1999 Folio No 536

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

COMMERCIAL COURT

Before:

The Hon. Mr. Justice Aikens

B E T W E E N:

(1) JOHN RICHARD LUDBROOKE YOUELL
(Suing as a representative Underwriter for and on behalf of the members of Syndicate 79 at Lloyd's and on behalf of all other members at Lloyd's subscribing to policy no. HO478394)

and others

Claimants

-and-

(1) KARA MARA SHIPPING COMPANY LIMITED
and others

Defendants

Jonathan Gaisman QC and Rebecca Sabben-Clare instructed by Hill Taylor Dickinson appeared on behalf of the Claimants.

Stewart Boyd QC and Claire Blanchard instructed by Ince & Co. appeared on behalf of the Defendants.

I direct pursuant to CPR Part 39 P.D. 6.1. 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.

The Hon. Mr. Justice Aikens
13 March 2000

JOHN RICHARD LUDBROOKE YOUEEL and others

Claimants

and

KARA MARA SHIPPING COMPANY LIMITED and others

First to Fifth Defendants

and

WORLD TANKER CARRIERS CORPORATION

Sixth Defendant

JUDGMENT

1. At about midnight on 20/21 December 1994 a collision took place between the bulk carrier ***"Ya Mawlaya"*** and the motor tanker ***"New World"***. It occurred in the Atlantic some 250 miles of Portugal in good visibility. ***"Ya Mawlaya"*** had loaded a cargo of soyabeans at Destrahan, Louisiana and was destined for Ancona and Porto Marghera. ***"New World"*** had loaded a cargo of West African crude oil in Gabon and was bound for Dunkerque. There may be argument about the precise sequence of events leading up to the collision but it is clear that the vessels were on *"crossing courses"*. Under the Collision Regulations ***"Ya Mawlaya"*** was the *"give way"* vessel. Although the vessels remained on a steady bearing, it appears that ***"Ya Mawlaya"*** did not take any action as the *"give way"* vessel until too late. As a result of the collision there was a fire on board ***"New World"*** . In the fire eight crewmen were killed and others were injured. Both vessels and their cargo suffered extensive damage. This collision and the subsequent loss of life and damage has resulted in much litigation in the USA, particularly in Louisiana. There has also been litigation in Hong Kong, India and England. The present proceedings, begun when some of the Hull & Machinery insurers of the ***"Ya Mawlaya"*** issued an Originating Summons on 20 April 1999, constitute the latest episode in this worldwide litigation.

2. There are three principal applications before the court. First the Sixth Defendant, the owning company of the ***"New World"***, applies[i] under ***CPR Part 11 (I)*** to set aside the permission I gave to the Claimants on 14 June 1999, (without notice) to serve proceedings on them out of the jurisdiction. Those proceedings sought declaratory relief. Secondly the Claimants apply[ii] for an interim - suit injunction to restrain the Sixth Defendant from pursuing three sets of proceedings in Louisiana, in which the Claimants in this action are directly or indirectly interested. Thirdly the Claimants apply[iii] for permission to put in evidence to cure any procedural irregularity there may have been in their original application, (without notice), for permission to serve out of the jurisdiction and also to rely on a further paragraph ***Order 11 Rule 1(1) (paragraph (d))*** as the basis for permission to serve the original proceedings out of the jurisdiction. As an alternative in the same application, the Claimants seek an order that they have permission to issue and serve a Part 8 Claim Form on the Sixth Defendant containing the requested declaratory relief. The Claimants say they intend to rely on ***Order 11 Rule 1(1)© and/or (d) (i) to (iv)*** for the permission to serve the new Part 8 Claim Form on the Sixth Defendants out of the jurisdiction.

3. In the course of the hearing before me the Claimants also sought permission to amend the terms of their Originating Summons to claim, as additional relief, a permanent anti - suit injunction. They also sought permission to amend the terms of their Application for an interim anti - suit injunction. These applications were not set out in separate Application Forms. Both those applications were opposed.

A. The Parties

4. **The Claimants**. The First Claimant is a representative Lloyd's underwriter for syndicate 79 and other Lloyd's underwriters who subscribed to a Hull & Machinery policy H0478394 on the ***"Ya Mawlaya"***. That policy covered 15% of the risk. Cover ran from 19 April 1994 for one year, thus including the date of the collision. The Second to Fifteenth Claimants are ILU companies that wrote a further Hull & Machinery policy H0478294 covering 45% of the risk for the same period and on materially the same terms. I will refer to these two policies as "the H&M Policies". The balance of 40% of the risk was insured with Italian and Belgian insurers who have taken no part in this action. The total insured value of the vessel under the policies was US$ 4.5 million. The H&M Policies were written on the standard MAR 91 form and incorporated the 1983 Institute Time Clauses, Hulls (***"the ITC"***). Thus the policies contained an exclusive jurisdiction clause ("EJC") in favour of the English Courts and a clause that the insurance "*is subject to English law and practice"*. The policy terms provided cover for "Three Fourths Collision Liability" on the terms set out under Clause 8.1 of the ITC[iv] They also provided cover for three - fourths of the legal costs incurred by the Assured or which the Assured may be compelled to pay in contesting liability or taking proceedings to limit liability, but only where the Assured had obtained the *"prior written consent of the Underwriters"*[v]. At the hearing before me Mr Gaisman QC and Miss Sabben - Clare represented the Claimants who I shall call ***"the "YM Insurers".***

5. **The Defendants.** The First to Fifth Defendants are companies that are or might be interested in the policies as assureds. The First Defendant was the demise charterer of ***"Ya Mawlaya"*** at the time of the collision. The Second to Fourth Defendants acted as her managers. The Fifth Defendant is or was a mortgagee of the vessel. These five defendants have not played any part in the hearing before me. However I shall have to refer to the First Defendant and will call it ***Kara Mara*** and will refer to the First to Fifth Defendants collectively as the ***"Ya Mawlaya** interests"* .

6. The Sixth Defendant is the company that owned ***"New World"***. It is a Liberian company. It was represented at the hearing before me by Mr Boyd QC and Miss Blanchard. I will refer to the Sixth Defendants as ***"World Tanker***."

B. Proceedings in various jurisdictions

7. On 30 December 1994 World Tanker began proceedings in a US Federal Court, which was the United States District Court for the Eastern District of Louisiana in New Orleans. The claim was for damages against ***"Ya Mawlaya"*** interests, including the present First to Fifth Defendants. I will call these ***the Louisiana liability proceedings***, to distinguish them from the later Louisiana actions which have given rise to the present English proceedings.

8. Following action to arrest sister vessels of ***"Ya Mawlaya"***, her P&I Club, the Newcastle, gave World Tanker security of US$20 million for potential claims against ***"Ya Mawlaya"***. On 20 December 1995 the Newcastle P&I Club stated to World Tanker that it would pay USS$15 million in respect of ***"Ya Mawlaya's"*** liability, plus a figure of proceedings in Hong Kong to which I refer below

9. On 28 January 1995 Kara Mara began limitation proceedings (on behalf of

9. On 28 January 1995 Kara Mara began limitation proceedings (on behalf of ***"Ya Mawlaya"*** interests) in Hong Kong. On 8 February 1995 Kara Mara began liability proceedings against World Tanker in Hong Kong. Subsequently, in September 1995, the Hong Kong court stayed all proceedings there on the ground that Louisiana was clearly the more appropriate forum.

10. On 12 May 1995 the managers of ***"Ya Mawlaya"*** began proceedings against World Tanker in India, claiming limitation of liability, an indemnity from the owners of the vessel and an anti -suit injunction to stop the Louisiana proceedings. In November 1995 the YM Insurers disavowed all interest in the Indian proceedings. They were dismissed by the Indian Supreme Court in April 1998.

11. On 19 June 1995 Kara Mara started limitation proceedings in Louisiana. But Kara Mara stated that this was a protective measure only and it contested jurisdiction.

12. On 26 February 1999 Kara Mara began *"in personam"* proceedings in the English Admiralty Court and sought leave to serve those proceedings out of the jurisdiction on World Tanker. Master Miller granted permission to do so on 4 March 1999. In that claim Kara Mara sought a declaration that any Louisiana

judgment was unenforceable; it also claimed a right to limit liability under the Merchant Shipping Act 1979. World Tanker applied to Judge Lemmon in the Louisiana court for an anti - suit injunction to stop Kara Mara proceeding with this limitation action. But on 8 April 1999 Judge Lemmon refused World Tanker's application on the ground that it had not been shown that the Louisiana judgment on liability (referred to below), which had been handed down on 3 March 1999, would not be shown proper respect.

C. The progress of the Louisiana Liability Proceedings by World Tanker

13. Kara Mara and the other ***"Ya Mawlaya"*** interests entered appearances in the Louisiana proceedings, but contested jurisdiction, venue and forum. The US District Court ordered discovery and interrogatories against those parties, but only in relation to jurisdiction issues. Ultimately the ***"Ya Mawlaya"*** interests decided not to give the discovery ordered and dismissed their attorneys. On 14 May 1997 the Louisiana court dismissed the jurisdiction challenges of Kara Mara because of its refusal to comply with the discovery orders the court had made. The Court held that Kara Mara's failure to respond to enquiries about its business dealings in the USA meant that it was admitting that it was doing business in the USA. The court also stated that the failure of Kara Mara to comply with court orders could lead to further sanctions against it.

14. On 23 July 1998 the Judge in charge of the Louisiana liability proceedings, Judge Lemmon, ordered sanctions against Kara Mara, holding that it was now clear that Kara Mara had made a conscious decision to ignore the court. The sanctions included an order that Kara Mara should post security for the claim of US$45 million. If it failed to do so then the Judge ordered that the Hull & Machinery underwriters of ***"Ya Mawlaya"*** would be required to shew cause why they should not put up security up to the limit of the insurance policies. It is possible, although this was not the reason expressed, that the basis for the Judge's order against the YM insurers was that Louisiana has a statute, known as the ***"Direct Action Statute***",[vi1] that enables claims to be made directly by an *"injured person"* against a liability insurer in certain circumstances. The Judge may have contemplated that World Tanker might be able to utilise this statutory provision at a later stage in the proceedings.

15. Kara Mara did not post security. The H&M underwriters of ***"Ya Mawlaya"*** protested to the Louisiana Court that they were not then party to any Louisiana proceedings and that the ***Direct Action Statute*** had no application in the present case[vii]. Despite this, Judge Lemmon ordered, on 16 September 1998, that the H&M underwriters should shew cause why they should not put up security to the limits of the policy.

16. On 3 March 1999 Summary Judgment was entered in the Louisiana Liability Proceedings against Kara Mara for US$21.4 million, including pre-judgment interest.[viii] In the judgment it was also held that Kara Mara was not entitled to limit its liability. The findings of fact and law[ix] included the following:

    (1) ***"Ya Mawlaya"*** was unseaworthy with the privity of Kara Mara upon departure from New Orleans;

    (2) no or inadequate repairs were made to the bridge equipment of ***"Ya Mawlaya"*** including the radar and HVF radios, before her departure;

    (3) her officers were incompetent;

    (4) a "one man watch system", which was not permissible, was in operation on board ***"Ya Mawlaya"***;

    (5) ***"Ya Mawlaya"*** failed to comply with the Collision Regulations;

    (6) Kara Mara, whilst *"thumbing their noses"* at the Louisiana court, had embarked on a *"forum shopping spree"* in India and Hong Kong. Because Kara Mara had acted in bad faith, the court would exercise its power to assess attorneys' fees.[x]

D. The aftermath of the judgment in the Louisiana liability action

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17. On 1 April 1999 World Tanker's New York lawyers, Haight Gardner, wrote to the London solicitors for the YM Insurers (Hill Taylor Dickinson - "HTD") and informed them that as Louisiana was a "direct action" jurisdiction, World Tanker could now claim directly from the YM Insurers for *"some proportion and perhaps all of the judgment"*. Haight Gardner said that the YM Insurers could avoid any litigation by *"paying off the judgment on their own"*. HTD's response to this was to issue the current proceedings on 20 April 1999.

18. **The Originating Summons in the current proceedings**

As originally framed the Originating Summons named Kara Mara as the First Defendant and World Tanker as the Second Defendant.[xi] The YM Insurers sought only declaratory relief against both defendants. In the form for which permission was sought to serve the proceedings on World Tanker out of the jurisdiction, the relief claimed was as follows:

(1) That, in accordance with Clauses 8.1 and 8.2 of the ITC[xii] the YM Insurers were not liable to pay any sum to the assureds under the H&M policies until the assureds, had actually made payments to another person in consequence of any collision liability;[xiii]

(2) That the limit of liability of the YM Insurers under the three - fourths collision clause was no greater than their proportion (ie. 60%) of three - quarters of the insured value of the vessel, ie. US$4.5 million, less sums already paid;

(3) That the YM Insurers were not liable to the assureds to pay legal costs (under Clause 8.3 of the ITC) unless they had been incurred with the prior written consent of the YM Insurers or they had been incurred or were payable under compulsion in contesting or limiting liability and that the YM Insurers were not liable to pay the sum of US$5,317,882.05 in respect of legal costs in India and Hong Kong which Kara Mara had been ordered by Judge Lemmon to pay to World Tanker in the Louisiana Liability proceedings;

(4) That the YM Insurers were not liable under the H&M policies to indemnify the assured against any liability for loss of life and personal injury; liability for loss of or damage to cargo laden on board ***"Ya Mawlaya"***; or liability for the removal or disposal of cargo from ***"Ya Mawlaya"***.

19. The Kara Mara interests, which are represented by Clyde & Co, acknowledge service of the proceedings on 27 May 1999. The acknowledgement of service stated that the claims would be contested *"in part"*.

20. The YM Insurers then sought permission to serve the Originating Summons on the Fifth Defendant[xiv] and World Tanker out of the jurisdiction on the basis that it was a *"necessary or proper party"* to the proceedings (ie. under ***RSC Order 11 Rule 1 (1)()).*** At that stage it was not suggested that World Tanker could be served out of the jurisdiction on the basis of ***RSC Order 11 Rule 1(1)(d)***, ie. that the claim was one *"brought to enforce...or otherwise effect a contract...which - (iii) is.... governed by English law; or (iv) contains a terms to the effect that the High Court shall have jurisdiction to hear and determine any claim in respect of the contract"*. I granted permission, without notice, on 14 June 1999. The evidence before me was an affidavit of Mr CS Zavos, a partner of HTD, together with an exhibit CSZ1. It is now accepted that in his affidavit Mr Zavos did not formally and specifically depose to the fact that there is a real issue which the court may reasonably be asked to try as between the Claimants and the First to Fourth Defendants, as he should have done in accordance with ***Order 11 Rule 4(1)(d)***.[xv]

21. On 20 August 1999 World Tanker issued an Application Notice, stating that it would apply to set aside the order giving permission to serve the Originating Summons on World Tanker out of the jurisdiction. The grounds given were: first that World Tanker is not a necessary or property party to the action against the First to Fourth Defendants; and secondly that there is no *"real issue"* as between the Claimants and the First to Fourth Defendants.

22. **The Enforcement Proceedings in Louisiana**

On 17 September 1999 World Tanker filed a claim against the YM Insurers in the Louisiana Federal Court: Action No 99 - 2861.[xvi] This claim is made under the ***"Direct Action statute"*** of Louisiana. I shall

refer to it as the ***"Direct Action Claim".*** The Complaint asserts that all the YM Insurers (and the remaining insurers not involved in the current English proceedings) do business in Louisiana or the USA. It pleads the judgment in the Louisiana liability proceedings, in particular the finding of fact that the casualty was the result of negligence of ***"Ya Mawlaya"*** and her unseaworthiness "*in Louisiana"*.[xvii] It alleges that these facts gave rise to a cause of action pursuant to the ***Direct Action Statute.*** The Complaint says that by virtue of the H&M policies and their terms there is a cause of action against the insurers to the extent of coverage under the policies. There is a reference to the insurers being obliged to pay the damages pursuant to the judgment in favour of World Tanker in the Louisiana liability proceedings. The prayer claims: *"a decree directly against the Defendants, jointly, severally and in solido, for amounts due under [the insurers'] policies for the judgment against their insureds"*.[xviii]

23. The YM Insurers made two responses to the Direct Action Claim. First, in the Direct Action Claim the YM Insurers filed an answer in which they took issue with jurisdiction, *forum conveniens* and service of the proceedings. They also pleaded defences under the Direct Action statute and under the terms of the H&M Policies.[xix] After this World Tanker served interrogatories and requests for documents on the issue of jurisdiction.

24. Secondly, in the current proceedings, the YM Insurers issued an application on 12 January 2000 for an interim anti - suit injunction. This claimed an injunction to restrain World Tanker from continuing or prosecuting any claim or application in the US Courts for direct payment to World Tanker of any sum allegedly payable under the H&M policies until the determination of the matters raised in the Originating Summons seeking declaratory relief.

25. Two further enforcement proceedings have been started by World Tanker in Louisiana. First, on 14 December 1999 Judge Lemmon approved the citation of the YM Insurers as garnishees of sums due from the H&M policy insurers to the assureds under those policies. That led to World Tanker filing a Supplementary Complaint in the original liability action in the Federal Court *"in aid of execution of judgment"*,[xx] seeking to garnish debts *"owed"* by all the H&M Insurers (who are specifically named in the Supplementary Complaint) to the judgment debtors, ie. Kara Mara.[xxi]The relief sought includes *"orders adjudicating all sums owed by the judgment debtors....to be turned over to the Plaintiff"*.[xxii] I will refer to these proceedings as the *"**garnishee proceedings**"*.

26. Secondly World Tanker began a further action (No 99 - 2056) in the New Orleans Civil District Court (a State Court), against the insurers under the H&M Policies. World Tanker brought this claim in response to the challenge to the jurisdiction of the Federal Court by the insurers. In this action World Tanker claims declarations on what sums are due and payable by the insurers to the assureds under the H&M policies. World Tanker pleads that such declarations will *"serve the salutary purpose of terminating the present and actual controversies between these parties and enable the insurers to pay proceeds found due and owing pursuant to a definitive judgment of a court of competent jurisdiction"*.[xxiii] The prayer asks for declaratory orders including *"the determination and quantifying with specificity the insurance proceeds due and payable as a result of the tort giving rise to such liability under each applicable policy of insurance"*. [xxiv] I will refer to these proceedings as the ***"State Court action"***.

27. Interlocutory proceedings in the Direct Action Claim have continued. World Tanker has taken depositions from thirteen insurers on the issue of jurisdiction. It has also pressed for answers to the interrogatories it has served and for discovery on the issue of jurisdiction to be given by the insurer defendants.

E. The Current state of the English Originating Summons Proceedings

28. As I have already mentioned, in the course of the two day hearing before me (on 8 and 9 February 2000) the YM Insurers applied orally to amend both the Originating Summons and the Application for an interim anti - suit injunction.

29. **The proposed amendments to the Originating Summons**

The claim that the YM Insurers wish to make in the Originating Summons now falls into two parts. The original claim for declaratory relief on the proper effect of the H&M Policies is still pursued. But it has really taken second place to the proposed additional claim. This is for a permanent anti - suit injunction

against World Tanker. The drafting of the new claim went through several editions, but in the final version the claim is for an injunction to restrain World Tanker from pursuing in any court, other than the English court, any proceedings for relief which is connected to any liability of the YM Insurers under the H&M Policies in respect of the collision between ***"Ya Mawlaya"*** and "***World Tanker***". The grounds for this relief are stated to be that the H&M Policies contain an Exclusive Jurisdiction Clause in favour of the English Courts and an English proper law clause. Therefore the YM Insurers have an equitable right not to be the subject of any proceedings of any nature in relation to which World Tanker seeks any relief based upon those H&M Policies that is connected with the collision, except proceedings in the English Courts.

30. The alternative basis stated is that the YM Insurers have an equitable right not to be subjected to *"vexatious, oppressive and unconscionable proceedings"* in any courts other than those of England and Wales which seek any relief based on the H&M Policies that is connected with the collision. The Louisiana Enforcement Proceedings are alleged to be vexatious, oppressive and unconscionable.

31. **The proposed amendments to the Application Notice of an interim anti - suit injunction**

There were two main changes in the proposed amendment to the Application Notice. The first was that World Tanker should be enjoyed from pursuing any proceedings anywhere in the world other than the Courts of England and Wales from pursuing any relief in relation to the liability of the YM Insurers on the H&M Policies in respect of the collision.[xxv] The second is that the interim injunction now sought should continue *"until further order"* instead of until the determination (by the English Courts) of the issues on which the YM Insurers sought declaratory relief under the terms of the Originating Summons as it originally stood. The first version of the Application Notice had stated the grounds (which continued to be relied upon by the YM Insurers) for the interim injunction. They were that the Louisiana enforcement proceedings ignored the EJC in the H&M Policies or that the Louisiana enforcement proceedings were vexatious and oppressive.

32. The final version of the re-re-amendments of the Originating Summons was only available to those advising World Tanker at the very end of the oral hearing before me. It was agreed that any submissions of both parties on the proposed re-re-amendments and the application to issue and serve this version on World Tanker should be made in writing. The submissions of World Tanker[xxvi]are that the proposed relief of a permanent anti - suit injunction is misconceived in principle Therefore permission for the re-re-amendment should be refused. Further World Tanker submits that the proposed relief for a permanent anti - suit injunction cannot be the subject of an application for leave to serve out of the jurisdiction under what is now ***CPR Schedule 1 Rule 11.1 (1)(c) or (d).*** World Tanker also submitted that there ought to be a fresh application for permission to serve the re-re-amended Originating Summons on World Tanker out of the jurisdiction. World Tanker says that such an application would be bound to fail because the YM Insurers would not be able to depose to a belief that they had a good cause of action for a permanent anti - suit injunction. Further, even if the court were prepared to treat that application as having been made and the necessary formal evidence as having been provided, then World Tanker asked the court to treat the application for leave to serve out of the jurisdiction as being without notice. Therefore, even if it were granted World Tanker would be able to renew its challenge to this court "on notice", rather than the Court of Appeal.

33. In relation to the proposed amendment to the Application Notice for an interim anti - suit injunction, World Tanker objected to the fact that the injunction now sought was much wider, a it sought to enjoin any proceedings throughout the world, rather than just in the USA or Louisiana. World Tanker said that the YM Insurers should not be permitted to "ambush" them with this new and much wider application.

34. The YM Insurers' responses[xxvii] to these submissions are that: (i) there is no need for a party to obtain permission to issue and serve out of the jurisdiction an amendment to any originating process which claims a new cause of action; but (ii) if there is then the court can either rely on the existing evidence or the YM Insurers would undertaken to file any necessary formal evidence, in particular stating that the YM Insurers believed that they had a good cause of action in respect of the claim for a permanent anti - suit injunction; (iii) the claim for a permanent anti - suit injunction is a cause of action which could be the subject matter of originating process; (iv) although the interim injunction now sought is in wider terms, the points were all argued at the hearing and as there is no suggestion of prejudice to World Tanker (in the sense that it has not had the chance to argue a point or put in evidence), then the Court should deal with the

new relief claimed. The YM Insurers accepted that if they failed in their submission that World Tanker was bound by the EJC, then any interim anti - suit injunction could only be limited to the current Louisiana enforcement proceedings.

F. The Issues that have to be determine

35. **A Threshold Question**. The YM Insurers' claim for an anti - suit injunction is now clearly the more important of the two claims made in the Originating Summons as re-re-amended. World Tanker submits that such a claim cannot be the subject of originating process where the relevant defendant is outside the jurisdiction. Therefore leave to re-re-amend the Originating Summons should not be granted nor should the Court entertain an application for leave to issue and serve the re-re-amended Originating Summons out of the jurisdiction. So I think that the first, threshold question is whether an anti - suit injunction can be the subject of a claim by the YM Insurers when the defendant sought to be enjoined has to be served outside the jurisdiction. Because the YM Insurers claims that they are entitled to an anti - suit jurisdiction on the basis of either (i) the existence of the EJC in the H&M Policies; or (ii) the existence of the English proper law clause in the H&M Policies, both these potential claims against World Tanker have to be considered.

36. **Permission for leave to re-re-amend and to issue and serve the claim for an anti - suit injunction out of the jurisdiction.** If either one of those claims for an anti - suit injunction can be the subject of an Originating |Summons when the defendant has to be served outside the jurisdiction, then the next issues must be: (i) whether the Court should grant permission to re-re-amend the Originating Summons; and (ii) grant permission to issue and serve the re-re-amended Originating Summons on World Tanker outside the jurisdiction. The points are inextricably bound up. The Court will not grant leave to re-re-amend unless it is satisfied that the new claim is one for which ***Rule 11.l1 (1)*** leave would be granted. That question therefore involves three sub - issues. They are:

    (1) Whether the YM Insurers can bring themselves within ***R11.1 (1) paragraph (d) sub paragraph (iii) or (iv)***in ***Schedule 1*** to the ***CPR***. Although paragraph six of the proposed re-re-amended Originating Summons claimed an anti - suit injunction generally against "*the Defendants*" this relief is clearly aimed only at the Sixth Defendants, World Tanker. Therefore ***paragraph (c)*** *("necessary or proper party")* is irrelevant for this particular application, because no similar claim is brought against a party within or outside the jurisdiction;

    (2) If the YM Insurers can rely on ***paragraph (d) (iii) or (iv)*** in relation to the claim for an "anti - suit" injunction against World Tanker, then can the YM Insurers also satisfy the Court that this is a proper case to permit service out of the jurisdiction under ***Rule 11.4(2);***

    (3) If the YM Insurers can do so in principle, then should permission be refused on the ground that the application was made by re-re-amendment and there has been no formal submission of evidence in support of this new application so as to satisfy ***Rule 11.4(1) and (2)***. Alternatively if the Court grants permission, should it be on the basis that the application was "without notice", so that World Tanker could reapply to set the permission aside.

37. **Should the original permission to issue and serve the declaratory proceedings on the Sixth Defendant be set aside.** Whether or not the application to issue and serve the claim for an anti - suit injunction on World Tanker is refused, the next question must be whether the permission I gave to serve out of the jurisdiction the unamended Originating Summons, claiming the declaratory relief in respect of the points on the H&M Policies, should be set aside. That involves the following issues:

    (1) Whether the YM Insurers can show that the declaration claim comes within either ***Rule 11.1 (1) paragraph (c) or (d);***

    (2) If the YM Insurers can only rely on ***paragraph (c)***[xxviii], then is there a *"real issue to be tried"* between the YM Insurers and the First to Fourth Defendants. If there is then is the formal defect in Mr Zavos' first affidavit (which is admitted) fatal to this application or not;[xxix]

(3) If the YM Insurers have got a good cause of action against the First to Fourth Defendants on which they can rely, then have they got a *"good cause of action"* against World Tanker in respect of the claims for Declarations;

(4) If they have then is this a case where the Court ought to exercise its discretion to serve out under ***Rule 11.4 (2).***

38. **The Application for an interim anti - suit injunction.** Mr Gaisman accepts that if he loses on the issue of whether leave should be given to serve World Tanker out of the jurisdiction (on the basis of either the original claim or the new claim for a permanent anti - suit injunction), then the issue of whether there should be an interim anti - suit injunction becomes irrelevant. However if the YM Insurers should win on the issue of leave to serve out on either basis, then the Court has to consider whether an interim injunction should be granted. The YM Insurers claim an injunction on two grounds, which are:

(1) That World Tanker is bound by the EJC in favour of the English Courts in the H&M Policies; or

(2) That World Tanker is not bound by the EJC but is attempting to make a claim on the basis of the H&M Policies that are expressly governed by English law.

G. The YM Insurers application for leave to serve out of the jurisdiction for an "anti - suit" injunction against World Tanker.

39. **The parties' arguments.**

The arguments of the YM Insurers are as follows:

(1) In the Direct Action claim in Louisiana World Tanker asserts a right to make a claim under the H&M Policies directly against the YM Insurers World Tanker claims that it can do so under Louisiana law by virtue of a statutory right of action conferred on it by the Louisiana ***Direct Action Statute.***

(2) Once World Tanker claims that the ***Direct Action Statute***, confers on it rights to make claims under the H&M Policies, then, so far as the English Court is concerned, World Tanker must be regarded as being subject to all the bundle of rights and obligations that are contained in those contracts. Those include the ECJ in favour of the English Courts and there is not *"good reason"*[xxx] why World Tanker should not be bound by it.

(3) Alternatively, World Tanker has accepted in these proceedings that if the Louisiana Federal Court has to deal with a claim by World Tanker to rely on its statutory rights under the ***Direct Action Statute,*** then the Court must, in the first place, construe the H&M Policies for the purpose of seeing whether there would be any right by the Kara Mara interests to make claims under the policies as assureds. World Tanker has also accepted that the H&M Policies are governed by English law. It has further accepted that this exercise of construction will be done by the Louisiana Court in accordance with English law.[xxxi] If the Louisiana Court does so, then it would be bound to conclude that the H&M Policies contain EJCs in favour of the English Courts. Although it is possible (or even likely[xxxii]) that the Louisiana Courts would strike down the EJC as being *"unlawful"* within the meaning of ***paragraph (C)***of the ***Direct Action Statute §655***, that is irrelevant to an English Court when considering whether World Tanker should be treated as being bound by the EJC.

(4) Once it is shown that World Tanker is attempting to make claim on the H&M Policies by means of the ***Direct Action Statute*** and the H&M Policies contain an EJC in favour of the English Courts and they are governed by English law, then that means that World Tanker is trying to rely upon contractual rights but is also evading compliance with terms of the contracts that govern the law and forum by which those claims should be determined.

(5) The YM Insurers, being a party to the H&M Policies, are entitled not to be subjected to proceedings of any nature in any Courts other than those of England or Wales where a party

claims relief connected with alleged liability of the YM Insurers to their assureds under those polices in relation to the collision If World Tanker made any claim under the H&M Policies, then it should be bound by all the terms, including the EJC.

(6) The fact that the Louisiana Court might hold the EJCs *"unlawful"* for the purposes of deciding whether World Tanker could enforce a claim against the YM Insurers under the ***Direct Action Statute***, is not a good reason to hold that World Tanker can evade being subject to the EJC in the H&M Policies.

(7) Accordingly the YM Insurers can show that they have a claim to enforce an equitable right,[xxxiii]which is based upon an EJC so that it falls within ***paragraph (d)(iv)*** of the ***Rule 11.1 (1).***

(8) Alternatively, if the YM Insurers cannot rely on the EJC the fact remains that World Tanker wishes to make a claim based upon the H&M Policies that are subject to English law, so the case falls within ***paragraph (d)(iii).*** In all the circumstances, particularly where the Louisiana Court may not give effect to the terms of the policies in relation to the provisions concerning *"pay to be paid"* and the *"prior consent of underwriters"* to legal costs, then it would be vexatious and oppressive to permit World Tanker to pursue the claim under the ***Direct Action Statute*** in the Louisiana Courts.

(9) The action by World Tanker claiming a right to garnish any proceeds from the H&M Policies payable by the YM Insurers to their assured also concerns the issue of what sums (if any) are due to the assureds under the policies. That is a contractual issue under a contract governed by English law and containing an EJC in favour of the English Courts. The State Action raises broadly the same issues, but in that case directly against the YM Insurers. The only reason for those proceedings is so that ultimately, World Tanker can benefit from contractual rights under the H&M Policies. Therefore the same considerations apply to all three types of enforcement proceedings in the Louisiana Courts.

40. The arguments of World Tanker are as follows:

(1) For the purposes of obtaining leave to serve proceedings on a party out of the jurisdiction under ***Rule 11.1*** there must be an underlying cause of action. A claim by the YM Insurers for a permanent anti - suit injunction is not a "cause of action" for the purposes of ***Rule 11.1(1)***. An injunction is only a remedy.

(2) If, in principle, an anti - suit injunction can be regarded as a cause of action in itself, World Tanker is not a party to the H&M Policies and therefore is not bound by the EJC. Nor is it bound by the EJC just because it is asserting *"a right of direct action against the insurer within the terms of the policy"*[xxxiv] in the Louisiana Court under the ***Direct Action Statute.***

(3) Even if the English Court should regard the Louisiana Enforcement Proceedings by World Tanker as effectively making claims on the H&M Policies which are subject to an EJC, nonetheless the English Court must place itself in the position of the Louisiana Court and consider whether, in the context of the ***Direct Action Statute***, the EJC would be enforced. It obviously would not because that would defeat the whole object of the statute as the rights granted by the Louisiana statute could not be enforced in any other court.

(4) Therefore the YM Insurers could not bring themselves within ***Rule 11.1(1) paragraph (d)*** because there is no claim either to *"enforce* the ECJs in the H&M Policies, nor is there a claim *"otherwise to effect"* those contracts.

(5) Alternatively there should be no leave to serve out because it would not be a proper case to permit it under ***Rule 11.4(2).***

(6) In any event the YM Insurers did not claim an anti - suit injunction in their Originating Summons for which they obtained leave without notice. It is an entirely new "cause of action" for which the

Claimants must obtain fresh leave, on the principle established in ***Parker v Schuller (1901) 17 TLR 299*** and many cases subsequently.[xxxv] The Claimants have not put the proper evidence before the Court in support of this new "cause of action". They should not be allowed to rely on the existing evidence (in support of leave to serve out in relation to the Declaratory relief originally sought in the Originating Summons) to support the new claim. Even if permission were to be granted, World Tanker must be entitled to treat it as an application "without notice" and could apply to set it aside again.

41. Anti - suit injunctions: the Basic Principles

Mr Boyd is obviously correct in submitting that an injunction is not, in itself, a cause of action. It is a remedy which the English court has power to grant when it is *"just and convenient to do so"* within the wording of ***section 37(1)*** of the ***Supreme Court Act 1981***. The right to obtain an injunction depends on there being a pre-existing cause of action against a defendant. That has to arise out of *"an invasion, actual or threatened [by the defendant] of a legal or equitable right of the plaintiff for the enforcement of which the defendant is amenable to the jurisdiction of the court":* ***per Lord Diplock in Siskina (Owners of Cargo lately laden on board) v Distos Compania Naviera SA [1979] AC 210 at 256.***

42. Lord Diplock applied that analysis (used in ***The Siskina*** in relation to ***"Mareva"*** injunctions) to the question of the juridical basis on which a claimant could obtain an anti - suit injunction in ***British Airways Board v Laker Airways Ltd [1985] AC 58 at 81B-D***. He held that there could be a legal or equitable right not to be sued in a foreign court if the action of the defendant in suing there was *"unconscionable"*. Lord Scarman applied the same analysis in his speech in the same case: ***see page 95D-H.*** In ***South Carolina Insurance Co v Assurantie Maatschappij "de Zeven Provincien" NV [1987] AC 24***, Lord Brandon of Oakbrook said that the English Courts had power to grant an anti - suit injunction even in cases where no legal or equitable right had been infringed or was threatened and even when the actions of the party bringing the foreign proceedings was not "unconscionable": ***see page 40F[xxxvi].***

43. In subsequent cases in which the House of Lords or the Privy Council has considered the juridical basis for the grant of anti - suit injunctions, they have made it clear that the remedy of an injunction is available because some legal or equitable right is or may be infringed by the foreign proceedings that the claimant wishes to restrain. The court can invoke the jurisdiction when *"the ends of justice require it",*[xxxvii] although certain other criteria must be fulfilled as well. I think that this is the effect of the analysis in the ***Aerospatiale case (see footnote below); Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] AC 335 at B-D per Lord Mustill;***[xxxviii] ***Mercedes - Benz AG v Leiduck [1996] 1 AC 284 at 310G-H per Lord Nicholls;***[xxxix] and ***Airbus Industrie GIE v Patel [1999] 1 AC 119 at 133E and 134F per Lord Goff of Chieveley.***

44. So I am quite satisfied that a claim for an anti - suit injunction could be the sole relief sought in the YM Insurers' Originating Summons and that it would be a legitimate claim. There can be two bases for the relief sought. The first is that there had been a breach of a contractual provision which binds the defendant and by which the parties have agreed that claims falling within the provision should be pursued exclusively in the English Courts[xl] or an arbitration tribunal.[xli] In those cases the prosecution of proceedings in a foreign court is an actual infringement of a legal right of the claimant for an anti - suit injunction. The English courts' general approach is to enforce those contractual provisions unless there is good reason not to do so.

45. The second basis is that the prosecution of the foreign proceedings is, in the circumstances, unjust. If the English court finds it is unjust, then that will amount to the actual (or if proceedings are threatened) a potential invasion of an equitable right not to be the subject of unjust or "unconscionable" action. In the most recent statement of the principles upon which the English courts will grant anti - suit injunctions, the House of Lords' decision in ***Airbus Industrie GIE v Patel [1999] 1 AC 119,*** Lord Goff of Chieveley drew a distinction between "alternative forum" cases and "single forum" cases. In the former he said the anti - suit injunction jurisdiction will be exercised where the pursuit of the relevant proceedings is *"vexatious and oppressive".*[xlii] In the case of "single forum" cases the jurisdiction will be exercised by the English court where the pursuit of proceedings overseas is *"unconscionable".*[xliii] But in both cases the court has to focus on *"the character of the defendant's conduct, as befits an equitable remedy such as an injunction".*[xliv]

46. Anti - suit injunctions and Rule 11.1(1)

Rule 11.1 (1) (as scheduled to the ***CPR***) provides that a *claim form may be served out of the jurisdiction with the permission of the court if"* the *"claim"* comes within one of the lettered paragraphs of ***Rule 11.1(1).*** The *"claim"* will usually be framed in terms of a remedy that the claimant wishes the court to grant because the defendant has infringed the legal or equitable rights of the claimant, in the manner set out in the Claim Form. The remedy sought could be damages or it could be a final injunction. Once it is accepted, as I think it must be, that a claim for an anti - suit injunction is based on the actual or threatened invasion of legal or equitable rights, then it is clear, contrary to Mr Boyd's submission, that such a *"claim"* can be the subject of proceedings which the claimant intends to seek permission to serve on a defendant out of the jurisdiction.

47. In cases where the foundation for anti - suit injunction is that the defendant has brought foreign proceedings in breach of an EJC in favour of the English courts by which he is bound, the Claimant can say that, for the purposes of ***Rule 11.1(1),*** the *"claim"* falls within ***paragraph (d)***. It will be a *"claim"* to *"enforce...or otherwise affect a contract...being a contract which ...(iv) contains a term to the effect that the High Court shall have jurisdiction to hear and determine any claim in respect of the contract"*. That was the analysis and conclusion of the Court of Appeal in relation to an English arbitration clause in ***Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH [1997] 2 Lloyd's Rep 279;***[xlv] see particularly the judgment of Hobhouse LJ at ***page 287*** and Sir Richard Scott V-C at ***page 291***. I note that in that case it does not seem to have occurred to anyone that there were any difficulties in making a claim for an injunction to restrain the Brazilian proceedings the subject of an action for which leave to serve out of the jurisdiction under ***RSC Order 11 Rule 1*** was needed.

48. In my view the analysis of the Court of Appeal in ***DVA v Voest*** must apply also in relation to an EJC. That is equally a contractual agreement that disputes will be resolved by a tribunal that has been chosen by the parties. A claim for an injunction to restrain a defendant who, it is said, is bound by the terms of the English EJC, must therefore be a claim to *enforce* the relevant contract; alternatively it is one that *otherwise affects* the relevant contract.

49. Where there is no English EJC or English arbitration clause, the claimant may have more difficulty in persuading the English court that his *"claim"* comes within one of the paragraphs of ***Rule 11.1(1).*** But I think that Mr Gaisman is correct in submitting that if the claim for an anti - suit injunction is in connection with a contract that is expressly governed by English law, then in principle the *"claim"* for an anti - suit injunction will be one *"brought to...otherwise affect a contract...which (iii) is by its terms, or by implication, governed by English law"*. In ***Gulf Bank KSC v Mitsubishi Heavy Industries Ltd [1994] 1 Lloyd's Rep 323*** Hobhouse J emphasised that the wording of the first part of ***paragraph (d)*** was intended to cover every possible category of contractual claim. He said that a claim for a declaration that a claimant was not bound by a contract (eg. because it has been frustrated) *"affects the contract"*. He continued: *"A claim for a negative declaration cannot be described as a claim to enforce a contract; it is the converse of that. It is a claim which affects a contract":* ***see page 327 RHS.***

50. In my opinion Hobhouse J's analysis[xlvi] must meant that a claim for an anti - suit injunction which is made in connection with a contract that is governed by English law, is a claim *"which affects a contract"*. Thus, provided that the claimant can demonstrate that the relevant contract satisfies one or other of the criteria set out in the sub - paragraphs (i) to (iv) of ***paragraph (d)***, the claim for an anti - suit injunction in connection with a contract is capable of falling within ***paragraph (d)(iii) of Rule 11.1(1).***

51. However it is important to emphasise that, whether the claim for an anti - suit injunction is based upon an EJC or the fact that the contract is governed by |English law and the prosecution of the foreign proceedings would be *"unjust"*, there are three further hurdles that the claimant must surmount before it could obtain permission to serve the claim for an anti - suit injunction out of the jurisdiction. First the claimant must show that there is a *"good arguable case"* that (i) there is a contract; and (ii) the intended defendant is, by some means, ***bound*** by the contract, in particular the EJC. Otherwise the claim would not fall within ***paragraph (d)(iv)*** at all. I think that this is clear from the speech of Lord Goff of Chieveley in ***Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran [1994] 1 AC 438; see particularly at 455A and 457A***. Secondly it must show that there is a serious question to be tried on whether there should be an anti - suit injunction. Thirdly it must demonstrate, in accordance with ***Rule 11.4(2)*** that it has been

made *"sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction under this Order"*.[xlvii]

52. **Can the YM Insurers show that they have a "*good arguable case*" that the claim comes within *paragraph (d)(iv)?***

There is a fundamental division between the parties on this issue. Mr Gaisman for the YM Insurers submits that once World Tanker asserts, in the Direct Action Claim, that it has statutory rights under the ***Direct Action Statute*** to bring claims on the H&M Policies, then, by the terms of the statute itself, World Tanker is asserting *"a right of direct action against the insurer within the terms and limits of the policy"*. This is a contractual claim, he says, and it does not matter that World Tanker was not originally a party to the H&M Policies with the YM Insurers. He submits that World Tanker's position is no different from a person suing as an assignee of a contract[xlviii] or a person making a claim under ***section 1*** of the ***Third Parties (Rights against Insurers) Act 1930***.[xlix] Both types of claimant have been held to be bound by arbitration clauses concluded between the original parties to the contracts. Mr Gaisman says that the same principle should apply to World Tanker and the EJC in the H&M Policies. Therefore as far as an English court is concerned a person who claims on a contract by a statute that grants him a *"right of direct action against the insurer within the terms and limits of the policy"*[l] must be bound by all its terms, including the EJC. So the claim by the YM Insurers for an anti - suit injunction is one to *"enforce"* the terms of the H&M Policies, including the EJC or is one that *"otherwise affects"* those contracts. In either case there is sufficient of a contract nexus between the YM Insurers (who have always been a party to those contracts) and World Tanker, the claimants pursuant to the ***Direct Action Statute***, to say that there is a good arguable case that the claim comes within ***paragraph (d)(iv).***

53. Mr Boyd for World Tanker accepts that, in the Direct Action Claim, the Louisiana Court would be bound to construe the H&M Policies according to English law principles in the first place, but he submits that this does not mean that World Tanker would, in the eyes of the Louisiana courts, be bound by the EJC. He relies upon ***paragraph C*** of the provisions of ***§ 655***, which state that *"any action brought under the provisions of this Section shall be subject to all of the* ***lawful*** *conditions of the policy or contract and the defenses which could be urged by the insurer to a direct actin brought by the assured,* ***provided the terms and conditions of such policy or contract are not in violation of the laws of this State".***[li] Mr Boyd submits that if the Louisiana Courts were to give effect to the EJC then it would defeat the whole object of the ***Direct Action Statute***, therefore it would not do so. The English Court should put itself in the same position as the Louisiana Court which was enforcing the ***Direct Action Statute*** and so hold that World Tanker would not be bound by the EJC.

54. Although the claim for an anti - suit injunction relates to all three Louisiana Enforcement Proceedings, I think it is sensible to concentrate first on the Direct Action Claim in which World Tanker directly asserts rights against the YM Insurers. In my view there are two stages to the exercise of seeing whether there is a good arguable case that the claim by the YM Insurers for an anti - suit injunction is one *"to enforce"* or *"otherwise affects"* a contract within the four sub - paragraphs of ***Rule 11.1 (1) paragraph (d)(iv)***. The first stage is to see whether the claim by World Tanker against the YM Insurers in the Louisiana Enforcement Proceedings under the ***Direct Action Statute*** is contractual in nature. If it appears to be so, then the second stage must be to see if it there is a good arguable case that the claim by the YM Insurers in the English proceedings for an anti - suit injunction is one *"to enforce"* or *"otherwise effects"* a contract within ***paragraph (d)(iv).***

55. When the English court is considering each stage it has to decide on the nature of the claim: is it contractual or not. In doing this the English Court must, I think, perform the analysis from the viewpoint of English law concepts of a "contractual" claim. It must do so because ultimately the question is whether the claimant has a *"good arguable case"* that the type of claim comes within a procedural rule of the English Court: viz. ***Rule 11.1(1)(d)***. The English procedural rule is obviously framed with English law concepts of contract and contractual claims in mind. There is thus every practical reason for performing the analysis according to English concepts rather than those of the law of another jurisdiction where claims might be brought or are being brought. So in principle I would reject Mr Boyd's submission that I should consider the nature of the claim by World Tanker under the ***Direct Action Statute*** through "Louisiana law spectacles".

56. I also think that this was the approach of the Court of Appeal in ***DVA v Voest***. It is particularly clear in the judgment of Hobhouse LJ. The facts of the case are complicated. A ship, the ***"Jay Bola"***, had been time chartered then sub - voyage chartered. Both the time and voyage charter contained an English arbitration clause. The cargo was damaged on a voyage from Brazil to Bangkok. The Brazilian cargo insurers indemnified the voyage charterers. In return the voyage charterers gave the insurers a "subrogation receipt" that assigned to the insurers all rights of action arising out of the damage to the cargo. The Brazilian insurers then sued the shipowners and time charterers in Brazilian proceedings, doing so in their own name as statutory assignees (by Brazilian law) of the rights of the assured cargo owners. Hobhouse J held[lii] that the action of the insurers against the shipowners was irrelevant. But he held that, as against the time charterers, the rights being asserted by the Brazilian insurers were derived from the voyage charterers. He further held [liii] that, as the rights of the parties to the time charter were governed by English law, then the Brazilian insurers, as statutory assignees of the voyage charterers' rights, acquired those rights subject to the English arbitration clause. The time charterers wished to claim an injunction to restrain the Brazilian insurers from pursuing the Brazilian proceedings on the basis that they were bound by the English arbitration clause and so should arbitrate disputes in English arbitration proceedings.

57. Having held that the Brazilian insurers took their rights under the time charter subject to the arbitration clause, Hobhouse LJ then considered whether the time charterers' claim for an injunction fell within ***RSC Order 11 Rule 1 (1)(d).*** He held that it did. As I understand his reasoning, (at ***pages 285 to 288***), it was as follows: (i) the English Court is entitled to analyse, using English law concepts, the nature of the claim being brought by the Brazilian insurers in Brazil; (ii) the claim asserted by the Brazilian insurers is that of a statutory assignee (under Brazilian law) of the rights of the voyage charterers; (iii) the claim is made against the time charterers under the voyage charter; (iv) because that contract is governed by English law the question of whether the statutory assignee is bound by the arbitration clause is also governed by English law, at least so far as an English Court is concerned; (iv) as a matter of English law the statutory assignee is bound by the arbitration clause in that English law contract; (vi) the time charterers wish to prevent the statutory assignees from pursuing Brazilian proceedings in breach of the English arbitration clause; (vii) therefore the time charterers are *"enforcing"* an English law contract, so (viii) the case comes within ***paragraph (d)(iv).***

58. The position in the present case is that World Tanker has asserted a claim on the H&M Policies by virtue of the ***Direct Action Statute*** in the Direct Action Claim. It is true that World Tanker have not become a party to the policies by a mechanism of statutory novation or of statutory assignment.[liv] But in my view the nature of the rights that the ***Direct Action Statute*** confers to World Tanker is contractual; it confers a statutory right to make a claim on a contract to which World Tanker was not originally a party. And (subject to paragraph C of the Statute) the rights are confined to the *"terms and limits of the policy"*.

59. If the statutory claim by World Tanker (in the Direct Action Claim) is based on the H&M Policies and is to be characterised as contractual, then the next question is, following Hobhouse LJ's analysis in ***DVA v Voest;*** what are the terms of that contact on which World Tanker wishes to rely in order to make its claim against the YM Insurers? World Tanker accepts that the H&M Policies contain an English proper law clause and an EJC in favour of the English Courts. If World Tanker wishes to rely on some contract terms then, to an English lawyer, it must at least be highly arguable that it is subject to all the terms of that contract. So the YM Insurers would be entitled to say that if World Tanker wishes to make a claim based on the H&M Policies terms, it must be subject to all the bundle of rights and obligations contained in that contact, including the EJC.

60. It would seem that if this analysis is correct in English law, then this would also have to be the conclusion of the Louisiana courts, at least at this first stage. This is because it was accepted by Mr Boyd for World Tanker that the Louisiana court would, in the first place, construe the H&M Policies according to English law.[lv] The only reason that the Louisiana court might subsequently strike down the EJC is if it declared that it was not "*lawful*" or that it was *"in violation of the laws of this State"*.[lvi] But in my view, contrary to the submission of Mr Boyd, there is no reason why the English court should have regard to the Louisiana law concept of whether an EJC in favour of the English courts is lawful, at least when, upon an English conflicts of laws analysis, the contract is governed by English law. Hence in ***Aggeliki Charis Compania Maritima SA v Pagnan Sp (The "Angelic Grace") [1995] 1 Lloyd's Rep 87*** the Court of Appeal held that it need not have regard to the fact that the Italian court might not give effect to the English arbitration clause.[lvii] And in ***Akai v People's Insurance Co [1998] 1 Lloyd's Rep 90***, Thomas J disregarded the fact that the Australian High Court would not have given effect to the EJC in the insurance contract.

61. Therefore I conclude that the nature of the claim by World Tanker against the YM Insurers in the Direct Action Claim is contractual and the terms of that contract would include the English proper law clause and the EJC.

62. The next question must be: is the contractual nexus between World Tanker and the YM Insurers sufficient to enable the YM Insurers to say that their claim for an anti - suit injunction is one to *"enforce"* a contract that contains an EJC. In my view it is. Mr Boyd submitted that ***Finnish Maritime v Protective National Insurance Co [1989] 2 Lloyd's Rep 99*** established that for the purposes of obtaining permission to serve out of the jurisdiction under ***paragraph (d)***, the claimant and the defendant had to be parties (*"in the fullest sense"*)[lviii] to the contract upon which the claim was made. I think that the position is more subtle than that, as Hobhouse LJ makes clear in ***DVA v Voest: see page 287***.

63. In the ***Finnish Maritime case*** the claimant sought a declaration that it was ***not*** a party to a contract with the defendant and obtained leave (without notice) under ***RSC Order 11 Rule 1 (1)(d)(ii)*** to serve the proceedings on the defendant. Mr Adrian Hamilton QC, sitting as a Deputy High Court Judge, held that a claim for a declaration that there was no contract between the claimant and the defendant could not be within ***Order 11 Rule 1 (1) (d)***. So he set the leave aside. In ***DVA v Voest*** Hobhouse LJ accepted that analysis, holding that for the purposes of ***paragraphs (d) and (e) of Order 11 Rule 1(1)*** *"it is necessary to assert that there is a contract"*.[lix] But he went on to hold that if the Claimant in the English proceedings ***does*** assert, for the purposes of the English proceedings, that there ***is*** a contract by which the defendant is bound and the Claimant wishes to enforce an arbitration clause in that contract, then it does not matter that one or other of parties has become bound because it is an assignee or by virtue of some other legal mechanism.

64. That is the position in this case in the Direct Statute Action. There World Tanker asserts that it has a statutory right to enforce contractual rights against the YM Insurers under the H&M Policies. The YM Insurers accept that this may be so for the purpose of the present English proceedings. The YM Insurers then say that, if that claim based on the H&M Policies is made in Louisiana, then World Tanker must be bound by all the terms, including the EJC in favour of the English Courts. And it is because the YM Insurers wish to enforce the English EJC that they bring the English proceedings for an anti - suit injunction.

65. For the purposes of seeing whether a claim fell within ***paragraph (d)***, Hobhouse LJ posed two questions in ***DVA v Voest at page 287***: *"Is there a contract? Is the [claimant] seeking to enforce that contract against the defendant?"* In the present case, in relation to the Direct Action Claim I think that the two relevant questions can be expanded to: "does the Claimant in the English proceedings rely on a contract on which the proposed defendant asserts claims in the foreign proceedings; if so is it seeking to enforce that contract against the defendant?" The answer to both question is "yes". Alternatively the claim for an anti - suit injunction against the Direct Action Claim is one that *"otherwise effects"* the H&M Policies that are governed by English law and have an EJC in favour of the English Courts. Therefore I have concluded that there is a sufficient contractual nexus between the claimant and the defendant to come within ***paragraph (d)(iv).***

66. The next issue is: does the claim for an anti - suit injunction against the Garnishee Proceedings and the State Action also fall within ***paragraph (d)(iv)***. Mr Boyd submitted generally that none of the Louisiana Enforcement Proceedings were contractual in nature. He did not advance any additional arguments on this point in relation to the Garnishee Proceedings and the State Action. But he did suggest that the nature of those two actions was so well known to the English Courts that it could not be argued that World Tanker's action in bringing them to aid enforcement was *"unconscionable"*.[lx] In argument Mr Boyd did accept that all three sets of proceedings were brought to enforce the judgment in the Louisiana Liability Proceedings. Mr Gaisman submitted that all three actions in the Louisiana Enforcement Proceedings raised the same question: what is the scope of the H&M Policies underwriters' contractual obligations under the H&M Policies. In the Garnishee Action World Tanker seeks a direct payment of sums due under the policies to the assured; in the State Action World Tanker seeks declaration of rights under the H&M Policies.

67. It seems to me that once the YM Insurers have satisfied the Court that they have a good arguable case that they can rely on a contract (the H&M Policies); that they are seeking to enforce it or that it otherwise

affects it; and that it contains an EJC in favour of the English Courts, then that must be enough to satisfy the first requirement for obtaining permission to serve out of the jurisdiction, ie. by coming within ***Rule 11.1 paragraph (d)(iv).*** The issue of whether the permission should extend to a claim for an anti - suit injunction against all the Louisiana Enforcement Proceedings, including the Garnishee Proceedings and the State Action must, I think, depend on the answers to the next two questions: is there a serious issue to be tried on the merits of the claim for an anti - suit injunction against one or more of the foreign proceedings and, if so, is this a proper case for permission to serve out of the jurisdiction.

68. But if necessary I would hold that the claims for an anti -suit injunction against those two proceedings also come directly within ***paragraph (d)(iv)***. The three Louisiana Enforcement Proceedings are all closely related. The ultimate aim of all of them is to enforce the judgment in the Louisiana Liability Proceedings. And they all seek relief (against the YM Insurers amongst others) concerning contractual rights under the H&M Policies. In the current proceedings, in relation to all the Louisiana Enforcement Proceedings, the YM Insurers rely upon the H&M Policies and say that they wish to enforce one of the terms: that is the EJC. I appreciate that, in the Garnishee and State Action proceedings, World Tanker is not asserting a direct statutory right to claim on the HP against the YM Insurers under the ***Direct Action Statute***. But I think that fact is not crucial to this issue. ***Paragraph (d)(iv)*** and the cases do not state that, in order to come within the paragraph the proposed defendant must for all purposes be bound by the EJC in the English law sense of being in privity of contract with the Claimant. Indeed ***DVA v Voest*** holds that this is not necessary. I think it is enough that for the YM Insurers to satisfy the Court that they have a good arguable case that, in relation to each of the foreign proceedings (i) they can rely on a contract (the H&M Policies); and (ii) they can *"enforce"* the EJC in relation to those proceedings; alternatively (iii) that the claim for an anti - suit injunction in relation to those proceedings is one that *"otherwise affects"* the H&M Policies.

69. Accordingly I hold that the YM Insurers have a good arguable case that the claim that the YM Insurers makes for an anti - suit injunction comes within ***paragraph (d)(iv)***. If I had concluded that there was not a good arguable case that the claim for an anti - suit injunction based on the EJC came within ***paragraph (d)(iv)***, then the same result must obtain if the claim were based on ***paragraph (d)(iii)***, relying on the English proper law clause in the H&M Policies. This is because the same issues are involved in both instances. The first is whether the claim of World Tanker is sufficiently contractual; the second is whether there a sufficiently close contractual nexus between the claimant and the defendant to come within ***paragraph (d)(iii) or (iv)***. Therefore in practice the YM Insurers can only advance their claim for an anti - suit injunction on the basis that there is an arguable case under ***paragraph (d)(iv).***

70. Are there *"serious issues to be tried"* on the YM Insurers claim on the merits for an anti - suit injunction?

Again I consider the point first in relation to the claim for an anti - suit injunction against the Direct Action Claim. The issues here will be: is World Tanker bound by the EJC; if so should it be held to that contractual provision? On both points the answer to this question must be "yes" in the light of the approach of the CA in ***Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 WLR 588*** and ***Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace") [1995] 1 Lloyd's Rep 87***. Mr Boyd advanced arguments that there were good reasons under ***Louisiana law*** why World Tanker should not be held bound by the EJC in the H&M Policies. But I am satisfied that the basic position, so far as the English Court is concerned, is that if someone asserts rights under a contract which contains an EJC, then that person has to show good reason why it should not be bound by that clause. Therefore there must be *"serious issues to be tried"* on the question of whether or not World Tanker should not be bound by the EJC. I would go further and say that the YM Insurers have a good arguable case that World Tanker should be bound and so the YM Insurers are entitled to the anti - suit injunction that they seek.

71. Mr Body did not suggest that, in relation to this particular point, there were distinctions in the position of World Tanker on each of the three Enforcement proceedings in Louisiana. He was right in this. They are all proceedings to enforce the Louisiana Liability judgment. All three of the actions are based on World Tanker's assertion of rights to declaratory relief or payment under the H&M Policies. Therefore there must be serious issues to be tried on the issue of whether the YM Insurers are entitled to an anti - suit injunction in relation to all three of the Louisiana Enforcement Proceedings.

72. **Has it been demonstrated that a proper case for permission to serve out: *Rule 4(2)***

Mr Boyd's arguments under this heading were, broadly, as follows. First he said that permission should not be granted because it would effectively enable the English Courts to decide on whether the Louisiana ***Direct Action Statute*** could be used when there is an EJC in the policy of insurance relied upon by the claimant in Louisiana. He said that this is a decision that should be left to the Louisiana Courts and if the English Courts did interfere it would be contrary to accepted notions of judicia comity. Secondly, he submitted that it would be wrong, by giving permission to serve out, to deprive World Tanker of its juridical advantage in Louisiana, being the right to claim under the ***Direct Action Statute*** and obtain the relief sought in the other two Enforcement Proceedings. Thirdly he submitted that the YM Insurers had agreed, by the H&M Policies, to meet liabilities of their insureds arising out of a collision and that the effect of the ***Direct Action Statute*** was to enable the insurers' liability to be enforced directly; this was a laudable policy which the English proceedings would only subvert.

73. I cannot accept these submissions. The fundamental position is that World Tanker wishes to take advantage of insurance policies that are governed by English law. The original parties to those policies agreed that disputes under them should be determined by the English Courts. If World Tanker wishes to assert claims under those policies, using a statutory right or otherwise, then I think that the English Courts' view must be that World Tanker has to accept all the terms of those policies, including the EJC, unless it can show a good reason why it should not be bound by it. I think that it is not contrary to accepted notions of comity to hold that English Court will give permission to serve proceedings on a party outside the jurisdiction when the contract relied upon in foreign proceedings contains a clause giving the English Court jurisdiction over claims arising under the contract.

74. I accept that the effect of granting permission to serve out could be, ultimately, to deprive World Tanker of the juridical advantage of the right to claim under the Direct Action Statute or other relief in the Enforcement Proceedings. But when the claim is made on a contract that contains an EJC in favour of the English Courts, it must be questionable whether that advantage is a legitimate one. I think it is certainly not so powerful an argument to be sufficient reason to refuse permission to serve out.

75. The third argument of Mr Boyd is another way of saying that the English Court should do nothing to prevent the Louisiana Courts from enforcing the ***Direct Action Statute*** That would be a powerful argument if there were no EJC in favour of the English Courts. But as there is one in the contracts on which World Tanker relies, I conclude that it is not a good reason to refuse permission to serve out.

76. **Leave to make the re-re-amendment of the Originating Summons to claim the anti - suit injunction**

The overall conclusion that emerges from the discussions above is that, in my view: (i) the YM Insurers have a good arguable claim for an anti - suit injunction against World Tanker; and (ii) subject to any deficiencies in the formalities, it is a claim for which the Court would grant permission to issue and serve proceedings out of the jurisdiction on World Tanker under ***Rule 11.1(1)(d)(iv) and Rule 11.4.*** But, logically, the prior issue is whether the YM Insurers should have leave to make the re-re-amendment to claim the anti - suit injunction. As all the relevant arguments were made at the oral hearing before me and i the written submissions afterwards, I should deal with that issue. There are two tests that the YM Insurers must satisfy. First, is the claim properly arguable and secondly, is it one for which permission to serve the claim out of the jurisdiction on World Tanker would be granted? I have concluded (for reasons set out above) that the claim is readily arguable. I have also concluded that permission to issue and serve the proceedings on World Tanker could be given, although in this particular case it is subject to the formalities point. Therefore I think that permission to make the re-re-amendment to the Originating Summons should be granted and I do so.

77. However that still leaves two further points taken by Mr Boyd, which he says are obstacles to the YM Insurers' pursuit of the claim for a permanent anti - suit injunction. They are: (i) that the YM Insurers require further permission to issue and serve the new claim on World Tanker out of the jurisdiction; and (ii) if permission is needed, the YM Insurers' failure to make any formal application or serve formal evidence before the hearing before me is fatal to the YM Insurers' application.

78. **The *"Parker v Schuller"* point**

The claim for an anti - suit injunction simply did not appear in the Originating Summons that was issued by the YM Insurers on 20 April 1999. So the first affidavit of Mr Zavos that was sworn in support of the application for permission to serve the Originating Summons out of the jurisdiction on World Tanker did not deal with this claim for an anti - suit injunction at all. The affidavit did not verify a cause of action for an anti - suit injunction or say that this was a proper case for the exercise of the English Court's powers under ***Order 11*** to grant permission to serve the proceedings on World Tanker in respect of an anti - suit injunction claim.[lxi] When the YM Insurers were granted permission (without notice) to serve the Originating Summons claiming declaratory relief upon World Tanker, the Court was not claiming to exercise jurisdiction over a person beyond the jurisdiction in respect of a claim for a permanent anti - suit injunction.

79. It is very established that if a claimant in English proceedings needs permission to serve those proceedings on a potential defendant out of the jurisdiction, then the claimant must take care to include all the causes of action on which he relies in the originating process for which he seeks leave to be served on the foreign defendant. That is the basis on which the court decides whether it will exercise this "exorbitant" jurisdiction on the foreign defendant. It is also the basis on which a foreign defendant can decide whether to take part in the English proceedings or to challenge them. This strict rule was recently reconfirmed by the Court of Appeal in ***DVA v Voest: see page 290 per Hobhouse LJ.***

80. If permission to serve a defendant outside the jurisdiction is granted under ***Order 11***, and the defendant then submits to the jurisdiction, a claimant will often wish to amend the proceedings against the defendant to expand the nature of the claim. The formal position is that the English Court will not give permission to amend unless it is satisfied that the new claim is one for which permission to serve out of the jurisdiction under ***Rule 11.1 and 4*** would be granted. A recent example of this is ***Credit Suisse First Boston (Europe) Ltd v. MLC (Bermuda) Ltd [1999] 1 Lloyd's Rep 767***, where the Claim Form was amended to add two new claimants and to add a claim for an anti - suit injunction after the original proceedings had been served within the jurisdiction.[lxii] Rix J permitted the two new claimants and the claim for an anti - suit injunction to be added, as he was satisfied that the new claimants would come within ***RSC Order 11 Rule 1(1)(d)(iii) or (iv).***[lxiii] Thus in circumstances where a foreign defendant ***has submitted to the jurisdiction*** and the claimant wishes to amend his claim to add a new cause of action, I accept that Mr Gaisman is correct in stating[lxiv]that it is not the law that *"upon a claimant applying for leave to amend existing proceedings brought against a foreign defendant a fresh application for leave must be made and fresh service out of the jurisdiction actually affected".*

81. I think a good way of testing the position is to ash what would have happened if permission to serve the Originating Summons (containing only the claim for declaratory relief) had been obtained without notice, but before World Tanker had acknowledged service the YM Insurers had decided that they wished to amend the Originating Summons to claim a permanent anti - suit injunction. I am sure that in those circumstances the YM Insurers would have had to obtain permission to amend and to issue and serve the amended Originating Summons on World Tankers out of the jurisdiction. To obtain that permission they would have had to serve evidence verifying the claim; stating that they had a good cause of action and also saying which paragraph of ***Rule 11.1(1)*** they relied on and why it was a proper case for service out of the jurisdiction.

83. I think that the same analysis ought to apply to the current situation, with some modification to take account of the unusual circumstances in this case. This is because I think that, in principle, when a foreign defendant has not already submitted to the jurisdiction of the English Court, it should not have to be subjected to a claim unless the English Court has decided that the claim is one that can and should be served on the foreign defendant under ***Rule 11.1.*** But, for the reasons that I have already given at length above, I have concluded that the anti - suit injunction claimed by the YM Insurers is a claim for which permission to serve out of the jurisdiction on World Tanker ought, in principle, to be granted. Therefore the question is what should be done in view of the fact that the YM Insurers have not complied with the formalities.

84. The failures to observe the formalities are very serious. The formalities involved are: (i) the requirement that the claimant must seek and obtain permission to issue and serve the claim on the defendant out of the jurisdiction; and (ii) the requirement that the claimant should file evidence supporting its belief that the claimant has a good cause of action in respect of the particular claim made (in this case the relief claimed

in paragraph 6 of the re-re-amended Originating Summons) and that it is a suitable case for service out of the jurisdiction.

85. However, in practice World Tanker knew from 12 January 2000 that the YM Insurers were seeking an injunction to restrain World Tanker from prosecuting any Louisiana proceedings until determination of the issues raised by the Originating Summons seeking the declaratory relief. World Tanker also knew of all the facts on which the YM Insurers relied in support of the anti - suit injunction. They had been set out in the second and third affidavits and the three witness statements of Mr Zavos that were served prior to the hearing before me in support of maintaining the permission to issue and serve the Originating Summons and in support of the interim anti - suit injunction. World Tanker also knew, at the latest from the first morning of the hearing before me, that the YM Insurers wished to re-re-amend the Originating Summons so as to claim a permanent anti - suit injunction. Therefore World Tanker could not say, nor did Mr Boyd submit, that there was any prejudice to it because there had been no formal application to obtain permission to issue and serve the claim for an anti - suit injunction on World Tanker out of the jurisdiction.

86. Further, in the course of argument all the points in favour of the YM Insurers' claim that it had a good cause of action for an anti - suit injunction and that it was a proper case for service out of the jurisdiction were canvassed by Mr Gaisman. Mr Boyd for World Tanker had the opportunity to deal with all the points and he did so comprehensively in his oral and written submissions.

87. In these circumstances it seems to me that ***in practice*** the hearing before me ought to be treated as if it were an application on notice for leave to issue and serve out of the jurisdiction a claim for a permanent anti - suit injunction at which the court had all the relevant evidence. But because there has been a failure to comply with the CPR (incorporating the old ***RSC Order 11***), then I have to consider whether I should exercise the powers I have under ***CPR 3.10*** to waive the irregularities in the formalities. ***CPR 3.10*** provides:

> *"Where there has been an error of procedure such as a failure to comply with a rule or practice direction-*
>
> *(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and*
>
> *(b) the court may make an order to remedy the error".*

88. Unless the regime of the ***RSC*** the Court of Appeal has said that the judges should exercise great care and caution when being asked to waive irregularities in procedure when it concerns an application to issue and serve proceedings out of the jurisdiction.[lxv] But Staughton LJ pointed out in ***Kuwait Oil Tanker Co SAR v Al Bader [1997] 1 WLR 1410 at 1418 - 9*** that the attitude of the Court of Appeal seemed to have been modified by the majority judgments[lxvi] in ***Golden Ocean Assurance Ltd v Martin (The "Goldean Mariner") [1990] 2 Lloyd's Rep 215.*** In the ***Kuwait Oil Tanker*** case Staughton LJ said at ***page 1419G***, that the majority in ***The "Goldean Mariner"*** concluded[lxvii] that the test should be whether there was *"good reason"* or *"good cause"* for the exercise of the discretion to waive the irregularity where service out of the jurisdiction is involved. Waite and Aldous LJ agreed with him.

89. In this case there has been very serious failures to observe the formalities. But in practical terms World Tanker has suffered no prejudice at all. I see no point in treating the hearing before me as an application by the YM Insurers, without notice, for permission to re-re-amend the Originating Summons and for leave to issue and serve the re-re-amended Originating Summons on World Tanker outside the jurisdiction. That would only lead to a repeat of the hearing before me if World Tanker wished to try to set the leave aside again.

90. I therefore conclude that there is *"good reason"* or *"good cause"* to make an order remedying the irregularities of the YM Insurers in relation to the application to re-re-amend the Originating Summons and the application to issue and serve the re-re-amended Originating Summons on World Tanker out of the jurisdiction. In so far as this necessitates granting permission to extend the validity of the Originating Summons I will grant it. But this must be on conditions,[lxviii] which are:

(1) That the YM Insurers undertake that within 7 days of this judgment being handed down, they will file evidence that: (i) verifies their belief that the Claimants have a good cause of action in respect of the claim for a permanent anti - suit injunction as claimed in paragraph 6 of the re-re-amended Originating Summons; (ii) verifiys which paragraph of ***Rule 11.1 (1)*** the YM Insurers rely upon and why; and (iii) states why there are good reasons that the court should exercise its discretion to grant permission to issue and serve out of the jurisdiction the claim for a permanent anti - suit injunction.

(2) That World Tanker have permission (if so advised) to amend its existing Application Notice[lxix] to include an application to set aside the leave to re-re-amend the Originating Summons and the leave that I will be giving to issue and serve the re-re-amended Originating Summons on World Tanker out of the jurisdiction.

(3) That the issue of costs be left open for argument.

91. On the assumption that the undertaking in (1) is to be given, I give permission to issue and serve the re-re-amended Originating Summons on World Tanker out of the jurisdiction.

H. The Claim for an interim anti - suit injunction

92. It is sensible to deal with this issue at this point, having concluded that the YM Insurers have a good arguable case for an anti - suit injunction against World Tanker for the purposes of the application for leave to serve out of the jurisdiction on World Tanker. The points that were made by Mr Boyd in opposition to the application for leave were repeated in the context of the claim for an interim anti - suit injunction. I cannot accept them in that context either.

93. No specific additional points were raised on the issue of *"balance of convenience"*. In my view the balance of convenience lies in preserving the present position. By that I mean that the rights of the YM Insurers to have any claims upon them under the H&M Policies determined by the English Courts and by English law should be preserved. This does not prejudice World Tanker except that its Louisiana Enforcement Proceedings will have to be suspended until there is a trial of the issue of whether a permanent anti - suit injunction should be granted. (I deal with the declaratory relief issue below). If there is to be a trial on the anti - suit injunction issue then it should be expedited.

I. Application to set aside the permissions to serve out in relation to the declaratory relief

94. The arguments raised by Mr Boyd for World Tanker on this aspect of the case were as follows:

(1) The YM Insurers have no right to claim declaratory relief of the nature set out in the Originating Summons against World Tanker. Just as World Tanker could not sue the YM Insurers for declarations as to the scope of the H&M policy cover, so the reverse must be true. This is because, in the words of Lord Diplock in ***Gouriet v Union of Post Office Workers [1978] AC 435 at 501,*** there is no issue on *"contested legal rights, subsisting or future, of the parties represented in the litigation before it and not of anyone else"*. World Tanker particularly relies upon the Court of Appeal decision in ***Meadows Indemnity Co Ltd v The Insurance Corporation of Ireland PLC [1989] 2 Lloyd's Rep 298***. Mr Boyd submits that the effect of this is that there is no *"serious issue to be tried"* between the YM Insurers and World Tanker.

(2) The YM Insurers cannot satisfy the test that there should be a *"good arguable case"* that the claim falls within ***Rule 11.1(1)(c)***. World Tanker is not a *"necessary"* party to the claims for declaratory relief; nor can it be said to be a *"proper"* party. This is because there is no right to claim the declaratory relief against World Tanker.

(3) Because the YM Insurers have no right to obtain declaratory relief against World Tanker, they cannot satisfy the test that there is *"a serious issue to be tried"* between the parties, even if there is a *"good arguable case"* that World Tanker is a *"proper"* party;

(4) The YM Insurers cannot rely upon ***Rule 11.1(1)(d)*** because there is an insufficiently close contractual nexus between the YM Insurers and World Tanker. Also, as against World Tanker,

it is not a claim to *"enforce"* the H&M Policies nor is it one that *"otherwise affects"* those contracts.

(5) Further the claims for declarations would serve no useful purpose as World Tanker is not pursuing any claims against the YM Insurers here in England. The Louisiana Courts can deal with any issues of English law and any questions of the application of the ***Direct Action Statute*** should be left to the Louisiana Courts. Therefore this is a case of a claimant using the mechanism of a claim for a "negative declaration" to found jurisdiction in a non - natural form. Thus this is not a proper case for leave to serve the Originating Summons out of the jurisdiction under ***Rule 11.4(2).***

95. In the Application Notice and at the start of the hearing it appeared that Mr Boyd was also taking a further point that there was not a serious issue to be tried as between the YM Insurers and the First to Fourth Defendants who had been served with the proceedings within the jurisdiction.[lxx] The suggestion was that there might be some "collusion" between the assureds under the H&M Policies and the YM Insurers. But in the course of the hearing Mr Boyd did not rely on this point and I will assume that it is not being pursued.

96. **Are the YM Insurers entitled to pursue the claim for declaratory relief against World Tanker?**

Mr Boyd submits that there are no contested legal rights in issue between World Tanker and the YM Insurers. The position is, he says, the same as that between the insured and the reinsurers in the ***Meadows Indemnity case***. There the Court of Appeal struck out a claim by the ***reinsurers*** who claim a declaration as against the ***insured*** that the ***insurers*** were entitled to avoid the insurance contact, when no claim had yet been made on the ***reinsurance*** contract. Mr Boyd submitted that as there is no contract as between the YM Insurers and World Tanker, then there cannot be any contested legal right between the two parties that can give rise to a right by the YM Insurers to claim declaratory relief, as against World Tanker, on the scope of the H&M Policies. He relies particularly on the statement of May LJ in the ***Meadows Indemnity case at page 309.***

97. I cannot accept that the position in the present case is analogous to that in the ***Meadows Indemnity case***. World Tanker has brought three sets of proceedings in Louisiana in which it claims, either directly or indirectly, to be entitled to assert rights under the H&M Policies by virtue of the Louisiana ***Direct Action Statute*** or claims for declaratory relief. All those rights are challenged by the YM Insurers in two ways. They say that World Tanker has no right to make claims concerning the H&M Policies in any court other than the English Courts and also that World Tanker would have no rights or restricted rights on the proper construction of the policy terms in any case. To my mind that demonstrates that there are contested rights between the YM Insurers and World Tanker. In particular in the Direct Action Claim, although there is no direct contact between the parties, World Tanker is relying on a statutory right to claim under the H&M Policies. SO I think that there is a sufficiently direct issue between the parties to gives the YM Insurers the right to claim declaratory relief.

98. **Can the YM Insurers shows that they have a good arguable case that the claim falls within *Rule 11.1(1)(c)*?**

Mr Gaisman accepts that World Tanker is not a *"necessary"* party to the proceedings for declaratory relief. But he asserts that World Tanker is a *"proper"* party. I accept that submission. For the reasons I have already given I conclude that the YM Insurers are entitled to claim declaratory relief as to the scope of the H&M Policies as against World Tanker. Therefore World Tanker is a *"proper"* party in the sense that there is a right to claim the relief sought against it. Further, in view of the fact that the First to Fourth Defendants have stated that they will contest the claims for declarations "in part", it seems to me that there is a *"real issue"* to be tried as between the YM Insurers and the defendants who have been served within the jurisdiction. I appreciate that, as yet, the assured under the H&M Policies have made no claim against the YM Insurers for any liability arising out of the collision. But that does not preclude the insurer from obtaining declaratory relief as against his assured if it would serve a useful purpose. In my view it would do so for two reason. First there obviously is some dispute between the YM Insurers and the assureds on the H&M Policies' terms. Secondly because the same points will arise, as a matter of English law, in the Louisiana Enforcement proceedings.

99. **Can the YM Insurers show that they have a *"good arguable case"* that the claim for declaratory relief, as against World Tanker, comes within *Rule 11.1(1)(d)?***

In my view they can do so. I have already concluded, in the section above dealing with the issue of permission to serve out of the jurisdiction on the claim for an anti - suit jurisdiction, that because of the claims by World Tanker in the Louisiana Enforcement Proceedings, there is a sufficient contractual nexus between the YM Insurers and World Tanker. I also note that in the proceedings in the Orleans District (State) Court, World Tanker is itself claiming declaratory relief as to the proceeds *"due"* under the policies. It does so as a *"person interested..or whose rights.. or legal relations are affected by ... contract"* within the meaning of Article 1872 of the Louisiana Code of Civil Procedure.[lxxi]

100. IN my view the declaratory relief claimed by the YM Insurers on the scope of the H&M Policies constitutes a claim which *"otherwise effects"* the contract on which World Tanker is basing its claims in the Louisiana Enforcement proceedings. It is also, I think, a claim to *"enforce"* the contract in the sense that the YM Insurers wish to have a declaration of who the contract terms are to be enforced. Either way the claim comes within the wording of ***paragraph (d)*** as explained by Hobhouse J in ***Gulf Bank KSC v Mitsubishi Heavy Industries Ltd [1994] 1 Lloyd's Rep 323 at 329.***

101. **The procedural difficulty for the YM Insurers.**

There is a procedural difficulty for the YM Insurers in basing their claim for permissions to serve out of the jurisdiction in respect of the declaratory relief claim on ***paragraph(d)***. This paragraph was not relied on, as against World Tanker, when the application was made without notice in June 1999. But a further Application Notice was issued by the YM Insurers on 1 February 2000 in which they sought permission to serve the re-amended Originating Summons[lxxii] on the basis that the claim came within ***paragraph (d) (i), (ii), (iii) or (iv).*** Mr Gaisman submits that the procedural failure to base the original application on ***paragraph (d)*** should be remedied by the Court, exercising its powers under ***CPR 3.10.***

102. The same test of *"good reason"* or *"good cause*" to remedy these procedural irregularities must apply to this issue as it did to the procedural failures of the YM Insurers in relation to the claim for an anti - suit injunction. World Tanker has not suffered any prejudice. It had notice of the amended application and all the evidence that the YM Insurers relied on. It would be pointless to teat the hearing before me as an application without notice. Therefore I think there is *"good reason"* or *"good cause"* to remedy the procedural irregularities. The proceedings before me will be treated as the hearing on notice. World Tanker will be permitted to amend its Application Notice under ***CPR Part 11.1*** so as to challenge this ground as well. All questions on costs must be reserved.

103. **Is this a proper case for permitting service out of the jurisdiction in accordance with Rule 11.4(2)?**

Mr Boyd has two principal arguments under the hearing of "discretion". First he says that the English proceedings for a declaration will serve no useful purpose, because World Tanker is not pursuing its claims under the ***Direct Action Statute*** or the Garnishee or State Action in England, but in Louisiana. The Courts there are perfectly capable of dealing with issues of English law and the proper construction of English law contracts. The real issues will arise in the Louisiana courts once the questions of English law raised in the declaratory proceedings have been determined. Then (for example) an issue will arise in the Direct Action Claim on whether the *"pay to be paid"* clause in Clause 8.1 of the ITC (Hulls) is a *"lawful condition of the policy"* within the meaning of ***paragraph C*** of the Direct Action Statute, *§ 655.*[lxxiii]

104. I agree with Mr Boyd that if the only question was whether the English Court or the Louisiana Court should decide on the proper construction of an English law contract, then it might not be a proper case to exercise discretion to permit proceedings to be served out of the jurisdiction in relation to the declaration relief. But that is not the only issue. I cannot consider the claim for the declaratory relief in isolation. The YM Insurers have now also sought a permanent anti - suit injunction and I have held that they are entitled to serve proceedings out of the jurisdiction in respect of that claim. I have also held that they are entitled to an interim injunction. So I have held that, on the face of it, the YM Insurers are entitled to have any issues on the policies decided by the English Courts by virtue of the EJC. The YM Insurers do wish the English Courts to decide issues of construction of the H&M Policies that will bind World Tanker. Therefore the balance must be in favour of permitting service out of the jurisdiction of the claim for the declaratory relief sought on the issues of construction.

105. Mr Boyd's second point is that this is yet another case of a claimant using proceedings to obtain a "negative declaration" to found jurisdiction in the English Courts when they are not the natural forum for the resolution of the dispute between the parties. Mr Boyd submits that the Louisiana Courts must be the natural forum for the resolution of claims for enforcement of the Louisiana Liability judgment and in particular for claims under the Direct Action Statute. He relies on the well - known decisions of ***Saipem SpA v Dredging VO2BV and Geosite Surveys Ltd (The "Volvox Hollandia") [1988] 2 Lloyd's Rep 361;***[74] ***Sohio Supply Co v Gatoil (USA) Inc [1989] 1 Lloyd's Rep 588;*** and ***First National Bank of Boston v Union Bank of Switzerland [1990] 1 Lloyd's Rep 32.***[75] However my attention was drawn, after the conclusion of the oral argument, to a new recent decision of the Court of Appeal in ***Messier - Dowty Ltd v Sabena SA (21 February 2000),*** in which Lord Woolf MR stated, at ***paragraph 36*** of his judgment, that the observations of Kerr LJ in the first and last of the cases referred to above should be *"treated with reserve"* because the use of negative declarations domestically had expanded over recent years. He said *"In the appropriate case their use can be valuable and constructive"*.

106. Once again I think that the problem with Mr Boyd's submission is that it ignores the facts that (i) World Tanker is asserting a claim in Louisiana under the ***Direct Action Statute*** on the H&M Policies asserts other claims concerning the H&M Policies in the other Enforcement Proceedings; and (ii) that I have held that the YM Insurers have a good arguable case for enforcing the EJC by means of an anti - suit injunction. If those conclusions are correct then the English Courts are the proper forum to claim the EJC and they are also the proper forum for the resolution of any issues on the proper construction of the policy terms. Mr Boyd was unable to rely on any case in which the Court has refused permission to serve out of the jurisdiction under ***Order 11 Rule 1***(or the new CPR) where there is an enforceable EJC in favour of the English Courts and the claimant seeks a negative declaration in the English proceedings. But there are two cases where the English Courts have held that it is proper to claim negative declaratory relief where the contract concerned was expressly governed by English law: ***HIB Ltd v Guardian Insurance Co Inc [1997] 1 Lloyd's Rep 412 at 417 per Longmore J;*** and ***Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyd's Rep 90 at 106 per Thomas J.*** In the former case Longmore J also held that although a "negative declaration" was sought he would still exercise his discretion to permit service of the proceedings out of the jurisdiction under ***Order 11 Rule 1 (1) (d) and Rule 4 (2).***

107. It seems to me that if, in addition to being expressly governed by English law, the relevant contract is one containing an EJC in favour of the English Courts then there can be no objection to a claimant using the mechanism of a "negative declaration" if that is the only means by which the relevant issue can be brought before the English courts. So I conclude that the fact that the YM Insurers claim "negative declarations" is not, of itself, a good reason to set aside the permission to serve out of the jurisdiction the Originating Summons for declaratory relief.

J. Conclusions

108. I will summarise my conclusions. They are:

(1) A claim for an anti - suit injunction is a legitimate type of claim that can be made in an originating process for which permission is needed to serve it out of the jurisdiction under ***Rule 11.1*** on a proposed defendant;

(2) If the basis of the claim for an anti - suit injunction is that the potential defendant is attempting to rely on contractual rights, whether directly or indirectly, eg. under a statutory right of action, then the claim can, in principle, come within ***Rule 11.1 (1) (d);***

(3) In this case World Tanker is relying on the Louisiana ***Direct Action Statute*** to make claims under the H&M Policies against the YM Insurers. World Tanker's reliance on the H&M Policies, through the ***Direct Action Statute,*** establishes a sufficiently close contractual nexus between the parties for the purpose of ***Rule 11.1 (1) paragraph (d);***

(4) Because the H&M Policies contain an EJC in favour of the English Courts, the YM Insurers' claim for an anti - suit injunction is a claim to *"enforce"* the EJC in the H&M Policies within ***paragraph (d)(iv)***. It is also a claim that *"otherwise affects"* that contract;

(5) That is enough to bring the claim for an anti - suit injunction against all three Louisiana Enforcement Proceedings within ***paragraph (d).*** But, if necessary, I would hold that the claim for an anti- suit injunction against the Garnishee Proceedings and the State Action also come directly within ***paragraph (d)(iv);***

(6) Therefore the YM Insurers have a *"good arguable case*" that they bring their claim for an anti - suit injunction within ***Rule 11.1 (1) (d)(iv).***

(7) If I had concluded that there was not a good arguable case that the claim for an anti - suit injunction came within ***paragraph (d)(iv)***, then I would have reached the same conclusion in relation to ***paragraph (d)(iii)***, if the YM Insurers relied on the English proper law clause, because the same issues arise in relation to that sub - paragraph;

(8) Because World Tanker is claiming rights (under the ***Direct Action Statute*** and otherwise) to make claims concerning the H&M Policies which contains an EJC in favour of the English Courts, there is a *"serious issue to be tried"* as between World Tanker and the YM Insurers on whether an anti - suit injunction (based on the EJC) should be granted. On the facts of this case the YM Insurers have a good arguable case that they should have an anti - suit injunction;

(9) As a matter of discretion if there had been no problems of procedural irregularities I would have exercised a discretion to permit service out of the jurisdiction of a claim for an anti - suit injunction;

(10) Therefore the YM Insurers have satisfied me that they should have leave to re-re-amend the Originating Summons to claim a permanent anti - suit injunction because: (a) the claim is arguable; and (b) it is one for which permission to serve out of the jurisdiction can and should (in principle) be granted;

(11) There have been serious procedural irregularities because there had been no original claim for an anti - suit injunction and even by the time of the oral hearing the formal requirements were not completed by the YM Insurers. However World Tanker has suffered no prejudice. Therefore, exercising the Court's powers to cure irregularities under ***CPR 3.10*** I would permit the YM Insurers to make the application for permission to re-re-amend the Originating Summons and to serve it out of the jurisdiction, upon certain conditions being fulfilled.

(12) The application of the YM Insurers for an interim anti - suit injunction will be granted;

(13) The application by World Tanker to set aside the permission to serve the original claim for declaratory relief on the basis of ***Order 11 Rule 1 (1) (c)*** will be rejected;

(14) The application by the YM Insurers for permission to serve the original claim for declaration relief on the further basis of ***Rule 11.1 (1) (d)*** would be permitted, despite the formal irregularities, which I cure exercising the Court's powers under ***CPR 3.10.***

109. A great many points were raised in the course of the two days of argument and in the written submissions that were made after the oral hearing. I am very grateful to counsel for the clear and exceptionally interesting arguments put forward on all the points. As arranged at the end of the oral hearing, the parties should attempt to agree what the consequences of my conclusions should be so that an order can be prepared.

Endnotes

1. The Application Notice is dated 20 August 1999: ***Bundle 1/Tab 2***. Although the Originating Summons of the Claimants was issued under the old procedure, it has been accepted by both sides that I should use the CPR to determine the present applications.

2. The Application Notice, as originally framed, is dated 12 January 2000: ***Bundle 1/Tab 1/pages 1-2.*** During the course of the hearing before me an amended version was issued for which permission was sought: ***Bundle 1/Tab 1/pages 7A-7C***.

3. The Application Notice is dated 1 February 2000: ***Bundle 1/Tab 1/pages 5-7.***

4. The ITC terms are: *"The Underwriters agree to indemnify the Assured for three-fourths of any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable by way of damages for: 8.1.1. loss of or damage to any other vessel or property on any other vessel..."* [The emphasis on ***"paid"*** is mind]. ***Bundle 2/page 45.***

5. See: ***ITC clause 8.3: Bundle 2/page 45***

6. The statute was passed as Act 55 of 1930, ie. in the same year as the ***Third Parties (Rights against Insurers) Act 1930.*** The Louisiana statute was subsequently amended and was re-enacted in 1958 and again in 1988. It is now known as ***Louisiana Revised Statute 22§655.***

7. The ***Direct Action Statute*** states that an *"injured person"* has a *"right of action against the insurer"* whether or not the policy of insurance sued upon was written or delivered in the state of Louisiana and whether or not such policy contains a provision forbidding such direction action, *"provided the accident or injury occurred within the state of Louisiana"*: ***§ 655 B(2): Bundle 3/page 539*** . As I have stated, the collision was about 250 miles off Portugal.

8. The full claim, as found by the court, was for damages of US$ 29.4 million plus US$5.3 million interest. But the court gave credit for US$ 12,262,000 that the Newcastle P&I Club had paid World Tanker in respect of ***"Ya Mawalay's"*** liability for the collision. There is a dispute on the nature of the payment by the Newcastle P&I Club which is referred to in paragraph 8 above. But it is agreed that the balance of the judgment is US$21.4 million.

9. In accordance with Louisiana procedure, World Tanker's lawyers had submitted draft findings of fact and law to the Judge. The judgment followed the draft findings almost to the letter.

10. **See judgment of Judge Lemmon at para 30 of the Conclusions of Law: Bundle 2/page 252.**

11 The other Kara Mara interests were added as defendants by amendment permitted by Cresswell J on 21 May 1999. He also permitted amendments to the terms of the relief sought in the Originating Summons. **Order at *Bundle 1/Tab 4/page 24***

12 That is the "three-fourths" collision liability clause.

13 This is commonly called the "pay to be paid" provision and it was dubbed the "pay to be paid" point at the hearing.

14 Sperex Shipping Company Limited was thought to be a mortgagee of the vessel and so, possibly, an assured under the H&M Policies. **Zavos Aff 1: Bundle 1/Tab 7/page 41 para 11**

15 Para 33.1 of the affidavit simply said: *"The Plaintiffs have a good arguable case in relation to each of the declarations which they seek..."* without identifying either the First to Fourth Defendants specifically or ***Rule 4(1)(d).*** **Zavos Aff.1: Bundle 1/Tab 7/page 51**

16 The Complaint is at: ***Bundle 3/page 341***

17 **Direct Action Complaint: Section VI:** ***Bundle 3/page 346.***

18 ***Bundle 3/page 347***

19 It seems that the Italian insurers participating in the two H&M policies did not plead to the merits of the claim at this stage but are contesting jurisdiction and *forum conveniens* in the Direct Action Claim: **Marsh 3:** ***Bundle 1/Tab 14/page 123 para 9***. Four Lloyd's syndicates have subsequently accepted that the Louisiana Court has jurisdiction because they have to accept that they have sufficient *"business contacts"* in Louisiana as they write insurance in favour of Louisiana insureds and/or on property situated in Louisiana: **Zavos Aff.3:** ***Bundle 1/Tab 13/page 117 para 35***

20 Heading of the ***"Supplemental Complaint": Bundle 3/page 388.***

21 See: ***Bundle 3/page 388.***

22 See: ***Bundle 3/page 391.***

23 **Para 5 of the Petition: Bundle 3/page 399.** The purpose is thus similar to that of the Declaratory relief sought by the YM insurers in the present action.

24 See: ***Bundle 3/page 403.***

25 The original version of the Application Notice had only sought to restrain World Tanker from pursuing their claims *"in the Courts of the USA"* generally and then specifically identified the three Louisiana proceedings.

26 Set out in the letter from Mr Boyd QC and Miss Blanchard dated 10 February 2000.

27 Set out in the letter from Mr Gaisman QC and Miss Sabben - Clare dated 10 February 2000.

28 That is the *"necessary or proper party"* paragraph.

29 The second Application Notice of the YM Insurers dated 12 February 2000 **(Bundle 1/Tab 1/pages 5-7)** for leave to waive any formal defects or for fresh leave to serve the Originating Summons can be dealt with under this heading.

30 Relying on the phrase of Millett LJ in ***"Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace") [1995] 1 Lloyd's Rep 87 at 96.***

31 Second witness statement of Mr Marsh, filed on behalf of World Tankers: Bundle 1/Tab 15/page 123 para 7.

32 It was in fact Mr Boyd's submission that it was inevitable that the Louisiana Court would strike down the English EJC, because if it upheld the clause it would defeat the purpose of the ***Direct Action Statute***.

33 That is a right not to be sued in a Court contrary to the terms of the EJC.

34 The wording of §**655 B (1)** of the *Direct Action Statute:* ***Bundle 3/page 539***

35 See: ***"The Eras EIL Actions" [1992] 1 Lloyd's Rep 570 at 612 RHS, per Mustill LJ; Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH [1997] 2 Lloyd's rep 279 at 290 per Hobhouse LJ.***

36 The other members of the House of Lords agreed with Lord Brandon, although Lord Goff of Chieveley preferred to regard the grant of an anti - suit injunction as *"one example of circumstances in which, in the interests of justice, the power to grant an injunction may be exercised":***see page 44H**

37 ***See Societe Nationale Industrielle Aerosaptiale v Lee Kui Jak [1987] AC 871 at 892B per Lord Goff of Chieveley***

38 That case was dealing with the power of the court to grant an interlocutory injunction in the context of a dispute that fell within an arbitration clause. But Lord Mustill dealt generally with the juridical basis on which the remedy of an injunction could be sought: *"...the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action":* **at 362C.**

39 This was a dissenting Advice in which he advised that the Hong Kong court could grant leave to serve a writ out of the jurisdiction where the only claim was for an interim ***"Mareva"*** injunction. But Lord Nicholls relied on the ***Laker case*** to make the point, in relation to claims for injunctions to restrain foreign proceedings, that the *"underlying right, if sought to be identified, can only be defined along the lines that a party has a right not to be sued abroad when that would be unconscionable":***see 310H**.

40 *As in* **Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 WLR 589:** ***see particularly at 589E-F per Steyn LJ***

41 As in ***Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace") [1995] 1 Lloyd's Rep 87; see particularly at 96 per Millett LJ***

42 ***See page 134D.*** In that case the House of Lords emphasised that the English courts would not interfere if the English courts had no interest in the matter. Where they do, because England is a possible alternative forum, then the court will not usually interfere unless it is established that England is ***the*** natural forum: see the ***Aerospatiale case at page at 896G***

43 *See page 134E.*

44 ***Ibid.***

45 Hereafter ***"DVA v Voest"***.

46 Which was adopted and approved by the Court of Appeal in ***DVA v Voest: see*** the judgment of Hobhouse LJ at ***page 287***.

47 The second and third points are also dealt with in ***the Seaconsar case: see pages 455E and 457A, per Lord Goff of Chieveley.***

48 As in ***DVA v Voest (supra)*** where the claim in the Brazilian courts was made by the Brazilian insurers who were, by Brazilian law, the assignees of the claims of their assured against the shipowners and the time charterers. The assignees were held to be bound by the arbitration clause: see ***pages 283-4***

49 As in ***The "Padre Island" No 1 [1984] 2 Lloyd's Rep 408***, where Leggatt J held that third party cargo interests making a claim under the ***1930 Act*** were bound by the arbitration clause in the P&I Club Rules to

submit their claim for an indemnity from the Club to arbitration. Leggatt J's decision was approved in the second stage of that litigation ***sub non: Firma C-Trade SA v Newcastle P&I Association [1991] 2 AC 1 at page 33B per Lord Goff of Chieveley.***

50 The wording of ***para B(1) of the Direct Action Statute: §655: Bundle 3/page 539***

51 My emphasis.

52 See: ***page 284.***

53 See: ***pages 285-6***

54 Compare the English ***Third Parties (Rights against Insurers) Act 1930 section 1(1).*** It is often said that this section gives third parties a "statutory assignment" of rights under policies if the preconditions are fulfilled.

55 Outline Submissions of World Tanker: ***para 25.***

56 That is the wording of ***paragraph C of §655.***

57 See: ***page 94 per Leggatt LJ; page 96 per Millett LJ; page 97 per Neill LJ.***

58 The phrase used by Hobhouse LJ to characterise the same argument in ***DVA v Voest: page 287.***

59 See: ***page 287 RHS***.

60 World Tanker's Outline Argument: ***paras 47 and 48***

61 So the requirements of ***Order 11 Rule 4(1)***were not complied with.

62 Service within the jurisdiction was possible because of an express provision for a place of service in the contract between the original claimant and the defendant. But the proposed two additional claimants could not rely on that clause as they were not party to that contract.

63 See: ***page 775***

64 As he does in para 2 of the Written Submissions made by the YM Insurers on the issue of the proposed re-re-re-amendment of the Originating Summons that I invited from the parties at the close of the oral hearing before me.

65 See: ***Leal v Dunlop Bio - Processes International Ltd [1984] 1 WLR 874; Camera Care Ltd v Victor Hasselblad Aktiebolag [1986] 1 FTLR 348.***

6 Those of McCowan LJ and Sir John Megaw; Lloyd LJ dissented.

67 Their analysis had relied, by analogy, upon the restatement of the test for renewing writs under ***Order 6 Rule 8*** as stated by Lord Brandon in the House of Lords' decision in: ***Kleinwort Benson Ltd v Barbrak Ltd (The "Myrto" No 3) [1987] AC 597 at 619E.***

68 In the Written Submissions of the YM Insurers they undertook to fulfil conditions if required: ***see para 3.***

69 This was issued on 20 August 1999: ***Bundle 1/Tab 2***

70 As already noted the first affidavit of Mr Zavos had failed specifically to verify that there was a "*real issue*" to be tried between the YM insurers, as claimants, and the First to Fourth Defendants, as required by ***Rule 11.4(1)(d).*** But World Tanker's Application Notice to set aside the leave to serve the Originating Summons out of the jurisdiction did not take this technical point. It was not relied upon in argument by Mr Boyd.

71 See: para 3 of the ***"Petition for Damages in Contract and in Tort With a Request for Declaratory Judgment and Trial by Jury": Bundle 3/page 399***

72 That did not contain the claim for an anti-suit injunction at that stage.

73 ***See: Bundle /page 539.***

74 In particular the comments of Kerr LJ at ***page 371.***

75 In particular the comments of Sir Michael Kerr at ***page 38***.

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[i] The Application Notice is dated 20 August 1999: ***Bundle 1/Tab 2***. Although the Originating Sumons of the Claimants was issued under the old procedure, it has been accepted by both sdies that I shuold use the CPR to determine the present application.

[ii] The Application Notice, as originally framed, is dated 12 January 2000: ***Bundle 1/Tab 1/pages 102.*** During the course of the hearing before me an amended version was issued for which permission was sought: ***Bundle 1/Tab 1/pages 7A-7C.***

[iii] The Application Notice is dated 1 February 2000: ***Bundle 1/Tab 1/pages 5-7***.

[iv] The ITC terms are: *"The Underwriters agree to indemnify the Assured for three-fourths of any sum or sums paid by the Assured to any other person or persons by reason of the Assured becoming legally liable by way of damages for: 8.1.1: loss of or damage to any other vessel or property on any other vessel...."* [The emphasis on ***"paid"*** is mine]. ***Bundle 2/page 45***.

[v] See: *ITC clause 8.3: Bundle 2/page 45*

[vi] The statute was passed as Act 55 of 1930, ie. in the same year as the ***Third Parties (Rights against Insurers) Act 1930***. The Louisiana statute was subsequently amended and was re-enacted in 1958 and again in 1988. It is now known as ***Louisiana Revised Statute22§655.***

[vii] The ***Direct Action Statute*** states that an *"injured person"* has a *"right of action against the insurer"* whether or not the policy of insurance sued upon was written or delivered in the state of Louisiana and whether or not such policy contains a provision forbidding such direction action, *"provided the accident or injury occurred within the state of Louisiana"*: ***§655 B (2): Bundle 3/page 539***. As I have stated, the collision was about 250 miles off Portugal.

[viii] The full claim, as found by the court, was for damages of US$29.4 million plus US$5.3 million interest. But the court gave credit for US$ 12,262,000 that the Newcastle P&I Club had paid World Tanker in respect of ***"Ya Mawlaya's"*** liability for the collision. There is a dispute on the nature of the payment by the Newcastle P&I Club which is referred to in paragraph 8 above. But it is agreed that the balance of the judgment is US$21.4 million.

[ix] In accordance with Louisiana procedure, World Tanker's lawyers had submitted draft findings of fact and law to the Judge. The judgment followed the draft findings almost to the letter.

[x] **See judgment of Judge Lemmon at para 30 of the Conclusions of Law: Bundle 2/page252.**

[xi] The other Kara Mara interests were added as defendants by amendment permitted by Cresswell J on 21 May 1999. He also permitted amendments to the terms of the relief sought in the Originating Summons. **Order at *Bundle 1/Tab 4/page 24***

[xii] That is the "three - fourths" collision liabilty clause.

[xiii] This is commonly called the "pay to be paid" provision and it was dubbed the "pay to be paid" point at the hearing.

[xiv] Sperex Shipping Compnay Limited was thought to be a mortgagee of the vessel and so, possibly, an assured under the H&M policies. **Zavos Aff 1: Bundle 1/Tab 7/page 41 para 11**

[xv] Para 33.1 of the affidavit simply said: *"The Plaintniffs have a good arguable case in relatino to each of th declarations which they seek...."* without identifying either the First to Fourth Defendants specifically or ***Rule 4(1)(d).*** **Zavos Aff.1: Bundle 1/Tab 7/page 51**

[xvi] The Complaint is at: ***Bhundle 3/page 341***

[xvii] **Direct Action Complaint: Section VI:** ***Bundle 3/page 346.***

[xviii] ***Bundle 3/page 347.***

[xix] It seems that the Italian insurers participating in the two H&M policies did not plead to the merits of the claim at this stage but are contesting jurisdiction and *forum conveniens* in the Direct Action Claim: **Marsh 3:** ***Bundle 1/Tab 14/page 123 para 9***. Four Lloyd's syndicates have subsequently accepted that the Louisiana Court has jurisdiction becuase they ahve to accept that they ahve sufficient *"business contacts"* in Louisiana as they write insurance in favour of Louisiana insureds and/on proerty situated in Louisiana: **Zavos Aff.3:** ***Bundle 1/Tab 13/page 117 para 35***

[xx] Heading of the ***"Supplemental Complaint": Bundle 3/page 388***.

[xxi] See: ***Bundle 3/page 388.***

[xxii] See: ***Bundle 3/page 391.***

[xxiii] **Para 5 of the Petition: Bundle 3/page 399**. The purpose is thus similar to that of the Declaratory relief sought by the YM Insurers in the present action.

[xxiv] See: ***Bundle 3/page 403***.

[xxv] The original version of the Applicatoin Notice had only sought to restrain World Tanker from pursuing their claims *"in the Courts of the USA"* generally and then specifically identified the three Louisiana proceedings.

[xxvi] Set out in the letter from Mr Boyd QC and Miss Blanchard dated 10 February 2000.

[xxvii] Set out in the letter from Mr Gaisman QC and Miss Sabben - Clare dated 10 February 2000.

[xxviii] That is the *"necessary or proper party"* paragraph.

[xxix] The second Application Notice of the YM Insurers dated 12 February 2000 **(Bundle 1/Tab 1/pages 5-7)** for leave to waive any forma defects or for fresh leave to serve the Originating Summons can be daelt with under this heading.

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[xxxi] **Second witness statement of Mr Marsh, filed on behalf of World Tanker: Bundle 1/Tab 15/page 123 para 7.**

[xxxii] It was in fact Mr Boyd's submission that it was inevitable that the Louisiana Court would strike down the English EJC, because if it upheld the clause it would defeat the purpose of the ***Direct Action Statute.***

[xxxiii] That is a right not to be sued in a Court contrary to the terms of the EJC.

[xxxiv] The wording of *§655 B (1) of the Direct Action Statute: Bundle 3/page 539*

[xxxv] See: ***"The Eras EIL Actions" [1992] 1 Lloyd's Rep 570 at 613 RHS, per Mustill LJ; Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH [1997] 2 Lloyd's rep 279 at 290 per Hobhouse LJ.***

[xxxvi] The other members of the Huose of Lords agreed with Lord Brandon, althuogh Lord Goff of Chieveley preferred to regard the grant of an anti - suit injunction as *"one example of circumstances in which, in the interests of justice, the power to grant an injunction may be exercised":* ***see page 44H***.

[xxxvii] ***See Société Nationale Industrielle Aerosaptiale v Lee Kui Jak [1987] AC 871 at 892B per Lord Goff of Chieveley***

[xxxviii] That case was dealing with the power of the court to grant an interlocutory injunction in the context of a dispute that fell within an arbitration clause. But Lord Mustill dealt generally with the juridical bassi on which the remedy of an injunction could be sought: *"...the right to an interlocutory injunction cannot exist in isolation, but is always incidental to and dependant on the enforcement of a substantive right, which usually although not invariably takes the shape of a cause of action":* ***at 362C.***

[xxxix] This was a dissenting Advice in which he advised that the Hong Kong court could grant leave to serve a writ out of the jurisdiction where the only claim was for an interim ***"Mareva"*** injunction. But Lord Nicholls relied on the ***Laker*** case to make the point, in relatoin to claims for injunctions to restrain foreign proceedings, that the *"underlying right, if sought to be identified, can only be defined along the lines that a party has a right not to be sued abroad when that would be unconscionable":* ***see 310H.***

[xl] As in ***Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 WLR 589; see particularly at 59E-F per Steyn LJ***

[xli] As in ***Aggeliki Charis Compania Maritima SA v Pagnan SpA (The "Angelic Grace") [1995] 1 Lloyd's Rep 87; see particulary at 96 per Millett LJ***

[xlii] ***See page 134D***. In that case the Huose of Lords emphasised that the English courts would not interfere if the English courts had no interest in the matter. Where they do, because England is a possible alternative forum, then the court will not usually interfere unless it is established that England is ***the*** natural forum see the ***Aerospatiale case at page at 896G***.

[xliii] ***See page 134E***.

[xliv] ***Ibid.***

[xlv] Hereafter ***"DVA v Voest".***

[xlvi] Which was adopted and approved by the Court of Appeal in *DVA v Voest: see* the judgment of Hobhouse LJ at *page 287*.

[xlvii] The second and third points are also dealt with in ***the Seaconsar case: see pages 455E and 457A, per Lord Goff of Chieveley.***

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[l] The wording of ***para B(1) of the Direct Action Statute: §655: Bundle 3/page 539***

[li] My emphasis.

[lii] See: ***page 284.***

[liii] See: *pages 285 - 6.*

[liv] Compare the English ***Third Parties (Rights against Insurers) Act 1930 section 1(1).*** It is often said that this section gives third parties a "statutory assignement" of rights uner policies if the preconditoins are fulfilled.

[lv] Outline Submissions of World Tanker: ***para 25.***

[lvi] That is the wording of ***paragraph C of § 655.***

[lvii] See: ***page 94 per Leggatt LJ: page 96 per Millett LJ; page 97 per Neill LJ.***

[lviii] The phrase used by Hobhouse LJ to characterise the same argument in ***DVA v Voest: page 287.***

[lix] See: ***page 287 RHS.***

[lx] World Tanker's Outline Argument: ***paras 47 and 48.***

[lxi] So the requirements of ***Order 11 Rule 4(1)*** were not complied with.

[lxii] Service within the jurisdiction was psosible because of an express provison for a place of service in the contract between the original claimant and the defendant But the proposed two additional claimants could not rely on that clause as they were not party to that contract.

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[lxiv] As he does in para 2 of the Written Submissions made by the YM Insurers on the issue of the proposed re-re-re-amendment of the Originating Summons that I invited from the parties at the close of the oral hearing before me.

[lxv] See: ***Leal v Dunlop Bio - Processes Internatial Ltd [1984] 1 WLR 874; Camera Care Ltd v Victor Hasselblad Aktiebolag [1986[1 FTLR 348.***

[lxvi] Those of McCowan LJ and Sir John Megaw; Lloyd LJ dissented.

[lxvii] Their analysis had relied, by analogy, upon the restatement of the test for renewing writs under ***Order 6 Rule 8*** as stated by Lord Barndon in the House of Lords' decision in ***Kleinwort Benson Ltd v Barbrak Ltd (The "Myrto" No 3) [1987] AC 597 at 619E.***

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[lxxi] See: para 3 of the ***"Petitoin for Damage in Contract and in Tort with a Request for Declaratory Judgment and Trial by Jury": Bundle 3/page 399***

[lxxii] That did not contain the claim for an anti - suit injunction at that stage.

[lxxiii] See: ***Bundle/page 539.***