition to liability under the excess reinsurances.

3. On 23rd November 2020, ABSA commenced proceedings in the High Court of South Africa against reinsurers seeking an indemnity in respect of the underlying claims. This claim has concerned the collapse of a South African investment fund in South Africa. The principal issue is likely to be whether certain persons identified as "Designated Persons" specified under the reinsurances had knowledge such as to enable reinsurers to deny coverage.

4. On 30th December 2020, the reinsurers commenced these proceedings in England for negative declaratory relief to the effect that they are not liable to ABSA for an indemnity under the reinsurances. Reinsurers also sought a permanent anti suit injunction to restrain ABSA from continuing the South African proceedings on the basis that the excess reinsurances contained exclusive jurisdiction clauses in favour of the English courts and that such a term is to be implied under the primary reinsurances.

5. On 25th January 2021, reinsurers applied ex parte for an interim anti suit injunction restraining ABSA from pursuing or continuing the South African proceedings. That injunction was granted by Calver J on 2nd February 2021. On 13th April 2021, Nicholas Vineall QC sitting as a Deputy Judge of the High Court set aside the interim anti suit injunction in respect of the claims under the primary reinsurances but continued the injunction as it related to claims against the excess reinsurers. In the light of that, ABSA discontinued the South African proceedings in respect of the excess reinsurances. The facts are set out in detail in the judgment of Mr. Vineall QC and I do not repeat them other than to contextualise the terms of this judgment.

6. In that judgment, the court held firstly that the jurisdiction clauses in the primary reinsurances were non exclusive in nature and as he put it:

> "About as far away from an exclusive England and Wales jurisdiction clause as one could get."

7. Secondly, that the jurisdiction clauses in the excess reinsurances are exclusive jurisdiction clauses in favour of the English courts. Thirdly, that the South African

proceedings are not vexatious or oppressive and England is not clearly the most appropriate forum for the dispute between the parties.

8. He said that:

> "[t]he centre of gravity of the issues that are in dispute is South Africa."

9. The judge noted that:

> "[i]t is not immediately attractive to adopt a route which will, unless one side or the other backs down, inevitably result in there being proceedings in two jurisdictions. This is self evidently not an ideal result."

10. It is fair to say that this was not a result that either party had anticipated nor positively contended for in submissions. To the contrary, both parties had proceeded on the basis that the reinsurances contained a unitary jurisdiction regime, so that either all disputes were capable of submission to the South African courts or capable of submission to the English courts.

11. Reinsurers refused to relinquish their claim for a permanent anti suit injunction over the South African proceedings even in respect of the dispute on the primary reinsurances. They also refused to discontinue the English proceedings on the primary reinsurances.

12. On 23rd December 2021, ABSA issued a stay application alongside an application to strike out or seek summary judgment in respect of aspects of reinsurers' Re-Amended Particulars of Claim. That application is based on the pleas which ABSA assert are intended to re-litigate, and they say amount to a collateral attack on, the Vineall judgment. It is listed to be heard as a one-day hearing on 18th October 2022. On 18th June 2021, those reinsurers who are named as defendants in the South African proceedings, following the Vineall judgment, filed their defence to those proceedings raising amongst other things a special plea to have the South African proceedings stayed pursuant to the principle of *lis alibi pendens*.

13. On 27th May 2022, the South African court delivered a judgment dismissing that special plea. In doing so, the court: (i) held there was an inextricable link between the primary reinsurances and excess reinsurances in the form of clause 1 of the excess reinsurances, which provides that no liability can attach under those reinsurance agreements unless liability on the primary reinsurances has been established; (ii) held that insofar as the issues in dispute are concerned, those in the English proceedings are the mirror image of those in the South African proceedings save that the action in South Africa is limited to an indemnity under the primary reinsurances; (iii) noted that it was common ground that all of the events relevant to the defence took place in South Africa, with South African role players, and that the evidence pertaining to those defences would have to be sourced in South Africa from South Africa-based witnesses; (iv) agreed with Mr. Vineall that the "*centre of gravity*" of the issues most pointedly in dispute "*lies entirely in South Africa*"; (v) noted the significant overlap between the defences raised in South Africa by the primary reinsurers and the arguments of the excess reinsurers in England; (vi) expressed a view that the prudent path would be for the parties to agree to let the South African proceedings run their course while the

English proceedings are held in abeyance. This way, any complications associated with a race to the finish could be avoided. It followed in the court's opinion, that "*reinsurers cannot justifiably … use the inconveniences associated with their election to proceed in England in parallel with the South African action to argue that a stay should be granted in South Africa*" and that "*it was not unfair to order the primary reinsurers to litigate in South Africa: that was the bargain they agreed to by agreeing to a* "*worldwide jurisdiction*"" in the primary reinsurances.

14. Of course, comments of the South African court reflected their own rules and principles and the application made under the *lis alibi pendens* principle. The English court has to apply a quite different set of rules and principles based upon the Brussels Regulation Recast and are not entitled to take into account the *forum conveniens* matters.

15. Now ABSA applies to have the English proceedings stayed pursuant to CPR rule 3.1(2)(f) and relies on the overriding objective. It seeks an order that the proceedings in respect of the primary reinsurances are stayed on a permanent basis and the proceedings in respect of the excess reinsurances are stayed on a temporary basis pending the resolution of the dispute on the primary reinsurances in South Africa.

Legal principles

16. The basis of the court's jurisdiction to determine the claims under the primary reinsurances and excess reinsurances is article 25(1) of regulation EU 1215/2012, the Brussels Regulation Recast. The jurisdiction granted to the court by article 25(1) is mandatory in nature. In *UCP plc v Nectrus Ltd* [2018] EWHC 380 (Comm), Cockerill J said at paragraph 41:

> "There is no mention of a reservation in the event jurisdiction is established under Article 25. This carries with it, in my judgment, an inference that there is intended to be no discretion to decline jurisdiction in other cases, in particular where the jurisdiction is founded under Article 25."

17. The jurisdiction conferred by article 25(1) is mandatory regardless of whether the jurisdiction agreement falling within the scope of article 25(1) is exclusive or non exclusive. This was confirmed by the Court of Appeal in *Ness Global Services Ltd v Perform Content Services Ltd* [2021] EWCA Civ 981; [2021] 1 WLR 4146 paragraphs 57 64 in the judgment of Sir Julian Flaux C with which Henderson LJ and Nicola Davies LJ agreed. At paragraph 58 the Court of Appeal said:

> "It is clear that the words of the Article: "that court or these courts shall have jurisdiction, unless the agreement is null and void" are equally applicable whether the agreement is exclusive or non exclusive and confer mandatory jurisdiction. As Henderson LJ said during the course of argument, unless the agreement is null and void, this is an absolute rule that the Court on which the agreement confers jurisdiction (whether exclusive or non exclusive) shall have jurisdiction."

18. Mr. Lynch QC for ABSA did not accept this position in respect of article 25. The arguments he put forward on this point were as follows. Firstly, he said that no specific

jurisdiction was referred to in the primary layers' jurisdiction clause: it is a worldwide jurisdiction. It therefore cannot be described as a non exclusive jurisdiction clause for the purposes of article 25 and therefore article 25 does not apply. Secondly, the Brussels Regulation Recast is applicable as a result of domestic secondary legislation and there is a saving provision in respect of the regulation under the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 Regulation 92. Regulation 93(2) allows the English court to decline jurisdiction even when first seised irrespective of the basis by which it is seised. Plus, the mandatory regime under the Brussels Regulation Recast no longer applies, and it cannot override primary legislation conferring a discretion on the court. Thirdly, the fact that there is an overlap with jurisdictional grounds cannot prevent the court exercising this discretion on case management grounds.

19. I reject those submissions. Firstly, the fact that the jurisdiction under the jurisdiction clause is worldwide does not prevent it from being a non exclusive jurisdiction clause in favour of the courts of a Member State. As Mr. MacDonald Eggers QC put it in argument, England is part of the world. Secondly, Regulation 93(2) provides:

> "Where before exit day a court in any part of the United Kingdom (the UK court) was seised of proceedings to which a relevant instrument applies, and a court in a State bound by that relevant instrument is subsequently seised of proceedings involving the same cause of action and between the same parties, the UK court may after exit day decline jurisdiction if, and only if, it considers that it would be unjust not to do so."

20. He points out that this only applies in circumstances where there are proceedings in a court in a State bound by the relevant instrument, which will normally be an EU court, or a court where the Brussels Regulation Recast applies, which is not the case in South Africa. He also points out that Regulation 93(2) speaks when the foreign court is subsequently seised of proceedings, whereas in the present case the South African court was actually seised first. These points are made in the draft explanatory memorandum to which I was also taken.

21. Thirdly, the point about being entitled to take into account jurisdictional factors in a case management application is based on comments in *Ness Global Services*, to which I referred earlier, at paragraphs 67 and 68, in the judgment of Sir Julian Flaux C. However, the context in which the Chancellor was making those comments was whether article 33 applied to an article 25 case and the Court of Appeal held it did not. That was a very different issue which is not applicable to the present.

22. Finally, it is also relevant to note that the defendants did not object to jurisdiction in this case and there is no challenge to the jurisdiction application before me.

23. The court has an inherent power to stay proceedings before it, as recognised and preserved by section 49(3) of the Senior Courts Act 1981. Subject to being exercised in the interests of justice, the discretion to order such a stay is unfettered and the body of case law establishes that it is exercisable where there are concurrent proceedings in another jurisdiction which raise similar or related issues in relation to the same or related parties and where the earlier resolution of those issues in the foreign proceedings would better serve the interests of justice, see *Reichhold Norway ASA v Goldman Sachs*

International [1999] CLC 486. Although the decision of Moore Bick J was upheld by the Court of Appeal at [2001] 1 WLR 173, Moore Bick J's judgment is the one usually cited.

24. A case management stay may be appropriate in a number of situations where there are proceedings in the same jurisdiction or abroad. Some examples are where the result of the foreign proceedings may make the English proceedings moot or perhaps where a criminal trial is abroad which may affect the English proceedings. Alternatively, it may be in relation to other proceedings in England where, for example, the Court of Appeal may decide a key point of law relevant to the other matter. What is fundamental is that in each such case the stay gives effect and recognises the rights of the parties to proceed in different jurisdictions rather than subvert their intention. What there cannot be is a forum application by another name.

25. In *Mazur Media Ltd v Mazur Media GmbH* [2004] 1 WLR 2966 Lawrence Collins J, as he then was, referred to what would not satisfy the test at paragraphs 69 71, and at paragraph 71 said:

> *"Each of the factors relied on is a typical forum conveniens factor: The cost of proceedings; the limited value of a damages judgment in the German insolvency; the availability of the German court to determine title to the Masters; and the multiplicity of proceedings and danger of inconsistent judgments. I do not consider that these are legitimate considerations in a case where the court has jurisdiction under the Judgments Regulation (especially exclusive jurisdiction in the case of claims under the Assignment). Even if they were legitimate considerations, they would not have justified a stay. The Assignment is expressly governed by English law, albeit that there may be some proprietary issues governed by German law, and (if there is a defence, which seems doubtful) the claim against Mrs Mazur under the Share Sale Agreement will proceed in England."*

26. Mr. Lynch sought to rely on the risk of inconsistent decisions and duplication in support of his submissions but it is important not to take that risk out of context. He refers to the judgment of Hildyard J in *Bundeszentral Für Steuern v Heis* [2019] EWHC 705 (Ch). However in the context of the case management application it is important to have in mind what Bryan J said in *MAD Atelier International BV v Manès* [2020] EWHC 1014 (Comm), [2020] QB at paragraph 82:

> "The Court has a discretion to order a stay to await the outcome of foreign proceedings in the exercise of its case management powers pursuant to s.49(3) of the Senior Courts Act 1981 and/or CPR r.3.1(2)(f). The principles relevant to the exercise of this discretion can be summarised as follows:
>
> (1) The court has a discretion to stay an action pending the resolution of a claim pending in another forum, but a stay should only be granted in 'rare and compelling circumstances':

> *Reichhold Norway ASA v. Goldman Sachs* [2000] 1 WLR 173 at 186 (C.A.).
>
> (2) 'Exceptionally strong grounds' are required to justify a stay on case management grounds where the parties have conferred exclusive jurisdiction on the English court: *Mazur Media Ltd v. Mazur Media GmbH* [2004] 1 WLR 2966 at [69] [70] (Lawrence Collins J); *Jefferies International Ltd v Landsbanki Islands HF* [2009] EWHC 894 (Comm) at [26]. The danger of inconsistent judgments is not a legitimate consideration amounting to exceptional circumstances and does not justify a stay in a case where the court has jurisdiction under the Brussels I Regulation Recast ('BIR'), especially exclusive jurisdiction*: Mazur, supra*, at [71].
>
> (3) The court's power to stay proceedings cannot be used in a manner which is inconsistent with the Judgments Regulation: *Mazur, supra*, at [69]; *Jefferies, supra*, at [26]. A defendant should not be permitted 'under the guise of case management, [to] achieve by the back door a result against which the ECJ has locked the front door': *Skype Technologies SA v. Joltid Ltd* [2009] EWHC 2783 (Ch) at [22] (Lewison J).
>
> (4) A stay will not, at least in general, be appropriate if the other proceedings will not bind the parties to the action stayed or finally resolve all the issues in the case to be stayed, or the parties are not the same: *Klöckner Holdings GmbH v. Klöckner Beteiligungs GmbH* [2005] EWHC 1453 (Comm) at [21] (Gloster J)."

27. It is important to have in mind that the court's powers to stay proceedings cannot be used as I have indicated in a manner which is inconsistent with the Brussels Regulation Recast: on this point in addition to the *Skype* case see *Bourlakova v Bourlakova* [2022] EWHC 1269 (Ch) at paragraph 342.

The defendants' submissions

28. The defendants submit that the final injunction and the way in which the position it entails has evolved create rare and compelling circumstances in the present case. Absent a stay of the English proceedings, there will be costly duplicative proceedings on the same issues involving the same parties in two different jurisdictions. The risk of inconsistent judgments looms large. More compellingly still, the evolution of this case illustrates the result that arises without either party contending or anticipating it. It follows that this court should proceed to decide the stay application on the basis that the South African proceedings will continue. In the circumstances, the defendants rely on the following factors in favour of the stay of the English proceedings.

    (1) The proceedings on the primary reinsurances are entirely duplicative. It is the same parties contesting the same issues. That duplication entails significant waste not only in costs but also in Commercial Court time, which can be avoided.

(2) Reinsurers accept that the overall costs of litigating in two jurisdictions will be higher. There will also be the wholly unnecessary risk of there being irreconcilable judgments, a risk which in itself is accepted as capable of amounting to a "very strong reason" in favour of a stay. If both the English and South African proceedings continue, it is possible the courts will come to different conclusions on primary reinsurers' liability under the primary reinsurances. That will create uncertainties as to liability and enforcement.

(3) The English proceedings were brought second in time and on the basis of reinsurers' position (now adjudged to be wrong) that the entire suite of reinsurances contained exclusive jurisdiction clauses. This is not a case in which the parties wished to have the reinsurance claims bifurcated, still less run in tandem, but rather a case in which reinsurers wanted all the claims determined in England and ABSA wanted all the claims to be determined in South Africa. It is not therefore a case in which the parties' agreement to non exclusive jurisdiction clauses in the primary reinsurances should be taken as an indication that they favour duplicative proceedings.

(4) Of the 12 reinsurers who are claimants in the English proceedings, only five are reinsurers solely on the excess reinsurances. It follows that the majority of the parties before the English courts have already agreed that South Africa is an appropriate forum for the resolution of relevant disputes by also agreeing to non exclusive jurisdiction clauses. This is relevant in assessing the level of interference with contractual rights, and therefore prejudice to the claimants, that a stay in this case would actually entail. In respect of the excess only reinsurers, it is also relevant to note that the prejudice to be caused to them is, at most, that of a temporary stay of their right to proceed in England.

(5) Further, it is possible that by staying the English proceedings, the excess reinsurers will accrue an advantage: in the event the South African court concludes that primary reinsurers are not liable on the primary reinsurances, the excess only reinsurers will be able to rely on that judgment for the purposes of the excess reinsurances dispute. It is open to the court to find that this benefit outweighs the prejudice caused by the delay of the temporary stay in England. For the excess reinsurers who are also parties to the primary reinsurances, that benefit will come without the cost of a second trial.

(6) This illustrates that given the interconnectedness of the liability regimes between primary and excess reinsurances, a resolution on the former would, at a minimum, be instructive of the latter. As Judge Keightley pointed out in South Africa, the resolution of the primary reinsurances dispute is almost certain to narrow the issues between the parties in England on the basis that ABSA and those reinsurers who are also parties to the South African proceedings will be bound by it. Staying the English proceedings could therefore prove to be a significant cost-saving measure: in the event the primary reinsurers are found not liable on the primary reinsurances in South Africa, the dispute in respect of the excess reinsurances will not need to come before the English court at all.

(7) Substantially all the evidence and all the witnesses relevant to this case are located in South Africa, including those individuals who will have to attest to questions over the notification of claims central to the reinsurers' case on

liability. It is worth pausing to recall that the events and settlements in respect of which ABSA, which is comprised of three South African entities (and a captive insurer incorporated in the Isle of Man), claims an indemnity all occurred in South Africa. Many of the questions central to what ABSA knew factually, and what the state of its knowledge can be taken to mean for the purposes of the relevant notification issues, will be matters of South African law on which the South African courts will have expertise. Notably, reinsurers' position on expert evidence as to South African law has recently and radically changed.

(8) The history of these proceedings illustrates that both parties are dissatisfied with the effect of the Vineall injunction and both are straining to find resolutions respectively. Without a court intervention it is likely that these efforts will continue. Reinsurers' request for a permanent anti suit injunction in their Re-Amended Particulars of Claim, their claim that England is the most appropriate forum for the disputes on all the layers, notwithstanding findings to the contrary in the Vineall judgment, and their determination to appeal the South African *lis alibi pendens* judgment, all show that to be the case.

(9) Finally, ABSA submit that in the present case considerations of comity are especially relevant given the South African judgment which provides an open invitation to this court to exercise its case management powers in favour of a stay. This adds a dimension to this case that has not been present on the facts of many of the relevant authorities, and makes it an appropriately rare and compelling case.

29. ABSA accepts that it is seeking a stay in respect of claims under the excess reinsurances pursued as of right pursuant to exclusive jurisdiction agreements in those excess reinsurances. However,

i) first it seeks only a temporary stay in respect of the excess reinsurances. Accordingly the level of interference with the excess reinsurers' right to sue is limited;

ii) ABSA's approach of seeking to stay the proceedings on the excess reinsurances is mandated by the fact that if the court chose to stay only the dispute on the primary reinsurances, excess reinsurers could, and on the basis of their conduct to date almost certainly would, press ahead and seek negative declaratory relief in connection with the excess reinsurances in any event. This would render the effect of the stay on the primary reinsurances nugatory and would not address the risk of inconsistent judgments; and

iii) merely because Article 25 applies does not deprive the court of its power to grant a case management stay.

Submissions of claimant reinsurers

30. The reinsurers by contrast submit that:

i) the stay application seeks to achieve the practical effect of a successful jurisdiction challenge, in circumstances where any such challenge was not in

fact made and could not have succeeded because of the mandatory nature of the English court's jurisdiction. This is because the objective of the stay application is to require the reinsurers to litigate in South Africa rather than England, with a view to the English court never determining the claims under the primary reinsurances and, on ABSA's case, creating a risk that the English courts would never determine the claims under the excess reinsurances. In substance this is a jurisdiction challenge, not an attempt at efficient case management;

ii) the factors relied on by ABSA in support of the application are all *forum non conveniens* factors including: duplicative proceedings, risk of inconsistent judgments, and arguments as to more appropriate forum. These are not legitimate considerations when considering the power to grant the case management stay in circumstances where there is an exclusive English jurisdiction agreement; and

iii) whilst the application is framed as a "case management matter", it is in truth not about efficient case management at all. The purpose of the stay application is to allow the South African proceedings to be concluded in relation to the primary reinsurances first in order to enable ABSA to argue that any issues to be determined in the South African proceedings preclude the English court from determining the same issues. ABSA have said as much themselves. This not a legitimate basis for a case management stay, rather it demonstrates that the stay application is a thinly veiled attempt by ABSA to seek through the back door that which they are denied through the front door, so much so that they did not even attempt a jurisdiction challenge. This is not a permissible basis for a stay. There are no "exceptionally strong grounds", as would be required to stay the claims under the excess reinsurances, and no "rare or compelling circumstances" as would be required to stay the claims under the primary reinsurances so as to justify a stay. Further, comity is not relevant. The proceedings will proceed in South Africa so no comity issue arises.

31. Reinsurers also argue that only a temporary stay, not a permanent stay, could be granted. See the Supreme Court decision in *Unwired Planet International Ltd v Huawei Technologies (UK) Co Ltd* [2021] 1All ER 1141, paragraph 99. However, this seems to me to be an issue of form rather than substance and can be dealt with by the wording on terms of any stay. In essence the point was that it amounted to a jurisdictional challenge and therefore to that extent was a permanent stay and does not add to the other submissions.

Disposition

32. In my judgment the claimant reinsurers are correct: this application is an attempt to do by the back door what cannot be achieved by the front door. It is a *forum non conveniens* application by another name. This is not in my view an application for a case management stay at all. It is an attempt to persuade the English court that the appropriate forum for this dispute is the South African court. I have been pressed with a range of discretionary reasons why it would be better for this dispute to be heard in South Africa. In my judgment, it would be contrary to principle for me to accede to such an application.

33. First, the case law on the mandatory nature of the Article 25 jurisdiction. Secondly, the importance of not acting in a way that is inconsistent with the Brussels Regulation Recast regime. Thirdly, the case law on case management stays, which assumes an English court is the court which has jurisdiction over the dispute and looks at whether there are exceptional or rare and compelling circumstances which justify a case management stay. This application has in my judgment nothing to do with case management and everything to do with jurisdiction. It is notable that the defendants' skeleton argument is replete with references to jurisdictional matters and indeed the first authority in the bundle is the *Spiliada* case referred to in their skeleton.

34. It may well be the case that it is inconvenient and unfortunate that there are two sets of proceedings proceeding in parallel. However, in my judgment it is not within my power to grant a case management stay to affect this. It is also fair to say that it works both ways. Reinsurers do not wish to give up the English proceedings for strategic reasons. The defendants do not wish to give up the South African proceedings for strategic reasons.

35. It is wrong to say that either one of them is right or wrong given the jurisdiction clauses. However, in my judgment, I am constrained by the authorities and the principles that this is not an appropriate case in which I can or should grant a case management stay. It follows that substantially for the reasons set out by reinsurers set out above I dismiss this application.

JUDGMENT ON COSTS

36. I have to assess costs. The defendants are claiming, without VAT, £220,071.10, which with VAT, if one compared like with like for the purpose of this analysis, would add another £44,000 on to that. So, it appears to be that the claimants' costs are not much over a third of what the defendants' costs are in those circumstances. I have also been told that they assume a 50/50 balance between this application and the case management application, which might be thought to be generous to the defendants. In those circumstances, I am going to order those costs recoverable in full and I will make an order for assessment in the sum of £94,297.47.

JUDGMENT ON DISCLOSURE

37. I have to consider on the defendants' disclosure an issue as to date ranges. This is for the issues for disclosure 4, 5 and 6. The question here is as to how far back the defendants' disclosure should go. The relevant paragraphs in the defence are 31 to 50, and that is the basis of the claim as to the knowledge of the designated persons.

38. The claimants said they want to go back to 2006, although they proposed a potential compromise for the six custodians referred to in the pleadings to 1st July 2007 and everybody else 1st January or February 2008. The defendants have proposed a compromise of the six custodians referred to in the pleadings to 1st February 2008 and everybody else from 1st January 2009. The claimants' submission is that the position of the defendants confuses the liquidity issues which are all based in 2009, that they failed to take into account what may be described as financial irregularities which go back to 2006.

39. I can see that it is possible that the claimants will want to go back further and they are entitled to do so. My concern at the moment, as is so often the case in these applications, is that it is completely impossible to get any real feeling as to whether going back further is likely to assist, or whether it will simply be, as the defendants say, a lot of additional work for no useful purpose.

40. What I propose to do is to more or less go along at this stage with what the defendants say. Their proposal of 1st February 2008 for the six people named, I am going to actually go back to 1st January 2008, but will otherwise go along with what the defendants are proposing by way of their compromise. However, I make it entirely clear that that is not intended in any way to shut out the claimants from making a further application. It seems to me that any such further application will be better informed by seeing the initial disclosure and lists of the defendants and it will be much easier for the court to form an informed view once the disclosure has been done and one can see whether this is really likely to be a waste of resources or whether there is a real possibility that it may bear fruit. On that express basis, I largely go along with what the defendants say by way of compromise.
