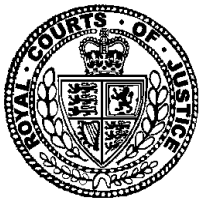

Neutral Citation Number: [2026] EWHC 1134 (Comm)

Case No: CL-2025-000301 and CL-2025-000406

IN THE HIGH COURT OF JUSTICE
BUSINESS & PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (KBD)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13 May 2026

Before:

MR JUSTICE PICKEN

- -

THE RUSSIAN AIRCRAFT LITIGATION –
OPERATOR POLICY CLAIMS

- -
- -

David Peters KC and Helen Morton (instructed by **Dechert LLP**) for **Chubb European Group SE**
Timothy Howe KC, Nik Yeo, Christopher Knowles and Orestis Sherman (instructed by **Reynolds Porter Chamberlain**) for **Fidelis Insurance Ireland DAC**
James Duffy KC, Max Kasriel and Lachlan Hopwood (instructed by **CMS**) for the **CMS Defendants**
Andrew Neish KC (instructed by **Holman Fenwick Willan LLP**) for the **relevant HFW Defendants**
David Bailey KC, Charles Kimmins KC, Michal Hain and Alexandros Demetriades (instructed by Shoosmiths LLP as local agent for **Kennedys Legal Solutions Pte Ltd**) for the **Shoosmiths Defendants**

Hearing date: 16 & 17 March 2026.
Judgment provided in draft: 7 May 2026.

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APPROVED JUDGMENT

Mr Justice Picken:

Introduction

1. These are applications by the Shoosmiths Defendants, the CMS Defendants and certain (in fact, the majority) of the HFW Defendants (the 'Applicants') to strike out or obtain summary judgment dismissing certain contribution claims (the 'Contribution Claims') brought against them by Chubb European Group SE ('Chubb') and Fidelis Insurance Ireland DAC ('Fidelis').

2. The context is complicated. However, the applications are made in the wake of the judgment in ***Re Russian Aircraft Policy Claims*** [2025] EWHC 1430 (Comm) (the 'LP Judgment'), in which Butcher J found Chubb and Fidelis, amongst others, liable, under contingent war risks cover (the 'LPs') in policies of insurance taken out by aircraft lessors (the 'Lessors'), to indemnify AerCap Ireland Ltd and certain associated companies (collectively 'AerCap') and Merx Aviation Servicing Ltd and certain associated companies (collectively 'Merx') for the loss of certain aircraft and/or engines (the 'LP Aircraft') that they leased to various Russian airlines (the 'Airlines').

3. More specifically, Chubb's and Fidelis's claims - and the related claims on which they are based - arise out of the restraint/detention of certain western leased aircraft and/or engines (the 'Aircraft') by the Russian Government, and the resulting loss of the Aircraft to their owners, the Lessors.

4. Chubb's position, in a nutshell, is that: it has been exposed to liability to certain Lessors *qua* insurer in respect of the loss of the Aircraft; the Defendant War Risk Underwriters (the 'WRUs'), including the Applicants, were (and are) also liable to the Lessors *qua* insurer in respect of that same loss under certain operator (re)insurance policies (the 'OPs'); and, had the WRUs provided the indemnity which they were obliged to provide under the OPs when they were obliged to provide it, Chubb would not have been exposed to liability at all (or would have been exposed to liability in a smaller amount). As a result, Chubb says, it is entitled to a contribution and/or an indemnity from the WRUs. Fidelis's position is the same as Chubb's save that its Contribution Claim is contingent in the manner described below.

5. Expanding on this somewhat, the Lessors had (and have) the potential benefit of two forms of War Risk ('WR') insurance in relation to the Aircraft. The first were the OPs, namely policies that the Russian airlines which leased and operated the Aircraft (the 'Operators') were obliged to put in place under the terms of the relevant aircraft leases. The Lessors contend that the leases also required that the OPs provide for the Lessors themselves to be able to sue thereunder in respect of their own interest in the Aircraft. Russian law requires that the Operators' own insurance be placed with local Russian insurers. However, the Lessors required reinsurance to be placed via the London market and that reinsurance contained 'cut through' clauses which the Lessors say entitled them to pursue the London reinsurers in respect of any loss of, or damage to, their interest in the Aircraft. The reinsurance was arranged first, with the domestic Russian insurance being placed afterwards. Both the reinsurance and the insurance are subject to Russian law.

6. As for the second form of WR insurance, these were the LPs, which were taken out directly by the Lessors themselves and which included cover designed to respond when the Aircraft were in the Operators' possession at the time of any relevant loss and the OPs failed to respond. The LPs are subject to English law.

7. Chubb's and Fidelis's present claims against the WRUs relate to their respective liability under two LPs, namely those issued to AerCap and to Merx. As to the former, AerCap's LP Policy was designed to respond only if certain contingencies occurred (the references to *"the Principal Insurance"* being to the OPs), the Contingent WR Cover providing as follows:

> *"(i) in the event that the Insured is not indemnified in whole or in part under the Principal Insurance; or*
>
> *(ii) in the event of the lack or insufficiency of required insurance due to error or accidental omission; or*
>
> *(iii) in the event of the exhaustion of the aggregate limit under the Principal Insurance."*

The cover was subject to a US$1.2 billion limit, save insofar as AerCap's claim on its LP arose out of an exhaustion of OP aggregate limits. In that event, a lower limit of US$1 billion would apply.

8. As to Merx's LP, rather than specifying contingencies that trigger cover, the WR cover provided general cover for Aircraft which were not in Merx's possession, subject to the following exclusions (*"Principal Policy"* being a reference to the OPs, like also *"the operator's Hull War insurance"*):

> *"SECTION FIVE: GENERAL EXCLUSIONS*
>
> *5.5 Principal Policy*
>
> *This insurance does not cover loss or damage which is recoverable as a claim from the Principal Policy.*
>
> *…*
>
> *6.6 Non-contribution*
>
> *This Insurance does not cover claims which are recoverable under any other policy in favour of the Insured except for any excess beyond the amount which would be payable under such other policy had this Insurance not been effected.*
>
> *SECTION SIX: OTHER TERMS AND CONDITIONS*
>
> *1. Under Contingent coverage claims arising from the exhaustion (partial or total loss) of the aggregate available under the operator's Hull War insurance are excluded."*

The aggregate limit under the Merx LPs was US$300 million.

9. Following the restraint/detention of the Aircraft, the Lessors sought an indemnity from WRUs under the OPs, and were refused. The Lessors, therefore, brought claims against the WRUs seeking an indemnity under the relevant OPs. Those claims (the 'OP Claims') are scheduled for trial, starting in October 2026 (the 'OP Trial'), with Chubb's and Fidelis's Contribution Claims being jointly case managed with the OP Claims and, currently at least, due to be determined at the OP Trial.

10. For the purposes of this application, it is to be assumed - as acknowledged by Mr David Bailey KC on behalf of the Shoosmiths Defendants, Mr James Duffy KC on behalf of the CMS Defendants and Mr Andrew Neish KC on behalf of the relevant HFW Defendants - that the WRUs are liable to indemnify the Lessors, and should have paid their limits at the outset, when they were called upon to do so. Be that as it may, having been rebuffed by the WRUs, the Lessors sought to recover under their LPs. This resulted in the LP Judgment, in which Butcher J held that: AerCap could recover under the contingent war cover in the AerCap LP where a claim had been made under the OPs, but the OP insurers had failed to pay; and Merx could recover under the war cover in the Merx LP where it had not recovered under the OPs despite having taken reasonable steps to do so. In particular, Butcher J held that the trigger in the AerCap LP – *"in the event that the Insured is not indemnified in whole or in part under the Principal Insurance"* – required the insured to *"at least have made a claim on the Principal Insurance"* which he considered *"consistent with the contingent nature of the cover"* (see [280]). He further held that *"the Principal Insurance remains that which is first looked to and which, if and to the extent it pays, will preclude recovery under the Contingent Cover"* (see [335]). As for the Merx LP, Butcher J held that *"recoverable"* in Clauses 5.5 and 6.6 *"implicitly"* meant *"recoverable by the taking of reasonable steps in claiming"* (see [454]), finding that Merx had taken such reasonable steps (see [457]).

11. Chubb and Fidelis, as LP Insurers, paid the following sums pursuant to the LP Judgment: Chubb paid US$57.6 million under the AerCap LP (Chubb paid Merx pursuant to a settlement agreement entered into during the trial), whilst Fidelis paid US$240 million under the AerCap LP and about US$50 million under the Merx LP.

12. It should be noted, in passing, that the 18 other LP Insurers of either AerCap or Merx, who have paid the vast majority of the insured values, have not (so far) sought to bring contribution claims.

13. Turning to the OP Claims, the first OP Claim was issued on 30 November 2022. Since then, over 90 OP Claims have been brought under 21 OPs which, in turn, are covered by 18 different OP WR Reinsurance slips. At the time of the OP Claims CMC on 8 November 2024, claims had been brought in respect of 258 aircraft and 39 engines for alleged agreed values in excess of US$12 billion.

14. Many OP Claims have been discontinued following settlements. Most of those settlements fall into two broad categories. The first are settlements entered into by some claimants with Limited Liability Company *"Insurance Company NSK"* ('NSK'), a Russian Insurance company established as a vehicle for such settlements using funds provided by the Russian authorities. The second are LP Settlements, entered into by some claimants with LP Insurers, subject to terms which provide for an *"entity release"* under which the relevant claimant agreed to discontinue (or enter into a consent order providing for the dismissal of) that claimant's OP Claims against the relevant LP Insurer (or other insurers within the LP Insurer's corporate group).

15. This, then, is the context in which the Contribution Claims came to be commenced by Chubb and Fidelis on 30 June and 8 September 2025 respectively.

16. As Mr David Peters KC, on behalf of Chubb, explained, the starting point for Chubb's Contribution Claim is that the WRUs are liable to indemnify the Lessors in respect of the loss of the Aircraft under the relevant OPs and, therefore, they ought to have provided such an indemnity at the outset, and their failure to do so was (and is) a breach of the relevant OPs. Mr Peters added that Chubb's claims also depend on the following propositions: first, that the Lessors ought not to be able to recover more

(across the OPs and the LPs) than they would have been able to recover, had the WRUs provided an indemnity under the OPs when they should have done; and secondly, that Chubb ought not ultimately to be liable for more than it would have been liable, had the WRUs indemnified the Lessors under the relevant OPs when they ought to have done.

17. As to Merx specifically, Mr Peters explained that since Chubb's LP did not provide any cover in the event of OP aggregate limits being lower than the value of Merx's loss, then, had the relevant WRUs paid their limits under the relevant OPs (or the value of Merx's loss, if lower), Merx would have had no claim against Chubb under its LP. As a result, he submitted, the fact that Chubb faced liability under the Merx LP was entirely attributable to the WRUs' breach of their OPs. In those circumstances, he observed, Merx would be overcompensated if it recovered its share of the OP aggregate limits (or, if lower, a full indemnity for its loss) in addition to the sums received under its settlement with Chubb, hence the need for Merx to give credit for the latter sums in its claim against the WRUs; and the WRUs' entitlement to such credit would mean that their liability to Merx under their OPs would be reduced *pro tanto* by the sums paid by Chubb under the Merx Settlement, and so it would be appropriate for the WRUs to pay (by way of a contribution and/or indemnity) an equivalent sum to Chubb. This would mean that each of Merx, the WRUs and Chubb would be left in the position in which they would have been had the WRUs done what they ought to have done at the outset (i.e. indemnify Merx under the relevant OPs).

18. Mr Peters submitted that the position is similar in relation to AerCap, in that, pursuant to the LP Judgment, Chubb has been held liable for a sum of US$57.6 million (representing its 4.8% line in respect of Contingent WR Cover with a limit of US$1.2 billion), meaning that, were AerCap to be entitled to be indemnified for the whole of its loss under the OPs, then, the position would be the same as in relation to Merx, namely that: Chubb was only ever subjected to a liability for US$57.6 million because of the WRUs' failure to provide the requisite indemnity under the OPs; AerCap must give credit for that sum of US$57.6 million when seeking to recover under its OPs; and the WRUs (having taken the benefit of this credit) should, then, be ordered to pay this sum back to Chubb by way of a contribution/indemnity. However, the position is more complicated, Mr Peters noted, owing to the fact that AerCap may recover less than a full indemnity because of OP aggregate limits – specifically, whilst AerCap's LP does provide AerCap with cover in the event of it not being fully indemnified under the OPs by virtue of the exhaustion of aggregate limits, that cover is subject to a limit of US$1 billion, which is US$200 million lower than the limit which was treated as being applicable in the LP Judgment. The impact of this will depend on, for example, whether (and by reference to which particular Aircraft) the OP aggregate limits are found to have been exhausted and the proper allocation of AerCap's existing recoveries (including recoveries made pursuant to the LP Judgment), but it was Mr Peters' submission that, had the WRUs paid their OP aggregate limits at the outset, then, the maximum indemnity to which AerCap would have been entitled under its LP would have been US$1 billion, and that Chubb's share of that indemnity would have been US$48 million (US$9.6 million less than it was ordered to pay (and has paid) under the LP Judgment). This level of recovery (i.e. its share of OP aggregate limits plus US$1 billion from its LP) would have been available to AerCap only if, in respect of the Aircraft subject to the LPs, it suffered a loss which was not indemnified under the OPs in an amount of US$1 billion or more. Even in that scenario, Mr Peters observed, AerCap would be overcompensated (to the tune of US$9.6 million) if it were to be entitled to obtain judgment against the WRUs for the full value of the OP aggregate limits, whilst also retaining the US$57.6 million which it received from Chubb under the LP Judgment. AerCap would, therefore, have to

give credit to the WRUs for the sum of US$9.6 million, with Chubb being entitled (as against the WRUs) to a contribution/indemnity in the same amount. However, Mr Peters continued, were AerCap's loss in respect of the Aircraft subject to the LP which was not indemnifiable under the OPs to be less than US$1 billion, then, the figure for overcompensation (and, therefore, the amount of credit which it would be required to give to the WRUs, and the amount of the contribution/indemnity they would be required to pay to Chubb) would rise accordingly. If there were no such loss, then, AerCap would be required to give credit (and the WRUs would be required to pay a contribution/indemnity) for the full sum of US$57.6 million which Chubb has been ordered to pay under its LP. It follows that Chubb's Contribution Claim in relation to its liability to AerCap in the LP Judgment is worth somewhere between US$9.6 million and US$57.6 million.

19. As for Fidelis's Contribution Claim, albeit without reference to the same level of detail as Mr Peters had done, Mr Timothy Howe KC explained, on Fidelis's behalf, that the position is similar, except that it is a contingent claim since Fidelis does not positively argue that the WRUs are liable to AerCap and Merx. Fidelis says, rather, that its Contribution Claim follows (only) if the WRUs are held to be liable to AerCap and/or Merx in: AerCap's and Merx's Russian OP Claims seeking indemnities for the loss of the LP Aircraft under the OPs to which the WRUs subscribed; and/or the Chubb Contribution Claim; and (in the case of Fidelis's liabilities under the LP Judgment in respect of AerCap only) the LP Judgment against Fidelis in AerCap's favour withstands the appeal. If those contingencies materialise, then, Mr Howe submitted, Fidelis would be liable under the LPs to indemnify AerCap and Merx for their loss of the LP Aircraft due to the Russian government's actions; the WRUs would also be directly liable to indemnify AerCap and Merx for their loss of the LP Aircraft due to the Russian government's actions; the OPs should have responded first but they did not (and the LPs were forced to pay first) because the insurers under the OPs and reinsurers under the OP WR Reinsurances refused to pay, and AerCap and Merx chose to sue the insurers under the LPs to judgment first.

20. Both Chubb and Fidelis found their Contribution Claims (albeit that they have each engaged in what might be described as a re-ordering as the proceedings have progressed), first, on the principles applicable where a secondary obligor discharges a primary obligor's liability; secondly, on the principles relating to double insurance; and, thirdly, under the Civil Liability and Contribution Act 1978 (the '1978 Act').

The applications

21. The present applications seek to strike out the contribution claims on the basis that there are no reasonable grounds for bringing them; in the alternative, summary judgment is sought because the contribution claims have no real prospect of success.

22. Mr Bailey (who took the lead in advancing the WRUs' submissions, although both Mr Duffy and Mr Neish also made briefer oral submissions) submitted that Chubb and Fidelis are seeking to bring those claims on a basis which is misconceived since payments by LP Insurers did not discharge the WRUs and, furthermore, if the WRUs are liable at all, then, their liability would be primary (and the contingent liability would be secondary), and so, since ordinarily a secondarily liable person is subrogated to the third party's claim against the primarily liable person, the contribution claims are bound to fail. More generally, it was Mr Bailey's submission that Chubb and Fidelis, as LP Insurers (like the Applicants), are trying to skip the queue to potential reimbursement, given that (at least as matters stand) they are the only LP Insurers to bring direct contribution claims instead of waiting to be credited with whatever sums they are entitled to receive through subrogation.

23. Mr Bailey went on to note that what might, in other circumstances, be a theoretical question has important practical consequences with trial due to take place in just a few months' time. He gave as an example in this respect the situation where an OP WR Reinsurer wants to settle an OP Claim, asking whether it would have to negotiate with that OP Claimant or with that Claimant plus that Claimant's myriad LP Insurers. Another example, Mr Bailey suggested, is where an OP Claimant enters into a settlement with a Russian insurer (or airline), and whether the LP Insurers are *prima facie* subrogated to such recoveries.

24. This, then, is the context in which the present applications fall to be considered.

Appropriate approach

25. As to the proper legal approach to applications of this nature, although it has become customary to set out the guidance given by Lewison J (as he then was) in ***Easyair v Opal Telecom Limited*** [2009] EWHC 339 (Ch) at [15], it is unnecessary to do so. I do, however, highlight three aspects to which Mr Howe rightly drew attention.

26. The first of these is that, as Mr Bailey accepted, the Court should consider whether Fidelis's and Chubb's claims have a real prospect of success on the premise that the Applicants are directly liable to indemnify AerCap and Merx for their loss of the LP Aircraft with the consequence that their failure to meet that liability breached the OP WR Reinsurances. This is because, as I myself pointed out in ***Arcelormittal North America Holdings LLC v Ravi Ruia*** [2022] EWHC 1378 (Comm) at [29], a strike-out application should assume the primary facts alleged are true and, as recently reiterated by Nugee LJ in ***Akintunde Giwa v Jnfx Ltd*** [2025] EWCA Civ 961 at [32]-[33], the Court should not conduct a mini-trial.

27. Secondly, whilst the Court can on an application such as the present decide short points of law, it is generally not appropriate that the Court should do so if the points are novel and controversial, arise in a developing area of law or are of general importance: ***Alliance Petrochemical Investment (Singapore) Pte Ltd v Francesco Mazzagatti*** [2025] EWHC 2155 (Comm) at [8a] per HHJ Pelling KC. It was Mr Howe's submission, in the circumstances, that, as there is no direct English authority dealing with a case like the present cases and since the legal issues may have wider importance, the Court should be wary of deciding those issues at this stage. That said, as Lewison J himself made clear in ***Easyair*** at [15(vii)]:

> *"…if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better."*

Furthermore, in a recent decision of the Court of Appeal, ***Lunak Heavy Industries (UK) Ltd v Tyburn Film Productions Ltd*** [2025] EWCA Civ 1643, Lady Carr CJ said this at [26]:

> *"That does not mean, however, that the court should shy away from determining summarily any question raised in an unjust enrichment claim if appropriate. However difficult it may be to identify whether a defendant's enrichment was at the expense of the claimant in cases which lie at the margin, the court should do so if the particular case clearly lies beyond the margin. … ."*

28. Thirdly, Mr Howe submitted that the fact that a summary judgment application is made close to trial makes it inappropriate to accede to the applications.

29. I bear these various points in mind in what follows. I should say right away, however, that I do not regard any of them as representing an obstacle to dealing with the substance of at least some of the points in dispute now. In view of this and for the practical reasons identified by Mr Bailey, it seems to me that the Court should grasp the nettle and decide those issues one way or the other.

Indemnity/reimbursement

30. Taking into account the re-ordering to which I have previously referred, I begin with the indemnity/reimbursement issue, although, as will appear, analysis of this issue necessarily entails consideration of what amounts to double insurance and so, to a large extent, the double insurance issue will also be addressed in the context of the indemnity/reimbursement issue, meaning that, when I come on to deal with the double insurance issue, I will do so only relatively briefly.

31. Mr Peters' submission has been described already and was straightforward. It was that it has long been established that where a party (Mr Peters used the label X) is primarily liable to pay a sum to another party (Z) and another party (Y) is compelled (or was compellable) to pay that sum to Z, then, Y may claim reimbursement or an indemnity from X: see generally *Goff & Jones on Unjust Enrichment* (10th Ed) at §§19-16 to 19-21; ***Niru Battery Manufacturing Co & Anor v Milestone Trading Ltd & Ors (No.2)*** [2004] 1 CLC 882. This, Mr Peters submitted, is the position in the present case, hence the indemnity/reimbursement claims which have been brought by Chubb and Fidelis.

32. In similar vein, Mr Howe submitted that where B has to pay damages to a third party (A) by the legal default of another (C), B can recover from C, by whose default the damage was occasioned, the sum so paid to A. *That, he submitted, is also the result if* liability for the same debt rests primarily on C and only contingently on B since, if both are legally obliged to pay A but B pays, then because C gets the benefit of the payment due to C's debt to A being discharged, B can recover from C to the extent that debt is discharged. The same principles apply where B is an insurer. As such, Mr Howe maintained, payment by a 'secondary' obligor can discharge the 'primary' obligor's liability and ground a direct claim by the former against the latter.

33. Specifically, Mr Peters and Mr Howe submitted, given the structure of the insurance arrangements involved in the present case, the OPs (the *"Principal Insurance"* or *"Principal Policy"*, as they are described in the LPs) are properly to be characterised as being primarily responsible for indemnifying the Lessors in the event of a relevant loss of the Aircraft, whereas Chubb's and Fidelis's liability was secondary in the sense that they were only exposed to liability at all because of the WRUs' wrongful failure to provide the indemnity which they should have provided. As such, Mr Peters observed, Chubb's and Fidelis's position is similar to that of a surety who pays because of the principal obligor's failure to do so, and who is entitled to an indemnity/reimbursement from the principal obligor.

34. Mr Peters submitted that it is important in this context to understand the sense in which the terms 'primary' and 'secondary' are used in the various authorities. They, Mr Peters suggested, are used to denote a situation in which the liability of the party which is secondarily liable is contingent upon a failure by the primary obligor to comply with their contractual obligations. That, Mr Peters posited, is the position here because Chubb and Fidelis would not have been liable (or would have been liable for

a lesser sum) if the WRUs had complied with their obligation to indemnify the Lessors. The position, as such, is different from the sense in which the term 'secondary' liability is used in the more conventional insurance scenario involving, for example, a motorist who insures their car, only for it to be crashed into by a wrongdoer. Whilst it might be natural to refer to the wrongdoer's liability in that situation as 'primary' and the insurer's liability as 'secondary', Mr Peters explained, the latter is not 'secondary' in the sense used in the authorities to which I have referred because the insurer's liability arises at the moment that the relevant car is lost or damaged as a result of the fact of that loss/damage and without reference to the wrongdoer's own willingness (or ability) to make good that damage.

35. Mr Howe supported this submission, adding that the authorities show that the fact that a secondary obligor's liability to a third party is secondary (or contingent) does not prevent payment by the secondary obligor discharging the primary obligor's liability to the third party, and nor does it preclude further recovery by the third party against the primary obligor or a direct claim for an indemnity or reimbursement by the secondary obligor against the primary obligor. Mr Howe cited four particular cases in this connection, also relied upon by Mr Peters, the first being ***Moule v Garrett*** (1872) LR 7 Exch 101, in which a sub-lessee's actions rendered both the sub-lessee and the lessee liable to the lessor, payment to the lessor by the lessee discharged that liability, and the lessee was held entitled to an indemnity from the sub-lessee. Secondly, Mr Howe referred to ***Brook's Wharf and Bull Wharf Ltd v Goodman Brothers*** [1937] 1 KB 534, where both a warehouseman and furrier were liable for duty on furs, the warehouseman discharged that liability, and recovered the sums paid from the furrier despite the warehouseman's liability being secondary (or "*contingent*") and arising later than the furrier's liability. Thirdly, Mr Howe highlighted ***Greene Wood & McLean LLP v Templeton Insurance Ltd*** [2011] Lloyd's IR 557, where the claimant solicitors and defendant ATE insurers were both liable to the claimant's clients in respect of the clients' exposure to adverse costs orders and certain disbursements. The claimant solicitors settled claims by the clients regarding the costs orders and disbursements, which discharged the claimant solicitors' and the ATE insurers' liability for the same. The claimant solicitors were entitled to an indemnity at law, alternatively under the 1978 Act, from the ATE insurers. That was despite their liability to the clients being secondary to that of the ATE insurers. Lastly, Mr Howe drew attention to ***Limit (No 3) Ltd v ACE Insurance Ltd*** [2009] NSWSC 514, in which the claimant excess insurer under a 'master' policy, providing what was ordinarily excess cover to the insured, indemnified the insured under a difference in conditions clause requiring it to do so if the primary insurer did not (as it did not) admit liability to the insured within a specified time. That payment discharged the primary insurer's liability to the insured, and the claimant excess insurer was entitled to recoupment (i.e. reimbursement) of it from the primary insurer.

36. I do not agree with these submissions for what, in truth, is a straightforward reason. This is that Chubb and Fidelis cannot show that their payments as LP Insurers discharged the WRUs' liability to the OP Claimants so that they are entitled to an indemnity/reimbursement. As such, their recourse is to bring a claim by way of subrogation. This is because insurance recoveries are *res inter alios acta* in the sense that they do not discharge the liability of a third party, including an insurer who is primarily liable for the loss, and so that the insurer's remedy cannot be a direct cause of action but must, instead, be in subrogation. Chubb's and Fidelis's claims are not, in short, claims of the type described in *Goff & Jones* at §20-01:

"To make out a claim for contribution or reimbursement, the claimant must show that he discharged the defendant's liability to a third party and that (1) the claimant and

the defendant were both liable to the third party, (2) who was forbidden to accumulate full recoveries from both of them, but (3) who could choose to recover in full from either of them, and that (4) some or all of the burden of paying the third party should ultimately be borne by the defendant."

In the insurance context, this is what double insurance entails, where there is what is sometimes described as co-ordinate liability between two or more insurers, so as to mean that the insurers are each under a liability to the assured. Rather, Chubb's and Fidelis's claims are contingent claims, which, as such, are, as Mr Bailey put it, the *"antithesis"* of co-ordinate liability.

37. In order to explain how I have arrived at these conclusions, it will be necessary to explore certain authorities and, indeed, the academic commentaries in some considerable detail.

38. Starting with the latter, I refer, first, to *Colinvaux's Law of Insurance,* 14th Ed, at §12-186:

"Contribution should be carefully distinguished from subrogation. Since contribution implies more than one contract of insurance, it is only where there are two or more policies involved that there can be any confusion between the two. Subrogation ensures that the assured receives no more than an indemnity by allowing the insurers to exercise the assured's rights against a third party. Contribution ensures that the insurers do not suffer injustice amongst themselves because of the rule that the assured can claim from the insurers as he thinks fit. Unlike a claim for subrogation, a contribution action must be brought in the insurer's own name. Contribution is not brought in the name of the assured and is in principle not affected by defences that might have been pleaded against the assured had the action been brought by the assured for his own benefit."

39. I refer also to a passage in *Arnould, The Law of Marine Insurance and Average*, 21st Ed at §31-06, as follows:

"The insurer's right of subrogation must be distinguished from his right to claim contribution from a co-indemnitor (usually a co-insurer in case of double insurance). Both rights arise where the insurer has indemnified the assured against loss, and another person is (or other persons are) liable to the assured in respect of the loss. But the right of subrogation arises where another person is primarily liable to the assured, and the insurer's obligation to indemnify the assured under the contract of insurance is secondary - as, for example where the loss against which the insurer has indemnified the assured has been caused by tort or breach of contract (including, in an appropriate case, a contract of indemnity) committed by a third party. The right of contribution arises where the liability of the insurer and a third party to the assured are co-ordinate - as, for example, where the assured is insured in respect of the same loss under more than one insurance policy, and elects to claim the loss from one insurer alone.

In order to test whether obligations are primary and secondary or co-ordinate, it is legitimate to ask whether the insurer's payment to the assured would be res inter alios acta between the assured and the other party liable. Where the payment made by the insurer would be res inter alios acta, so that the other party would remain liable to the assured notwithstanding the insurer's payment, the obligation of the other party is primary, and that of the insurer secondary, so that the insurer may pursue a subrogated claim to enforce the rights of the assured. Where the payment made by the insurer would not be res inter alios acta, and would discharge the other party liable

to the assured (in whole or in part), the obligations of the insurer and the other party are coordinate, and the insurer may pursue only a claim for contribution."

What this passage makes clear is that if the obligations are primary rather than secondary or co-ordinate, then, the payments made by the paying insurer are *res inter alios acta* as against the party that is primarily liable. In such cases, what it is open to the paying insurer to do is to pursue a subrogated claim in the name of the assured. It is only in other cases, where the payments are not *res inter alios acta*, that an indemnity/ reimbursement or a contribution claim can be pursued.

40. This same point is made by *Arnould* at §32-15, in these terms:

"Contribution is an equitable remedy which arises between co-debtors where one or more of them has been called upon to discharge a disproportionate part of the debt in respect of which all have bound themselves. The foundation of the modern law of contribution lies in the equitable rights which exist between co-sureties. Although the right of contribution is equitable, rather than contractual, it may be modified by contract. Section 80(2) of the Marine Insurance Act 1906 recognises the origin of the right of contribution between co-insurers, in the provision that an insurer who has paid more than his proportion of the loss is entitled to 'the like remedies as a surety who has paid more than his proportion of the debt'.

The right of contribution between co-insurers must be distinguished from the rights of subrogation that accrue to an insurer on payment under a contract of insurance. The right of contribution between co-insurers (although sui generis) is analogous to the equitable right of contribution that exists between co-indemnitors. That right is founded upon the proposition that payment by one co-indemnitor discharges the liability of all others: the indemnitee, having been indemnified, may not make any further claim under other contracts of indemnity. In consequence, the indemnitor who has paid acquires a right to claim rateable contribution, in his own name, from those co-indemnitors whose liability his payment has discharged. Subrogation, by contrast, is founded upon the proposition that a claim paid by an insurer is, so far as third parties are concerned, res inter alios acta. Thus a third party liable to the assured remains liable even though the assured has been indemnified under the contract of insurance. But the insurer is entitled to the benefit of the assured's claim against the third party: he is therefore subrogated to the position of the assured, and may pursue the claim, but in the name of the assured. However, it does not follow that where an insurer has made a payment under the policy, he cannot be subrogated to the claim of his assured against a third party under another contract of indemnity, and can only claim contribution. On the contrary, he will be subrogated to his assured's claim under another contract of indemnity in all cases where the insurer's obligation to indemnify (under the contract of insurance) is secondary to the third party's obligation to indemnify. In most cases where the assured has a claim against a third party under a contract of indemnity other than a contract of insurance, the insurer's obligation to indemnify will indeed be secondary to the obligation of the third party to indemnify, if only because the payment made by the insurer will be res inter alios acta (and thus will not discharge or reduce the obligation of the third party), whereas any payment made by the third party will extinguish or reduce the sum due from the insurer under the policy. But where two contracts of insurance are concerned, each providing indemnity against the same loss, the liability of the respective insurers to indemnify their assured will be co-ordinate. In consequence, the insurer who has paid the indemnity will be entitled to claim rateable contribution from the insurer who has not paid."

41. *Arnould* cites, amongst other cases, ***Caledonia North Sea Ltd v British Telecommunications Plc*** 2000 SLT 1123, a decision of the Court of Session (Inner House) arising out of the Piper Alpha disaster. Specifically, the owners and operators of the oil platform raised an action against contractors engaged on the platform, to recover settlement moneys and expenses paid to survivors and relatives of those killed in a catastrophic explosion on the platform, in terms of indemnity clauses in the pursuers' contracts with the defenders. The bulk of the claims had been settled by the pursuers' insurers. On day 381 of a 391-day proof, the defenders advanced, and the Lord Ordinary ultimately accepted, the argument that six out of seven test actions were irrelevant as the pursuers had not made any of the payments to claimants and had, therefore, suffered no loss for which the contractors should indemnify them. Whilst the actions were raised in the pursuers' name, the pursuers accepted that their insurers were using that name by virtue of subrogation. The pursuers reclaimed, arguing that the Lord Ordinary had erred in dealing with the defenders' argument at all as it was not mentioned in their pleadings or focused in a specific plea in law. Further, they argued, payments made by the insurers to indemnify the pursuers were *res inter alios acta* so far as any third party was concerned. The defenders argued (1) that the pursuers had already been indemnified by their insurers and could not be indemnified again by the defenders; (2) that as the insurers and the defenders had each entered into contracts of indemnity with the pursuers, or contracts containing indemnity clauses, covering the events which had occurred, the law regarded them as co-obligants and the insurers were limited to a right of contribution enforceable in an action of relief.

42. On appeal, the Inner House held that an insurer, in making good a loss, was entitled to be put in the place of the insured and subrogated to any remedies against a third party, and there was no distinction between insurance cases generally and cases concerning contracts or clauses of indemnity; that between the contract of insurance and the contract containing the indemnity the latter was the primary obligation, being part of a mutual arrangement in a wider contractual relationship, whereas the pursuers' insurance arrangements were intended for their own benefit and were *res inter alios acta* as respects the defenders; and that it followed that the actions were properly brought by the insurers in the name of the pursuers, and the Lord Ordinary was wrong to sustain the general plea to the relevancy.

43. The Lord President, Lord Rodger, summarised the competing submissions in this way at page 1133B-E:

> *"As Mr Wolffe for the defenders said, the defenders' basic argument was simple. The pursuers had been indemnified by their insurers. The pursuers now sought to be further indemnified by the defenders under the various indemnity clauses in their service contracts. But, having been fully indemnified by their insurers, the pursuers were not entitled to seek any further indemnity from the defenders, since this would mean that they were being more than fully indemnified, contrary to the basic principle of the law of indemnity … The present actions would accordingly be irrelevant if brought by the pursuers and they must equally be irrelevant when raised by the insurers using the pursuers' name.*
>
> *In attacking that argument Mr Batchelor, QC, advanced an equally simple point of view on behalf of the pursuers. He did not call into question the principle that an assured is not entitled to be more than fully indemnified. But, he said, payments made by insurers to indemnify an assured were res inter alios acta so far as any third party was concerned. That was a general principle which applied in any case where an insurer raised proceedings in the name of the assured. It therefore applied in the*

present cases where the proceedings were based on a right under a contract of indemnity. … .”

44. Lord Rodger continued at pages 1133L-1134I by saying this:

“In presenting their argument that the payment by the insurers had the effect of extinguishing the contractors’ liability under the indemnity clauses, counsel for the defenders accepted, of course, that payments by an insurer are not generally regarded as having the effect of extinguishing a third party’s liability to the assured. To take only the most obvious example, it has long been settled that a wrongdoer’s liability to pay damages is not affected by the fact that the victim may have been indemnified for his loss under a contract of insurance… Counsel argued, however, that a clause or contract of indemnity was different. Under such a contract the person to be indemnified is entitled to be indemnified for his loss but is entitled to nothing more. Therefore, it was said, in a case where the person seeking to be indemnified had already been indemnified by his insurers, he no longer had any loss for which he could be indemnified under the contract or clause of indemnity.

I do not find the supposed distinction compelling. In a case where an owner’s property is damaged by the wrongful act of a third party, the third party’s liability is to pay damages which will compensate the owner for the loss which he has suffered as a result of the third party’s act. The liability arises only where there is loss. In a particular case, of course, the owner may have been insured and so may receive a full indemnity from his insurers. In those circumstances he will no longer be suffering any actual loss as a result of the damage to his property. Nevertheless, as between the owner and the third party, he is regarded as still suffering a loss, at least for the purpose of allowing proceedings to be brought in his name to recover that loss from the third party. Were the law not to treat him as continuing to suffer a loss for these purposes, there would be no loss for which the third party would remain liable to compensate him; he would have no remaining right to damages from the third party and so there would be no right which the insurers could enforce by raising proceedings in his name. In other words subrogation could not operate. …

So, it is critical to the entire approach of the law to many routine claims for damages which are brought before our courts that the pursuer is regarded as continuing to suffer loss even though he has been indemnified for his loss by his insurer. In all these cases any payment by the insurer to the assured indeed the very existence of a contract of insurance - is said to be res inter alios acta. For that reason, when considering whether an assured’s right to be indemnified is to be treated as remaining in existence, even after the assured has been indemnified by his insurer, I do not find the answer simply in the fact that the indemnifier’s obligation is to indemnify for loss. Equally, a wrongdoer’s liability is to compensate for loss. In both cases, the question is whether, as between the assured and the third party, the law regards the assured as continuing to suffer loss even though he has been indemnified by his insurer. We know that in the case of a wrongdoer the law does indeed treat the assured as continuing to suffer loss in those circumstances and so allows an action to be brought in his name. For my part I can see no real distinction, for present purposes, between that kind of case and the case of an indemnity clause or contract; nor do I perceive any reason in principle why the approach of the law should be different in the two cases.

What counsel for the defenders were really arguing was that the question should be decided by focusing on the contract or clause of indemnity and its characteristics. In my view that is to look at the matter from the wrong end. Subrogation is a remedy which is available to the insurer under the contract of insurance and its purpose is to

give effect to that contract as one of indemnity. ... subrogation works by giving the insurer who indemnifies the assured the right to raise proceedings in his name and, by the very nature of the circumstances in which it comes into play, the proceedings by the insurer must necessarily be to recover sums which have already been paid to the assured or paid on behalf of the assured. The remedy could not exist unless, in insurance as in other cases of indemnity, our law took the view that payments made by the indemnifier fall to be ignored in proceedings raised by him in the name of the assured against a third party. Those payments are ignored in all cases where subrogation applies, whatever may be the basis of the action which is raised in the name of the assured after he has been indemnified by the insurer."

45. Lord Rodger, then, referred to certain examples as reflected in various decided cases, before picking up the analysis at pages 1134L-1135K:

"In all these cases the law has chosen to disregard the payments made by the insurer to the assured and to permit the insurer to raise an action in the assured's name. This is not a standpoint which is compelled by legal logic alone: if nothing but legal logic had been in play, the law could equally well have taken the opposite view. It could have regarded the payments made by the insurer as having the effect of indemnifying the assured and so as extinguishing the loss. But the law has consistently taken the opposite view and, as a matter of substance, this can only be because the policy underlying the law of insurance is that the insurer should not bear the ultimate responsibility for indemnifying the assured in these cases. Instead, the third party who is under an enforceable legal obligation to pay the assured is made to bear the ultimate responsibility. ...

On the basis of the authorities the doctrine could perhaps be stated in a more general form to the effect that where the assured has a primary right against a third party which goes to reduce his loss, whether the right be based on a delict or on a contract, an insurer on making good the loss is entitled to be put in his place and to enforce the remedies which he would have had against the third party.

Counsel for the defenders sought to distinguish the present cases from other cases involving a liability on a third party by pointing out that they involve two sets of companies, the insurers and the contractors, both of which undertook, for a consideration, to indemnify the pursuers in the events which occurred. Counsel suggested that, since both had undertaken the obligation to indemnify as a commercial transaction, there was no obvious reason why the contractors rather than the insurers should bear the ultimate liability to indemnify the pursuers. The answer to counsel's suggestion must be that the pursuers are regarded as having a primary right against the contractors and a secondary right against the insurers. The primary right derived from the agreement under which the contractor in question carried out its role on the platform. The contractor's indemnity was just one element in the complex of relationships which were put in place to allow the platform to be operated. The insurers were not a part of that complex of relationships but were external to it, owing an obligation to the pursuers by reason of a contract which was concerned only with insuring the pursuers against losses suffered by them as a result of the operation of the platform. More particularly, in the absence of any indication to the contrary, it can be assumed that the pursuers took out and paid for the policy of insurance, partly at least, to protect themselves against any loss which they might suffer as a result of any failure by the contractors to fulfil their contractual obligations to indemnify the pursuers against the claims and losses specified in the respective indemnities. The insurance policy was intended to benefit the pursuers. If the defenders' argument were correct, by paying for the insurance policy, the pursuers would have benefited not themselves but the defenders, who would be

relieved pro tanto of their contractual obligation to indemnify the pursuers against the relevant claims and losses. That is inconsistent with the nature of a contract of insurance. The perception that a contract of insurance is intended to benefit the assured rather than a third party, expounded long ago by Bramwell B in ***Bradburn v Great Western Railway Co****, applies as much in the present situation as in any other.*

*I therefore see no reason in principle why the law should adopt a different approach and exclude the possibility of a subrogated action in the case of a clause of indemnity. Such a clause of indemnity, however absolute its terms, is just an undertaking by the indemnifier to pay to the creditor the amount of the loss which he has suffered. In essence that obligation is no different from the absolute obligation of the wharfinger to make good the loss suffered by the owner of grain stored in his warehouse and destroyed by fire (****North British & Mercantile Insurance****), or the obligation of a tenant under a lease to repair the landlord's house if it is destroyed by fire (****Darrell v Tibbitts****). In these cases the insurers can raise subrogated proceedings against the wharfinger or tenant and recover the loss, even though the owner has been indemnified. If the law does not impose the ultimate liability to indemnify on the insurers in these cases, there can be no reason of legal policy to make the insurers bear the ultimate liability in a case like the present. They should therefore be entitled to raise proceedings in the pursuers' name based on the indemnity clauses."*

46. Lord Rodger added at pages 1141J-1142A:

"Counsel for the defenders argued that in all cases where there was a right to contribution, it must work in both directions - in other words, if one obligant has a right of relief against the other, that second obligant must have a similar right against the first. That will indeed be so where the nature of the relationship is such that each is to bear a pro rata share of the burden of the debt and the right is, accordingly, properly described as a right to contribution. It will not, however, be the case where, as with a cautioner and principal debtor, one of the obligants has the primary or ultimate obligation to the creditor and the other has a secondary obligation. In that situation, while the cautioner who pays the debt is entitled not merely to a contribution but to total relief from the principal debtor, the principal debtor has no corresponding right to any contribution or relief from the cautioner - for the simple reason that the principal debtor is the person who is to bear the final responsibility of paying the debt to the creditor.

It follows that, even if we approach the matter in the present case on the footing that, as the defenders argue, the insurers and the defenders are under parallel obligations to indemnify the pursuers, that does not in itself tell us anything about the extent of the rights of relief which arise if the insurers indemnify the pursuers. The extent of those rights of relief depends on the nature of the overall relationship among the parties.

If the insurers and the defenders were properly to be regarded as co-obligants on an equal footing in a joint and several obligation to indemnify the pursuers, the insurers would indeed have a right to relief to the extent of a contribution of their pro rata share from the defenders. That is the position which the law has adopted in respect of double insurance where two insurers are liable to indemnify the assured in the events which have happened. Reflecting the commercial reality and the practical understanding of insurers, the law treats the matter as if there were really only one insurance and the insurers are seen as co-obligants, each liable to bear a one half share of the liability. Accordingly, if one of two insurers indemnifies the assured, it is entitled to recover a contribution of one half from the other in an action of relief. ... ."

The distinction between a case where there are primary and secondary insurances, on the one hand, and a case where there is double insurance, on the other, is clearly described in this passage. It is an important distinction.

47. Lord Rodger later, at page 1143D-F, returned to the double insurance position, saying this:

"I emphasise that the approach which I have outlined would not apply, of course, to cases of double insurance. As Lord Low stressed in ***Sickness and Accident Assurance*** *at p 980, double insurance has been treated in a somewhat special manner by the law. The various policies taken out by the assured are treated as truly one insurance and an assured who has been indemnified by one of the insurers cannot recover any more from another insurer. Lord Low's approach was adopted by Barwick CJ in* ***Albion Insurance*** *at p 347. Having explained the particular analysis which applies in cases of double insurance, Lord Low goes on to distinguish the situation in double insurance from the situation where an assured has a primary right against a third party. In double insurance the assured has no such primary right against any third party and so there is no right which an insurer can use to enforce its right to a pro rata contribution from any other insurer. In cases of double insurance, therefore, the insurer's only way to enforce its right to the appropriate contribution is by means of an action of relief. … ."*

48. Lord Sutherland's analysis was similar to that of Lord Rodger. Thus, at page 1181D-I he had this to say:

"Certain basic principles are clear. (1) As a general rule whatever arrangements a party may choose to make to cover his own position by insurance are res inter alios acta as far as any third party is concerned. (2) Where there is double insurance by one insured it is treated as being one insurance: ***Sickness and Accident Assurance Ltd v General Accident Insurance Corporation Ltd****. Accordingly, each insurer is liable to contribute. An insurer who pays in full may sue other insurers in his own name for contribution. The basis for this rule is expressed by Lord Mansfield in* ***Godin v London Assurance Co*** *and* ***Mason v Sainsbury*** *and is that it would be unfair to one insurer to be saddled with the whole loss just because it is that insurer from whom the insured has elected to claim. Similar principles have been evolved in relation to co-cautioners. A cautioner who pays the whole debt is entitled to relief in full against the debtor, failing which relief pro rata from co-cautioners. (3) Where a party who has double insurance sustains a loss which has been paid in full by one insurer, he cannot claim against the other insurer for the same loss. Similarly if he is paid by a third party he cannot claim against his insurers because he has no outstanding loss. In a question with a third party the insured and the insurer are treated as one:* ***Simpson & Co v Thomson****. (4) Where there is a primary obligation owed by a third party to an insured in respect of the loss and the insurer pays the loss, the insurer may be subrogated to the rights of the insured and sue the third party in the name of the insured:* ***North British & Mercantile Insurance Co v London, Liverpool and Globe Insurance Co****. This is because the primary obligation remains in place, despite the insurers' payment, unlike the position in double insurance where, as both insurances are treated as one, payment by one insurer is payment of the whole and the remedy of that insurer is to claim relief in his own name against his co-insurer. (5) If, after the insured has been paid by his insurer, he chooses to proceed against the third party on the still subsisting obligation and receives payment from the third party he is bound to reimburse his insurers, thus avoiding being recouped for more than his actual loss:* ***Castellain v Preston; Morley v Moore****.*

The question that arises for decision in this case is whether, where the obligation of a third party is of the nature of an indemnity, that can ever be a primary obligation which is not discharged by payment by an insurer and which can thus give rise to subrogation, or whether it is to be equiparated to insurance and thus discharged when the insurer makes payment to the insured, which can only give rise at best to a right of relief at the instance of the insurer. I did not understand it to be disputed by the respondents that it would be possible and legitimate to frame an indemnity clause in such a way as to make it a primary obligation, their contention being that the wording of the indemnity clauses in these contracts gave no indication that such a construction would be proper."

49. Lord Sutherland went on, at page 1182B-1182L, to explain as follows:

*"As a general rule insurance policies are taken out by a party for his own protection and they are res inter alios acta as far as a third party is concerned. When considering the rights and liabilities of parties to a commercial contract, whatever insurance may have been taken out by either party for whatever purpose falls to be ignored. If the reclaimers have a right of indemnity as part of their contract with the respondents, that is a primary contractual right which remains vested in them whatever arrangements may have been made between the reclaimers and their own insurers. There are many examples of contracts which are regarded as primary and which remain vested in insured persons giving right to subrogation on payment by insurers. A right of subrogation rather than contribution has been upheld where a civil body had a statutory duty (**Mason**), where there is a covenant in a lease (**Darrell v Tibbitts**), where there is absolute liability of a bailee (**North British & Mercantile**), where a seller has rights under a contract of sale (**Castellain**), and where there is a right of contribution under general average (**Dickenson v Jardine**). ...*

*Where a third party can be categorised as a wrongdoer giving rise to the loss there is no doubt that his obligation to the injured party is a primary obligation. This is so even if the wrongdoing only arises out of an absolute obligation without fault, e g **North British & Mercantile** where wharfingers were liable on custom of trade. The same would apply to a breach of contract giving rise to the loss (**Darrell**). There is no material difference between a covenant in a lease and an indemnity. What, however, is the position of an entirely innocent third party who is not in breach of any duty either absolute or in delict or under contract but who has granted an indemnity to cover the loss sustained? Can that contractual indemnity ever be a primary obligation or must it be treated as being on an equal footing with a contract of insurance? In **North British & Mercantile** at p 584 it was said that the contract whereby a bailee was made absolutely liable in case of loss by fire is not a contract of insurance so as to make the bailee himself an insurer but is merely part of the terms of a contract of bailment. It is difficult to see any distinction here where there is an equivalent absolute obligation (in the events which happened) which even although it is called an indemnity is part of a contract of services.*

If the contractors had accepted liability under the indemnity clause in respect of claims by their employees against the reclaimers and had paid the claimants, the reclaimers obviously would not have had any claim against their own insurers having suffered no loss, but could the contractors claim contribution from the reclaimers' insurers on the basis that they were joint indemnifiers of the reclaimers? In my view not, because the reclaimers' insurance arrangements are res inter alios as far as the contractors are concerned. Contribution, however, is a two way exercise. You cannot have contribution from one without contribution from the other. Accordingly, in the events which happened and had the contractors fulfilled their contractual obligations when called upon to do so, contribution would be out of the picture. It follows, in my

view, that in the reverse situation the reclaimers' insurers could not claim contribution from the respondents. While it does not necessarily follow that because there is no room for contribution there must be a right of subrogation, it does at least show that the position of the indemnifier and the position of the insurers are not the same, and once that is accepted, a major part of the respondents' argument disappears."

I interject here to observe that in the present case the WRUs would obviously not have been able to seek a contribution from Chubb and Fidelis.

50. Lord Sutherland continued:

"*The basic rule that an indemnitee cannot claim if already paid may seem to be a problem. However, in all cases of subrogation the insured has, by definition, been paid but that does not bar a claim in his name under a primary obligation. The rule against claiming when already paid is to prevent an indemnitee making a profit. Where, however, the claim is made under subrogation any benefit goes to the insurers and there is no profit to the indemnitee. This is so even when the insurers have asked the insured not to make any claim but the insured nevertheless successfully does so (Morley). The insured's proceeds from that claim belong to the insurers.*

…

A contractual scheme of indemnities is in my view intended to allocate primary responsibility. This appears to accord with general practice within the industry and makes perfectly good commercial sense. The fact that a party chooses to insure against the possibility of non-recovery under the indemnity clause, either because the indemnifier cannot pay or because he can escape liability under some limitation of the indemnity clause (which is what the respondents argue for in another part of this appeal), or even simply because they prefer to have a straightforward way to be indemnified immediately without having to have recourse to litigation to resolve complications arising out of the terms of what is on any view a limited indemnity clause, cannot affect the contractual obligations which are primary. The reclaimers' liability having shifted under the contract to the contractor, if the contractor fails to meet its contractual obligation the reclaimers and thus their insurers may have to pay. That, however, is contingent upon the contractors' failure to meet their contractual obligation. The position of the reclaimers' insurers is thus secondary to the contractors' obligation and the fact that the reclaimers may have backup insurance is res inter alios. … The liabilities of the contractor and reclaimers' insurers are not in my opinion coexistent and on the same footing so as to give rise to the inference that they constitute a joint and several obligation under which payment by the reclaimers' insurers automatically extinguishes the obligation owed by the respondents. As it was put in ***Albion Insurance****, the reason behind the rule relating to double insurance is that payment by one insurer is made for the benefit of both and thus contribution is equity. This is because the two insurances are treated as one and payment by one insurer discharges the whole obligation. In the present case the payment by the insurers on a claim under the policy, which could not be resisted, was made for the benefit of the reclaimers. … ."*

51. Lord Sutherland's conclusion, at page 1184D, was, accordingly, this:

"On the whole matter, therefore, I am satisfied that the contractual indemnity does not stand on the same footing as the insurance taken out by the reclaimers, that the reclaimers' insurance cannot be used to benefit the respondents, that the contractual indemnity is to be regarded as a primary obligation and that it is therefore

appropriate that the insurers, having paid the claims, are entitled to be subrogated to the rights of the reclaimers to indemnity under the contract."

52. Lord Coulsfield, it is to be noted, agreed with Lord Rodger and Lord Sutherland.

53. Turning to the House of Lords decision in the same case ([2002] UKHL 4, [2002] 1 All ER (Comm) 321) dismissing the appeal and agreeing with the reasoning of the Inner House, Lord Bingham explained at [11] that he agreed with the conclusions expressed by Lord Mackay in relation to what he described as the subrogation issue and, then, went on to refer at [11] to section 80 of the Marine Insurance Act 1906 (the '1906 Act'), as follows:

"80(1) Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.

(2) If any insurer pays more than his proportion of the loss, he is entitled to maintain an action for contribution against the other insurers, and is entitled to the like remedies as a surety who has paid more than his proportion of the debt."

54. Lord Bingham continued, again at [11], by saying this:

"Although applicable in terms only to marine insurance, these sections express more general principles. And the argument for the contractor seeks to build upon them. In very simplified form the argument runs like this. A claim was made against the operator for the death of Mr Pyman, an employee of the contractor. It was settled by the operator's insurers. The operator itself therefore suffered no ultimate loss and has no claim to be pursued in its name against the contractor. The operator's insurers may have a claim to contribution against the contractor as another party liable (with the insurer) to indemnify the operator but that is not a subrogated claim to be pursued by the insurer in the name of the operator but a claim to contribution from a co-indemnifier to be pursued by the insurer in its own name."

It will be apparent that the submission that Lord Bingham was here describing is similar to the submission now advanced by Mr Peters and Mr Howe on behalf of their respective clients.

55. Lord Bingham went on to say the following at [12]:

"The right of an insurer who has paid a claim to seek contribution from other insurers of the same risk on the same interest in the same property is clearly established ... It is equally clearly established that a surety who is obliged to pay the debt owed by the debtor to the creditor is entitled to contribution from his fellow co-sureties ... The question at the heart of this issue in the appeal is, as it seems to me, this: is the present claim, as the operator contends, a subrogated claim properly made in its name by its insurer (who has indemnified it under a policy of insurance) to enforce a contractual right of the operator against the contractor or is it, as the contractor contends, a claim for contribution by one party liable to indemnify the operator against another?"

Again, it will be apparent that the question in the present case is essentially the same question: whether or not the claim should be constituted as a subrogated claim or whether it was a claim for a contribution by one party liable to indemnify the operator against the other.

56. Lord Bingham's answer to the question that he identified at [12] was clear, as set out at [13]:

> *"I am clearly of opinion that the operator's contention is to be preferred, for the reasons given by the judges of the Inner House and also by Lord Mackay. The operator was not obliged to insure itself against adverse claims. Thus the existence of such insurance, prudent though no doubt it was in business terms, is irrelevant to the mutual obligations of the operator and the contractor; in technical language, it was strictly res inter alios acta. It would be wholly anomalous if the operator's voluntary decision to insure itself against the risk to which it was exposed should operate to the advantage of the party against whom its contractual claim for indemnity lay (a party not involved in the decision to insure and not responsible for payment of any part of the premium). The contractor's contention would also, as it seems to me, disturb the very clear apportionment of risk for which the parties have provided by their contract. As already noted, the legislature has not sought in this field to restrain the pursuit by insurers of subrogated claims."*

57. Lord Bingham, then, added at [15] that:

> *"The researches of counsel have not disclosed any Scots or English case in which any contention at all similar to the contractor's in this case appears to have been advanced. But courts in the United States have been asked to consider a similar contention. The American cases must be approached with a measure of reserve since courts have on occasion applied a principle of superior equity which has no counterpart in our law. It is nonetheless clear that courts of high standing have adopted an approach close to that outlined in the foregoing paragraphs. In* ***Hall & Long v The Railroad Companies*** *(1871) 80 US 367 Strong J, giving the opinion of the Supreme Court of the United States, said at p 370:*
>
> *'It is too well settled by the authorities to admit of question that, as between a common carrier of goods and an underwriter upon them, the liability to the owner for their loss or destruction is primarily upon the carrier, while the liability of the insurer is only secondary. The contract of the carrier may not be first in order of time, but it is first and principal in ultimate liability.'*
>
> *In* ***Chicago St Louis & New Orleans Railroad Co v Pullman Southern Car Co*** *(1891) 139 US 79 at 88 the liability of the railroad company was described as 'in legal effect, first and principal' and that of the insurer as 'secondary, not in order of time, but in order of ultimate liability'. In* ***FH Vahlsing Inc v Hartford Fire Insurance Co*** *(1937) 108 SW 2d 947, 950 the Court of Civil Appeals of Texas adopted a statement in 26 Corpus Juris to this effect:*
>
> *'The right of subrogation is not limited to cases where the liability of the third person is founded in tort; but any right of the insured to indemnity will pass to the insurer upon payment of the loss.'*
>
> *In* ***Meyer Koulish Co v Cannon*** *(1963) 28 Cal Rptr 757, 762 a District Court of Appeal in California observed:*
>
> *'Appellants were parties to an express contract whereby they assumed responsibility for the loss of the goods of respondents. They thereby accepted primary liability and it cannot be said that appellants stand on equal footing with the insurance company. The equities in this matter do not balance but preponderate in favor of the insurer of the bailor.'*

The Supreme Court of Washington expressed the point very clearly in ***Consolidated Freightways Inc v Moore*** *(1951) 229 P 2d 882, 885.*

'That insurance company recoveries, under their right of subrogation, most often flow from tort actions is quite natural, but without significance. Subrogation is an equitable principle and applies to contract rights as fully as it does to tort actions.

By his contract the appellant bound himself to pay the loss. Respondent has a contractual right to recover it from him. This cause of action is not defeated by the insurance company's payment of the judgment. The insurer is subrogated to appellant's contract right of indemnity. This sustains the cause of action against appellant for the identical reason that subrogation sustains a tort action where the plaintiff has been paid for his loss.'

A similar ruling was made in ***North Central Airlines Inc v City of Aberdeen, South Dakota*** *(1966) 370 F 2d 129, a decision of the United States Court of Appeals."*

58. Lord Bingham continued at [16]:

"Reference was made to ***Albion Insurance Co Ltd v Government Insurance Office of New South Wales*** *(1969) 121 CLR 342. That was a decision of the High Court of Australia, concerned with the right of a co-insurer to contribution. Kitto J (at pp 349-350) referred to the principle that 'persons who are under co-ordinate liabilities to make good the one loss (eg sureties liable to make good a failure to pay the one debt) must share the burden pro rata'. But his ruling was not directed to the case where the liabilities of the two indemnifiers are not co-ordinate, where (to use different language) one liability is primary. In* ***Speno Rail Maintenance Australia Pty Ltd v Hammersley Iron Pty Ltd, Zurich Australian Insurance Ltd v Speno Rail Maintenance Australian Pty Ltd [2000] WASCA 408,*** *(2000) 23 WAR 291 the Supreme Court of Western Australia followed the decision of the Inner House in the present case. Ipp J pointed out (at 312 (para 93)) that the competing liabilities (one of them arising from a contract of insurance) were intrinsically different and not co-ordinate. Wheeler J (at327 (paras 167 and 168)) shared this view:*

'It appears to me that the status of a policy of insurance as res inter alios acta so far as third parties are concerned, and the cases to which the Court of Session refers where a right of subrogation has been held to exist, suggest that where, as here, there is a contract for services which contains within itself an indemnity provision, together with insurance which may also cover the events the subject of the indemnity, it is generally appropriate to regard the insurance as a secondary rather than a co-ordinate obligation. I would not be prepared to suggest that this must invariably be the case; rather, it appears to me that the terms of the particular indemnity provision will be relevant. However, in this case, the works and services contract is, as one would expect, a document dealing in detail with all the rights and liabilities of the parties arising in relation to the work to be performed by Speno. It does appear to me that in the context of that contract, the indemnity clause is, as Lord Sutherland put it, intended 'to allocate primary responsibility'.'

I can find no support for the contractor's contention in the terms of the contract, in the commercial context, in principle or in authority. I would accordingly resolve this issue against the contractor, as the Inner House did."

59. As for Lord Mackay, he framed the argument that was before the House of Lords in the following way at [48]:

"There is no objection taken to the title of the operator to sue this action. The objection is taken to the relevancy of the action on the basis that since the claims in issue were settled by the indemnity insurers of the operator, the operator cannot now make a relevant case for payment to him of the amounts covered by indemnity granted by the contractor under clause 15.1(c) of the contract. It is not disputed on the basis on which this part of the case is argued that if the operator had paid these sums he would be entitled to repayment from the contractor. The sole reason that this claim is not a good claim in law it is asserted is that the sums were paid by an indemnity insurer of the operator and that this defeats the claim for repayment from the contractor. The submission is that here we have the operator entitled to the benefit of two indemnities in respect of the claims on which the action is founded, the indemnity from the contractor and the indemnity covering exactly the same claims from the operator's insurers. It is not permissible to be indemnified twice in respect of the same loss and therefore it is not permissible for the indemnity insurer, by suing in name of the operator, to pass his liability on to the contractor. It is said that if the operator's insurer is entitled to pass his claims on to the contractor, if the contractor paid the claims he would be equally entitled to pass his liability to the operator's insurer, thus producing a deadlock which would have to be resolved on other principles. The argument is further elaborated by saying that in truth the operator's insurance company as its indemnifier in respect of these claims is entitled only to an action of relief against the contractor. It was this aspect of the case that raised the question whether this action could be treated as an action of relief and whether an action of relief could be raised in name of the indemnified. If the claim of the operator in this action is well founded in law as an action for payment, this second question which was considered in detail particularly in the opinion of the Lord President in the Court of Session would not arise."

60. Noting at [49] that *"this precise question has never been raised by the Bar or Bench in Scotland nor England for 200 years although the propriety of such a claim has been assumed by persons of the highest standing in the field of commercial law"*, Lord Mackay went on at [51] to refer what he described as *"the early leading case"*, ***Mason v Sainsbury*** (1782) 3 Dougl 61, which involved an action under the Riot Act to recover damages sustained by the demolition of a house in the riots of 1780 and in which Lord Mansfield CJ observed at page 64 as follows:

"The facts of this case lie in a narrow compass. The argument turns much on want of precision in stating the case, as most arguments do. The office paid without suit, not in ease of the Hundred, and not as co-obligors, but without prejudice. It is, to all intents, as if it had not been paid. The question, then, comes to this, can the owner, having insured, sue the Hundred? Who is first liable? If the Hundred, it makes no difference; if the insurer, then it is a satisfaction, and the Hundred is not liable. But the contrary is evident from the nature of the contract of insurance. It is an indemnity. Every day the insurer is put in the place of the insured. In every abandonment it is so. The insurer uses the name of the insured. The case is clear: the act puts the Hundred, for civil purposes, in the place of the trespassers; and, upon principles of policy, as in the case of other remedies against the Hundred, I am satisfied that it is to be considered as if the insurers had not paid a farthing."

61. Lord Mackay continued at [53] by saying this:

"The central question posed by Lord Mansfield CJ – 'Who is first liable?' - is the appropriate question to pose in the present case. Putting the matter another way - was the Hundred liable only if the insurance office failed to pay the plaintiff or was the insurance office liable to indemnify the plaintiff only if the hundred failed to pay? … ."

Applying this approach, Lord Mackay explained at [54], the question is: *"is the contractor liable to indemnify the operator only if and to the extent that the operator's insurer fails to do so, or is the operator's insurer liable to indemnify the operator only if and to the extent that the contractor fails to do so?"*. His answer to that question was contained in [55] and was that:

"Since there is no provision in the contract requiring the operator to have insurance I cannot see any ground on which it can be said that the contractor's indemnity is limited to indemnifying the operator if and to the extent that the operator's insurer fails to do so."

He continued at [56]:

"I consider that support for this view is obtained from the clause dealing with insurance which I have already quoted in which it is provided that the insurances required by the contract other than workers' compensation and employer's liability should include the operator as a co-insured thus giving the operator a right against the insurer as an insured and the further provision that such policies must also provide that they are to be primary and not contributing with any other insurances available to the operator. This is a strong pointer to the conclusion that indemnities stipulated for in the contract are to be primary obligations and that any other insurance available to the operator is to be secondary."

In the present case, as previously noted, it is common ground that what is entailed are primary and secondary insurances, the contingent policies necessarily being secondary because they only respond in circumstances where at least a claim has been made under the principal (or primary) insurances.

62. Lord Mackay, then, said this at [59]:

"Your Lordships were treated to a very well prepared and forcefully presented argument on behalf of the contractor and if the indemnities granted by the contractor and the operator's insurers were truly to be regarded as on an equal footing or co-ordinate I think the result for which counsel argued might be appropriate. For the operators we were treated to an equally persuasive argument in which the principles underlying the relationship of insured and insurer and insured and third parties were clearly laid before your Lordships and in which the crucial question first posed by Lord Mansfield was demonstrated to be the critical question for your Lordships. The doctrine of subrogation with its incidents available against third parties in both situations in which the claims of the assured arise in contract and in tort or delict were illustrated by authorities in England, Scotland and the United States of America, as well as in Australia. Among the cases from England and Scotland ***Yates v Whyte*** *(1838) 4 Bing NC 272;* ***Dickenson v Jardine*** *(1868) LR 3 CP 639;* ***Simpson & Co v Thomson*** *(1877) 3 App Cas 279 and* ***Esso Petroleum Co Ltd v Hall Russell & Co Ltd (Shetland Islands Council, third party), The Esso Bernicia*** *[1989] 1 All ER 37, [1989] AC 643 may be referred to as examples."*

63. He continued at [62], having referred to certain US and Australian authorities at [60] and [61]:

"These cases show that generally liabilities incurred in tort or delict, or in contract will be primary while the liability of the indemnity insurer of the injured party will be secondary. In cases relating to marine insurance, s 79 of the Marine Insurance Act 1906 is statutory authority to this effect."

He added at [63]:

*"**Sickness and Accident Assurance Association Ltd v General Accident Assurance Corp Ltd** (1892) 19 R 977 dealt with the situation in which an insurance company, after paying to a tramway company a sum due under a policy insuring against loss by accident, raised an action in its own name against another insurance company for contribution on the ground that it had insured the same risk, which is the situation as it was presented in the contractor's argument in the present case. Where there are co-ordinate indemnities for the same loss it is clear that the doctrine of subrogation cannot provide an answer, and that where one of the indemnifiers pays, the way their liabilities inter se are decided is by an action of relief. The principle of res inter alios acta will not be of relevance in that situation where the overriding principle is that a person cannot be indemnified twice over for the same loss, and therefore if one indemnifier has made good the loss to the indemnified the rights of the indemnified are no longer useful in deciding questions between the indemnifiers."*

Lord Mackay was here referring to double insurance and the fact that, under the double insurance principle, the assured can only recover once and not more than the assured's actual loss.

64. Lord Mackay concluded with the following observation at [64]:

"The absence of any case directly deciding the present question is because I believe it has always been assumed that a contractual indemnity will be the primary indemnity in situations where the other indemnity is provided by an insurer of a party to a contract where there is no obligation on the party to make any insurance arrangement, and where in consequence the insurance arrangements are res inter alios acta so far as the other parties to the contract are concerned."

It should be noted here, given the submission that Mr Peters and Mr Howe advanced concerning the so-called *"primary wrongdoer"* (as addressed shortly), that Lord Mackay referred to *"the other parties to the contract"*, so demonstrating that the principle at play is not confined to a *"primary wrongdoer"* scenario (at least as portrayed by Mr Peters and Mr Howe).

65. Lord Hoffmann's analysis is also of note. He had this to say at [89]-[97]:

*"89. The contractors' second defence is that insofar as the action is a subrogated claim, their liability to the operator has been discharged by the payments made by the underwriters. This is at first sight a bold argument, because it has been settled law for over two centuries that payment under an insurance policy does not relieve the liability of a third party against whom the insured has an action in contract or tort to recover the insured loss: see **Mason v Sainsbury** (1782) 3 Doug 61. By right of subrogation the insurer may prosecute the claim in the name of the insured.*

90. Mr Keen QC, who argued this point on behalf of the contractors, accepted the general principle but said that there was an exception when the claim against a third party is, like the claim against the insurer, a claim to indemnity. In such a case, the two indemnifiers stand upon an equal footing. Payment by either discharges the liability of the other. The one who has paid the whole loss may have an action for relief against the other for a contribution which may in an appropriate case amount to a complete counter-indemnity. But there cannot be a subrogated claim in the name of the party indemnified.

*91. In support of this principle, Mr Keen relied upon a number of cases of high authority which state that a person who has a right to be indemnified by more than one person cannot recover more than once. So, for example, in **Sickness and Accident Assurance Association Ltd v General Accident Assurance Corporation Ltd** (1892) 19 R 977 at 980 Lord Low, in a judgment approved on appeal by the Inner House, said:*

> *'In marine insurance a rule which has long been recognised is that when the insured has recovered to the full extent of his loss under one policy, the insurer under that policy can recover from other underwriters who have insured the same interest against the same risks a rateable sum by way of contribution. The foundation of the rule is that a contract of marine insurance is one of indemnity, and that the insured, whatever the amount of his insurance or the number of the underwriters with whom he has contracted, can never recover more than is required to indemnify him. The different policies being all with the same person, and against the same risk, are therefore regarded as truly one insurance, and if one of the underwriters is compelled to meet the whole claim, he is entitled to claim contribution from the other underwriters, just as a surety or cautioner who pays the whole debt is entitled to claim rateable relief against his co-sureties or co-cautioners.'*

92. Mr Keen deduces from this and other similar statements his general rule that when two or more persons have separately agreed to indemnify someone against the same risk, payment by one discharges the others. But in my opinion, that is not what Lord Low meant. It is certainly a general principle, as he says, that a person who has more than one claim to indemnity is not entitled to be paid more than once. But there are different ways of giving effect to this principle. One is to say that the person who has paid is entitled to be subrogated to the rights against the other person liable. The other is to say that one payment discharges the liability. The authorities show that the law ordinarily adopts the first solution when the liability of the person who paid is secondary to the liability of the other party liable. It adopts the second solution when the liability of the party who paid was primary or the liabilities are equal and co-ordinate.

*93. It was therefore an essential part of Lord Low's reasoning, in coming to the conclusion that a right of contribution existed, that not only was insurance a contract of indemnity but also that the policies could be regarded as 'truly one insurance'. Or, as Barwick CJ said in **Albion Insurance Co Ltd v Government Insurance Office of New South Wales** (1969) 121 CLR 342 at 350, they were 'co-ordinate liabilities'. On the other hand, in **Mason v Sainsbury**, when insurers who had paid the loss on a house damaged by rioters made a subrogated claim under a statute which made the Hundred liable for riot damage, Lord Mansfield CJ said: 'The question, then, comes to this, can the owner, having insured, sue the hundred? Who is first liable? If the Hundred, it makes no difference; if the insurer, then it is a satisfaction, and the Hundred is not liable'. (See (1782) 3 Doug 61 at 64, 99 ER 538 at 540.)*

94. The liability of the Hundred was held to be primary and therefore not discharged by the insurance payment. …

95. Mr Keen submitted that these cases were distinguishable because the liability of the party held to be primarily liable was not truly one of indemnity. But what is a liability for an indemnity? It surely includes a liability to make good a loss. The question cannot turn upon whether the contract uses the word indemnity.

That would be an extraordinary technicality in a branch of commercial law based upon principles of fair dealing. In my view the Hundred was liable to indemnify the house-owner against riot damage to his house and the wharfinger was liable to indemnify the owner of the goods against damage. The judges in the ***North British*** *case, faced with an argument similar to that now advanced by Mr Keen, did not deny that the liability of the wharfinger was a liability to indemnify. They said that it was not a contract of insurance. So James LJ said (at p 581) that the rule of contribution 'only applies where there is the same person insuring the same interest in more than one office' and cited* ***Mason v Sainsbury*** *as an example of primary and secondary liability. Mellish LJ said (at 584) that the liability of the bailee was 'the terms of the contract of bailment' and 'not a contract of insurance'.*

96. Further authority is in my view unnecessary, but it is worth observing (as did the First Division) that in ***Larrinaga Steamship Co Ltd v R*** *[1943] 2 All ER 736, [1944] KB 124, CA and [1945] 1 All ER 329, [1945] AC 246, HL, three very eminent commercial judges (Mackinnon LJ and Lords Wright and Porter) seem to have thought it went without saying that a ship owner's underwriters would be entitled to be subrogated to his claim for indemnity against a charterer in respect of losses caused by the master's compliance with the charterer's orders as to the employment of the ship, under a standard term of a charterparty. Sir Sydney Kentridge QC, who appeared for the operators, also referred us to a number of cases in the United States in which insurers were held entitled to be subrogated to a contractual right of indemnity (expressly so called) to which the insured was entitled under the terms of a commercial arrangement. The latter was held to be the primary liability.*

97. Likewise in this case, I am of opinion that the indemnity under clause 15.1(c) was not secondary to or co-ordinate with any insurance that the operators might choose to obtain in respect of the same losses. I suppose that it would have been theoretically possible to frame the clause to confer an indemnity only insofar as the operator was unable to recover from its insurers, although one cannot imagine the parties in practice entering into such a contract. But this contract did not require the operator to take out any insurance at all. It therefore follows that the contractual indemnity was a primary liability and the underwriters were entitled to be subrogated."

66. Lord Hoffmann's approach was, therefore, the same as that of Lord Bingham and Lord Mackay, as well as that of Lord Rodger, Lord Sutherland and Lord Coulsfield in the Inner House. It is an approach which reflects a fundamental principle of insurance law, namely that, other than in cases of double insurance, insurance recoveries are *res inter alios acta* in the sense that they do not discharge the liability of a third party, including an insurer who is primarily liable for the loss. As such, another fundamental principle of insurance law comes into play, namely that the paying insurer's remedy is not a direct cause of action for reimbursement/contribution but, instead, lies in the ability to bring a subrogated claim in the name of the assured. In circumstances where, to repeat, it is common ground that the WRUs have the primary liability to the Lessors and that Chubb and Fidelis are secondary or contingent insurers, it necessarily follows that that is the position in the present case.

67. Put shortly and to repeat, this is not a double insurance case. As noted in *Colinvaux* at §12-175 by reference, in fact, to the LP Judgment:

*"**Contingent cover** A distinction is to be drawn between double insurance and contingent cover. The latter applies where the insurers under the primary policy have*

refused to pay a claim, in which case the contingent cover kicks in and provides an indemnity to the assured. The contingent insurers will in turn have a subrogation action against the primary insurers. An illustration of contingency wording is provided by ***AerCap Ireland Ltd v AIG Europe Ltd*** *…".*

This is entirely consistent with the passages in *Arnould* to which I have previously made reference and it is, furthermore, albeit unsurprisingly in the circumstances, also entirely consistent with the analysis contained in the judgments both of the House of Lords and of the Inner House in ***Caledonia***. The only difference between the present case and ***Caledonia*** is that that case involved a contractual indemnity being given by a primary obligor rather than by an insurer, but that does not alter the analysis.

68. That this is the position is further borne out by, for example, the commentary contained in Soyer and Tettenborn, *Ship Building, Sale and Finance* 1st Ed. (2016) in a chapter entitled *"Mortgagees' interest insurance"* written by Peter MacDonald Eggers KC, as follows:

"Some mortgagees' interest insurance policies may respond to a claim by the mortgagee in the event that the shipowner is unable to recover under its own policy, even though the mortgagee may be able to assert an independent valid claim under the same policy. Further, the mortgagee may be able to recover under another policy which has been placed in its favour. In such cases, the mortgagees' interest insurers, having paid a claim to the mortgagee, may have rights available either in subrogation or contribution arising by reason of the mortgagee's rights under the other policies. In such cases, the question will arise whether any of the competing policies are intended to be the primary source of indemnity or whether they are co-ordinate. If one policy is primary, the other insurers may be subrogated to the mortgagee's rights under the primary policy, If the policies are co-ordinate, the indemnifying insurer will be entitled to a contribution from the other co-ordinate insurers."

It is significant in this context that the footnotes in support of these propositions include reference both to ***Caledonia*** and to section 80 of the 1906 Act.

69. Mr Peters and Mr Howe nonetheless sought to argue that the WRUs' case entails, as Mr Peters put it, *"a dramatic overreading"* of ***Caledonia***, their submission being that the decision entailed a policy-based rule rather than a rule grounded in legal analysis to the effect that, again as Mr Peters put it, *"the primary wrongdoer"* should not be permitted to be released from liability through a payment that is made by an insurer. Where, Mr Peters explained, *"the primary wrongdoer"* is the party at fault (in his example, the thief of a car), then, the policy-based rule makes sense. Where, however, he and Mr Howe submitted, there is no such *"primary wrongdoer"*, and the case instead involves an insurer and a guarantor (or an insurer in a position akin to that of guarantor), then, there is no need to apply any policy-based rule. Rather, in that situation, Mr Peters and Mr Howe submitted, authorities such as ***Caledonia*** do not assist. Nor, they also submitted, does terminology that entails descriptors such as 'primary' or 'secondary' since what matters is that there is, overall, a package of protection in place, and what the Court has to do is to work out where, within that package of protection, ultimate responsibility or liability should rest.

70. The difficulty with these submissions, however, is that they entail an unwarranted gloss on the principles addressed and applied in ***Caledonia***. Nowhere in any of the judgments in that case, whether in the Inner House or in the House of Lords, is there support for the position advanced by Mr Peters and Mr Howe. On the contrary, those judgments are clear: in a case such as the present subrogation is the appropriate, indeed the only, route by which an indemnity or reimbursement can be achieved.

71. I have previously mentioned in this context what Lord Mackay had to say in the House of Lords at [64]. It is instructive also, however, to recall what Lord Rodger stated in the Inner House at pages 1134L-1135D, noting, in doing so, that one of the examples to which he was referring was a case where a house is destroyed by fire and the landlord sues the tenant, having been indemnified by its insurer, in circumstances where there is *"no question of fault on the part of the tenant"*: see page 1134L. This, then, is not a case where there is a *"primary wrongdoer"* in the somewhat moralistic sense described by Mr Peters and Mr Howe. Nor, when looking again at what Lord Rodger had to say at page 1135A-D, is it apparent either that he was describing (as Mr Peters and Mr Howe would have it) a purely policy approach (on the contrary, he apparently had in mind both policy and *"legal logic"*), or that the third party should be a wrongdoer in a sense that necessarily connotes fault since, instead, he described the third party merely as being the party *"who is under an enforceable legal obligation to pay the assured"* – to include, therefore, a landlord and tenant case of the sort which he had mentioned on the previous page where the tenant was liable under a covenant to repair despite not being at fault. It is clear that Lord Rodger's focus in these passages was on the insurer not bearing the ultimate responsibility for indemnifying the assured and the assured's loss thereby becoming extinguished. This is what lies at the core of the reasoning in ***Caledonia*** and it is reasoning which applies as much to the present case as it did in that case.

72. The suggestion that the Court should, instead, adopt a different approach is, in short, without foundation.

73. Mr Peters was driven to make the following submission during the course of his oral submissions:

> *"... we say that this case falls between the principles governing both scenario 2 and scenario 3 in that we say it is in fact a double insurance case and we say it is also a case that is sufficiently analogous to what I'll call the guarantee-type cases, because it is not a line of authority confined to guarantees, and is therefore one where indemnity or reimbursement may be claimed by the person who did pay from the person who should have paid first ... And so, therefore, in high level terms what we're saying is you have two principles with perhaps rather fuzzy edges and it just so happens that this sits in an area where they overlap."*

I have largely already addressed the double insurance issue and will come on to do so further a little later. However, as to the balance of this submission, it seems to me that, to adopt Mr Peters' own language, it is itself somewhat *"fuzzy"*. I reject the suggestion, in particular, that the Court should adopt what might be described as a 'near miss' approach and thereby permit a departure from well-established principle in order to accommodate particular cases. Moreover, on analysis, there is no support in the authorities on which Mr Peters and Mr Howe's submissions were based.

74. Specifically, as for ***Moule v Garrett***, Lord Cockburn CJ explained as follows at page 104:

> *"The damage therefore arises through their default, and the general proposition applicable to such a case as the present is, that where one person is compelled to pay damages by the legal default of another, he is entitled to recover from the person by whose default the damage was occasioned the sum so paid. This doctrine, as applicable to cases like the present, is well stated by Mr. Leake in his work on Contracts, p. 41:*

'Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount.'"

What should be noted here is that the principle to which Lord Cockburn CJ was referring requires the payment that has been made by the claimant (or plaintiff) to have discharged the defendant's liability to the common creditor. Without such discharge, the principle cannot come into play. In an insurance context there is no such discharge, hence the *res inter alios acta* principle applying in that context.

75. ***Brook's Wharf*** is also somewhat different from the present case. That was a case where a bonded warehouse became legally obliged under section 85 of the Customs Consolidation Act 1876 to pay importer's Customs duty, the payment thereby discharging the importer's own liability to Customs. As a result, the bonded warehouse had a direct cause of action for recoupment or reimbursement from the importer. Lord Wright MR said this at page 542 by reference to section 85:

"That is an undertaking that the requirements of the Act as to the payment of duty shall be duly complied with; but, in my opinion, the obligations so imposed on the plaintiffs as warehousemen are ancillary to and by way of security for the due payment to the Customs and do not supersede the liability of the importers, though, if the warehousemen pay the duty, the importers cannot be made by the Customs to pay it over to them a second time."

Accordingly, although the bonded warehouse's liability was a secondary liability, once the Customs duty had been paid, Customs could not make the importer pay a second time since the importer's liability to Customs had been discharged. It follows that this was a different situation to the present (insurance) context. Indeed, had section 85 not existed and had Customs insured against the non-payment by the importer of what it was liable to pay, so as to mean that Customs looked not to the bonded warehouse for what was due but, instead, to the insurer, then, the insurer would inevitably have been able to look to the importer by way of a subrogated claim, the insurer's payment to Customs under the insurance being, in such circumstances, *res inter alios acta*. This illustrates the fundamental difference between the present case and that of ***Brook's Wharf***.

76. Turning to ***Greene Wood & McLean***, this was a case that involved very particular facts, in that the claimant firm of solicitors made a claim for contribution against ATE costs insurers ('Templeton') in relation to payments the solicitors (Greene Wood & McLean or 'GWM'), or, rather, their own insurers, had made to a group of miners, who had been their clients, under a guarantee stating that if the clients lost the litigation they would not have to pay anything in respect of their own or the counterparties' costs. That guarantee was provided to the miners, who were claimants in a proposed group litigation, following the miners' entry into ATE insurance with the defendant insurers. The ATE insurance was to cover the risk of any adverse costs orders and any liability for their own disbursements in connection with the litigation. When the application for a group litigation order was dismissed and various costs orders were made, Templeton refused to pay and the firm (its insurers) paid the miners pursuant to the guarantee. Accepting a submission advanced on its behalf (see [52]), Cooke J decided that GWM, the guarantor, was entitled to make a claim for contribution against Templeton on the basis of the principle that where a person discharges the indebtedness of another because he is obliged to do so, he has a claim to be indemnified by that other person.

77. It should be noted that Cooke J reached this decision notwithstanding a submission by Templeton that the guarantor was liable to the miners for its own negligence: see [56]. The judge did not agree, holding as follows at [61]:

"Insofar as the claimant miners were entitled to indemnity under the ATE policy, I have no hesitation in finding that, as between GWM and Templeton, this was the intended primary means of discharging the liability of the claimant miners for adverse costs and own disbursements, and that GWM's Guarantee was secondary thereto, being made in reliance thereon, albeit wider in its terms. Whilst both the ATE policy and the GWM guarantee were made in the full knowledge of the existence of the other, there cannot be any doubt that the primary liability to the claimant miners lay with Templeton and that the parties would, if asked by an officious bystander at the time of making the arrangements, unhesitatingly have agreed that this was the case."

He continued at [62]:

"Whilst therefore there was no implied term in the contract between GWM and Templeton that Templeton would honour the policy, it was clearly understood between GWM and Templeton that if the situation arose where adverse costs or own disbursements became payable by the claimant miners, so that both Templeton and GWM were liable under their respective contracts with the claimant miners, the primary liability to them lay with Templeton."

Cooke J went on to explain, at [63]-[64], that he regarded ***Brook's Wharf*** as being *"very much in point here"* and, at [65], that the principles set out in ***Moule v Garrett*** applied so that GWM could recover from Templeton the amount which it paid for which Templeton was primarily liable under the ATE policy. Cooke J went on to observe at [66] that the *"same result is in fact reached under the Civil Liability (Contribution) Act 1978 claim for not dissimilar reasons"*, a matter which I will come on to consider later. What is important to appreciate for present purposes, however, is that Templeton did not dispute that GWM's payment (in its capacity as guarantor rather than as an insurer) had discharged its liability. It was not, therefore, argued that the payment made by the guarantor was *res inter alios acta* and that, as such, the claim would need to be by way of subrogation.

78. ***Greene Wood & McLean***, then, is also a very different case when compared with the present case. Again, the position would have been different if, instead of relying upon the guarantee given by GWM, the miners had taken out contingent insurance against non-payment by Templeton. In that event, had the contingent insurer indemnified the miners, then, Cooke J would not have arrived at the conclusion that he did since the payment would clearly have been *res inter alios acta* and Templeton would not have been discharged by virtue of the contingent insurer's payment. In short, there is a material difference between a payment that is made by a guarantor and a payment that is made by an insurer: in the first scenario, there is a discharge of the obligation of the principal obligor, whereas in the latter situation there is not.

79. This brings me, lastly, to ***Limit (No 3)***, a first instance decision of Rein J in the New South Wales Supreme Court. This was a case which involved two policies of insurance taken out by a joint venture (or 'JV'), namely a policy with ACE Insurance Ltd ('ACE') and a Lloyds policy which was similar to Chubb's and Fidelis's policies in that, as can be seen from what was stated at [20(8)], the latter contained the following language:

"should any such Local Policy or Underlying Insurance, by virtue of its scope of cover, definitions, conditions or limits of liability, not indemnify the Insured in whole

or in part in respect of such legal liability, costs and expenses as herein provided, this Master Policy, subject to its terms, Conditions and Exceptions, shall provide indemnity to the extent that such indemnity is not provided by the terms and conditions of such Local Policy or Underlying Insurance.

In the event that the Insured cannot obtain an admission of liability from the insurer of an Underlying Insurance and/or Local Policy and/or the Underlying Insurance and/or Local Policy fails or is reasonably likely not to indemnify the Insured, then the Insurer of this Master Policy shall be obligated to indemnify the Insured and defend any actions."

A claim was made by the JV under the ACE policy which was not admitted by ACE. As a consequence, payment was made under the Lloyds policy, with that insurer, then, seeking to recover what had been paid from ACE. Rather than bringing a claim in the JV's name, the Lloyds insurer, instead, brought a claim against ACE in its own name. As Rein J put it at [266]-[267], having referred at [265] to ***Brook's Wharf***, it was Lloyds's contention that it was entitled to recover from ACE on the basis that it was entitled to recoupment because, although it had paid the JV, ACE had not also done so. Specifically, he described the Lloyds insurer's argument, at [269], as being that:

"(1) ACE has been relieved of a burden to indemnify the JV by the payment of Lloyds.

(2) It would be just and equitable to require ACE to reimburse Lloyds all of the amount paid by Lloyds because Lloyds' liability to pay the JV only arose because ACE did not meet its obligations under its policy."

As Mr Bailey pointed out, however, and notwithstanding that later on in the judgment at [302(2)] Rein J accepted that it was the case, (1) cannot be right since, as has been seen, the payment by the Lloyds insurer was obviously *res inter alios acta*. Be that as it may, Rein J went on, at [270]-[273], to describe ACE's case as being that the claim by the Lloyds insurer *"does not meet the requirements for contribution nor the requirements for recoupment"* because, as he put it at [273]:

"Given that ACE was on risk from the moment of casualty and Lloyds was only contingently liable on the failure of ACE to indemnify it, I accept that the two insurers were not jointly liable as at the time of casualty. Where one insurer is liable to indemnify and remains liable to indemnify and subsequently another insurer becomes liable there may be some room for argument as to the applicability of ***AMP v QBE****, but I proceed on the basis that contribution as a remedy in the insurance context is not available as a remedy for this reason. … ."*

It can be seen, therefore, that Rein J accepted that, because the Lloyds policy was a contingent policy, this was not a case of co-ordinate liability; there was no double insurance, and so there was no right to a contribution. He nonetheless ultimately concluded that the Lloyds insurer was entitled to look to ACE for recoupment in circumstances where, as he noted at [278(3)], ACE's stance included adopting the somewhat unattractive position that, by paying the JV, Lloyds did not discharge ACE's liability *"but rather, simply precluded the JV bringing a claim against ACE because it had already been indemnified by Lloyds"*.

80. Mr Bailey rightly characterised this contention as ACE trying to have its cake and eat it since it entailed ACE saying both that it no longer had any liability to the JV and that its liability was not discharged. Importantly, it seems that Rein J was heavily

influenced by this in arriving at the conclusion that he did; indeed, he described ACE's position, at [302(5)], as having *"a distinct lack of merit"*. This was after reviewing various authorities, including ***Moule v Garrett*** and ***Brook's Wharf***, as well as a passage in O'Donovan and Phillips*, The Modern Contract of Guarantee* which he set out at [292]:

"The position is different if the payment made also relieves the payer from her or his own liability. For example, where two persons are liable for the same debt, and, as between them, one is primarily liable and the other is secondarily liable, the former is obliged to indemnify the latter if the latter discharges the liability. This restitutionary right to an indemnity is not founded on a request for payment and there is no question of the secondary obligor officiously exposing herself or himself to the liability to pay the principal debt: the secondary obligor is, after all, liable in her or his own right. The right to an indemnity arises simply because the secondary obligor discharges the liability of the primary obligor. This principle allows a lessee, who had assigned the lease, to obtain an indemnity after payment to the lessor, not only against the assignee, but also against a surety for the assignee. The indemnity arises despite the absence of privity of contract between the lessee and the surety for the assignee."

In this passage the point is made very clearly that the "*right to an indemnity arises simply because the secondary obligor discharges the liability of the primary obligor"*. That, however, as previously explained, is not the position in the insurance context, at least where double insurance is not involved, and Rein J was wrong to proceed on the basis that it was the case.

81. This is an error that lay at the heart of Rein J's subsequent reasoning and, accordingly, his ultimate conclusion since, although he was right, as already noted, to consider that the case did not involve double insurance, nonetheless he went on to reason as follows at [302]:

"In my view this present case, even if not falling within the description of contribution, is sufficiently close as to enable some aspects of the approach taken in relation to contribution in the insurance context to be relevant when looking at the case as one for recoupment, i.e.:

(1) Just as there is no question that a second insurer who pays a claim can recover from another insurer even where the first insurer has no knowledge of the existence of the other policy there is no requirement for Lloyds to prove that ACE requested that the JV enter into the Lloyds policy or knew that the JV proposed to do so (there is, as it happens, evidence that ACE did know of the Lloyds policy).

(2) In contribution, it is accepted that the payment by one insurer discharges the burden of the second insurer and it should be accepted here. I reject ACE's assertion that it was not discharged by Lloyds' payment. I note that in para 170 of its submissions of 10 March 2009, ACE agreed that it 'obviously obtains the benefit of having its liability discharged' but as this discharged Lloyds' own liability that made a difference. I do not accept that contention - if Lloyds was not meeting a liability of its own then it might have been said that it was an officious intermeddler.

(3) The essence of contribution in insurance law is that it is just and reasonable for the party relieved of liability to the insured to pay its share to the insurer which has paid. That same underlying principle here requires consideration of whether the liability for ACE was a primary obligation or not.

…

(5) In my view the law of contribution recognises that there is nothing 'officious' about an insurer covering a liability that is covered under another policy by another insurer. An agreement by an insurer to meet a liability imposed on another insurer when that second insurer refuses to meet its obligations seems to me to be a commercial arrangement with positive ramifications for commerce and the construction industry, rather like credit or mortgage insurance, and I do not accept ACE's argument that Lloyds only has itself to blame for entering into a policy of that kind and meeting its obligations under it, or that Lloyds, by providing conditional cover, was acting 'behind [ACE's] backs' … ACE's position has a distinct lack of merit to it and none of the cases relied on by ACE support, in my view, such an outcome.

… ."

These are reasons which all proceed on what was an incorrect premise, namely that payment by the Lloyds insurer discharged ACE's liability to the JV and so that the payment did not amount to *res inter alios acta*. As such, Rein J's analysis and ultimate conclusion are not ones with which I can agree. It follows that ***Limit (No 3)*** is not an authority that assists Chubb's and Fidelis's case.

82. I am also clear that in ***Limit (No 3)*** the judge was wrong to accept, in effect, the type of 'near miss' argument that Mr Peters, in particular, advanced before the Court in the present case. I can understand why Rein J strove to do so given the stance that ACE adopted concerning discharge. However, nothing in the judgment persuades me that he was right to adopt the approach that he did. Either there was double insurance, which Rein J held there was not, and there could be recoupment directly from ACE, or there was not, in which case, as a matter of principle, there was no scope for what the Lloyds insurer was seeking to do.

83. In short and again to repeat, I reject the suggestion that it is open to the Court to proceed as Mr Peters (with his *"fuzzy"* submission) and Mr Howe invited me to do, and so to approach the matter on the basis that the present case involves what might be characterised as something approximating to double insurance or, in the alternative, as something approaching to a guarantee, without in either case actually amounting to either, and so to allow direct recovery from the WRUs on the basis that coming somewhere between the two is sufficient to allow such recovery. Such an approach would be both novel and wrong in principle. As previously made clear and as addressed also in the next section, this is not a double insurance case; as such, the right to proceed directly against a fellow insurer does not arise. Nor is this a guarantee case since, whereas in a guarantee situation the guarantor is effectively promising to perform the obligation of the debtor in the debtor's place, so as to mean that, if the debtor is not liable, then, nor is the guarantor, in the present case, as Butcher J has previously held, it was not necessary to find liability under the OPs for there to be liability under the LPs. That is because the OPs and the LPs are each separate contracts of insurance, under which a contingent insurer is promising to perform its own independent obligation to indemnify on the terms of its own contract if the primary insurance does not respond. There is no scope, in such circumstances, for a conclusion that there is, as Mr Peters characterised it, a *"gap"* which should be filled, as he put it, through *"the relevant principles"* being *"applied by analogy"* or *"the relevant flexible doctrine"* being *"expanded to extend to this particular case"*. Nor is there any support for such an approach in the authorities (with the possible exception of ***Limit (No 3)***) or in any of the academic commentary.

84. My conclusion, therefore, is that the primary way in which Chubb and Fidelis put their case is misconceived.

Double insurance

85. I turn, next, albeit only briefly in the circumstances, to the double insurance issue. It will be apparent from what I have already had to say what my conclusion is in relation to this: it is that Chubb and Fidelis are unable to establish that there is in the present case double insurance, and so that this alternative way in which the contribution claim is put must fail.

86. There are several reasons why I have reached this conclusion, having regard, in particular, to the need, if there is to be double insurance, for there to be two or more insurers liable to the same insured for the same loss, in which case the assured is forbidden to accumulate recoveries beyond the total amount of its actual or agreed loss. As Lord Mansfield explained in ***Godin v London Assurance Company*** (1758) 97 ER 419 at 421:

> *"Where a man makes a double insurance of the same thing, in such a manner that he can clearly recover, against several insurers in distinct policies, a double satisfaction, 'the law certainly says that he ought not to recover doubly for the same loss, but be content with one single satisfaction for it.'"*

A more recent explanation is to be found also in ***Watford Community Housing Trust v Arthur J Gallagher Insurance Brokers*** [2025] Lloyd's Rep IR 407 at [31]-[32], as follows:

> *"Double insurance arises where the same party is insured with two (or, as is said to be the position in this case, more) insurers in respect of the same interest on the same subject matter against the same risks. ... By the middle of the 18th century, the common law had already developed a principled response to incidents of double insurance. First, the indemnity principle operated to limit the insured's recovery to his or her actual (or agreed) loss and, secondly, an insurer who had paid a claim could seek contribution from other insurers who were liable for the same loss. ... It is now settled that the right of contribution arises in equity and can be exercised by the insurer in his own name without resort to the doctrine of subrogation."*

87. The first reason, already articulated at some length, why this is not a double insurance case is that the contingent nature of Chubb's and Fidelis's liability under their insurance arrangements makes it impossible to view those arrangements as forming part of double insurance arrangements also entered into by the WRUs. Chubb's and Fidelis's payments to the Lessors did not discharge OP WR Reinsurers.

88. Secondly, the expressly contingent nature of the LPs cover means that the assured did not have a free choice whether to sue one or other insurer. This is wholly inconsistent with the notion of double insurance where the assured can choose whom to sue, as made clear by Lloyd LJ (as he then was) in ***Legal & General v Drake*** [1992] QB 887 at page 892E when he explained that *"the existence of the equity depends on the ability of the assured to claim against either A or B at his choice"*.

89. Thirdly, it is well established that, in order for there to be a right to contribution in a double insurance context, there needs to be mutuality. Thus, *Colinvaux* at [12-203] describes the position in this way:

"Insurer A, the paying insurer, cannot claim contribution from insurer B in circumstances where, had insurer B paid first, insurer B could not have claimed contribution from insurer A. Contribution requires mutuality. ***HIH Claims Support Ltd v Insurance Australia Ltd*** *concerned the Scheme established following the collapse of HIH in 2001. A Trustee was appointed and Government funds were made available to pay at least 90% of claims against HIH. As a condition of obtaining payment, any policyholder had to assign to the Trustee his claim against HIH. S was insured against public liability under a policy issued by HIH and also under a policy issued by IAL's predecessor in title. S was paid by the Trustee on behalf of HIH, who sought to exercise rights of contribution against IAL. The High Court of Australia held that no contribution claim was possible. Had IAL paid S first, IAL would not have had any contribution claim against the Trustee because IAL was not a policyholder. In the absence of mutuality - under which whoever paid first was entitled to a contribution claim - the Trustee could not have a contribution claim against IAL."*

Self-evidently, there is no mutuality in the present case since the WRUs would obviously not have been able to claim contribution from Chubb and Fidelis (or any other contingent insurer) given that their liability is only triggered in circumstances where the WRUs have not themselves paid.

90. I need not, in the circumstances, go on to address a fourth submission advanced by the WRUs, namely that there are different assureds involved since, whereas under the LPs, Chubb and Fidelis insured the OP Claimants, the WRUs did not insure the OP Claimants but the Russian insurers. Specifically, Mr Bailey highlighted how it is common ground between the Shoosmiths Defendants and (at least) AerCap and Shannon Engine Support Limited ('SES') (whose pleaded cases Chubb has adopted) that (as pleaded in paragraph 21.3 of the Common Defence):

"The purpose of the Cut Through Clauses was not to circumvent mandatory requirements of Russian law that prohibit foreign insurers from covering risks in Russia without a Russian license by using a local insurer as a nominal 'fronting insurer'."

Mr Bailey also pointed out that AerCap, SES and Merx, whose cases Chubb adopts, each plead that they are entitled to payment under the WR Reinsurances as beneficiaries under Article 430 of the Russian Civil Code; they do not plead that they are insureds under the WR Reinsurances.

91. Nor need I address a fifth submission made by the WRUs. This was that the risks insured are different, in that the insured risk in the LPs is different from the insured risk in the OPs which are different yet again from the insured risk in the WR Reinsurances since the LPs are insurances against the risk of non-indemnification under the OPs, whereas the OPs are property insurances.

92. Mr Peters and Mr Howe submitted that these are submissions which ignore the practical reality and, furthermore, that the correct characterisation of the WRUs' liability is a matter which is to be determined at the OP Trial, so that it is to be assumed that there is a real prospect that the Court will conclude that the WRUs' liability under the OPs is not legally and factually distinct from Chubb's liability under the LPs. In the circumstances, I regard it as inappropriate to determine the applications on these further bases.

93. My conclusion, nonetheless, for the various reasons previously given, is that the double insurance-based contribution claims advanced by Chubb and Fidelis are unsustainable.

The Civil Liability and Contribution Act 1978

94. I turn, lastly, to Chubb's and Fidelis's reliance on the 1978 Act, section 1(1) of which provides as follows:

> *"Subject to the following provisions of this section, any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise)."*

95. It is Chubb's and Fidelis's case that this provision applies in the present case given that section 6(1) is in these terms:

> *"A person is liable in respect of any damage for the purposes of this Act if the person who suffered it … is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise)."*

96. Their position is that section 1(1) does not depend on the WRUs and them being liable for damages or even for the same damage, but merely that they are liable in respect of the same damage. Furthermore, Mr Peters and Mr Howe observed that, whilst the relevant liability must be one to pay *"compensation"*, this is a word that is to be afforded a broad construction, in particular that it can cover a situation where one party is liable in tort and another is liable for breach of contract or where two parties are both liable for breach of contract or liabilities arising in debt. As such, Mr Peters and Mr Howe submitted, the 1978 Act is plainly capable of encompassing Chubb's and Fidelis's claims against the WRUs, in circumstances where the basis on which the OP Claims are advanced (which the Court should assume to be correct for the purposes of this application) is that the WRUs are liable to indemnify the Lessors in respect of loss of, or damage to, their interest in the Aircraft, and it was established by the LP Judgment that Chubb and Fidelis were liable under the LPs to provide an indemnity in relation to that very same damage – but only (subject to the qualifications identified above) if the OPs failed to provide an indemnity first. The contingent nature of the cover provided under the LPs only serves to emphasise, Mr Peters and Mr Howe suggested, that they and the OPs created a liability in respect of the same damage because, in reality, the LP Insurers' liability was to indemnify the Lessors in respect of loss of (or damage to) the Lessors' own interest in the Aircraft insofar as that very loss and/or damage was not covered by an indemnity under the OPs.

97. In response, the WRUs raise a number of objections: first, they say that, because (as a matter of Russian law) their liability sounds in debt they are not liable in respect of *"damage"*; secondly, they contend that the 1978 Act does not apply at all as between insurers; and, thirdly, they contend that they are not liable for the same damage as Chubb or Fidelis.

98. Mr Peters and Mr Howe's position is that these objections are misplaced and, in any event, that they are not suitable for summary determination. Mr Howe, in particular, cites ***On the Beach Ltd v Ryanair UK Ltd*** [2023] EWHC 2694 (Comm) at [111]-[118] as an example of a case where it was decided that the question of whether the 1978 Act can apply when a contribution defendant's liability was in restitution was not suitable for summary judgment.

99. Mr Peters and Mr Howe advanced two main submissions. First, they submitted that the fact that Russian law happens to characterise an insurer's liability as sounding in debt, rather than in damages, is irrelevant since the present case concerns claims under the 1978 Act arising out of liabilities of an essentially identical character – i.e. insurers' liability to pay an indemnity. As such, they submitted, if English law recognises that type of liability as one in respect of which a claim under the 1978 Act may be brought, then, there is no principled reason for excluding it from the scope of the 1978 Act because of how it happens to be characterised by some other system of law. Mr Howe added that, in interpreting section 1(1) of the 1978 Act, the Court should apply English law and not feel constrained by how a liability is regarded under a foreign law: see ***Various North Point Pall Mall Purchasers v 714*** [2022] EWHC 4 (Ch) and ***Charter plc v City Index Ltd*** [2008] Ch 313, [2007] 2 CLC 968. Accordingly, he suggested, if the characterisation of an (re)insurer's liability for the purposes of the 1978 Act falls to be determined through English law eyes, then, the answer is provided by the common ground that Fidelis's own liability under its LP sounds in damages; hence, any liability the WRUs have should, it is submitted, also be characterised in the same way. On that basis, this being a dispute between Chubb and Fidelis and the WRUs, each of whose liability under their respective insurance contracts sounds in damages as a matter of English law, the 1978 Act should be treated as applying, even if the 1978 Act draws a distinction between *"debt"* and *"damage"*. Secondly, Mr Peters and Mr Howe's position was that, in any event, the 1978 Act applies also to claims in debt, and so the fact that this is how insurance claims are characterised under Russian law makes no difference.

100. I do not agree with either of these submissions; on the contrary, I am clear that the 1978 Act has no application in the present case for the reasons that follow.

101. First, it is common ground that a claim under an insurance policy governed by Russian law sounds in debt, rather than damages. As such and as I shall develop shortly, I agree with Mr Bailey when he submitted that section 1(1) of the 1978 Act has no application since the WRUs are not *"liable in respect of any damage"* (sections 1(1) and 6(1)) and have no liability to pay *"compensation"* (section 6(1)). It is *"immaterial"* that the WRUs' liability is governed by a law other than English law since section 1(6) is in these terms:

> *"References in this section to a person's liability in respect of any damage are references to any such liability which has been or could be established in an action brought against him in England and Wales by or on behalf of the person who suffered the damage; but it is immaterial whether any issue arising in any such action was or would be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales."*

All that matters, as this provision makes clear, is that the third party must be *"entitled to recover compensation"*, and a creditor (i.e. the debt claimant) is not recovering compensation from the debtor.

102. As to the second of the submissions advanced by Mr Peters and Mr Howe concerning the application of the 1978 Act to debt claims, that is a submission which is undermined by the distinction between a debt and damages drawn by the 1978 Act when looked at as a whole. It is instructive in this respect that section 3 expressly distinguishes between a debt and damage, providing as it does as follows:

> *"Judgment recovered against any person liable in respect of any debt or damage shall not be a bar to an action, or to the continuance of an action, against any other*

person who is (apart from any such bar) jointly liable with him in respect of the same debt or damage."

It is difficult to see why, if liability *"in respect of any damage"* under sections 1(1), 1(6) and 6(1) is intended to embrace a liability in debt, section 3 would distinguish between debt and damages in the way that it does.

103. Nor do I agree with the submission advanced by Mr Peters and Mr Howe that there is authority that makes it clear that debt claims come within the ambit of the 1978 Act. They refer in this connection to two cases in particular: ***Howkins & Harrison (a firm) v Tyler and Powell*** [2001] PNLR 634 at [13] and [24] per Scott V-C; and ***Friends' Provident Life Office v Hillier Parker May & Rowden*** [1997] QB 85. In the former, Sir Richard Scott V-C had the following to say at [13]:

"Section 1(1) enables the person 'liable in respect of any damage', the appellants in the present case, to recover contribution 'from any other person liable in respect of the same damage'. The only other person at whom the finger is pointed in these proceedings are the two respondents. So the next question is whether they are persons 'liable in respect of the same damage'. What is the damage for which they are liable? On one view they are not liable to the Alliance and Leicester for damage at all; they are simply liable for the payment of debt that they had covenanted to pay the Alliance and Leicester. But that view may adopt too narrow a construction of the word 'damage'. It is possible to take the view that where, under a contract, A owes B a sum of money, ie., a debt, a failure by A to pay B, although of course a failure to pay a debt, is also a breach of contract. To categorise the failure as a breach of contract seems a little unrealistic because the remedy for such a breach of contract would ordinarily be simply an order for payment of the debt. But there is certainly a sense in which the person to whom the money is owed suffers damage by reason of the breach of the contractual obligation to pay the money, the damage being the non-receipt of the money that is due. So, in answer to the question, what is the damage to the Alliance and Leicester for which the two respondents were and are liable, it may be said that the damage is the failure of the respondents to pay the money due under the security documents they had signed."

He continued at [18]:

"The Act was intended to deal with cases where the damage suffered by the victim could be remedied by a claim against one or other of two or more possible defendants, and where the quantification of the damage to the victim for which a defendant would be liable would be affected by what the victim might recover or had recovered from one or other of the possible defendants. If that condition is not present, it seems to me that the Act was not intended to apply and cannot be applied. When this point was put to Mr Seitler, his response was to submit that the payment of the £400,000 agreed damages by the appellants to the Alliance and Leicester reduced the amount of the debt that the respondents owed to the Alliance and Leicester. In my judgment that proposition is incorrect. The debt owing by the respondents to the Alliance and Leicester is, in my view, not reduced or discharged by the receipt on the part of the Alliance and Leicester of the damages from the appellants. … ."

He went on at [19]:

"In that event, the £400,000 agreed damages assumes a potential recovery by the Alliance and Leicester from the respondents of £100,000. But the receipt of the £400,000 by the Alliance and Leicester does not reduce the debt that the respondents owe. If the respondents were to win a substantial amount in the lottery, it seems to me

there would be nothing to stop the Alliance and Leicester from suing for recovery of the £500,000. The result would be that the Alliance and Leicester would have recovered £500,000 on the debt due from the respondents and £400,000 damages from the appellants."

He, then, said the following at [20]:

"I agree with Mr Seitler's instinctive response that in those circumstances the excess over the £500,000, and whatever costs of recovery might be involved, would be held by the Alliance and Leicester upon trust for the appellants. The appellants would have been shown to have paid more than they should have paid. The £400,000 damages would have been shown to have been calculated on an incorrect premise as to the amount of the debt recoverable from the respondents. If the Alliance and Leicester were to sue on the £500,000 debt and to recover, say, £200,000, they would, in my view, hold £100,000 for the appellants. Similarly, it seems to me, although this is not a matter which needs to be decided now, that if the appellants want to test the extent of the recovery that the Alliance and Leicester can obtain from the respondents, they can bring an action joining the Alliance and Leicester and the respondents as defendants, and claiming payment by the respondents of the £500,000 debt. The extent of the benefit the appellants would obtain in such an action would depend, first, on the extent of the recovery obtained from the respondents and, second, on the state of the account between the Alliance and Leicester and the respondents."

Importantly, he concluded at [21]:

"These are matters of subrogation and of restitution. They have in my view nothing whatever to do with the 1978 Act. So far as the 1978 Act is concerned, it seems to me, a contribution can be claimed only in cases where a sum to the victim paid by the claiming party would reduce the liability of the other party. That, in my view, is not so in this case."

104. Aldous LJ, equally importantly, said this at [23]:

"For my part I do not wish to express any view as to whether a liability in debt falls within section 1 of the Civil Liability Contribution Act 1978. As my Lord, the Vice-Chancellor pointed out, there is no need to decide that matter in this case. … ."

105. I do not, in the circumstances, regard ***Howkins*** as constituting binding authority that a debt claim comes within the ambit of the 1978 Act. I would observe, furthermore, in passing but relevant to a matter to which I will return shortly, that what the case is authority for is that, in order for there to be a claim under the 1978 Act, there must be a discharge of liability since Sir Richard Scott V-C very clearly had this in mind in what he had to say at [18].

106. As for ***Friends' Provident***, that was a case where the Court of Appeal held that liability in restitution can be *"liability for damage"* so as to engage section 1(1) of the 1978 Act, even though restitution is not recovery against a *"wrongdoer"* in the principal sense. Specifically, Auld LJ had the following to say at pages 102G-103E:

"In my judgment, despite the distinction between a claim for restitution and one for damages, each may be a claim for compensation for damage under sections 1(1) and 6(1) of the Act of 1978. The difference between asking for a particular sum of money back or for an equivalent sum of money for the damage suffered because of the withholding of it is immaterial in this statutory context, which is concerned with 'compensation' for 'damage'. The purpose and effect of the Act were to provide for

contribution beyond that of joint tortfeasors for which section 6 of the Law Reform (Married Women and Tortfeasors) Act 1935 had previously provided. The contribution is as to 'compensation' recoverable against a person in respect of 'any damage suffered by another' 'whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise'. It is difficult to imagine a broader formulation of an entitlement to contribution. It clearly spans a variety of causes of action, forms of damage in the sense of loss of some sort, and remedies, the last of which are gathered together under the umbrella of 'compensation'. The Act was clearly intended to be given a wide interpretation, as Ferris J observed in ***K v P (J, Third Party)*** *[1993] Ch. 140, 148, holding that illegality was arguably not a defence to a claim under the Act of 1978:*

'The Act of 1978 extends the potential for contribution beyond joint tortfeasors to joint contractors, joint trustees and others who are liable in respect of the same damage ... it is manifest that the words of section 6(1) of the Act of 1978 are intended to be interpreted widely, hence the use of the words 'whatever the basis of his liability' and the emphasis added by the word 'otherwise at the end of the enumerated causes of action.'

As to the judge's reliance on the word 'responsibility' in section 2(1) of the Act, it is a word which, in my view, has some elasticity of meaning in this context. It may or may not, depending on the circumstances, connote some notion of breach of duty or default. It has an obvious role when apportionment on 'just and equitable' principles has to be made, but it is not to be so narrowly construed as to restrict the wide language of section 6(1). The final words of that provision, in particular, 'whatever the legal basis of his liability' and 'or otherwise' make plain that it was not intended to confine the operation of section 1(1) to liability arising from breach of duty or default.

As to the judge's reliance on the special provision for debt in section 3, an action of debt is, historically and in everyday parlance, quite distinct from a claim for compensation for damage. It is true that a claim for restitution in quasi-contract may in some respects be close to a claim in debt because of the former's origin in indebitatus assumpsit: see per Lord Wright in ***Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*** *[1943] A.C. 32, 61-63. However, indebitatus assumpsit, as its name indicates, was, when it developed in the 16th and 17th centuries, a hybrid of an action on a (fictitious) contract and in debt. Its origin, explained in Maitland, Forms of Action (1936), pp. 63, 68-70, was quite distinct from that of debt, and delictual in nature. It emerged as an offshoot of the action on the case, developing into the action of assumpsit and then indebitatus assumpsit, largely supplanting debt; see also Goff & Jones on the Law of Restitution, 4th ed., ch. 1. Even though the need for precise categorisation has disappeared since the Common Law Procedure Act 1852 (15 & 16 Vict. c. 76), the hybrid character of indebitatus assumpsit and its modern manifestation, quasi-contract, lingered on: see, e.g., per Lord Sumner in* ***Sinclair v Brougham*** *[1914] A.C. 398, 452. In any event, for the reasons I have given, even if the judge was right in associating a claim for restitution in quasi-contract with an action for debt, that would not exclude it from being a claim for compensation in respect of damage in quasi-contract within the meaning of sections 1(1) and 6(1) of the Act of 1978."*

Auld LJ was here, therefore, distinguishing a restitutionary type of claim from a claim in debt. He was doing so, moreover, in the course of explaining why the former falls within the 1978 Act; by implication, therefore, although not the issue that was before the Court of Appeal in that case, Auld LJ was saying that a debt claim, in contrast, does not come within the ambit of the 1978 Act.

107. It can be seen, accordingly, that neither ***Howkins*** nor ***Friends' Provident*** provides support for the proposition that the 1978 Act applies to a debt claim. On the contrary, since in both cases the judges went out of their way to explain that they were not addressing the debt position, these are authorities which, if anything, lend support to the WRUs' case that debt actions are not caught by the 1978 Act. I am clear, at a minimum, that Mr Peters and Mr Howe cannot be right when they invoke ***Howkins*** and ***Friends' Provident*** in support of a somewhat generalised submission that the Court should adopt a broad approach to what is included within the ambit of the 1978 Act. The suggestion made by Mr Howe, in particular, that *"there is no reason in principle why the position regarding debts should be different to the position regarding restitution"* runs counter to the reasoning of Auld LJ in ***Friends' Provident*** and so cannot be right. The fact that in another case cited by Mr Howe, ***Dormco Sica (In Liquidation)*** [2021] EWHC 3209 (Ch), it was held that actions in respect of defrauding creditors under section 423 of the Insolvency Act 1986 could engage section 1 of the 1978 Act is, similarly, somewhat beside the point since that is a very different type of claim to a claim in debt.

108. Nor am I persuaded by Mr Peters and Mr Howe's submission that there is no reason in principle why what Lord Bingham in ***Royal Brompton NHS Trust v Hammond (No 3)*** [2002] 1 WLR 1397 at [6] described as *"the underlying equity"* embodied by the 1978 Act should not apply also to debt since it is plain that, as also considered in both ***Howkins*** and ***Friends' Provident***, there is a difference between a situation where a party is liable in damages and a situation where a party is liable in debt. I reject the submission, advanced by Mr Peters in particular, that, as a matter of practicality, it may well be that many liabilities in debt often cannot be said to have arisen *"in respect of ... damage"* for the simple reason that debts do not, in the ordinary course, become payable upon the occurrence of damage, yet it does not follow that a liability in debt which does arise upon and as a result of the occurrence of damage can nonetheless never be said to be one *"in respect of ... damage"*. It cannot be appropriate, in my view, to seek to sidestep in this way characterisations that the law – in this case, Russian law – places on different causes of action.

109. Furthermore, there are authorities which point towards the correctness of the submissions advanced on the WRUs' behalf. Thus, in ***Eastgate Group Ltd v Lindsey Morden Group Inc*** [2002] 1 WLR 642, Longmore LJ said the following at [7]:

> *"One accepted restriction on the width of the statutory wording is that a person who is liable to a claimant in debt cannot seek contribution from a person who is liable to the claimant in damages. That is partly because it is difficult to say that someone who is a mere debtor is liable in respect of damage at all ... ."*

110. Similarly, in ***Hampton v Minns*** [2001] EWHC 555 (Ch), [2002] 1 WLR 1, Kevin Garnett QC proceeded on the basis that a claim in debt is not a claim to which the 1978 Act has any application (see [79]); and in ***HM Revenue & Customs v Yousef*** [2008] BCC 805; [2008] EWHC 423 (Ch) HHJ Purle QC took the same approach (see [22]), adding at [24] that:

> *"Reliance was placed on certain comments in* ***Howkins and Harrison (a firm) v Tyler*** *[2001] 1 PNLR 1, at [13] and [24], to the effect that a party may suffer relevant 'damage' for the purposes of the 1978 Act as a result of non-payment of a debt. The suggestion is that a breach of a contractual obligation to pay gives rise to damage (recoverable as such) in the amount of the unpaid debt. That argument (even if correct) does not arise in the present case, as the only obligation giving rise to the debt is a statutory one. There is no possibility of a claim for breach of contract nor is there a sustainable claim in tort such as breach of statutory duty. The only remedy is*

to recover the debt as unpaid tax. There is no recoverable 'damage' and the remedy is not 'compensation'."

111. More recently, in ***ARAG plc v Jones*** [2020] EWHC 3484 (Comm), [2020] Costs LR 1951 at [14], HHJ Keyser QC had this to say:

"Despite the terms of the defence, which he drafted, Mr Parsons had accurately explained in his skeleton argument why s 1 did not apply to a claim for contribution in respect of costs alone. At common law there was no general right of contribution as between joint wrongdoers: see ***Merryweather v Nixan*** *(1799) 8 Durn & E 186. A statutory exception to this position was made in the case of joint tortfeasors by s 6(1)(c) of the Law Reform (Joint Tortfeasors and Married Women) Act 1935. In 1977 the Law Commission's Report on Contribution Law (Law Com No. 79) recommended that the right of contribution ought not to be limited to cases of tort but ought to be extended to any case of breach of duty. The 1978 Act gave effect to this recommendation; see the concluding words of section 6(1). However, the liability of Ms Gibson and the defendant for Mr Francis's costs arose by virtue of the court's exercise of its power under s 51 of the Senior Courts Act 1981. The costs order created a debt, or at the very least something analogous to a debt; it was not in the nature of a remedy for a wrong. An action for a debt is not within the scope of s 1 of the 1978 Act:* ***Hampton v Minns*** *[2002] 1 WLR 1. I agree with all of that."*

112. The same approach – that the 1978 Act does not apply to debt claims – was adopted by HHJ Rawlings in ***RSA Insurance v Assicurazoni Generali*** [2018] EWHC 1237 (QB), albeit in recording an agreement between counsel as follows at [32]:

"The submissions made by Mr Kent and Mr Feeny as to the purpose of the 1978 Act led to them agreeing that the answer to the question as to whether or not RSA's claim for a contribution against Generali is a claim covered by s 1(1) of 1978 Act is determined by answering the question as to whether the Company's claim against RSA, for an indemnity in respect of Mr Merritt's Mesothelioma claim, was a claim sounding in debt or a claim sounding in damages. Mr Kent and Mr Feeny agree that if it is a claim sounding debt then is not covered by s 1(1) of the 1978 Act whereas if it is a claim sounding in damages then it is covered by s 1(1) of the 1978 Act."

I will say something further about this case in a moment. However, what matters for present purposes is that it was accepted before HHJ Rawlings that a debt claim is not covered by the 1978 Act. HHJ Rawlings appears to have agreed that this is the position, and I agree that it is, indeed, the position, noting that there is no authority (including ***Howkins*** and ***Friends' Provident***) that necessitates a different approach and that, on the contrary, there are a number of cases (***Eastgate***, ***Hampton***, ***Yousef***, ***ARAG*** and ***RSA*** itself) pointing to the correctness of the proposition that the 1978 Act has no application in relation to debt claims.

113. Further support for the view that I have formed is to be found in an Irish decision of the Court of Appeal (Civil), ***Ulster Bank Ireland Ltd v McDonagh*** [2022] IECA 87, which concerned the effect of section 17(2) of the Civil Liability Act 1961. Although this is not a provision that is identical to section 1 of the 1978 Act, nonetheless the discussion contained in the judgment is instructive. As pointed out at [53], the definition of *"concurrent wrongdoers"* appears in section 11(1) and has two elements:

"two or more persons are concurrent wrongdoers when both or all are wrongdoers and are responsible to a third person … for the same damage."

As for a *"wrongdoer"*, this is a person who commits or is otherwise responsible for a *"wrong"* (section 2(1)), a word which is defined in broad terms in section 2(1) as meaning *"a tort, breach of contract or breach of trust, whether the act is committed by the person to whom the wrong is attributed or by one for whose acts he is responsible …"*. As for *"Damage"*, under section 2(1), this *"includes loss of property, loss of life and personal injury"*, and is to be contrasted with *"damages"*, which is defined separately in the same subsection of the Act as *"except in Part IV [of the Act] [including] compensation for breach of trust"*.

114. It was in the context of these statutory provisions that the Court of Appeal came on at [75] to observe as follows:

"The distinction between a claim for debt and a claim for recovery of damages was explained in precisely these terms by Millett LJ. In ***Jervis v Harris*** *[1996] 1 All ER 303, at p. 307 as follows:*

'The law of contract draws a clear distinction between a claim for payment of a debt and a claim for damages for breach of contract … a debt is a definite sum of money fixed by the agreement of the parties as payable by one party to the other in return for the performance of a specified obligation by the other party or on the occurrence of some specified event or condition; whereas damages may be claimed from a party who has broken his primary contractual obligation in some way other than by failure to pay such a debt.'"

115. The Court of Appeal continued at [76]:

"It follows that a person who seeks to recover a debt does not have to have suffered any 'damage' and, as we have explained, does not claim 'damages'. They are simply enforcing their contractual right. Although, as Clarke J stressed in ***Moloney v Liddy*** *(at para. 5.3) differences in wording between the CLA and other similar statutes in other jurisdictions mean that one must exercise caution in applying authorities from those jurisdictions in interpreting the Irish Act, we think the statement from Goff and Jones on Restitution (5th ed. 1998), at page 396, cited with approval by Lord Steyn in* ***Royal Brompton Hospital v Hammond*** *(No. 3) [2002] 2 All ER 801 at para. 33 must be both correct and applicable to the Irish legislation: a restitutionary claim is not one for 'damage suffered', the suggestion that it is 'cannot be justified in principle' and this, a fortiori must be the case in an action for debt which is quite distinct from an action 'for damage' (see Goff and Jones op cit p. 396 to 397 at fn 14). It is, functionally and in principle, equivalent to a claim for an order requiring a defendant to discharge any primary obligation owed by it to the plaintiff."*

116. Then, at [79], the Court of Appeal said this:

"If, as we consider to be clearly the case, a person who seeks to recover a debt does not bring an action for 'damages', and if, more importantly, they need establish no 'damage' as a precondition to the bringing of their claim, the proposition that the person who does not pay the debt is responsible for 'the same damage' as a party without whose negligence the debt would not have been incurred must be wrong. To put it another way, if a plaintiff in an action for recovery of debt is not claiming 'damages' it must follow that his claim against a third party but for whose actions it is alleged the debt would not have been incurred (which is a claim for 'damages') cannot be said to be in respect of the 'same damage'. They are legally distinct because the object of the proceedings is different, and they are factually distinct because one is for the recovery of debt and the other for damages to compensate for a loss where (and to the extent that) the debt is not recovered."

117. I agree with what the Court of Appeal in ***Ulster Bank*** had to say in these passages. The different legal characterisations attributed to claims for damages and claims in debt are not mere technicalities but reflect meaningful and substantive distinctions which ought not to be brushed aside when considering what the 1978 Act does or does not cover.

118. For these reasons, I agree with Mr Bailey's submission that the 1978 Act is not applicable in the present case.

119. It is unnecessary, in the circumstances, to take up time addressing the second of the WRUs' objections, namely that the 1978 Act has no application as between insurers. This was an objection which Mr Bailey described, when addressing the Court orally, as *"the boldest"* of his submissions. He was right to do so since, although I am inclined to think that he was right that the 1978 Act does not, indeed, apply as between insurers, what is clear is that it would not be right to decide that point at this summary judgment/strike-out stage. In the circumstances, I propose to do no more, and then only very briefly, than to outline the submission advanced by Mr Bailey.

120. This was that insurers do not have statutory claims for contribution against one another under the 1978 Act because contribution claims between insurers are, instead, governed by the principles concerning double insurance. As such, an assured is not entitled to *"recover compensation from"* its indemnity insurer for *"damage"* within the meaning of section 6(1); insurers are not *"responsible"* for *"the damage in question"* within the meaning of section 2(1); and where an insured is *"over-insured by double insurance"* within the meaning of section 32(1) of the Marine Insurance Act 1906, the insurers are not liable *"in respect of the same damage"* within the meaning of the 1978 Act.

121. As for authority, in ***Zurich v IEG*** [2015] UKSC 33, [2016] AC 509, whilst he did not resolve the question of whether liability under an indemnity insurance is regarded as a liability in debt or damages, Lord Mance nonetheless had the following to say at [64]:

> *"… if insurance contract liabilities are viewed as sounding in damages, it appears somewhat surprising if the 1978 Act could operate as an alternative statutory remedy with different effect in a case of true double insurance in respect of post-commencement liabilities."*

Mr Bailey submitted that, whilst *obiter dicta*, what Lord Mance here observed is correct as a matter of principle since the alternative would be that an indemnity insurer could in every case pursue two potentially inconsistent remedies: a *"just and equitable"* contribution claim under the 1978 Act and a rateable contribution claim in equity or under the 1906 Act.

122. The difficulty from the WRUs' perspective, at least at this summary judgment/strike-out stage, is that in the same case, dissenting on the main point in the appeal, Lord Sumption disagreed with Lord Mance, observing at [181] that, on the hypothesis that an insurer on risk for only part of a period of exposure to asbestos is liable for the whole loss, then, *"[a]s between insurers each of whom insured only part of the period of exposure but are liable (on this hypothesis) in full, I think it clear that there is a statutory right of contribution"* on the basis that a *"contract of indemnity gives rise to an action for unliquidated damages"* and, as such, falls within the ambit of the 1978 Act.

123. As Mr Peters and Mr Howe observed, given this conflict between Lord Mance and Lord Sumption, it would not be right to determine this issue at this stage. I should,

however, make one particular observation concerning a submission advanced by Mr Howe by reference to ***RSA*** and, more particularly, to what is said about that decision in *Colinvaux* at §12-185, which was this:

"The court's conclusion was that the authorities on insurance claims were unambiguously in favour of the proposition that a claim was one for unliquidated damages rather than debt, that two insurers on risk for the same loss were both liable in damages for an insurance claim and that the 1978 Act superseded previous principles."

This does not, however, entirely accurately reflect what was decided by HHJ Rawlings in ***RSA*** since it is important to note that the parties agreed in that case that, if the judge were to conclude that the liability of RSA to the company was a liability that sounded in damages rather than in debt, then, RSA's right to contribution from Generali fell within the ambit of section 1 of the 1978 Act: see [115]. Accordingly, HHJ Rawlings did not decide that Lord Sumption was right and that Lord Mance was wrong; in fact, he reached no conclusion on the present issue.

124. This brings me to the third of the objections raised by Mr Bailey to Chubb's and Fidelis's invocation of the 1978 Act. This is that, even assuming that the 1978 Act does apply to a debt claim (which I have decided it does not) and assuming also that it applies as between insurers (which I have decided cannot appropriately be determined at this stage), then, still the 1978 Act does not apply in the present case because the WRUs, on the one hand, and Chubb and Fidelis, on the other hand, are not liable for or in respect of the *"same damage"* within the meaning of section 1(1) of the 1978 Act. Specifically, Mr Bailey submitted, first, that the *"damage"* in respect of which the WRUs are liable is factually and legally different to that in respect of which Chubb and Fidelis are liable; and, secondly, that Chubb's and Fidelis's payments under the LPs have not discharged (even in part) their liability to the Lessors.

125. Consistent with my earlier approach when addressing essentially the same argument, I prefer not to address the first of these points. As to the second, however, and again consistent with what I have previously had to say, I agree with Mr Bailey about this. For reasons which I have previously explained when addressing the two earlier issues, I struggle to see how the 1978 Act can apply in circumstances where there has been no discharge of the WRUs' liability through payments made by Chubb and Fidelis. Indeed, it is worth noting that, when in ***Greene Wood & McLean*** Cooke J observed that the *"same result is in fact reached under the Civil Liability (Contribution) Act 1978 for not dissimilar reasons"* (see [66]), he plainly had in mind the need for there to be a discharge of another party's liability in order for the 1978 Act to apply. Although I have explained why I do not consider ***Greene Wood & McLean*** to assist Chubb and Fidelis in the present case, on this point I agree with Cooke J. In circumstances in which the payments by the LP Insurers have not discharged the liability of the WRUs, a claim under the 1978 Act is, in my view, unavailable.

126. It follows that, even if Mr Peters and Mr Howe were right when they made their first submission, namely that the correct characterisation of the WRUs' liability is a matter which is to be determined at the OP Trial and, for the purposes of this application, it is to be assumed that there is a real prospect that the Court will conclude that the WRUs' liability under the OPs is not legally and factually distinct from Chubb's and Fidelis's liability under the LPs, the fact remains that, as I have previously explained, there has not been a relevant discharge of the WRUs' liability by the payments that were made by Chubb and Fidelis.

Conclusion

127. Accordingly, the Applicants succeed with their applications to strike out or obtain summary judgment dismissing the contribution claims brought against them by Chubb and Fidelis.

128. I end by thanking all counsel for their considerable assistance.