JUDGMENT : JONATHAN HIRST QC Commercial Court. 16th July 2004)

1. The Defendants (who I shall call Sun Life UK and Sun Life Canada respectively and Sun Life collectively) apply:

   (1) To stay these proceedings against Sun Life UK in favour of the proceedings between the same parties before the Ontario Superior Court of Justice;

   (2) To set aside the permission granted to the Claimants on 16 March 2004 to serve the Claim Form out of the jurisdiction on Sun Life Canada;

   on the grounds that Canada is an alternative available forum with competent jurisdiction which is clearly and distinctly a more appropriate forum than England for the trial of this action.

Background

2. Sun Life Canada is the parent company of the long established and well known Sun Life of Canada group of companies. It was originally a mutual organisation. It is now incorporated in Toronto in the Province of Ontario, Canada, where its head office is situated. It owns subsidiaries in many parts of the world, including Sun Life UK which is a major subsidiary.

3. Sun Life UK is incorporated in England & Wales. It has its head office at Basingstoke in Hampshire. At all relevant times it was a substantial participant in the UK financial services industry selling and managing investment and insurance products within the UK. It employed a substantial sales force. Until 1 December 2001, it was regulated by the Personal Investment Authority ("the PIA"). Thereafter, it has been regulated by the Financial Services Authority ("the FSA") in accordance with the Financial Services and Markets Act 2000.

The Policy

4. In September 2000, Sun Life Canada took out a global "Blended Excess Program" contained in a single policy No. MMF/1460 ("the Policy") consisting of a primary and three excess layers. Coverage extended to US$300 million any one claim with an excess retention of $25 million each and every loss or claim and US$600 million aggregate over the policy period. Sun Life Canada was named as the Parent Organisation, but the insured were defined as including any subsidiary of Sun Life Canada. The Policy period was for three years from 30 September 2000 till 1 October 2003. Coverage was divided into four sections:

   Section 1A: Financial Institution Bond.

   Section 1B: Financial Institution Professional Liability.

   Section 1C: Employment Practices Liability.

   Section 1D: Fiduciary Liability.

   All sections were subject to the Master General Conditions. The undivided premium for this extensive programme was US$6,930,000.

5. The insurers' participations differed as between the layers. Originally the participations were as follows:

   Primary Layer (US$50m)
   Lead insurer, Gulf Insurance Company U.K. Ltd: 20%
   ("Gulf UK")
   Participating Insurers
   Lloyd's Syndicates (led by Syndicate 839) 40%
   American Home Assurance 15%
   Chubb Insurance Company of Canada 15%
   Liberty Mutual Insurance Company 10%

   First Excess Layer ($50 million)
   Gulf UK 20%
   Lloyd's Syndicates 40%
   American Home Assurance 15%
   Chubb Insurance Company of Canada 10%
   Liberty Mutual Insurance Company 15%

   Second Excess Layer ($100 million)
   Gulf UK 10%
   Lloyd's Syndicates 35%
   American Home Assurance 11.5%
   AIG Europe
   as agents of New Hampshire Insurance Co 3.5%
   Chubb Insurance Company of Canada 15%
   Liberty Mutual Insurance Company 25%

   Third Excess Layer ($100 million)
   SR International Business Insurance
   Company Ltd 50%
   American Home Assurance 24%
   AIG Europe as agents of New Hampshire Insurance Co 3.5%
   Chubb Insurance Company of Canada 12.5%
   Liberty Mutual Insurance Company 10%

6. Gulf UK is a subsidiary of Gulf Insurance Group ("Gulf US") based in New York. It has changed its name to Travelers Casualty and Surety Company of Europe Limited

7. Section 1B of the Policy, with which this dispute is concerned, stated:

"Declarations

this is a claims made policy. subject to its terms, this policy applies only to any claim first made during the policy period provided such claim is reported to the insurers as soon as practicable."

The insuring clause covered loss resulting from a claim first made during the policy period for a wrongful act, which was widely defined to include actual or alleged error, omission, negligent act, any misrepresentation, misstatement, misleading statement and "breach of any regulation, rule, standard of practice or specification of any financial services regulatory authority or Self Regulatory Organisation." Coverage also extended to all sums which the insured became obligated to pay, and all costs incurred as a result of any investigation or review by a financial services regulatory authority.

8. Clause 6 of the Master General Conditions incorporated the terms of a warranty letter ("the Warranty") signed on 27 September 2000 by Susan Meltzer, the Assistant Vice-President, Insurance and Risk Management, of Sun Life Canada. It warranted with effect from 30 September 2000 that:

"As respects the Financial Institution Professional Liability Policy … issued by Gulf Insurance Company UK Ltd ("the Insurer"), the Insured provides the following:

The Insured hereby represents and warrants that it has no knowledge or information of any actual or alleged fact, circumstance, situation, act error, omission, misrepresentation, neglect or breach of duty which could give rise to a Claim within the scope of the proposed coverage against the Insured or any of the persons or entities covered under the Policy except as disclosed in "Corporate Errors & Omissions Insurance Program Claims History (as of September 20, 2000)" in Appendix A attached. The Insured acknowledges and agrees that if such fact, circumstance, situation, act, error, omission, misrepresentation, neglect and/or breach of duty exists, whether or not disclosed, any Claim arising therefrom is excluded from coverage under the Policy."

Knowledge or information of the "Insured" was defined under the Warranty as meaning: *"…the following individual employees at Sun Life: executive officers, risk managers, general managers and vice presidents of national offices, heads of national office legal departments, general counsel and vice chairman."*

9. Appendix A of the Warranty listed four sets of losses greater than US$2.5 million in the previous 5 years including UK pension mis-selling (estimated loss £400 million) and Canadian and US premium offset litigation (estimated losses Can$85 million and US$100 million).

10. Clause 7 of the Master General Conditions provided:

"Reporting and Notice

Once known or discovered by the Assistant Vice President, Insurance and Risk Management, notice shall be provided to the Insurer as soon as practicable for:

(a) any Claim, Loss, or potential Loss exceeding $12,500,000;

(b) any formal administrative or regulator proceeding, Claim or investigation;

(c) any class action lawsuit

All other Claims, Losses or potential Losses exceeding $2,500,000 shall be reported to the Insurer on an annual bordereau."

Clause IX of Section 1B of the Programme stated:

"Assignments and Action Against Insurers

No action shall lie against the Insurer unless, as a condition precedent thereto, the Insureds shall have fully complied with all of the terms of this Policy …"

Notifications were to be given to the Lead Insurer, Gulf UK, on behalf of itself and the participating insurers.

11. In April 2001, after the premium had been paid, Gulf UK was replaced by the Second Claimant, Travelers Casualty & Surety of Canada ("Travelers Canada"), effective from inception. The change was at the request of Sun Life Canada in order to avoid payment of the tax that would be due in Ontario on an insurance arrangement with a foreign domiciled insurer. Travelers Canada were fronting for Gulf UK, which continued to administer the Policy. Sun Life paid premiums to Gulf UK and Lloyd's underwriters via Marsh UK. Gulf UK and Gulf US each received all notifications.

The Claim and Proceedings in London and Ontario

12. On 10 October 2000, a few days after the Policy incepted, the FSA wrote to Sun Life UK following a "focus" visit in August 2000. It recited a summary of a number of serious criticisms made by the PIA and required Sun Life UK to undertake a review of past business ("PBR") in order to demonstrate that investors had not been disadvantaged during the period when the firm was unable to demonstrate appropriate internal controls There was a threat of disciplinary proceedings and corrective action was to be taken within two months.

13. In April 2002, Sun Life through Marsh gave Gulf UK and Gulf US an informal report about a possible claim arising from the PBR conducted following a visit and subsequent report by the FSA in August/October 2000. It was indicated that the administration budget was currently £10.4m. There followed a meeting and correspondence between Freshfields Bruckhaus Deringer's London office, acting for Sun Life, and Robin Simon LLP

for insurers. On 29 December 2003, Sun Life Canada submitted a provisional proof of loss submission, setting out a history of the PBR. The claim was summarised as follows:

Costs of conducting the PBR: £22,077,716.88

Payments made to policyholders £2,824,525.

On this basis, allowing for the policy retention of $25 million, an interim net claim of US$19,005,996.74 was advanced. In February 2004, a revised proof of loss was sent increasing the interim net claim to $25,302,433.63, based on costs of £23,073,577.41 and payments to policyholders of £3,828,997. Sun Life indicated that it believed the PBR was near completion.

14. In immediate response to the provisional proof of loss, insurers through Gulf US requested some further information and reserved their rights generally.

15. On 10 March 2004:

(1) Robin Simon LLP wrote to Freshfields Bruckhaus Deringer for Sun Life stating that the claim was excluded from coverage under the terms of the policy.

(2) These proceedings were issued in the Commercial Court The Claimants were all the insurers on the primary layer, plus Gulf UK and New Hampshire ("the Insurers"). Attached to the claim form were detailed Particulars of Claim running to some 26 pages.

No letter before action was sent. In their letter of 10 March, Robin Simon stated that Insurers did not see that protracted correspondence would resolve the coverage issue. The appropriate course (so they asserted) was for the matter to be determined by the Commercial Court. The Claim Form was delivered to Sun Life UK's registered office on 12 March 2004. Service is deemed to have taken place on 15 March 2004.

16. On 16 March 2004, Steel J. gave permission for the Claim Form and Particulars of Claim to be served on Sun Life Canada on the basis that they were a necessary and/or proper party to the claim against Sun Life UK.

17. The grounds upon which Insurers deny liability under the Policy, as adumbrated in the Particulars of Claim, are as follows:

(1) The claim is excluded under the Warranty. There were actual facts, circumstances etc. existing at the date of the Warranty and/or the inception of the Policy which could give rise to a claim, and in the event did give rise to a claim. Insurers set out a lengthy history, based on documents supplied by Sun Life, starting in July 1997 in support of this case. They focus particularly on a series of events, including meetings with the PIA, between March and September 2000. If, contrary to Insurers' primary case, it was necessary that these facts and matters should be known to Sun Life UK or Canada, then it is asserted that they were known in detail and/or in substance to the senior management of both companies.

(2) Sun Life failed to comply with the notification provisions of the Policy in Section 1B of the Policy and Clause 7 of the Master General Conditions by notifying Insurers of the PIA letter of 10 October 2000, which is said to constitute a formal administrative or regulatory proceeding, or of the Claim as soon as practicable, or as soon as practicable after it was known to Ms Susan Meltzer, the Assistant Vice-President, Insurance and Risk Management.

18. The Particulars of Claim seek declarations that:

(1) The Claim, and/or any claim based upon the same or similar facts, is excluded from the Policy by virtue of Clause 6 of the Master General Conditions and/or the Warranty;

(2) The Insurers have no liability under the Policy and/or no action lies against them because the Insured failed to comply with the notification provisions [of the Policy]; and accordingly

(3) The Insurers are not liable to make any payment in respect of the Claim under the Policy.

19. On 24 March 2004, Sun Life Canada and Sun Life UK commenced proceedings in the Ontario Superior Court of Justice against the Insurers who had commenced the English proceedings, denying a breach of warranty and seeking recovery under the Policy of some US$19 million, plus further amounts. On 15 April 2004, Insurers applied to set aside service of and/or to stay the Ontario proceedings. That application is due to be heard in September 2004. More recently the Ontario proceedings have been amended to seek an award of punitive damages against Insurers in the amount Can$100 million on the grounds of alleged breach of good faith and fair dealing in commencing the English proceedings (so called "blatant forum shopping") and in improperly denying a claim which they reasonably believed to be covered. Sun Life have also formally given notice that they require the issues of fact and damages to be assessed by a jury.

20. On 26 April 2004, Sun Life applied to stay the English proceedings in favour of the Ontario proceedings, on the grounds that Canada is an alternative jurisdiction which is clearly and distinctly a more appropriate forum. Thereafter a very considerable volume of evidence was submitted by both parties and I heard argument from Gavin Kealey QC and Andrew Wales for Sun Life UK and Sun Life Canada and from Robert Howe for Insurers. I am grateful to all counsel for their careful written and oral submissions, and their instructing solicitors for preparing the heavy documentation for the hearing.

The EU Jurisdiction Regulation

21. Mr Howe's first submission was that, under Article 2 of the Regulation of EU Council Regulation 44 of 2001 (superseding the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters), which is part of the law of England, Sun Life UK is sued *as of right* in the English Court and I have no

discretion to stay the proceedings as against Sun Life UK. If that were so, it must follow (so he argued) that the claim against Sun Life Canada should be tried here to avoid multiplicity of proceedings.

22. Article 2 of the Regulation provides:

1. Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State
2. Persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that State."

The Brussels Convention was in similar terms.

23. Sun Life UK is an English company, with its statutory seat, central administration and principal place of business in England. It is unquestionably domiciled in England for the purposes of Article 2(1).

24. In ***Re Harrods (Buenos Aires) Ltd*** [1992] Ch. 72, the Court of Appeal held that the Brussels Convention was intended to regulate jurisdiction only as between contracting States and it was not inconsistent with the Convention for the English Court to stay proceedings on the grounds of *forum non conveniens* in a case involving a conflict of jurisdiction between the English Court and the courts of a non-contracting State (in that case Argentina).

25. In ***Universal General Insurance Company v Group Josi Reinsurance*** [2001] QB 68 ("*UGIC*"), the European Court of Justice considered a case under the Brussels Convention in which the Plaintiffs were a Canadian company, and thus not domiciled in a member State. The dispute was whether the Belgian defendants should be sued in France, where the Defendants' brokers were domiciled, or in Belgium, where the Defendants themselves were domiciled. This raised the issue whether the Convention had any application to proceedings brought by a Plaintiff who was not domiciled in a member state. In its judgment, the ECJ said as follows (p.85):

"55 The Convention enshrines, on the other hand, the fundamental principle that the courts of the contracting state in which the defendant is domiciled or established are to have jurisdiction.

56 As is clear from paragraph 47 above, it is only by way of exception to that general rule that the Convention includes certain specific provisions which, in clearly defined cases, accord an influence to the plaintiff's domicile.

57 It follows that, as a general rule, the place where the plaintiff is domiciled is not relevant for the purpose of applying the rules of jurisdiction laid down by the Convention, since that application is, in principle, dependent solely on the criterion of the defendant's domicile being in a contracting state.

58 It would be otherwise only in exceptional cases where the Convention makes that application of the rules of jurisdiction expressly dependent on the plaintiff being domiciled in a contracting state.

59 Consequently, the Convention does not, in principle, preclude the rules of jurisdiction which it sets out from applying to a dispute between a defendant domiciled in a contracting state and a plaintiff domiciled in a non-member country.

60 As the Advocate General observed in paragraph 21 of his opinion, it is thus fully in accordance with that finding that the court has interpreted the rules of jurisdiction laid down by the Convention in cases where the plaintiff had his domicile or seat in a non-member country, although the provisions of the Convention in question did not establish any exception to the general principle that the courts of the contracting state in which the defendant is domiciled are to have jurisdiction: see ***Marc Rich & Co AG v Societa Italiana Impianti PA*** *(Case C-190/89) [1991] ECR I-3855 and* ***Owners of cargo lately laden on board the ship Tatry v Owners of the ship Maciej Rataj*** *(Case C-406/92) (Note) [1999] QB 515.*

61 In those circumstances, the answer to the first question must be that Title II of the Convention is in principle applicable where the defendant has its domicile or seat in a contracting state, even if the plaintiff is domiciled in a non-member country. It would be otherwise only in exceptional cases where an express provision of the Convention provides that the application of the rule of jurisdiction which it sets out is dependent on the plaintiff's domicile being in a contracting state."

26. Mr Howe argued that the reasoning and decision of the ECJ in *UGIC* meant that *Re Harrods* could no longer be regarded as good law. He cited the decision of HHJ Bentley QC, sitting as a Deputy High Court Judge, in ***Owusu v Jackson,*** in which he held that *Re Harrods* was no longer good law. The judgment is not reported but I was provided with a copy of it. The learned Judge stated (at page 3 of his Judgment) that the ECJ held in ***UGIC*** that:

"the question whether the jurisdictional rules in the Brussels Convention applied to a dispute in principle depended upon whether the Defendant had its seat or domicile in a contracting state, and that the Convention applied to a dispute between a defendant domiciled in a contracting state and a claimant domiciled in a non-member country.

If the European Court's construction of the Convention is correct it would appear to follow that Re Harrods is bad law and that the English Court may not stay proceedings brought against a Defendant domiciled here on the ground of forum non conveniens since Art. 2 makes it obligatory for a claimant, whether domiciled in a contracting or non-contracting state, to sue such defendant in the English courts. That … certainly appears to be the opinion of the learned editors of Cheshire and North, Private International Law, 13th ed. who say at p.266 that 'it is hard to resist the conclusion that the decision in ***Re Harrods*** *is misguided if not downright wrong'."*

27. In the light of that conclusion and section 3 of the Civil Jurisdiction and Judgments Act 1982, the Judge held that he was bound to follow the decision of the ECJ and that he could not grant a stay, as he made clear he would otherwise have granted.

28. On appeal [2002] EWCA Civ 877, the Court of Appeal referred to the ECJ the issue whether it is inconsistent with Article 2 of the Brussels Convention for a national court to exercise a discretionary power, available under its national law, to decline to hear proceedings brought against a defendant domiciled in that State in favour of the courts of a non-Contracting State:

    (a) If the jurisdiction of no other Contracting State under the 1968 Convention is in issue;

    (b) If the proceedings have no connecting factors to any other Contracting State.

    Although the Court of Appeal stressed the urgency of the case, the oral hearing in the ECJ only took place recently. The advice of the Advocate General is awaited and it is likely to be some time (probably 2005) before the ECJ delivers its judgment.

29. In ***DSM Anti-Infectives BV v SmithKline Beecham Plc*** [2004] EWHC 1309 (Ch.), Lewison J followed and applied HHJ Bentley's decision in *Owusu*. At paragraph 34 of his Judgment, he stated that the ordinary rules of precedent required him to follow that decision unless he was convinced it was wrong. He observed that the Court of Appeal were plainly not convinced that the Judge was wrong, otherwise they would not have referred the case to the ECJ on the basis that the question was *acte clair* He held therefore that he did not have jurisdiction to stay the proceedings brought against an English company in favour of Pennsylvania. I was told that Lewison J. did not see Judge Bentley's judgment (although it is shortly summarised in Brooke L.J.'s judgment in *Owusu*) but that he was shown some of the Court of Appeal authorities I set out below. There is no analysis in his judgment of Judge Bentley's reasoning or of the Court of Appeal authorities.

30. On the basis of these authorities, Mr Howe argued that, in accordance with English rules of precedent, I should follow HHJ Bentley QC and Lewison J., and hold that I had no discretion to stay the proceedings against Sun Life UK. However, Mr Kealey cited a number of Court of Appeal authorities which (he argued) established that the decision in *UGIC* was not inconsistent with *Re Harrods*.

31. First, in ***Ace Insurance SA-NV v. Zurich Insurance Co.*** [2001] Lloyd's Law Reps I.R. 504, decided after the ECJ decision in *UGIC*, which was cited to the Court of Appeal (see paragraph 43), Rix L.J. held (at paragraph 39 of his judgment) that *Re Harrods* had not been decided *per incuriam* and was binding on the Court of Appeal. The other judges concurred. It is right to observe, however, that it does not appear that it was argued that the decision in *UGIC* was inconsistent with *Re Harrods*.

32. Second, in ***Owusu*** on appeal to the Court of Appeal, Brooke L.J. explained for the benefit of the ECJ that the situation that confronted the Court of Appeal was a different one from that considered in *UGIC*. It was not suggested that the courts of any other member State might be involved. *"This is not a matter on which the European Court of Justice has ever made a ruling"* (paragraphs 40-42). In my judgment this is wholly inconsistent with the view expressed by Judge Bentley that the reasoning of the ECJ in *UGIC* was inconsistent with *Re Harrods*. Nor do I think that by referring the issue to the ECJ, the Court of Appeal were supporting this reasoning. The whole flavour of the Court of Appeal's judgment is to the contrary.

33. Third, in ***American Motorists Insurance Co. v. Cellstar Corp*** [2003] EWCA Civ 206; [2003] Lloyd's Rep. I.R. 295, the Court of Appeal stated explicitly that *Re Harrods* was binding authority that the Court of Appeal has power to stay in favour of the courts of a State which is not party to the Brussels Convention.

34. Fourth, in ***Anton Durbeck GmbH v. Den Norske Bank ASA*** [2003] EWCA Civ 147; [2003] QB 1160, the Court of Appeal decided, following *Ace*, that under the equivalent and identical provisions of the Lugano Convention, it was bound to hold that the Judge had discretion to stay proceedings served on the Defendants in London in favour of Panamanian jurisdiction. The Court of Appeal gave leave to appeal to the House of Lords, a reference to the ECJ being impossible under the Lugano Convention. This judgment clearly proceeds on the basis that *Re Harrods* should be followed in the Court of Appeal.

35. I would only refuse to follow the decisions of Judge Bentley and Lewison J. if I was convinced that they were plainly wrong (per Lord Goddard CJ, ***Huddersfield Police Authority v. Watson*** [1947] KB 842, 848). But I am convinced that there is a quartet of Court of Appeal authorities all decided *post UGIC* which hold that *Re Harrods* remains good authority. The Court of Appeal decision in *Owusu* is plainly inconsistent with Judge Bentley's assumption that the issues decided in *UGIC* were the same as those before the Court in *Re Harrods*. I think that Brooke LJ. said the opposite and that Lewison J. was, with respect, wrong to hold that he should follow Judge Bentley's decision in *Owusu*.

36. It follows that in my judgment, as English law stands, I am bound to consider whether I should stay this action on the grounds of *forum non conveniens*. Of course, it is possible that the ECJ will determine in the ***Owusu*** reference that the Court of Appeal's views are wrong, but that is a matter for the future and I will not speculate.

FORUM CONVENIENS

The Test

37. Sun Life UK has been duly served within the jurisdiction. If I were to look at the claim against them only, I would only stay the action if I was satisfied that:

    (1) Sun Life UK has shown there to be another court with competent jurisdiction which is clearly and distinctly more appropriate than England for the trial of the action, and

    (2) It is not unjust for the Insurers to be deprived of a right to trial in England.

– *Dicey & Morris*, "Conflicts of Laws" (13th Ed.) Rule 31(2); summarising the effect of the House of Lords' decisions in ***Spiliada Maritime Corp. v Cansulex*** [1987] AC 460, 475-8, and ***Connelley v RTZ Corporation*** [1998] AC 854, 871-873.

38. Sun Life Canada has been served outside the jurisdiction with the permission of the Court on the grounds that it is a necessary and proper party to the proceedings commenced against Sun Life UK. If I were to look at Sun Life Canada's position in isolation, the burden of proof would be reversed and the Insurers would have to establish that England was clearly the appropriate forum for this action.

39. In ***E.I Du Pont de Nemours & Co. v. I.C. Agnew*** [1987] 2 Lloyd's Reps 585, Bingham L.J. giving the judgment of the Court of Appeal considered the right approach where the proceedings were brought against defendants within and without the jurisdiction. He said this (at p.593 col.1):

The critical equation

I now turn to consider the comparison which the authorities indicate must be carried out. In doing so I make three points at the outset. First, in a case such as this where some defendants have been served within and some without the jurisdiction, the Court must in my judgment view the case in the round. It would not be correct to review the position of the English defendants independently and treat that decision as concluding the position of the foreign defendants. Or vice versa. Relative appropriateness and the requirements of justice should be assessed taking account of the case as a whole and not giving preponderant weight to the position of either group of defendants. Second, I do not regard this as a case in which the dates of beginning of proceedings are significant. As it happens, the English proceedings began first and the Illinois action a month later. It might have been the other way round. I do not think the outcome of these appeals should be affected by what is little more than an accident of timing. Third, I should emphasise, perhaps unnecessarily, that the standing and integrity of the Illinois Court are beyond all doubt or reproach."

40. I understood both parties to agree that this was the approach I should adopt in this case. So, I must consider the case in the round and ask which jurisdiction is the natural or most appropriate forum for the trial of this action. I must consider what factors connect this case with England, and what factors connect it with Ontario so that I can decide which jurisdiction has the most real and substantial connection with the dispute. I should make it absolutely clear that the standing and integrity of the Courts of Ontario are beyond all doubt and reproach.

41. Counsel for the parties made forceful and opposite submissions as to the appropriate jurisdiction.

42. For the Insurers, Mr Howe submitted that:

(i) The Policy was, by deliberate choice of the parties, broked and issued in London, and is governed by English law.

(ii) The insurance claim arises out of the acts and defaults by Sun Life UK, a UK financial services company, which took place entirely in the UK, in relation to its obligations under the UK financial services regulatory regime.

(iii) The documents and the great majority of the relevant witnesses are in Engand. It would be much easier to compel relevant third party evidence, especially from the FSA, if the proceedings were in England.

(iv) The negative declaration proceedings were properly brought and directly raise the key issues in the action.

(v) The central issue in the action is one which this Court is uniquely well placed to determine, namely what was the risk of action by the UK financial services authorities against Sun Life UK in the light of their long history of dealings with, and criticisms of, Sun Life UK, stretching over a number of years.

(vi) Even if the Policy is governed by Ontario Law, this Court could readily resolve the legal issues raised with the assistance, if necessary, of expert evidence. By contrast, if there was a trial in Ontario a great deal of evidence would be required as to the regulation of the UK financial services industry which would be unnecessary if the case were heard in the Commercial Court. It would be particularly difficult to explain the system of UK regulation to a jury in Ontario.

43. For Sun Life, Mr Kealey argued:

(i) The Policy is governed by the law of Ontario.

(ii) Insurers were greatly exaggerating the connections with England. The Policy was issued to Sun Life Canada, the Canadian parent.

(iii) The real issue in the case (especially the late notification defence) is the knowledge of Ms Meltzer who is based in Canada. The majority of the witnesses are in Canada and the documents could easily be transported to Canada. If it was really necessary to obtain evidence from the FSA, this would be within a narrow compass and could be achieved by means of letters rogatory addressed by the Ontario Court to the English Court.

(iv) The issues of Ontario law, particularly whether there was power to relieve from forfeiture for late notification, were much more suitably determined by the Ontario Court.

(v) The negative declaration proceedings commenced were wholly inappropriate.

(vi) An Ontario court would have a general familiarity with regulation of the financial services industry. A jury would be well able to decide the issues of knowledge.

(vii) This was a blatant case of improper forum shopping by Insurers. Insurers had improperly taken advantage of the belief of Sun Life in Canada that it was subject to a 60 day moratorium on proceedings. Sun Life should be allowed to pursue its claim for punitive damages in Ontario.

44. Before I consider the critical equation of connecting factors, I propose first to consider:
(1) The applicable law of the Policy;
(2) The issues of Ontario law that would arise if the trial takes place in England;
(3) What are likely to be the real factual issues between the parties;
(4) The appropriateness of the negative declaration proceedings and whether Insurers unfairly took advantage of Sun Life by commencing these proceedings in England.

Applicable Law

45. The Policy is underwritten by some insurers who are established and carrying on business in a member State of the EU, and by some who are not. It insures some risks situated within a member State (or States) of the EU and other risks which are not. These factors raise difficult questions as to whether the rules for determining the applicable law are those set out in the Rome Convention, appended to the Contracts (Applicable Law) Act 1990, or in Schedule 3A to the Insurance Companies Act 1982 (since repealed, but in force when the Policy was entered into), giving effect to the EU second general insurance directive. The problems particularly arise from the fact that the Directive and hence Schedule 3A did not appear to contemplate the obvious possibility of the risk being situated partly in a member State (or, indeed, States) and partly in other countries altogether.

46. In ***American Motorists Insurance Co v. Cellstar Corporation*** (*supra*) paras. 14-43 Mance L.J. reviewed the applicability of these schemes in considerable detail. He decided (para. 21) that the policy in that case was a single, probably multi-partite, contract and that neither the parties nor the Rome Convention could sensibly be taken to have intended to "scissor up" the policy and to subject different aspects of it to different governing laws. For the purpose of applying Schedule 3A, the policy holder in that case was the parent company which took out the policy, with the subsidiary companies being insureds.

47. In this case the position is the same. The Policy was taken out by Sun Life Canada for itself and its subsidiaries. It is a composite multi-partite policy with a single undivided premium payable. It is inconceivable that the parties intended that the Policy should be "scissored up" so as to provide for a different governing law for different insureds or risks. The risk is a large risk for the purposes of Schedule 3A.

48. The parties agreed that it followed that whether the Rome Convention applied or Schedule 3A applied, the issues were the same (see Mance L.J.'s judgment at paragraph 19):
a. When making their contract, did the parties choose the law of any country and, if so, which? (Rome Convention Article 3; paras. 1(6) and 2(1) of Schedule 3A). That choice of law must be expressed or demonstrated with reasonable certainty.
b. If not, which is the country with which the contract is most closely connected?

These are familiar concepts to a common lawyer seeking to ascertain the proper law of a contract.

49. There is no express choice of law in the Policy. There is considerable dispute between the parties as to the correct facts relevant to deciding the applicable law.

50. Looking at the terms of the Policy itself, first, it is significant that section 1A was to follow all the terms and conditions of a policy issued by Columbia Casualty Company (previously known as Continental Casualty Company), Section 1C was to follow all the terms and conditions of a policy issued by American Home Assurance Company, and Section 1D was to follow all the terms and conditions of a policy issued by Liberty Mutual Insurance Company. Section 1B had no similar provision although there is reference to a policy placed by Massachusetts Financial Services, a subsidiary of Sun Life based in the State of Massachusetts.

51. The Columbia Casualty Company policy is a reference to a policy headed "CNA, Canadian Operations" giving an address in Toronto. It states that the Policy has been signed by CNA's Chairman and Secretary at Chicago, Illinois but that it should not be binding upon the insurer unless countersigned by a duly authorised representative of the insurer. The policy was countersigned by the Chief Agent for Canada. The insured was Sun Life Financial Services of Canada Inc with an Ontario address and its subsidiaries, affiliates and plans, and the policy gave worldwide coverage. The policy contains numerous references to United States Federal legislation and Canadian legislation. Notices are to be given to the insurer in New York. There is no express choice of law, but there is an American Arbitration Association arbitration clause, but it appears only to apply to disputes as to the allocation of recoveries where a loss is partially insured. An agreement to arbitrate in a particular country would normally give rise to a strong, albeit rebuttable, presumption that the applicable law was also intended to be that country's – ***Cie Tunisienne de Navigation SA v. Compagnie d'Armement Maritime SA*** [1971] AC 572. Here that presumption is less strong. First the arbitration clause does not point to any particular US State's law although coupled with the reference to the policy being signed in Chicago, Illinois, the pointer may fairly be said to be towards Illinois. Second the arbitration clause only applies to a fairly narrow category of disputes. Other issues fall to be litigated. In my judgment, it is impossible to be clear as to the proper law of this policy. Just looking at the terms of this policy, the stronger connection is perhaps just with Illinois, but other surrounding circumstances of which I am unaware might tip the balance to Ontario.

52. The American Home Assurance policy was issued by the Canadian head office (with an address in Toronto) of a US insurer. The Insured is Sun Life Canada and its subsidiaries. All notices are to be given to the insurers in Ontario. There is an optional ADR clause under which there could be an arbitration under the Ontario Arbitration

Act 1991, c.17. In my judgment it is fairly clear that the law of Ontario is the system of law most closely connected with the policy.

53. The Liberty International Policy was issued by Liberty International Canada, the Canadian branch of a US insurer. The insured is Sun Life Financial Services of Canada Inc. with an address in Toronto and its subsidiaries. The policy gives coverage against wrongful acts according to the applicable law which is defined by reference to Canadian and US pension legislation. This is not a choice of law clause but there is an Ontario arbitration clause covering disputes as to the allocation of defence costs between insurer and insured. That is a fairly narrow category of disputes. Overall, in my judgment it is fairly clear that the law of Ontario is the system of law most closely connected with the Policy.

54. Section 1B refers to a policy placed by Massachusetts Financial Services ("MFS"). This policy was probably issued to MFS by ICI Mutual Insurance Company of Vermont. It provided Directors and Officers and errors and liability insurance cover to MFS and numerous other related corporations and their directors and officers. It contained an exclusive Vermont jurisdiction clause and a choice of Vermont law for all "Foreign Entities" defined to include all (or almost all) the insureds.

55. So, two of the four sections of the policy follow the terms and conditions of policies governed by Ontario law. The third follows the terms and conditions of a policy perhaps governed by Illinois law, but that is far from clear. None of the underlying policies contain an express choice of law clause. The fourth section does not follow any other policy but refers to a policy governed by Massachusetts law – I regard this is as being of little significance since the main purpose of the reference is to provide MFS with 'difference in conditions' cover.

56. The following connections (apart from the underlying policies) emerge from the Policy:
- The policy is entitled "Sun Life Financial Services of Canada Inc. Blended Excess Program";
- Sun Life Canada is named as the Parent Organisation with its principal address in Ontario;
- The currency of the policy is in US dollars, but currencies are to exchanged at the US$ rates published in the Globe and Mail, a daily newspaper published in Toronto.
- The policy period is by reference to Toronto time;
- The named Lead Insurer, writing 20% on the primary and first excess layers and 10% on the second excess layer was a company incorporated in England & Wales carrying on business in London. I have already mentioned that there was a novation whereby Travelers Canada was substituted for Gulf UK, but this occurred long after the issue of the Policy and both parties agreed that the applicable law had to be ascertained as at the issue of the Policy, and that it did not change as a result of the novation.
- The next 40% on the primary and first excess layers and 35% on the second excess layer was written by Lloyd's underwriters. Substantial following lines were written in the Canadian market.
- The brokers are named as Marsh Canada Limited in Ontario.
- The language (and particularly the spelling in the policy) is perhaps more US/Canadian than English, but the General Conditions of Section 1B and the Master General Conditions state that the policy is in the language of the insurers, so this may be a neutral point.
- The Lead Insurer (Gulf UK) was to receive notification of all Claims notices and to deal with all Claims.

57. Mr Kealey argued that the requirement to follow these three policies, coupled with the other pointers to Ontario, amounted to an implied choice of Ontario law. He referred to Ms Meltzer's evidence that it would be contrary to her 29 years experience in the industry for an excess cover to be governed by a different law to the underlying primary policy. Her evidence is expressly based on the assumption that all three underlying policies are governed by Ontario law. In my judgment, first it is not at all clear that all three policies are governed by Ontario law. If only two out of the three are so governed, this is a less powerful indication of a choice of Ontario law. Second, Section 1B is self-standing without any reference to an underlying policy. Third, the Master General Conditions provide that they are to supersede conditions in the individual policy sections unless conditions more beneficial to the Insured are contained within each individual policy section. I think this rather weakens the force of the requirement to follow the underlying sections, although it does not neutralise it. As regards the other factors, I consider that they provide a mixture of pointers. Overall, I do not consider that it has been expressed or demonstrated with reasonable certainty (at least at this interlocutory stage) that the parties made an implied choice of Ontario law; that is the test that must be applied under Art. 3 of the Rome Convention and paras. 1(6) and 2(1) of Schedule 3A.

58. Looking outside the terms of the Policy, there is a dispute between the parties as to the relevant facts leading up to the conclusion of the Policy.

59. Insurers submit that this was a policy led and issued in London as required by Sun Life Canada. They point to the following:
- The first approach was made in London to Simon Ashby of Gulf UK by Marsh UK on instructions from Ms Meltzer. Ms Meltzer was very keen for Gulf UK to provide lead terms for Sun Life.
- Travelers Canada played no part in the negotiations. Gulf US was involved but it was never suggested that Gulf US should issue the Policy.
- There were meetings in London, Basingstoke, New York and Toronto (attended by some participants by telephone).

- Gulf UK's dealings were with Marsh UK who were the brokers licensed to operate in the London market.
- At Marsh UK's request, Mr Ashby for Gulf UK scratched a London Market slip on 24 November 1999 "subject to … Gulf UK Limited subjectivities". This was, as I see it, an agreement in principle only designed no doubt to establish progress in the negotiations.
- Marsh UK expressed concerns whether Gulf UK could participate as leader on a policy involving a Canadian resident corporation, given that Gulf UK was not licensed in Canada. Gulf US took advice from Gouldens, well known City solicitors On 25 November 1999, they advised (having consulted Mr Vincent O'Donnell QC in Montreal), that, providing such business was brought to Gulf UK in the traditional manner and providing the policies were issued in London and not subsequently delivered outside the UK, then no Canadian authorisation was needed.
- This advice was supplied to Marsh UK. I interpolate that this is disputed by Sun Life, who say the advice is not on Marsh UK's files. However, given (as the advice records) that the concern had originally been raised by the broker, and that a letter dated 11 November 1999 sent by Gouldens to Gulf US recorded their understanding that their advice was to be produced to the broker, it does seem quite likely that Marsh UK would have been told of the advice to assuage their concerns. It appears that the original Policy and slips are held by Marsh UK in Norwich. This accorded with Gouldens' advice.
- On 25 September 2000, another slip was signed by Mr Ashby for Gulf UK, the underwriter for Syndicate 839, and AIG for New Hampshire. This slip contained a Canadian service of suit clause (permitting service of suit on Insurers at an address in Montreal, Quebec) and, attached to it, were the FINPRO Broker Convenience Clauses, referring to a number of London market clauses. Other Lloyd's syndicates scratched an additional page of the slip at about the same time.
- On 26 September 2000, Mr Ashby for Gulf UK as Lead Insurer scratched the Policy as did Lloyd's Syndicate 839 representing all other Lloyd's participation. It was only after the main placement had been made in London and 60% of the primary risk and 1st excess layer written (rather less on the 2nd and 3rd excess layers) that the Policy was presented to the Canadian following insurers. There was never any question of the risk being presented to the Canadian followers before London underwriters were bound.
- The Policy was given an LPSO number.

60. For Sun Life, Mr Kealey submitted:
    - The whole Policy was put together and drafted by Marsh Canada. They led the negotiations with Insurers. Marsh UK were only involved due to local regulatory requirements.
    - Gulf UK's and Mr Ashby's role was a minor one. The real negotiations for the Gulf group were conducted by Gulf US based in New York. Mr Ashby had no real authority to do anything without the express approval from New York.
    - In particular the Warranty was negotiated between Gulf US on the one hand, and Marsh Canada and Sun Canada on the other.
    - 40% of the subscribing market participated through Canadian branches.
    - This was not a standard London market slip or standard London policy but a bespoke policy negotiated outside London.
    - Claims were always to be handled in New York, because (as was indicated prior to the issue of the policy) Gulf UK had no claims department of its own.

61. Mr Kealey placed some reliance on the fact that the slip signed on 25 September 2000 contained a Canadian service of suit clause. This was not even a non-exclusive jurisdiction clause. In my judgement it would be a weak pointer to Canadian law – see ***Du Pont*** (*supra*) at page 592 and ***King v. Brandywine Reinsurance Co (UK) Ltd*** [2004] EWHC 1033 (Comm) at para. 54. Furthermore, the Canadian service of suit clause was not repeated in the Policy. Once the Policy was issued, it superseded the Slip – ***HIH Casualty and General Insurance Ltd v. New Hampshire Insurance Co*** [2001] EWCA Civ 735; [2001] 2 Lloyd's Reps 161 at para.79. I am more doubtful whether it was intended to supersede the FINBRO Broker Convenience Clauses.

62. I have set out the rival contentions at some length to show that the factual issues are complex. In my judgment, I cannot possibly resolve at this stage whether, as a matter of English conflicts of laws, the Policy is governed by the law of England or the law of Ontario. Neither party asked me to decide it as a preliminary issue. In this jurisdiction, the issue will have to be determined at trial, or possibly as a preliminary issue. What I can say clearly is:

    a. There is a good arguable case that the Policy is governed by the law of Ontario.

    b. There is also a good arguable case that the Policy is governed by English law;

63. Mr Howe argued, on the basis of *The Magnum* [1989] 1 Lloyd's Reps 47, that once I determined that there was a seriously arguable case that the Policy was governed by English Law, I should exercise my discretion on the basis that this was an English law contract, and ignore the possibility that Ontario law might apply. *The Magnum* was concerned with very different circumstances, but in any event Mr Howe's approach is wholly inconsistent with that of considering the case in the round. The reality is that the trial judge is very likely going to have to determine the applicable law at trial and, because it cannot be certain which law applies, hear evidence of the law of Ontario insofar as it is contended that it differs from English law. In determining the appropriate jurisdiction, I must take that into account.

Issues of Ontario Law

64. I have had the benefit of evidence from Mr Glenn Smith, a member of the Canadian Bar and of the Law Society of Upper Canada, and a senior partner in Lenczer Slaght Royce Smith Griffin LLP of Toronto, and from Mr Brian Brock Q.C., also a member of the Law Society of Upper Canada, and a senior partner of Dutton Brock LLP of Toronto.

65. It is clear from their evidence that the rules of construction that would be applied to the Policy and the Warranty in Ontario are not substantially different from the rules applicable in this jurisdiction. In particular, the principles applicable to the construction of insurance policies, as summarised by the Supreme Court of Canada in ***Non-Marine Underwriters, Lloyd's of London v. Scalera*** [2000] 1 S.C.R. 551 (QL) at paras. 67-72, are readily recognisable to an English commercial lawyer. So, if the action was tried here, there would be no need for expert evidence on the rules of construction. An English commercial judge would be well able to construe the Policy. There is no suggestion of any local considerations that might affect the approach to construction.

66. Where Ontario law does differ from English law is that under section 129 of the Insurance Act 1990, the Court has power to relieve from forfeiture for imperfect compliance with the terms of an insurance policy. If the compliance was imperfect, the Court may, if it considers it inequitable that the insurance should be forfeited, grant relief against forfeiture on such terms as it thinks just.

67. It is agreed that this provision has no application to the Insurers' defence under the Warranty. Its potential relevance is to the denial of liability on the grounds of late notification. Two issues will arise:

(1) Has there been "imperfect compliance".

(2) If so, does the Court consider it inequitable that the insurance should be forfeited and, if so, should relief be granted and on what terms.

68. As to (1), the Supreme Court of Canada decided in ***Falk Bros v. Elance Steel Fabricating Co*** [1989] 2 S.C.R. 778 (QL) at paras. 18-23 that the equivalent section in Saskatchewan extends to contractual conditions and that failing to provide notice to an insurer in timely fashion is imperfect compliance. A distinction was drawn between imperfect compliance and non-compliance, akin to the distinction between a breach of a term of the contract and the breach of a condition precedent. *"If the breach is of a condition, that is, it amounts to non-compliance, no relief under [the section] is available."*

69. In ***McNish and McNish v. American Home Assurance Co*** 68 O.R. (2d) 365, the Plaintiffs were insured under a claims made policy which required notice to be given to insurers as soon as practicable after learning of a happening which may give rise to a claim. It was a condition precedent that no action would lie against the insurer unless the insured had fully complied with all the terms of the policy. A claim was made during the policy period, but the insured failed to report it. Steele J. sitting in the Ontario High Court held that the section gave him power to relieve against forfeiture. Insurers had suffered no prejudice and he granted relief against forfeiture. In a five line judgment ([1991] O.J. No. 2256) the Court of Appeal for Ontario expressed their agreement with the Judge and dismissed the appeal.

70. In ***Canadian Newspapers Co. v. Kansa General Insurance Co***. [30 O.R (3d) 257] the insured failed to comply with its duty to co-operate with insurer. The Court of Appeal for Ontario held (at p.18) that this was a substantial breach of the insured's duty to co-operate and of the insurers' right to defend the action and that, applying *Falk*, the breach constituted a substantial breach rather than "mere 'imperfect compliance'" and, on this basis alone, the insured could not claim relief from forfeiture.

71. In ***Stuart v. Hutchins*** 40 O.R (3d) 321, the Plaintiff was insured under a claims made and reported policy. The insured was notified of a potential claim during the period of the policy but failed to report it to insurers. The trial judge was prepared to grant relief against forfeiture, but the Court of Appeal for Ontario held that the reporting requirement was not merely incidental to the event triggering coverage (as in ***McNish***), but an integral part of that event. To extend reporting time would be tantamount to an extension of coverage *gratis* This was so very different from a mere condition of the policy that in effect it would rewrite the policy. The trial judge had *"failed to address the critical question, namely, whether [the Plaintiff's] breach constituted imperfect compliance with a term of the plan or non-compliance with a condition precedent to coverage …"*

72. On the basis of *Stuart*, the Court applying the law of Ontario would have to consider whether the requirement in the Policy, especially the Declaration at the opening of Section 1B quoted in paragraph 7 above, was a condition of coverage or a clause of the Policy. It would appear from *McNish* that the fact that there is a term making compliance with all terms a condition precedent to the bringing of an action will not prevent an insured from seeking relief under the section. However it is not entirely easy to see how this fits with the distinction drawn in *Falk* between imperfect compliance and non-compliance, akin to the distinction between a breach of a term and a breach of a condition precedent.

73. In either jurisdiction, the Court would have to grapple with this issue. Obviously it would be easier for the Ontario Court to do this and there would be the availability of an appeal to a higher Court. In England, expert evidence from Ontario lawyers would be needed. However, the issue is fairly self-contained and I think a commercial judge in England would be well able, having heard expert evidence from distinguished Ontario lawyers, to decide whether section 129 could be invoked in principle, if that were necessary.

74. If it were concluded that relief was available in principle, I think that an English judge would be well able to decide whether it was inequitable that the claim be denied because of late notification, and whether to grant

relief and, if so, on what terms. These are familiar considerations in other contexts. I do not accept Mr Kealey's submission that a Canadian Court would enjoy a substantial advantage in dealing with this aspect of the case.

75. A further difference between English law and Canadian law is that in Canada (including Ontario) it is possible to award punitive damages against an insurer. In *Whiten v. Pilot Insurance* Co. [2002] 1 S.C.R. 595 (SCC), the Supreme Court of Canada held that punitive damages could be awarded where the insurers were guilty of *"high handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour"* (per Binnie J. at para. 94 giving the majority judgment). The insurers had trumped up a case of arson against a family who had lost their home and its contents and their three cats, and forced an eight week trial, hoping to starve the insured into a cheap settlement. The Supreme Court of Canada upheld the jury's award of Can$1 million punitive damages (about treble the loss) on the grounds that the insurers conduct was exceptionally reprehensible.

76. In this jurisdiction, exemplary damages are available across the whole range of torts with a wilful element (***Kuddus v. Chief Constable of Leicestershire*** [2002] 2 AC 122) but not, as the law stands, in contract: ***Addis v. Gramaphone Company Ltd*** [1909] AC 499; Chitty on Contracts (29th ed.) §26-019. It is possible, as McGregor on Damages (17th ed. at §11-016) suggests, that this might change, but not I think short of the House of Lords.

77. Before me, the parties proceeded on the assumption that, even if the Policy was governed by the law of Ontario, an English Court would not award punitive damages. Certainly counsel were unable to cite a single instance where an English Court has awarded punitive damages for breach of a foreign law contract. However, I can see that it is arguable that, if the applicable law of a contract permits the award of punitive damages, the English court could also do so – in *S.A General-Textiles v. Sun & Sand Ltd* [1978] 1 QB 279, 299-300, Lord Denning M.R. considered (*obiter*) that it would not have been contrary to English public policy to enforce a French award of punitive damages in favour of a private person, although he considered, as did the other members of the Court of Appeal, that properly understood the award in that case was compensatory. The question was plainly regarded as debateable by Potter L.J. at paragraph 50 of his judgment in ***Lewis v. Eliades*** [2003] EWCA 1758; [2004] 1 WLR 692. However, I proceed on the basis however that an English court could not award punitive damages in this case.

78. I shall return to the weight that I attribute to the possible availability of punitive damages in Ontario (but not in England) later in this judgment.

The likely real factual issues between the parties and evidential requirements

79. In considering most appropriate jurisdiction, it is obviously important to form a provisional view of the real issues between the parties on which evidence will be required. As I see it there will be four main issues on liability and quantum:

(1) Was there a breach of the Warranty.

(2) Has there been a failure to comply with the notification provisions of the Policy.

(3) If so, assuming Ontario law applies and that relief from forfeiture is available in principle, should relief from forfeiture be granted.

(4) If insurers lose issues (1)-(3), what is the appropriate quantum of the insurance claim.

I also need to consider who are the real claimants under the Policy and which Insurers are on effective risk.

80. There are disputes as to the correct interpretation of the Warranty. Insurers contend that a breach of Warranty does not depend on knowledge of the stated individual employees at Sun Life, that is "executive officers, risk managers, general managers and vice presidents of national offices, heads of national office legal departments, general counsel and vice chairman". Sun Life contend to the contrary and further that, as regards employees of Sun Life UK, it is only the knowledge of managers and vice presidents at UK national offices that would count for the purposes of the Warranty. They name two individuals as qualifying in the UK – Steve Melcher, the UK General Manager, and Barry Blackburn, Vice President and Chief Legal Adviser of Sun Life UK – and eight Toronto witnesses as qualifying.

81. These may be the primary submissions of the parties but they both seem rather extreme approaches to the proper construction of the clause. I regard the Insurers' narrow construction of the Warranty as virtually unarguable. I am sure that they will wish to try and prove knowledge on the part of one or more of the defined class of Sun Life employees/officers. I am equally sure that Sun Life will wish to be able to rebut knowledge on the part of a wider class of UK employees than they presently concede to be within the defined class.

82. In my judgment, the trial will inevitably involve a detailed investigation of what transpired between the PIA/FSA and Sun Life UK, especially in the months leading up to the FSA letter dated 10 October 2000, and of the perceptions of those involved at executive officer, risk manager, general manager and vice president level in the UK and at the head of Sun Life UK's legal department. The knowledge of their opposite numbers in Toronto will also be relevant but, since their involvement was indirect rather than direct, it seems to me that the primary focus will be on the UK witnesses because, if they did not have the requisite knowledge, it seems rather unlikely that those to whom they reported in Toronto would have obtained the requisite knowledge.

83. The PIA/FSA is bound to have relevant evidence available as to what Sun Life UK was told at meetings, especially in the latter period. Evidence as to PIA/FSA internal thinking or justifications for their actions would be irrelevant. It is the interface between Sun Life UK and PIA/FSA that would be of relevance.

84. By contrast, on the issue of notification, the ultimate focus will be on the knowledge of Ms Meltzer, the Assistant Vice President, Risk Management whose knowledge is critical under Clause 7 of the Master General Conditions. Nevertheless, Ms Meltzer is likely to have been at the end of the reporting chain. Sun Life's case is that the first notification was made informally by Ms Meltzer at a dinner party held in New York on 19 November 2001 attended by representatives of Gulf NY. Ms Meltzer states that she said "there was a regulatory issue in the UK which [she] was monitoring". Reliance is placed alternatively on an e-mail sent by Ms Meltzer on 22 March 2002, which was forwarded to underwriters on 12 April 2002. Insurers accept that they received notification in mid-April 2002 I doubt that anything turns on the elapse of time between 22 March and mid-April 2002, but I can see the potential for a substantial dispute as to whether what Ms Meltzer said at a New York dinner party in November 2001 amounted to proper notification for the purposes of the Policy.

85. I am sure that the trial will involve a detailed investigation of what was happening in the UK between September 2000 and March 2002, and what was passed on to Ontario and thence to Ms Meltzer. I think it highly unlikely that the evidence on this issue will be confined to Ontario, let alone to Ms Meltzer's evidence. There will inevitably be a substantial volume of relevant evidence from UK witnesses, and from some other Canadian witnesses.

86. I doubt that on issues of relief from forfeiture, which I have already explained, there would be much, if any, evidence from witnesses who would not be before the Court anyway.

87. Quantum is, I think, bound to be in dispute. It is striking that such a high proportion of the claim (about 86% of the revised claim) consists of expenses paid to accountants, lawyers and other professionals, as opposed to compensation to policyholders. The investigation of the necessity for, and reasonableness of, these expenses will be tied up with the notification issue. When were they incurred, and when did they become apparent to Ms Meltzer, and what conclusions were drawn as to the likely development of the loss? As I understand it, all the expenses were incurred in England and the evidence would be in England.

88. Ms Meltzer asserts that Sun Life Canada is the insured that suffered the loss. According to her evidence, although the loss incurred as a result of the PBR was initially accounted for in the accounts of Sun Life UK, the loss is now accounted for in the consolidated accounts of Sun Life Canada. "*Therefore it is Sun Life Canada which has suffered the loss*". In my judgment, the internal *ex post facto* accounting within Sun Life cannot alter the proper Claimant under the Policy. It was Sun Life UK which was forced by the FSA to conduct a PBR and to compensate its policyholders. Sun Life UK is the only proper claimant under the Policy. Sun Life Canada is a proper party to the litigation, because it claims to be the proper claimant, so it is important that it is bound by the result In my judgment, its claim to be the proper claimant is wholly unpersuasive.

89. As to the insurers on risk, in my view, Travelers Canada is the lead Underwriter on risk following the novation, not Gulf UK. The fact that Travelers Canada was fronting for Gulf UK does not create any contractual relationship between Sun Life and Gulf UK. New Hampshire is only on the 2nd and 3rd excess layers. The loss would have to exceed US$125 million to affect New Hampshire. There is no suggestion that the loss will get anywhere near to this level. In my judgment, New Hampshire's claims are in the realm of the hypothetical. So, in considering the balance between UK based and Canadian based Insurers truly on risk for this claim, I proceed on the basis that 60% of the Insurers are in Canada and 40% in the UK.

The appropriateness of the negative declaration proceedings and whether Insurers unfairly took advantage of Sun Life by commencing these proceedings in England.

90. In ***New Hampshire Insurance Co. v. Philips Electronics North America Corporation*** [1999] 1 Lloyd's Rep. 58, 61-62, decided in 1997, the Court of Appeal approved the judgment of Rix J. where he laid down four key principles of which the following three are relevant:

    (1) There is power to grant a negative declaration but the fundamental test is whether it would be useful.

    (2) Careful scrutiny must be exercised, not just to test the utility of negative declaratory relief, but also to ensure that inappropriate forum shopping is not allowed, let alone encouraged.

    (3) The existence of imminent foreign proceedings is always a highly relevant consideration, not only for the purpose of testing the utility of the English claim, but also having in mind the need to avoid the twin dangers of forum shopping and of the vices of concurrent proceedings.

91. It is no longer the case that negative declaratory relief claims are to be permitted only in exceptional circumstances. Lord Woolf MR said in *Messier Dowty v. Sabena S.A.* [2000] 1 Lloyd's Rep. 428, 434, they can perform a positive role, although they are an unusual remedy insofar as they reverse the usual roles of the parties. My impression is that proceedings seeking negative declarations have been on the increase since 2000, spurred on by the Brussels Convention and now the Jurisdiction Regulation, and by decisions in the ECJ such as *The Tatry* (*supra*), so that they cannot really be said to be an unusual remedy in 2004.

92. However, careful scrutiny is still required to ensure that inappropriate forum shopping is not allowed – ***Burrows v. Jamaica Private Power Co Ltd*** [2002] Lloyd's Rep. I.R. 466 at 470 para 7; ***Lincoln National Life Ins Co v. Employers Reinsurance Corp*** [2002] EWHC 28 (Comm); [2002] Lloyd's Rep. I.R. 853 at 858-9.

93. Looking at the negative declaratory relief sought in this case, in my judgment it directly raises the two crucial issues on liability:

    (1) Can Insurers prove a breach of the Warranty; alternatively

    (2) Can Insurers prove that they have no liability under the Policy because of a failure by Sun Life to comply with the notification provisions.

Having reached a determination of these issues, there would be no difficulty in framing the appropriate declarations. In my judgment the grant, or the refusal to grant, these declarations, would be decisive as to Insurers' liabilities under the Policy. If Insurers failed to establish (1) and (2), all that would be left to determine would be quantum. So in my judgment there can be no substantial doubt that the determination of these issues would be useful. Indeed they are the issues that must be determined either in England or Ontario to decide liability under the Policy. It does not make any real difference to their efficient determination which party is claimant/plaintiff and which defendant. The burden of proof will not be altered.

94. Sun Life complain that Insurers acted unconscionably in issuing these proceedings simultaneously with the rejection of the claim without a letter before action, and at a time when Sun Life believed that under the law of Ontario there was a moratorium on the issue of proceedings

95. As to the moratorium, Ms Meltzer said in her first witness statement that she was aware of section 136 of the Ontario Insurance Act 1990 and believed that Sun Life would have a cause of action if the claim was not paid by Insurers within 60 days of submission of the proof of loss. "*Accordingly I believed that (in the absence of payment in full under the Policy), a cause of action would have accrued to Sun Life Canada in respect of the claim on 27 February 2004*". In a subsequent witness statement Ms Meltzer suggested that she now thought that the submission of the revised proof of loss in February 2004 extended the time until 12 April 2004. I do not find this latter assertion at all persuasive in the light of what she said in her first witness statement. In my judgment, at the relevant time, she believed that the cause of action accrued on 27 February 2004. The English proceedings were not issued until 10 March 2004, a fortnight later. In those circumstances, I do not see that Sun Life can complain that Insurers took advantage of Sun Life by issuing proceedings at a time when Ms Meltzer believed there was a moratorium. At the time she believed that the moratorium had elapsed. I would add that there is no evidence that Insurers appreciated the existence of any moratorium, or realised that Sun Life was treating itself as being subject to one.

96. Sun Life can however fairly make the point that Insurers acted aggressively in commencing these proceedings when they did. It is clear that Insurers had taken advice from Mr Brock QC in October 2003. He advised that an Ontario Court would be influenced in the view it took about a challenge to its jurisdiction by which proceedings were commenced first. If English proceedings were first in time, this would improve the Insurers' position. He also advised that the Canadian Courts could award punitive damages, but only for egregious and outrageous conduct. Once a decision had been made to reject the claim, Insurers were therefore advised by Ms Sharma of Robin Simon that they should commence proceedings as soon as possible. Those preparations must have taken some time. The Particulars of Claim served with the Claim Form make detailed allegations as to the chronology of events leading up to the FSA's letter dated 10 October 2000.

97. In my judgment it is fairly clear that Insurers perceived that there would be an advantage to them if they were able to be swift off the blocks (as Mr Howe put it) and issue the proceedings first. It would surely have been possible to send a letter rejecting the claim earlier, but Insurers believed that if they did so, this might provoke the commencement of proceedings by Sun Life in Ontario first. That was something that Insurers wanted to avoid. I also consider that Insurers genuinely believed that England was the proper jurisdiction in which to litigate the dispute and that they feared that if they allowed proceedings to be commenced first in Ontario, they would be at a procedural disadvantage in arguing for English jurisdiction.

98. This is a case that was always bound to end up in litigation. There are large sums at stake, and I do not consider that there was any realistic chance that, had Insurers adopted a more courteous approach and written a letter declining liability, this would have led to a settlement. Litigation was inevitable, as was a dispute as to the appropriate jurisdiction.

99. Insurers have derived no advantage in this Court by being "first out of the blocks" in the commencement of proceedings. I have to decide which is the most appropriate jurisdiction for the determination of the issues. There is no kind of presumption, rebuttable or otherwise, that because the English proceedings were started first, they should be allowed to continue (cf. the position under the Brussels Convention and the Jurisdiction Convention).

100. I do not accept the submission that this is a case of "blatant forum shopping", if by that is meant pejoratively that Insurers were attempting to achieve English jurisdiction improperly, any more than I regard the proceedings commenced by Sun Life in Ontario as blatant forum shopping. Both parties understandably prefer their chosen jurisdictions. To that extent both are forum shopping. There are, as I see it, respectable arguments both ways as to the right jurisdiction, which I have to resolve. As in the *Du Pont* case, I do not regard this as a case in which the dates of the beginning of proceedings are significant. The proceedings might just as well have been started the other way round. Neither action has made much progress to date.

Conclusion as to the most appropriate forum

101. In striking the balance between England and Ontario, I have taken into account the following additional factors.

102. The majority of the relevant documents are likely to be in England but there will also be relevant documents in Ontario. Most of the disclosure will come from Sun Life. Wherever the case is tried, documents are going to have to be transported across the Atlantic. I do not regard this as of much significance either way. It is easy to transmit documents electronically and the cost of air-freighting original documents is modest by comparison with the rest of the costs that will be incurred in the course of this litigation.

103. I have already indicated that the FSA will have relevant documents. It is very possible that these will not be produced without a Court order. This could be achieved from Canada by the means of letters rogatory, but that is a rather cumbersome means of obtaining documents and a number of obstacles will have to be overcome under the Evidence (Proceedings in Other Jurisdictions) Act 1975. I am far from saying that an order could not be obtained against the FSA, but I think it will be easier and cheaper if it is done in the context of English proceedings where an order for third party disclosure would be possible.

104. Turning to factual witnesses, I would expect a substantial number to be called. In my view a significant majority will be English based, although there will also be a number of important Canadian witnesses, above all Ms Meltzer. Overall, I would expect it to be more convenient and cheaper if the trial were held in England. Mr Kealey argued that, since almost all of the witnesses are likely to be called by Sun Life, and they were willing to fly them to Ontario if necessary, that should neutralise this point. I do not think that it is a real answer to the point. The Court must look at the overall balance of cost and convenience. That balance is not altered by the fact that one party is willing to bear the cost in the first instance. I also attach some weight to the fact that there is probably relevant oral evidence to be given by FSA witnesses as to what transpired between the FSA and Sun Life UK in the few months prior to the letter of 10 October 2000. That could be achieved by letters rogatory but there will be obstacles to be overcome under the 1975 Act. It will be easier and cheaper to secure that evidence if the trial takes place in England. Moreover, under the usual procedures for providing evidence to a foreign Court, evidence would be given to an examiner, rather than direct to the foreign Court. That is likely to be markedly less satisfactory than giving the evidence in Court in the usual way. So, as regards factual evidence I think that the overall balance favours England, but not decisively.

105. As regards expert evidence, if the trial is in England there will have to be expert evidence as to the law of Ontario. Although that evidence would be relatively self-contained and short, it will add to the expense. Moreover, although I consider that a Commercial judge would be able to deal with the issues of Ontario law satisfactorily, it would obviously be better resolved in Ontario. This is a feature which significantly favours trial in Ontario.

106. The countervailing consideration is that a great deal of the time of the Court will be occupied in considering the history and significance of the dealings between Sun Life UK and the FSA/PIA, all of which occurred in England. This will be a central factual enquiry at the trial. Whilst I am sure an Ontario judge could deal with these regulatory issues, an English commercial judge would have a distinct advantage. In Ontario, there would have to be a considerable volume of expert evidence, whereas in England, whilst there might be some expert evidence, I would expect it to be within a much smaller compass. This would add considerable expense and time at a trial in Ontario by judge alone. Sun Life have required a trial by jury in Ontario. I should record that Mr Brock has expressed the opinion that Sun Life would not be permitted to have the Ontario action tried by jury. Mr Kealey did not tell me that this was accepted by Sun Life or that they were intending to withdraw the requirement of trial by jury, and I must proceed on the basis that a jury trial is a real possibility. If trial were by jury, the need to explain the UK regulatory system would be likely to add very considerably to the costs and time taken. A jury would start with no experience whatever of the complex regulatory system in the UK, or any equivalent system in Ontario. In my judgment, these countervailing considerations point strongly in favour of England.

107. If trial is in England, I have assumed that punitive damages could not be awarded against the insurers. Superficially that may be seen as a substantial disadvantage to Sun Life but I am satisfied it is not. In my judgment the case pleaded in the Ontario proceedings is distinctly unpersuasive. According to *Whiten* (*supra* para. 75), Sun Life would have to show high handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. I do not consider that the Insurers' conduct comes anywhere near to reaching this threshold – there are plainly serious issues to be tried as to liability, and I can see no reason to doubt Insurers' good faith in raising them. I agree with Mr Brock that the current facts as disclosed do not remotely suggest that an Ontario Court would make an award of punitive damages. I have gained the clear impression that the claim for Can$100 million punitive damages has been raised *in terrorem*. So, in my judgment, this is not a factor that favours Ontario jurisdiction.

108. Striking an overall balance in the light of the considerations I have set out, I have reached the clear view that it is more appropriate that the trial should take place in England rather than in Ontario. I accept Mr Howe's submission that this case concerns events which substantially took place in England. It is worth observing that, prior to the commencement of the litigation, the claim was being handled by the London solicitors for Insurers and Sun Life. The claim is by an English financial services company in relation to costs incurred and compensation paid in the UK. At the heart of the case will be the dealings between Sun Life UK and the FSA/PIA, and perceptions of Sun Life UK and Sun Life Canada as to the risks of regulatory action in the UK, and the risk that a claim would arise. Significant evidence will come from Canada, but the bulk will come from the UK. In my judgment the dispute has its most real and substantial connection with England and, on balance it will be more conveniently tried in England.

109. Mr Howe argued that, even if I concluded that Ontario was the more convenient forum, I should refuse to stay the English proceedings because it would be unjust to the Insurers to deprive them of a right of trial in the UK. This was because, if there is a trial in Ontario, it is likely that the Ontario Court will conclude that the Policy is governed by Ontario law because section 123 of the Ontario Insurance Act 1990 would deem the Policy to be governed by Ontario law if it decided that the Policy was delivered in Ontario. Mr Smith expressed the opinion

that section 123 applied. Mr Howe argued that this approach was unfair because it did not involve a balancing exercise of the kind that an English Court would perform and ignored the intentions of the parties The result would be that the Court would have jurisdiction to relieve from forfeiture, which would not arise if the parties intended that the Policy should be governed by English Law.

110. Had I concluded that Ontario was the most appropriate forum, this argument would not have deflected me from granting a stay. Section 123 may be somewhat mechanistic, but so are some of the rules now applicable in this jurisdiction as a result of the Financial Services and Markets Act 2000 (Law applicable to Contracts of Insurance) Regulations. Section 123 cannot be regarded as unjust.

111. I should add that, equally, I think it irrelevant that in the English jurisdiction, when considering the applicable/proper law of the Policy, it is likely that the parties will wish to call evidence covering the areas of dispute I have summarised at paragraphs 59-60 above. If Ontario would simply decide the issue by applying section 123, that would make for a cheaper resolution of the issue of the applicable/proper law, but I do not consider that is a reason to prefer Ontario jurisdiction.

112. In those circumstances, I decline to stay these proceedings against Sun Life UK, or to set aside the permission granted to the Claimants on 16 March 2004 to serve of the Claim Form out of the jurisdiction on Sun Life Canada. I will hear counsel as to what orders I should make for the future conduct of this action.

Gavin Kealey QC and Andrew Wales (instructed by Clifford Chance LLP) for the Defendants
Robert Howe (instructed by Robin Simon LLP) for the Claimants