not think its proposals would alter the substance of the law, it is significant that terms imposing insufficient funds charges probably would have been subject to assessment for fairness under its scheme.

PAUL S. DAVIES

THE CONTRACTUAL NATURE OF REINSURANCE

IN *Wasa International Ins. Co. Ltd.* v. *Lexington Ins. Co.* [2009] UKHL 40, [2009] 3 W.L.R. 575 Lexington insured Alcoa, a mining company based in Massachusetts but operating throughout the United States and beyond, for a certain period of time against loss of or damage to property and business interruption risks (the primary insurance). Lexington obtained reinsurance cover on the London market for the same period on similar terms, under which various London underwriters, Wasa among them, agreed to cover Lexington's primary insurance of Alcoa. As usual the reinsurance was governed by English law.

In the early 1990s Alcoa was required by United States' environmental regulators to clean up pollution at some 35 Alcoa sites. The US Supreme Court held that the insurers on risk at the sites – including Lexington – were jointly and severally liable to Alcoa for all resulting property damage. Lexington settled Alcoa's claim in late 2003, agreeing to pay more than $103 m. The "joint and several" theory of liability applied by the Court is not one found in English law and even in the United States it applies in some but not all states. In London, Wasa commenced proceedings seeking negative declaratory relief. Lexington cross-claimed for sums due under the reinsurance policy.

The House of Lords held that the reinsurers were not bound by the settlement. To reach this conclusion the House had to decide various points specific to the case and, bearing in mind that London is a leading world market for reinsurance, one of considerable general importance – the essential nature of reinsurance itself.

One view of reinsurance is that it "is not an insurance of the primary insurer's potential liability or disbursement" but "an independent contract between reinsured and reinsurer in which the subject-matter of the insurance is the same as that of the primary insurance" (*Charter Re* v. *Fagan* [1997] A.C. 313, 392, *per* Lord Hoffmann). Lord Mustill expressed a similar view (*ibid*, 387). In spite of such powerful opinion the issue has not been regarded as sufficiently settled (see for example the scholarly judgment of the New South Wales Supreme Court in *New Cap Reinsurance* v. *Grant* [2008] NSWSC 1015, (2008) 221 F.L.R. 164).

The Court of Appeal in *Wasa* v. *Lexington* ([2008] EWCA Civ 150, [2008] Lloyd's Rep IR 510) decided that reinsurance is liability insurance. Sedley L.J. (at [49]) made a strong case for that view. He said that the notion of "double cover" on the same risk (the view in *Charter Re*) was a fiction due to the illegality of reinsurance as such until 1864 and that the "practice and vocabulary of reinsurance law have for a long time now reflected the reality that what is reinsured is the insurer's own liability". Distinguished commentators agree because the "trigger for recovery under the insurance is that the reinsured's liability has been established and quantified, not that a peril has occurred" to the insured subject-matter; and "the amount of the reinsured's indemnity is not based on the degree of damage [to that subject-matter but] on the amount of the reinsured's exposure" (Gurses and Merkin [2008] L.M.C.L.Q. 366–388, 374).

Unfortunately, however, the House of Lords allowed the appeal: reinsurance, it said, is not a form of liability insurance but a further insurance on the subject matter of the original primary insurance: "double cover". It is as if the insurer of my house reinsured the risk: my house would then be covered against fire by two insurers, insurer and reinsurer. In the event of a fire my claim would only be against the insurer with whom I had contracted. That insurer would later recover part of what it paid me from the reinsurer.

The consequence for Wasa was that, as reinsurers, they were not automatically liable to meet liabilities incurred by Lexington under Lexington's separate and primary insurance contract, notably the obligation to pay the amount agreed in Lexington's settlement with Alcoa. This contractual settlement was distinct from and without impact on Wasa's reinsurance policy. The consequences for London insurers at large, which do environmental and pollution business of that kind, may be far reaching; but so large are the sums of money involved it is unlikely that litigation on others aspects of reinsurance will cease.

MALCOLM CLARKE

ANTI-SUIT INJUNCTIONS AND NON-EXCLUSIVE JURISDICTION CLAUSES

WHERE the English court has personal jurisdiction over a defendant it is well-established that an anti-suit injunction may be granted preventing that defendant from taking steps to litigate a dispute in a foreign jurisdiction if the English court also has an interest in, or connection with, the matter: *SNIA* v. *Lee Kui Jak* [1987] A.C. 871. Such an injunction is granted on one of two bases: either the court has an