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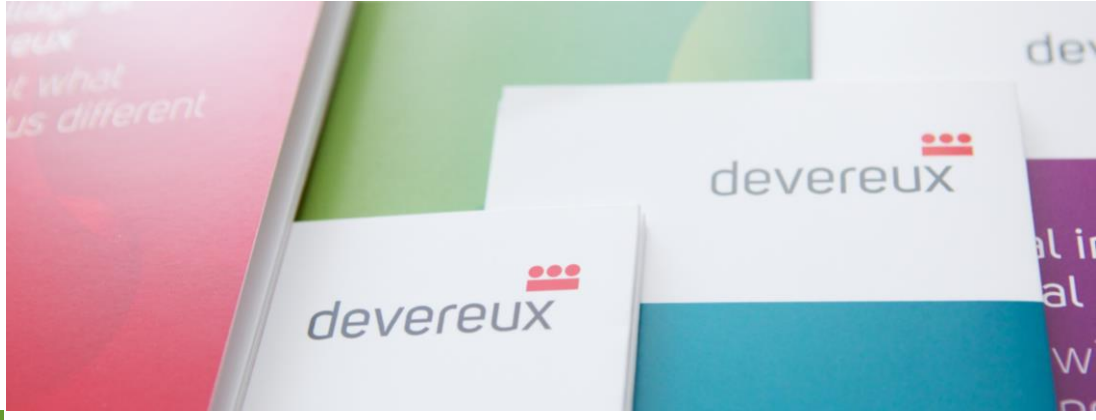


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# What price success: AstraZeneca in the Court of Appeal – by Jesse Crozier

In an article first published by the BILA Journal, issue 127 2014, Jesse Crozier reviews the Court of Appeal's decision in *AstraZeneca Insurance Co v XL Insurance & ACE Insurance*[1] confirming the limits of an insurer's obligation to indemnify an insured under a liability policy.

**Introduction**

In a blow to insureds - but a victory for the English language - the Court of Appeal held that a 'liability' trigger in an indemnity policy requires the insured to have a demonstrable actual liability in the underlying action. The Court of Appeal also confirmed that, on the particular wording of the policy in issue, recoverability of defence costs would only follow actual liability. There is nothing novel in this approach. Devlin J (as he then was) held in *West, Wake, Price & Co v Ching* that "[t]he essence of the main indemnity clause – as indeed of any indemnity clause – is that the assured must prove a loss. The assured cannot recover anything under the main indemnity clause or make any claim against the underwriters until they have been found liable and so sustained a loss."[2] The same applies even where an insured reaches a commercially sensible settlement: it remains for the insured to demonstrate that it was under a legal liability and that its settlement of the action was for a reasonable sum.[3]

But this should not spell despair for insureds. Whilst clear language is needed to displace the presumption[4] that indemnity policies respond only to an actual liability, there are ample wordings that parties can opt for which provide for alternative policy triggers. This article seeks to examine the judgments of the Commercial Court and Court of Appeal in *AstraZeneca* against a backdrop of similar cases reaching the English courts over recent decades, and to explore alternative policy wordings to the standard liability-trigger indemnity policy.

**The Seroquel Litigation**

*AstraZeneca* emerged from the eponymous pharmaceutical company's settlement of one of the largest pharmaceutical class actions in US legal history.[5] Over 28,000 claimants filed claims against AstraZeneca alleging that its premier antipsychotic drug, Seroquel, caused diabetes and other conditions, and that AstraZeneca failed to warn doctors and patients of the risks associated with the drug. Only one individual case ever reached trial, resulting in the claim against AstraZeneca being dismissed; other individual cases were dismissed summarily. By October 2012, AstraZeneca had settled all claims for some $800m, most of which was made up of costs. At the time the settlement was heralded as a "great deal" for the company, and on notably better terms than settlements reached by other big pharmaceutical companies in similar cases.[6] By comparison, Eli Lilly had

paid over $1.2bn to settle claims relating to their own anti-psychotic drug, Zyprexa.

Following settlement, AstraZeneca turned to its captive insurer, AstraZeneca Insurance ('AZ Insurance'), who duly indemnified AstraZeneca for all defence costs and around 50% of the settlement sums, and then turned to their reinsurers. So what went wrong?

AZ Insurance, as the captive insurer, had put in place reinsurance with XL Insurance and ACE Insurance under a Bermuda Form liability policy layer of £133,333,333 excess of £365m. The standard Bermuda Form provides for a London arbitration clause governed by New York law. For reasons which are not entirely clear, the Bermuda Form policy between AZ Insurance and its reinsurers was amended by endorsement to expressly provide for an English choice of law. The choice of law clause amendment, perhaps ill-considered, had a dramatic impact when it came to construing the reinsurers' liability to indemnify AZ Insurance under the policy.

The policy provided for indemnity against all damages where:

> "'Damages' means all forms of compensatory damages, monetary damages and statutory damages, punitive or exemplary damages and costs of compliance with equitable relief, other than governmental (civil or criminal) fines or penalties, *which the Insured shall be obligated to pay by reason of judgment or settlement for liability* on account of Personal Injury, Property Damage and/or Advertising Liability covered by this Policy, *and shall include Defense Costs.*"[7]

The reinsurers refused to indemnify AZ Insurance premised on AstraZeneca not in fact being liable to any claimant in the underlying Seroquel litigation. Indeed, at no point did AstraZeneca or AZ Insurance seek to advance a case based on any actual liability to the underlying claimants. When it came to resolving the dispute, both parties waived the arbitration clause and opted to litigate through the Commercial Court.

**The judgments**

The court at first instance was required to determine two, related preliminary points. First, did the underlying liability insurance policy respond to actual legal liability or to some lower threshold of settled alleged liability? Second, did the policy provide for an indemnity in respect of defence costs only where there was an actual legal liability or did the defence costs clause provides a free-standing indemnity which did not require legal liability?[8]

The answer to the first preliminary issue has long been clear under English law. The trigger under a liability policy was authoritatively restated by Aikens J in *Enterprise Oil v Strand Insurance Co*:[9] "in the absence of express wording to the contrary, an insured under a liability policy can only recover against his insurer if it was actually under a liability to a third party, upon a proper analysis of the law and the facts."[10] Indeed, the Court of Appeal in *AstraZeneca* went so far as to hold that even a judgment against the insured is not necessarily in itself sufficient to establish liability under the relevant policy.[11]

The courts' answer to the second preliminary issue turned on the intricacies of the policy wording. Whilst any interpretation of the 'Damages' clause involved some "violence" to the language of the policy, the Commercial Court held that that defence costs were only recoverable where an actual liability had been established.

**New York, New York**

In the Commercial Court, AZ Insurance first sought to persuade Flaux J that the traditional New York law context to a Bermuda Form policy should be treated as part of the essential factual background against which the court should construe the policy. Under New York law the insurer would be bound to indemnify the insured following a reasonable *bona fide* settlement of the claim, regardless of actual liability. If such a construction could be maintained, the policy should be read as incorporating or implying a reasonable bona fide settlement clause into the policy. This, in Flaux J's judgment, was "misconceived and heretical,"[12] an indictment approved by the Court of Appeal.[13]

The Judge's reasoning was effectively twofold. First, the parties had by endorsement expressly deemed the policy to be governed by English law. The standard, unamended form of the policy cannot be used to sneak New York law back into the policy as background or context. Indeed, although neither the Commercial Court nor the Court of Appeal expressly referred to it, the parties' clear amendment to the standard Bermuda Form to choose English law should be construed as at the forefront of the parties' intent.[14] No 'settled understanding' or 'market understanding' of the Bermuda Form could be relied upon to subvert the clear language of the policy.[15]

Second, the principle of New York law upon which AZ Insurance sought to mount this argument was, as Flaux J[16] and the Court of Appeal[17] both found, a substantive principle of New York law and not a principle of construction that could readily be imported in the manner proposed by AZ Insurance. The substantive principle of law was derived from

the obligation on the insurer under New York law to defend a claim where it is notified in accordance with the policy. Where the insurer declines to defend the claim, the insurer will be "conclusively bound by any reasonable good faith settlement the [insured] may make or any litigated judgment that may be rendered against him."[18] This, in turn, is derived from the distinct obligation to defend under New York law requiring insurers to defend claims against which they have undertaken to provide an indemnity. Where the insurer fails to perform this obligation, it is nonetheless bound by the reasonable good faith settlement reached by the insured. There is, however, no equivalent general duty upon insurers to defend in English law.[19] Further, and perhaps most persuasively, under the policy the parties themselves had by endorsement, separately and expressly excluded any duty to defend. The substantive principle of New York law relied upon was, therefore, neither good law in England nor good law under the bespoke policy in place between the parties.

**"Alleged" liability**

AZ Insurance's second core argument was that the policy, albeit outside the central 'Damage' clause set out above, made frequent reference to 'actual or alleged' liability. This must reflect, AZ Insurance argued, the parties' clear intent for the policy to reflect both actual and alleged liabilities. This argument was roundly rejected by both the Commercial Court and the Court of Appeal. Flaux J exclaimed that "[t]he draftsman is not shy in using the word 'alleged' elsewhere in the policy wording when he wants to."[20] In fact arguments based upon tangential uses of 'alleged' have been tried and always failed before. In *McDonnell Information Systems Ltd v Swinbank*,[21] where the policy wording referred to "any claim…alleging," Mance J (as he then was) held that, in his judgment, the allegation-based construction "places more weight on the single word "alleging" that it can in its context bear."[22] In *AstraZeneca*, the Court of Appeal readily upheld the Commercial Court's judgment finding that the smattering of 'allegeds' across the policy wording, were "wholly insufficient to signify that the coverage provided by Article I is, despite (i) its language, (ii) the English law context in which it sits, and (iii) the absence in it of any reference to "alleged", to be treated as covering something other than actual liability."[23]

**Defence costs**

Both the Commercial Court and the Court of Appeal began their judgments on the issue of defence costs by observing the general position at English law: save in respect of marine liability insurance, there is no general right to recover defence costs.[24] The English law context was therefore again determinative of the issue, unless the policy contained clear wording to the contrary.

The real difficulty faced by both parties in relation to defence costs is that the rather odd drafting of the 'Damage' clause meant that on a literal construction there were no conceivable circumstances under which defence costs could be recovered. On a strict reading of the policy, defence costs would only be recoverable following an actual liability to pay defence costs. Both courts[25] observed that that this bad drafting meant defence costs would, on a literal reading, never be recoverable. Defence costs are simply not ever "incurred by reason of a liability imposed by law." Even where a defendant's lawyers sue on their defence costs, this simply converts defence costs into an actual liability rather than crystallising defence costs as such. In the circumstances, both courts considered that the clause could not in reality mean what it said, and instead construed it against the commercial realities and obvious intent of the parties to render defence costs recoverable in some circumstances.

The judge's construction,[26] endorsed by the Court of Appeal,[27] was that defence costs must follow liability. Flaux J at first instance wrestled with the policy wording and found that no construction was obvious and without difficulty. However, he found that defence costs must, on the wording of the policy "only be recoverable in circumstances where what might be described as 'traditional' damages are recoverable, not that there should be free-standing coverage for such defence costs."[28] This did, in the judge's view, "little" – perhaps better phrased as *less* – "violence to the language of the provisions of the contract."[29] The Court of Appeal followed this reasoning, holding that the only construction consistent with the policy wording is that they be "parasitical on Damages."[30]

The consequences of the judgments for the insured are obvious. A straightforward amendment to a choice of law clause left the Claimant captive insurer facing a nine-figure bill for legal fees and settlement costs with no reinsurance in place to share the burden. This should not, however, have been unexpected.

**Settled law**

Beyond the novelty of having a Bermuda Form policy not only governed by English law but litigated in the English courts, *AstraZeneca* does little to augment the settled principles of construction applicable to insurance policies.
*MacGillivray on Insurance Law* reflects the established view: "The general principle is that liability insurance provides an indemnity against

actual established liability as opposed to mere allegations."[31] The same was held by Mance J, restating the well-established principle in *Swinbank* as "the indemnity afforded thus by insurers depends on the established liability, not on the existence of liability which has not yet been established, and certainly not on claims or allegations.[32] In numerous cases over the past two decades, the Court of Appeal and High Court have rejected arguments similar to those adopted by the insured in *AstraZeneca*.

However, the Court of Appeal in *AstraZeneca* went a step further. It has long been questionable whether an insurer could go behind a liability judgment against an insured to dispute whether the insured was really liable. The Court of Appeal appears to have considered, albeit obiter, in both *Swinbank*[33] and in *Commercial Union Assurance Co v NRG Victory Reinsurance*[34] that the judgment of a foreign court would be decisive and binding as to the insured's underlying liability. This view did not find favour in subsequent cases[35] and, although again strictly obiter, both Flaux J[36] and the Court of Appeal confirmed that the better view is that it remains open to an insured to challenge the basis of the insurer's underlying liability.[37]

As a matter of practicality an insurer will indemnify an insured for a covered risk upon judgment, absent some particular reason to go behind a liability judgment. However, should the insurer seek to refuse to indemnify, it remains open to the insurer to require the insured to prove in court or arbitration that it was under an actual liability. There is a clear logic to this approach. It would obviously not be right to require an insurer to indemnify an insured merely because the insured conceded liability, for example. Indeed, as an alternative approach to avoiding the same absurd result, some liability policies now exclude cover if the insured assumes by agreement a liability which it would not otherwise have been under.[38] At heart, this position affirms and follows from the underlying rationale of an indemnity policy, namely to indemnify an insured against an actual, defined loss.[39]

The position with defence costs is somewhat less uniform. Outside marine liability insurance, English law does not routinely provide for the recoverability of defence costs without there being some established liability. The position on defence costs again turns on the wording of the indemnity policy itself, which *tend* only to trigger where a legal liability is established.[40] *Colinvaux's Law of Insurance*, states the general position across the market as:

> "Contractual provisions for the payment of Defence Costs vary. Some state that the insurers are not under any obligation to fund Defence Costs and that the assured is entitled to a reimbursement of Defence Costs only if the assured is ultimately found to be liable on grounds which fall within the scope of the policy, in particular the assured as not dishonest".[41]

It was recognised by the Court of Appeal that it was "surprising" and, for AstraZeneca, "profoundly unsatisfactory" that defence costs should only be recoverable where the defence is unsuccessful, but this was far from unheard of. The obvious inference from the particular wording in AstraZeneca is that little or no thought was given to defence costs in drafting the policy.

**An inevitable inconvenience of insureds?**

The Court of Appeal's decision, as Christopher Clarke LJ rightly observed, is "potentially very inconvenient for insureds."[42] Commercial common sense dictates that a practical settlement sum is often a price worth paying. This is particularly so in litigation with the potential full-liability value of the Seroquel litigation, or litigation which (like the Seroquel class action) may be subject to the uncertainty of trial by jury, and potentially the determination of punitive damages by jury. Indeed, AZ Insurance's legal team sought to persuade Flaux J at first instance that there was "something unfair or unreasonable about a liability policy only responding to actual liability."[43]

But there is nothing inevitable under English law in an actual liability trigger. Contrary to the view peddled by some American lawyers, including AstraZeneca's Delaware counsel in the underlying class action,[44] this decision does not mean that liability policies with English choice of law clauses are inherently inflexible or ignorant of the commercial realities of group litigation. Far from it. The astute insured, with the benefit of some bargaining power, can ensure that their liability cover does not respond solely to liabilities *per se*. The foundations of the English approach to construction remains that insurance policies are to be read as meaning what they say: "interpretation is the ascertainment of the meaning which the document would convey to a reasonable person…"[45]

Rather, the lesson to be drawn from *AstraZeneca* is to know what you are bargaining for. If you opt for English law you are "taken objectively to have intended that their contract should be governed by English law….[and] are taken to know English law…[and] to have appreciated the differences [from New York law] and yet deliberately chosen English law."[46] The unavoidable conclusion is not that English law cannot cope with common-sense in

insurance contracts, but that English law will not abide by policies which are alleged to mean other than what they say.

**Alternative wordings**

Under New York law, and as is open to the insurer and insured under English law, an insurer "is contractually obligated to defend even meritless suits that fall within coverage."[47] This requirement to defend leaves the responsibility for the defence and associated costs with the insurer, always provided those costs remain within the limits of the policy. Whilst there is no general principle of English law obliging an insurer to defend, the parties could readily import an 'insurer shall defend all claims falling within the Certificate' wording. This is not uncommon.

Another option, and one that is wide-spread in professional indemnity policies, is the QC clause where the insured and insurer agree to abide by the view of a QC (or equivalent) on whether a claim should be contested or settled. QC clauses typically provide cover for:

> "any such claim or claims which may arise without requiring the assured to dispute any claim, unless a Queen's Counsel (to be mutually agreed upon by the underwriters and assured) advises that the same could be successfully contested by the assured and the assured consents to such a claim being contested, but such consent not to be unreasonably withheld." [48]

This hands the effective decision on the insurer and insured's primary liability in the underlying litigation to a nominally neutral expert.

Christopher Clarke LJ proffered other possibilities in the Court of Appeal's judgment. "The insured can seek (no doubt at a price) cover which insures him against claims made, or judgment given, or against occurrences. The policy may contain a follow the settlements clause where by the insurer is bound to follow the settlements of the insured… The policy may contain provisions whereby actual liability is, as between the insurer and the insured, taken to have been established if certain conditions are met."[49]

One interesting example of a broader liability trigger can be found in the professional indemnity policy considered in *ACE European Group & Ors v Standard Life Assurance Ltd*.[50] In that case, "civil liability" was defined to mean:

> "(a) a legally enforceable obligation to a third party for compensatory damages in accordance with an award of a court or tribunal by whose jurisdiction the Assured is bound; or
> (b) a legally enforceable obligation to a third party for compensatory damages acknowledged by an agreement made, with the consent of the Underwriters, such consent shall not be unreasonably withheld or delayed, between the Assured and third party in settlement of a claim; or
> (c) any compensatory damages pursuant to any award, directive, order, recommendation or similar act of a regulatory authority, self regulatory organisation or ombudsman or following arbitration or other alternative dispute resolution processes whose findings are binding upon the Assured.

This wider definition of liability will encompass not only "liabilities" as traditionally understood in English law, but will extend to any award of a court notwithstanding the absence of an actual liability, and to settlements entered into with the consent of the underwriter.

Moreover, the policy in issue in *Standard Life Assurance* provided an indemnity against mitigation costs where mitigation costs

> "shall mean any payment of loss, costs or expenses reasonably and necessarily incurred by the Assured in taking action to avoid a third party claim or to reduce a third party claim (or to avoid or reduce a third party claim which may arise from a fact, circumstance or event) of a type which would have been covered under this policy (notwithstanding any Deductible amount)."

The Court of Appeal upheld the Commercial Court's finding[51] that the mitigation costs clause in that case covered an injection of some £100m into Standard Life's pension fund to avoid mis-selling claims, even where the cash injection had the dual purpose of protecting Standard Life's brand. It is likely that had the AstraZeneca policy had a similarly-worded mitigation costs provision the settlement of the Seroquel litigation would have fallen within the policy.

There are also clauses frequently used across the indemnity insurance market which provide for a wider indemnity in relation to defence costs. In *Thornton Springer*, for example, Colman J held that a policy providing that 'Underwriters shall in addition indemnify the Assured in respect of all costs and expenses incurred with their written consent in the defence of settlement of any claim' entitled the insured to their costs arising from an approved settlement; any alternative construction would be "quite absurd."[52] A policy wording that expressly responds, for example, to:

> ‘all costs and expenses incurred in the investigation, defence or settlement of any claim made and which falls to be dealt with under the Certificate provided always that the Insurer shall have given their prior consent in writing to such costs being incurred’[53]

should respond to all costs associated with the defence of a claim which otherwise fall within the policy, whether successful or otherwise and always provided consent is provided by the Insurer. Finally, and perhaps offering little comfort to the insured at the inception of the policy or the outset of a claim, it is always open to the insured to seek the consent of the insurer and reinsurer to any settlement. A commercially-sensible outcome may result.

**Clear wording**

This gives rise to the question of how clear the wording must be to displace the general presumption that a liability policy responds solely to liability. Mance J’s approach to the use of “alleging” in *Swinbank* demonstrates the drafting difficulty associated with any other policy meaning. Likewise, in *Enterprise Oil*, despite the policy itself expressly stating that it should be construed in the broadest and least restrictive manner possible,[54] “liability…assumed under contract or agreement” wording was not sufficient to displace the presumption that liability did not include liabilities assumed pursuant to a settlement agreement in the absence of any underlying liability. One does have to ask, if the liability-trigger was not departed from in the favourable interpretative environs in *Enterprise Oil*, then where?
Flaux J offered some indication of an answer in *AstraZeneca*: “If [the policy] were intended to cover alleged … liability as opposed to actual liability, I would expect to see an insuring clause in [the policy] which expressly so provided and which made clear by its wording that the parties intended to depart from the general principle of English law applicable to liability insurance, which forms part of the background against which this contract falls to be construed.”[55] This proposition echoes through the case law. Colman J stated in *Thornton Springer v NEM Insurance & Ors* that he would not entertain an argument against a liability-based trigger “unless the insuring clause is drafted to show in clear terms that this basic principle of liability insurance is intended to be excluded.”[56]

What is abundantly clear is that “liability…incurred,” “obligated to pay,” or equivalent liability-based wordings, will respond only to actual liability. Any departure from this general principle must be so clear that it cannot sustain a liability-based construction, or otherwise so obvious in departing from the basic interpretative tenet of English insurance law.

Herein lies a salutary lesson: as Mance J observed in *Swinbank*, “haphazard results are possible if a true construction of the policy involves them.”[57] Haphazard results are best avoided by policy wording that means what it says and says what it means. Successful settlement or defence may otherwise prove pyrrhic.

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**Footnotes**

[1] [2013] EWCA Civ 1660 (‘CA Judgment’) upholding the judgment of Flaux J at first instance, [2013] 1 Lloyd’s Rep IR 290 (‘CC Judgment’)
[2] *West, Wake, Price & Co v Ching* [1957] 1 WLR 45 at 49
[3] *Structural Polymer Systems v Brown* [2000] Lloyd’s Rep IR 62 *per* Moore-Bick J at 72: “provided [the insured] can show that they were liable to [the third party] in an amount at least equal to the total sum paid under the Settlement Agreement, the amount of the settlement cannot be regarded as unreasonable.”
[4] Colman J refers to a “strong presumption” in *Thornton Springer v NEM & Ors* [2000] Lloyd’s Rep IR 590 at 600
[5] *In Re. Seroquel Products Litigation* 06-MD-01769
[6] http://www.bloomberg.com/news/2011-07-28/astrazeneca-resolves-almost-all-seroquel-suits-for-647-million.html; http://prescriptions.blogs.nytimes.com/2011/07/28/astrazeneca-settles-most-seroquel-suits/?_php=true&_type=blogs&_r=0
[7] author’s italics. See appendix to CA Judgment for full policy wording.
[8] see CC Judgment at [11]-[13] and CA Judgment at [5] for the Court of Appeal’s simplification of the Preliminary Issues
[9] [2007] Lloyd’s IR 186
[10] *ibid*, per Aikens J at [72] citing the decisions at first instance and on appeal in the *Swinbank* case (see below)
[11] CA Judgment p*er* Christopher Clarke LJ at [23]
[12] CC Judgment at [5]
[13] CA Judgment at [25]
[14] *Homgurg Houtimport BV v Agrosin Ltd* [2004] 1 AC 715 *per* Lord Bingham at [11]
[15] CC Judgment at [29]
[16] *ibid* at [25]

[17] CA Judgment at [25]
[18] *Feuer v Menkes Feuer Inc* (1959) 8 AD.2d294 *per* Breitel J in the context of an indemnity agreement in a contract of service. Later applied in the insurance context: *Damanti v A/S Inger* (1963) 314 F.2d 395; *Luria Bros Inc v Alliance Assurance* 780 F.2d 1082 (2d Cir, 1986) and in *Uniroyal Inc. v The Home Insurance Co* 707 F.Supp 1368 (EDNY, 1988)
[19] Aikens J expressly rejected the underpinnings for such a general duty in *Enterprise Oil* at [186]-[188] and a similar contract-based analysis at [66].
[20] Judgment at [101]
[21] [1999] Lloyd's Rep IR 98
[22] *ibid* at 102
[23] CA Judgment at [47]
[24] s.78 of the Marine Insurance Act 1906 makes specific provision for "expenses" incurred in the context of marine insurance; see CC Judgment at [137]; CA Judgment at [72]
[25] CC Judgment at [138]; CA Judgment at [73]
[26] CC Judgment at [144]-[145]
[27] CA Judgment at [76]-[79]
[28] CC Judgment at [144]
[29] *ibid* at [145]
[30] CA Judgment [76]
[31] McGillivray on Insurance Law (12th ed., Sweet & Maxwell, 2013), eds. Birds et al., 29-006
[32] *Op. cit.* at 101, citing *West Wake Price & Co* v *Ching* [1957] 1 WLR 45, *Post Office* v *Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363 and *Bradley* v *Eagle Star Insurance Co Ltd* [1989] AC 957
[33] *MDIS LTD (formerly McDonnell Information Systems Ltd) v Swinbank London & Edinburgh Insurance Co & Anr* [1999] 1 Lloyd's Rep IR 516 *per* Clarke LJ at 524
[34] [1998] 2 Lloyd's Rep 600, *per* Potter LJ at (with whom Woolf MR and May LJ agreed) 610-611
[35] c.f. dicta of Lord Mance in *Wasa International Insurance v Lexington Insurance* [2009] Lloyd's Rep IR 675 at [37]
[36] CC Judgment at [65]
[37] CA Judgment at [17]. Also see Christopher Clarke LJ at [23] citing his own earlier judgment in *Omega Proteins v Aspen Insurance UK Ltd* UK Ltd [2011] Lloyd's Rep. IR 183 at [49]
[38] e.g. *AS Screenprint Ltd v British Reserve Insurance Co* [1999] Lloyd's Rep IR 430 at 435
[39] *West, Wake, Price e & Co v Ching* at 49; *Post Office v Norwich Union Fire Insurance* [1967] 2 QB 363 at 374, 378; *Bradley v Eagle Star Insurance* [1989] 1 AC 957 at 966
[40] *Thornton Springer* at [47]
[41] Colinvaux's Law od Insurance (9th ed., Sweet & Maxwell, 2013), R. Merkin, 20-047; cited with approval at CA Judgment [81]
[42] CA Judgment at [18]
[43] CC Judgment [33]
[44] Note the remarks of Michael P Kelly and Andrew Dupre of McCarter & English LLP: http://blog.pharmexec.com/2013/07/31/the-curious-case-of-astrazeneca-v-ace/, to wit "Should *AstraZeneca v. XL* stand on appeal, it will mean that an English law insurance contract, and all reinsurance policies derived from it, are worthless for settling US pharmaceutical mass tort liabilities not already lost in a trial….The critical lesson learned for the pharmaceutical industry is the importance of not having form insurance contracts modified to English law."
[45] *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR 896 *per* Lord Hoffmann at 912H-913F
[46] CC Judgment at [19]
[47] *Capitol Indemnity Corp.* v *Elston Self Service Wholesale Groceries, Inc*, 559 F.3d 616, 619 (7th Cir. 2009) and *Hyundai Motor America* v *National Union Fire Ins. Co*, 600 F.3d 1092. 1097-98 (9th Cir. 2010)
[48] see *West, Wake, Price & Co v Ching* at 50
[49] CA Judgment at [19]
[50] [2013] Lloyd's Rep IR 415
[51] [2012] EWHC 104 (Comm) *per* Eder J at 185
[52] *ibid* at [48]; relying upon similar wording construed in *Capel-Cure Myers Capital Management v McCarthy* [1995] LRLR 498 *per* Potter J at 504
[53] Wording based on (but not identical to) *Capel-Cure Myers Capital Management v McCarthy* [1995] LRLR 498; see also the costs clause wording in *Enterprise Oil* at [25]
[54] *Enterprise Oil* at [22]
[55] CC Judgment at [127]
[56] *Thornton Springer* at 600
[57] *Swinbank* at 103

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