IN THE HIGH COURT OF JUSTICE **No. HC13C02801 of 2013**

CHANCERY DIVISION

IN THE MATTER OF

ENGLISH & AMERICAN INSURANCE COMPANY LIMITED

AND

IN THE MATTER OF THE TRUSTEE ACT 1925

Before Mr Clive Freedman QC sitting as a Deputy Judge of the High Court pursuant to section 9 of the Senior Courts Act 1981

9 October 2013

JUDGMENT

Introduction

1. The claim is made by trustees pursuant to section 57 of the Trustee Act 1925 ("the Act") "or the Court's inherent jurisdiction in relation to trusts". The trustees, John Mitchell Wardrop ("Mr Wardrop") and Michael Steven Walker ("Mr Walker"), are both licensed insolvency practitioners and partners in KPMG LLP of London ("the Trustees"). The claim concerns trust arrangements that were established to deal with certain protected liabilities of English & American Insurance Company Limited ("EAIC"). EAIC was incorporated in England & Wales on 28 June 1929 to write insurance business and was initially a subsidiary of Bowring Services Limited (formerly C.T. Bowring & Co Limited). The Trustees make their claim as the current trustees of a trust inserted into Schemes of Arrangement which have been put in place to deal with the insolvency of EAIC.

2. In paragraph 3 of his witness statement in support of the application, Mr Wardrop has summarised the reason for the making of the application in the following terms, namely

"In essence, very briefly, the Application is made because the existence of a small subset of beneficiaries who potentially have rights to benefit from the trust fund

means the Trustees are unable to make the anticipated distribution to the vast majority of beneficiaries whose claims will in the near future become ascertained. Moreover, absent assistance from the Court, this will continue to be the case potentially for years to come. This is obviously prejudicial to the vast majority of the beneficiaries."

3. The application has been made by Mr Giles Richardson of Counsel instructed by Clifford Chance on behalf of the Trustees. Mr Richardson has submitted an opinion dated 13 March 2013 and has made submissions orally on 3 October 2013 and in writing by a skeleton argument dated 27 September 2013. There has been nobody who has appeared to contest the application despite notification of relevant parties. Whilst the application has been unopposed, it has been evident from the measured and balanced submissions which have been made that the Trustees have been mindful of the special responsibility to ensure that the Court is accordingly fully informed of the relevant factual background and the law before reaching its decision. In particular, attention has been given to enable the Court to be satisfied before reaching its decision (a) that it has jurisdiction to entertain the application and (b) that it can properly exercise its discretion to do what is being asked of it: see Mummery LJ in *Southgate v Sutton* [2011] EWCA Civ 637 at paragraphs 8 and 9.

Factual background to the application

4. The factual background to the trust, to the issues facing the Claimants as trustees and thus to the present proceeding is of some complexity. It is summarised in the Claim Form and set out more fully in the statement of one of the Trustees, Mr Wardrop, at paragraphs 3 and 6 – 36.

5. In brief summary, EAIC was incorporated in England & Wales on 28 June 1929 to write insurance business and was initially a subsidiary of Bowring Services Limited (formerly C.T. Bowring & Co Limited). Since that date, EAIC had been involved in a number of underwriting activities. EAIC's active underwriting operations included participation in a number of "pools" of business which underwrote marine, aviation and non-marine insurance and reinsurance business (the **"Pools"**).

6. EAIC experienced an increase in claims notifications during 1992. In particular, EAIC's marine account experienced a substantial volume of additional losses, largely unprotected by EAIC's reinsurance programme. The adverse claims development resulted in a significant deterioration in the company's financial position. It was clear to EAIC and its group holding companies that it and they faced real issues affecting their solvency arising from long tail liabilities to which it was exposed (including U.S. asbestos related liabilities). As EAIC had a significant share of the Pools' liabilities, it was agreed that the Pools would cease taking on new business. It was also agreed that EAIC would cease underwriting completely with effect from 23 November 1992.

7. On 19 March 1993, a winding-up petition was presented by EAIC acting by its directors, and Anthony James McMahon and Roger Smith, partners in KPMG Peat Marwick, were appointed as provisional liquidators by order of the court. The provisional liquidators developed a run-off plan for EAIC which included the implementation of a "reserving" scheme of arrangement under section 425 of the Companies Act 1985 under which EAIC continued in run-off and made payments to creditors pro rata on their agreed claims known as "Established Scheme Liabilities" (**"ESLs"**). This Scheme (the **"Original Scheme"**) became effective on 8 February 1995.

8. The Original Scheme was amended by a revised scheme, approved by the Court and effective from 31 August 2000 (the "Run-Off Scheme"). It was at this point that the trust arose. It arose because some EAIC policy holders' policies had been issued through the Institute of London Underwriters (the "ILU"). Those policy holders had the benefit of guarantees given in their favour to the ILU as their trustee by other companies in EAIC's group. Those companies were also within insolvency processes. In essence, their office holders agreed to compromise the ILU's claims against them under the guarantees by making a payment of £9,783,906 to the ILU. The ILU then agreed to settle that sum into a trust for such policy holders within the overall context of EAIC's proposed Run-Off Scheme: see clauses 1.2 and 1.3 of the Trust Deed.

9. In 2009, the scheme administrators determined that it was appropriate further to revise the schemes of arrangement. The key element of this further amendment was the

setting of a bar date for claims into EAIC's estate. On 6 October 2010 the Court sanctioned such an amended scheme (the **"Closing Scheme"**), with a bar date of 11 April 2011.

10. The beneficiaries of the Trust are defined as any "*creditor of EAIC... who has (or potentially has) a valid and enforceable claim properly due and payable by EAIC under a policy signed and issued by the ILU on EAIC's behalf ... on or after 1 September 1983*".

11. Amongst the universe of policy holders with such policies issued on or after 1 September 1983 are a small number who also have the benefit of a Letter of Credit issued in favour of the ILU by Marsh & McLennan Companies Inc ("**Marsh Mac**")..." Marsh Mac which is available to satisfy EAIC's proportion of any valid claim under policies issued by EAIC through the ILU in the period from 3 July 1980 to 6 October 1983 (both dates inclusive). These are those policy holders with policies issued through the ILU between 1 September 1983 and 6 October 1983 (again, both dates inclusive) (the "**Overlapping Beneficiaries**"). These policy holders fall within the definition of "Beneficiary" within the Trust Instrument but, if they ever make a claim, may well make it under the Letter of Credit (which ought to give them a complete recovery), rather than making a claim in the Schemes or to the trust fund. (Assuming they did, Marsh Mac would then be subrogated to their claims under the relevant policies, however, and hence might itself then claim through such policy holders to the trust fund.)

12. There were, however, two categories of claim or potential claim into the EAIC estate which it was determined were not appropriately to be included within the Closing Scheme. One of these is what is styled **"Marsh Mac Protected Liabilities"**. These were liabilities of EAIC to policy holders who also had rights under a letter of credit from Marsh Mac to make them whole. Hence they might have elected or might well elect to claim against Marsh Mac rather than seek a dividend from the EAIC estate. (Marsh Mac would or might then have a right of subrogation to claim against the EAIC estate.)

13. The Marsh Mac Protected Liabilities, therefore, continue to be subject to the Run-Off Scheme rather than the Closing Scheme. In consequence, no bar date attaches to such claims. A no doubt unintended effect of this has been to "freeze" the trust fund. This is because, whilst the great majority of policy holders entitled or potentially entitled to benefit from the trust fund are subject to the Closing Scheme, a small number (19 out of 782) are not, because their claims are Marsh Mac Protected Liabilities (the **"Overlapping Beneficiaries"**). The relevant claims on policies issued by EAIC are largely ones arising from asbestos exposure and pollution claims.

14. As a result, on the definitional terminology within the trust deed, EAIC's potential liability to them is a "Relevant Liability" and has not ceased to be so but is not (yet) an "Established Liability".

15. Further, by clause 2.2 of the trust deed (tab 4, p. 35):

> "*... payments shall be made to Beneficiaries only after the Trustees are satisfied that all Relevant Liabilities have become Established Liabilities ... or ceased to be Relevant Liabilities, whereupon the Trust Fund shall, after payment of or allowance for all costs, charges, expenses and disbursements, be distributed amongst the Beneficiaries pari passu*".

16. Paragraph 4 of the skeleton of Mr Richardson then sets out in very clear terms the nature of the dilemma which faces the trustees and the trust as a whole in the following terms, namely

> *"4. The trust deed contains no power of amendment or of resettlement or the like. The commercial result is a disconnect between the operation of the Closing Scheme and the administration of the trust:*
>
> *4.1 The sums held in trust were and are simply intended to provide "top up" payments to policyholders of EAIC who had the benefit of the guarantees extracted by the ILU, topping up the dividend they are entitled to as part of EAIC's general body of unsecured creditors.*

4.2 The Closing Scheme is intended to and will deal with the great majority of policy holders' general claims into EAIC's estate. A final dividend to them will be made in the relatively near future. (The precise date is not certain, but it is likely to be before the end of 2013.)

4.3 It is inherent in the Closing Scheme running alongside the Run-Off Scheme that the scheme administrators will undertake a reserving exercise based on actuarial calculations. The purpose of this will be to reserve a pool of assets to cover the anticipated claims into the estate of those creditors whose claims remain subject to the Run-Off Scheme. The balance of the estate will then be distributed to all other creditors on a final distribution under the Closing Scheme. This strategy has been approved by the Court on the approval of the Closing Scheme. In consequence, and but for the trust issues arising in relation to the trust, the administrative costs necessary to deal with the claims of all creditors subject to the Closing Scheme would then come to an end. And each such creditor would have received the total amount to which they were entitled from the estate.

4.4 The assumption when the trust was drafted was plainly that all claims into the EAIC estate would be conclusively dealt with by some reasonable point in time, when a final distribution of both the general estate and the trust fund would be made. This was on the basis that all "Relevant Liabilities" would have become "Established Liabilities" or would have been rejected or otherwise ceased to be Relevant Liabilities. Thereafter, the trust fund could and would be distributed to all entitled beneficiaries in one go on a final general distribution of the estate and at that reasonable date.

4.5 By reason of (a) the exclusion of the Marsh Mac Protected Liabilities from the Closing Scheme and (b) the overlap between policy holders with such liabilities and policy holders who are potential beneficiaries of the trust, however, no such distribution of the trust fund to those policy holders who are clearly beneficially entitled and who will otherwise receive their final distributions under the Closing Scheme shortly is prima facie lawful.

4.6 It also appears likely that the residual Run-Off Scheme will continue to operate for a considerable further period, running to some years. (How long exactly it will have to continue for is not known at present.)

4.7 Absent a mechanism to resolve the situation, therefore, policy holders whose claims are subject to the Closing Scheme and who are also entitled to a "top up" payment from the trust will not receive those payments for a lengthy and uncertain period after they have received their general final distributions. In addition, the Trustees will need to continue to administer the entire trust fund for the entire beneficial class, adding material administration expenses which will be borne by the trust fund, contrary to all beneficiaries' interests."

Quantification of beneficial entitlements

17. The EAIC estate overall is a substantial one: to January 2013, the scheme administrators had distributed about US$322m on claims subject to the Schemes, those claims amounting to about US$716m in total.

18. The trust fund, as at 31 December 2012, was valued at £1,053,269 and US$19,745,039.

19. There are 5,652 policies potentially covered by the ILU guarantees, whose holders thus potentially have a beneficial entitlement to a share of the trust fund. These are held by, in effect, 782 policy holders, including 19 Overlapping Beneficiaries. It appears very unlikely that further policy holders will now emerge to add to the number of Overlapping Beneficiaries.

20. To date, the overall level of claims paid or accepted by the scheme administrators held by the 782 policy holders totals US$73,411,712. Of this, just US$20,430 is referable to claims of the Overlapping Beneficiaries and these are paid claims, which have been satisfied.

21. The essential driver of the application is to bring the operation of the trust into line with the operation of the Run-Off Scheme and the Closing Scheme. It is of the essence of both of these schemes that the scheme administrators will create a reserve to meet claims of the creditors left within the Run-Off Scheme whilst making a distribution to all other creditors. That reserve will be calculated on the basis of actuarial calculations of likely entitlements of these creditors in the Run-Off Scheme.

In the Scheme of Arrangement dated 28 October 1994, reserving is identified as a purpose of the Scheme. Clause 1.4.1 reads as follows:

"The purpose of the Scheme is:

(a) (subject to certain restrictions on the taking or continuing of any Proceedings against the Company) to enable the liabilities of the Company in respect of the Scheme Claims to be established and ascertained in the normal course; and

(b) To provide for the payment of dividends by the Company to those of its creditors whose Scheme Claims have from time to time become established; whilst

(c) Providing for the retention by the Company of sufficient cash assets to enable the same dividends to be paid by the Company to those of its creditors whose Scheme Claims become established at a later date."

22. To this end, the Trustees need to ensure that sufficient funds are retained by way of reserve to ensure that early distributions do not disadvantage the payment to reserve beneficiaries.

23. The Trustees through KPMG have undertaken an actuarial review to establish the presently certain (but unpaid) and the potential prospective claims of the Overlapping Beneficiaries to the trust fund itself. The results appear at page 123 of the exhibit to Mr Wardrop's statement, within the second box on the page, headed "Total by Guarantor". As set out there:

(1) The total amount of "outstanding" claims (that is, valid claims not yet paid) from policy holders with the benefit of the Marsh Mac letter of credit comprise the sum of US$4,477,616. But none of these claims are held by the Overlapping Beneficiaries.

(2) The Review provides three assessments of potential "Incurred But Not Reported" ("IBNR") claims levels, from low to high.

24. It will be noted that the actuarial report also states as follows:

a. *"We do not believe that the data is as complete or as accurate as would be ideal for projecting outstanding liabilities. As such we must bring to the reader's attention the inherent uncertainty in our projections"* (p. 14); and

b. *"The inherent uncertainty of the insurance process makes it almost certain that actual developments will vary from the best estimate projections and it is also possible that the result will ultimately fall outside the estimated range. As such, the range is provided to ensure that it is understood that there is significant uncertainty surrounding any best estimate of reserves for this business and that alternative outcome should be considered"* (p. 20).

25. Despite this, Mr Wardrop's statement indicates how unlikely it is that there are new Beneficiaries who have not yet made a claim, such that it is unlikely that there will be a result outside the possible ranges of outcomes. In particular, reference is made to the following:

a. (paragraph 38) *"...the likelihood of any 'new' Beneficiaries, in addition to the 831 identified to date, making a claim against the Trust in the future is minimal, especially considering the fact that underwriting ceased some 20 years ago (in 1992)..."*

b. (paragraph 39) *"In order for a new policyholder to be identified, over and above the holders of the 5,652 policies written prior to 1990, it would have to have policies written prior to 1990, have had no claims values at the time of conversation to Pro's old system in 1990 and have had no claim movements in the period 1990 to the Bar Date of 11 April 2011, the possibility of which is negligible"*

c. (paragraph 54)*: "In respect of the IBNR figures, the calculation of likely future claims is not an exact exercise and KPMG's Actuarial Report provides a range of possible outcomes, from low to high. It is customary for a mid-range figure to be used when making provisions in insurance companies' books. That is the approach which the Trustees propose to adopt here."*

26. In other words, on an actuarial calculation of appropriate reserving levels, the most appropriately taken assessment of the level of claims to be made by Overlapping Beneficiaries is US$14,952. Further, the range between the low and high IBNR estimates, moreover, for the Overlapping Beneficiaries' claims is just US $15,684.

27. As set out at paragraph 46 of Mr Wardrop's statement, the anticipated rateable pay out to beneficiaries is about 28% of the face value of their overall claims. Hence, as set out at paragraph 55 of Mr Wardrop's statement, what is said to be the most appropriately assessed prospective level of entitlement of the Overlapping Beneficiaries to the trust fund is just, on a conservative basis, (US$14,952 x 30%) or US$4,485. If an even more conservative basis is adopted, said to be a high IBNR (incurred but not reported), the sum is still small, namely (US$23,010 x 30%) or US$6,903.

28. The Trustees consider that it is prudent to maintain in the Reserve an amount of US $25,000 to cover their reasonable costs in maintaining the Trust Fund and in making further payments to Reserve Beneficiaries. Consequently, the Trustees propose to keep the total sum of US $30,000 in the Reserve: see paragraph 55 of Mr Wardrop's statement.

The possible solutions

29. Three solutions have been advanced. They are set out in the order of preference in which they have been advanced.

30. The first and primary one is under section 57 of the Act by way of apportionment of the Fund so as to create a principal sub-trust for the vast majority of beneficiaries and a residual sub-trust for the Overlapping Beneficiaries. The second and secondary one is under the inherent jurisdiction of the Court, sometimes referred to as the ***Re Benjamin*** [1902] 1 Ch 723 jurisdiction, to grant a power to make interim payments to beneficiaries with Established Liabilities on the basis of actuarial advice and leaving sufficient within the trust fund to secure the due payment of sums to Overlapping Beneficiaries who come to have Established Liabilities thereafter. The third and least favoured is the same, but pursuant to section 57 of the Act. In the Opinion of Mr

Richardson in March 2013, there were only two options canvassed, the first and the third above. The second of the three options has been introduced into the written and oral submissions as a result of the recent decision of David Richards J in ***MF Global UK Limited*** [2013] EWHC 1655.

The first option: Section 57 of the Act by way of apportionment of the Fund.

31. The principles applicable to the application for additional powers under section 57 of the Act are set out in the Opinion at paragraphs 21-34. Section 57 of the Act provides as follows:

> *"57. — **Power of court to authorise dealings with trust property.***
>
> *(1) Where in the management or administration of any property vested in trustees, any sale, lease, mortgage, surrender, release, or other disposition, or any purchase, investment, acquisition, expenditure or other transaction, is in the opinion of the court expedient, but the same cannot be effected by reason of the absence of any power for that purpose vested in the trustees by the trust instrument, if any, or by law, the court may by order confer upon the trustees, either generally or in any particular instance, the necessary power for the purpose, on such terms, and subject to such provisions and conditions, if any, as the court may think fit and may direct in what manner any money authorised to be expended, and the costs of any transaction, are to be paid or borne as between capital and income.*
>
> *(2) The court may, from time to time, rescind or vary any order made under this section, or may make any new or further order.*
>
> *(3) An application to the court under this section may be made by the trustees, or by any of them, or by any person beneficially interested under the trust.*

(4) This section does not apply to trustees of a settlement for the purposes of the Settled Land Act 1925."

32. In ***Alexander v Alexander*** [2011] EWHC 2721, Morgan J was faced with the issue as to whether it was proper to vary a will trust by the exercise of the s. 57(1) jurisdiction on facts very dissimilar to the instant case. Morgan J identified the conceptual task faced by the Court on an application under s. 57(1) as follows:

"*Under s. 57(1) of the 1925 Act, there are three matters to be considered in turn. The first is whether the court has jurisdiction to act under that subsection. The second is whether it is expedient to confer the power which is sought. The third is whether the court should, in the exercise of its discretion, confer that power...*" (at paragraph 12).

33. He went on to note that, when considering the issue of expediency:

"*This requires me to look at the interests of the trust as a whole, that is, the interests of the beneficiaries collectively. Where beneficial interests may be affected in different ways by what is proposed, all interests must still be considered. I should attempt to hold the scales fairly between the various interests*" (at paragraph 23).

34. Finally, in relation to the Court's ultimate discretion, he noted that:

"*Normally, where a transaction is expedient within the subsection, the court would exercise its discretion to confer power on the trustees to effect the transaction. However... the court can take into account the wishes of the settlor when deciding whether, in the exercise of its discretion, to confer the relevant power on the trustees*" (at paragraph 33).

35. As to what is expediency, Mr Richardson helpfully referred me to the decision of the New Zealand Supreme Court in Christchurch of ***In Re Dawson (Deceased)*** [1959] NZLR 1359 where the third paragraph of the headnote, referring to the New Zealand equivalent of Section 57, summarises the reasoning of FB Adams J by saying the word *"expedient" "does not require the Court to be satisfied that the transaction is expedient or advantageous to the interests of each and every beneficiary considered*

separately. The Court must take into consideration the interests of all the beneficiaries, and, upon a broad and commonsense view of the matter, must be able to conclude that the proposed transaction can fairly be said to be expedient for the trust as a whole."

36. It might at first sight appear that the language of Section 57 is limited to the grant of additional powers of administration in relation to the on-going management of a trust fund, not its distribution or appointment to or for the benefit of beneficiaries, and that it cannot be used to advance the timing of the payment of monies to most beneficiaries. However, the authorities indicate that in fact it can be used to achieve such purposes because, as Mummery LJ put it in ***Southgate v Sutton*** [2011] EWCA Civ 637 "*The expressions 'other transaction' and 'expedient' in s. 57(1) are very broad*" (at paragraph 6) so that, for instance and in that case, the Court of Appeal was prepared to confer on the trustees powers of "*appropriation and partition of the trust property vested in them*" such that it thereafter was to be held in separate trust funds for discrete classes of beneficiary (at paragraphs 10 and 41 per Mummery LJ).

37. As Mummery LJ went on to articulate, however, broad as "*other transaction*" and "*expedient*" are within s. 57(1):

"*they are confined by the context of the 'management or administration' of the trust property. Thus it has been held that there is no jurisdiction under s. 57(1) to confer a power to depart from the beneficial interests under the trusts by re-writing, remoulding or re-arranging them. Variations of the beneficial interests under the trusts are not, as such, matters of 'the management or administration' of the trust property and 'trust property' cannot be equated with beneficial interests in the trust property...*

It has been held, on the other hand, that an application under s. 57(1) to confer powers for the purpose of a proposed transaction is within the jurisdiction of the

court, if the exercise of the powers conferred by the court under s. 57(1) might only incidentally affect the beneficial interests in the trust property..."[1].

38. In that case, the trustees' application was to obtain a power to apportion the trust fund so as, in the first place, to create a sub-trust for the benefit of US resident beneficiaries who were likely otherwise to suffer double-taxation on eventual capital distributions from the trust. The effect of the apportionment was to alter all beneficiaries' interests from being ones to a share in an undivided universal trust fund of assets to being an entitlement to the whole of a divided part of the trust fund. Previous authority (specifically *dicta* of Goff LJ in ***Re Freeston's Charity*** [1978] 1 WLR 741 (CA)) led Mann J at first instance to determine that this would affect the beneficial interests in the trust in such a manner as meant the Court lacked jurisdiction under s. 57(1) to grant the powers sought by the trustees (see paragraphs 40 - 43 of his judgment).

39. The Court of Appeal overturned his decision. It noted (at paragraph 37) that Goff LJ in ***Freeston*** had not considered the ambit of the "incidental" exception to the principle that beneficial interests must not be varied (i.e. that a variation of beneficial interests which was merely an "incidental" effect of the grant of powers under s. 57(1) was permissible) and that the case which first articulated that exception, ***Re Downshire*** [1953] Ch 218 (at 248 per Evershed MR), was not cited to him.

40. It went on to distinguish *Freeston*, with Mummery LJ holding at [38] that:

"*It is not authority for an unqualified proposition that the partition of a trust fund is always a variation or re-arrangement of the beneficial interests in it, or always has more than an incidental impact on the beneficial interests in it. Freeston was a case of altering the nature of the beneficial interests by the division of the fund, but in circumstances where there were no difficulties 'in the management or administration of the trust property.' Nor was there any suggestion of expediency which would have justified the conferral by the court of a power to partition the trust fund. There was no difficulty of the kind present here of the Trustees having to act even-handedly and*

[1] See also, e.g., *Royal Melbourne Hospital v Equity Trustees Ltd* [2007] VSCA 162 at [171] – [172]; [178] – [186] per Bell AJA.

having to reconcile the different interests of the different beneficiaries under the Settlement."

41. On this basis, the Court of Appeal was prepared to exercise the jurisdiction under s. 57(1) to grant the power of apportionment sought grant powers of apportionment. In doing so, it also drew support from ***MEP v Rothschild Trust Cayman Limited*** [2009] CILR 593, a decision of Smellie CJ in the Grand Court of the Cayman Islands, which had been prepared to grant powers of apportionment on facts which were "*almost identical to the present case in relevant respects* (at paragraphs 25 and 39). That Court has considerable experience in this field due to the large number of trusts in that jurisdiction. In that case, Smellie CJ referred to the administrative powers conferred on trustees by the Cayman equivalent of section 57, saying that *"the jurisdiction exists if what is proposed...is in essence to be regarded as administrative and not dispositive in nature, as being expedient in the interests of the administration or management of the trust."* (paragraph 14). He said the following at paragraphs 15-16:

"15. Even though the transaction would expressly and directly involve the partition of the trust fund into three sub-funds and so fundamentally alter the structure of the trust, I am satisfied that the predominant purpose and practicalities are essentially administrative in nature. This is primarily for the reason already mentioned – that the sub-funds will remain governed by the trusts of the Z Trust and so there are not intended to be any alterations of the respective beneficial entitlements.

16. "There perhaps will, nonetheless, be some unintended, unforeseen and incidental change to the practical beneficial entitlements..."

42. Smellie CJ recognised that this could not be allowed to vary or interfere with or intermeddle with the existing beneficial trusts, but *"there is to be recognised an acceptable exception to the extent that beneficial interests might be affected, but only incidentally affected, by the proper exercise of the powers which the section of the Law does in terms expressly confer."* (paragraph 17). Whilst this did go against the obiter dictum of Goff LJ in *Freeston,* Downshire had not been cited, and Evershed MR had there referred to an exception *"to the extent that they might incidentally be affected by the exercise of the powers which the section does in terms confer"* (at page 248). He also noted that a power to partition, when given expressly, had been

characterised as administrative and not dispositive in nature, citing ***Russell v Inland Revenue Commissioners*** [1988] 1 WLR 834.

43. Applying the foregoing to the instant case, I conclude that the Court has jurisdiction to grant the Trustees power to partition the trust fund under section 57 on the basis of the actuarial calculation of the medium or the high IBNR claims held by Overlapping Beneficiaries. This would be done by creating a principal sub-trust for the vast majority of beneficiaries and a residual sub-trust for the Overlapping Beneficiaries. This would need to be drafted so as to ensure that, in relation to the majority of beneficiaries, clause 2.2 would continue to operate as it presently does but, since the Overlapping Beneficiaries would no longer be amongst the participating or potentially participating class of beneficiaries, distributions could be made to all other beneficiaries as at the same time as final dividends were made to them under the Closing Scheme. The claims of the Overlapping Beneficiaries would continue to be dealt with under the Run-Off Scheme, as presently, along with all other policy-holders with the benefit of the Marsh Mac Letter of Credit. On the eventual conclusion of that Scheme, a payment out of the Overlapping Beneficiaries' sub-trust would then be made to such of their number as had been found to have Established Scheme Liabilities under that Scheme.

44. I find that whilst the effect of the foregoing would be to affect the beneficial interests in the trust, it does so only incidentally. As Mr Richardson observed in his Opinion, an apportionment of the trust fund so as to create a sub-fund for the Overlapping Beneficiaries cannot with certainty ensure that each of them who is ultimately found to be entitled to a payment from the fund – or indeed each of the other beneficiaries found to have a good claim to the main fund – will receive exactly what he would have received had the fund remained undivided. This is because the amount placed into the sub-fund can only be based on the estimations undertaken by the actuaries as to what the value of the valid claims of the Overlapping Beneficiaries is likely to be. Nonetheless, it is very likely that, if such apportionment takes place, each beneficiary who is ultimately entitled to a payment from the trust fund will receive a sum very close in amount to that which he would have done had no apportionment taken place, and any variation ought to be very modest. As noted above, the variation between the low and high estimates of IBNR (recognising that they are estimates only) in relation

to the Overlapping Beneficiaries as calculated within the Report amounts to just US$15,684 (against a trust fund with a value of £1,053,269 and US$19,745,039, that is less than one tenth of one percent of the fund).

45. Moreover, undertaking what in effect is a reserving exercise on the basis of actuarial calculation for the claims of Overlapping Beneficiaries is of a piece with the general reserving exercise in relation to the claims of policy holders with the benefit of the Marsh Mac Letter of Credit: their claims are not within the Closing Scheme and the scheme administrators will create a reserve to meet their anticipated valid claims before making a final dividend from the EAIC estate to all those policy holders who are within the Closing Scheme. This will likewise be based on actuarial calculations. It is, in essence, the only practical way in an insolvency of an insurance business in which the decision to separate out the administration of the claims of those with the benefit of Marsh Mac Letter of Credit from the administration of the rest of the EAIC estate can be managed.

46. Applying the reasoning of the Courts in the above decisions, and in particular the Court of Appeal in *Sutton v England*, such variation of beneficial entitlement, which is very likely to be miniscule in amount, is no more than "incidental" in the context of the expedient grant of the power to apportion. The sort of actuarially guided determination of the appropriate respective interests of the sub-fund for Overlapping Beneficiaries and the general fund for other beneficiaries as would take place in this case would have, on any reasonable approach to the level of uncertainty in that determination, what can properly be categorised as an incidental effect only on the beneficial interests of all beneficiaries.

47. I now consider whether the expediency criterion in Section 57 is satisfied. This approach would be the most expedient one, being more commercially rational than the alternatives, since it will bring both classes of beneficiary into line with their respective positions more generally under the Closing Scheme and the Run-Off Scheme. It will also be a more cost effective and administratively efficient means of proceeding. This is particularly the case in the light of the following factors. First, in the event that there is no court intervention, there is clearly real and material prejudice to the vast majority of beneficiaries if funds to which they are entitled remain tied up

within the trust for, potentially, many years after the final distribution has been made from the Closing Scheme. This would be because of a very small number of Overlapping Beneficiaries both in number and in amounts both in absolute terms and relative to the amount of the trust fund as a whole. Secondly, the reserve should be sufficient to cover the entire claim of the Overlapping Beneficiaries, the risk of the the claims falling outside the ranges provided being negligible for the reasons set out at the above cited paragraphs 38 and 39 of Mr Wardrop's statement. Thirdly, a comparison of the expected administrative expenses of the first and second options points to expediency of the first option. The reserve for the first option is just US$25,000 due to the relatively small number of policies affected (paragraph 55 of Mr Wardrop's statement) against a reserve of US$150,000 in respect of the interim distribution second option due to the vast number of policies affected (paragraph 60 of Mr Wardrop's statement). Thus, considering not each and every beneficiary separately, but taking into consideration the interests of all of the beneficiaries and taking a broad and common-sense view, I am entirely satisfied that the expediency criterion is satisfied.

48. As regards the third criterion of discretion, the factors relating to expediency indicate that the discretion should be exercised in favour of using the Section 57 power, and there does not appear to be any reason indicating that the discretion should not be exercised.

The second option – interim jurisdictions under the inherent jurisdiction of the Court

49. I should say for the purpose of completeness what I would have held if, contrary to the above, the first and primary option could not be applied. If presented with the second option and not the first option, I should have made an order for interim distribution in the form of the second order sought based on the analysis of the Court's *Re Benjamin* [1902] 1 Ch 723 jurisdiction undertaken by David Richards J in *Re MF Global UK Ltd* [2013] EWHC 1655 (Ch). In essence, in that case the Court

considered that the *Re Benjamin* jurisdiction was capable of application to a fact situation which was to some degree at least analogous to the present one: see [29] – [32] of the judgment.

50. In the present case, given the actuarial review's analysis of the probable value of the Overlapping Beneficiaries' claims and given that the Court's jurisdiction to give a *Re Benjamin* direction cannot remove beneficial entitlements, it seems appropriate that any such direction involve the same reserving exercise as does the Trustees' application for a power to make an interim distribution under section 57. The effect of such an order would be to authorise the Trustees' conduct in paying out monies to most beneficiaries and so immunise them from personal liability if it turns out that they have distributed too much to some beneficiaries and thereby breached trust to other beneficiaries. (As summarised in the passage from *Lewin on Trusts* 18th ed. quote at paragraph 30 of the judgment of David Richards J.)

51. However, this is not the order which I shall make because I am of the view that such a direction would be less satisfactory than the first and primary option, namely the grant of a power to partition under section 57, since it would not determine the extent of any person's beneficial entitlement. Hence here, it would not definitely establish the Overlapping Beneficiaries' entitlement. It has, therefore, the same practical disadvantages and would lead to the increased administrative costs to which I have referred above, being a multiple greater than the estimated costs in respect of the first option of apportionment. Nonetheless, if the first option had not been available, I should have found that it is appropriate to make an order in the form of the second option, namely of distribution. The reason for this is because the alternative of no distribution for years is highly undesirable, and the concomitant expenses of administering the distribution is far preferable to leaving payments for many years.

52. In view of my conclusions thus far, as Mr Richardson agreed orally, it is not necessary for me to make a conclusion as regards the third option. I should add for the purpose of completeness that I endorse the conclusions in paragraphs 17-19 of Mr Richardson's opinion that a fourth option of effecting a "winding up of EAIC so as, potentially, to release the trust fund" would for the reasons there set out not have been

at all satisfactory. In line with paragraph 20 of the Opinion, I regard the application to the Court as having been absolutely appropriate and necessary in all the circumstances.

Conclusion

53. For the reasons set out above, I find that the Court has jurisdiction to grant the Trustees power to partition the trust fund under section 57 on the basis of the actuarial calculation of the medium or high IBNR claims held by Overlapping Beneficiaries.

54. I find that this approach would be expedient and that it is the appropriate course to exercise. It is more commercially rational than the alternatives, since it will bring both classes of beneficiary into line with their respective positions more generally under the Closing Scheme and the Run-Off Scheme. It is more cost effective than the alternatives and it is an administratively efficient means of proceeding.

55. There is a minor change I shall make to that which has been suggested as appropriate. For reasons which I expressed during the hearing, I take the view that the higher IBNR should be used to calculate the appropriate reserve for Overlapping Beneficiaries' claims.

56. Whilst I do not doubt that the medium IBNR would be regarded usually as appropriate, I have come to the view that the higher IBNR would not deprive the beneficiaries other than the Overlapping Beneficiaries of any significant percentage of their entitlements. On the other hand, the Overlapping Beneficiaries (however small their number and their claims in amount) might significantly be affected if it turned out that the higher IBNR turned out to be the one closest to the actual value of the claims of the Overlapping Beneficiaries. In my judgment, the order ought to reflect this finding so that paragraph 1(1) refers to assets to the value of US$32,500.

57. I therefore make the order in the first form provided to me, the form of which I shall attach to this Judgment.

Clive Freedman
9.10.13

FORM OF ORDER

UPON the claim of the Claimants (the "**Trustees**") commenced by Part 8 Claim Form dated 11 July 2013 pursuant to section 57 of the Trustee Act 1925

AND UPON hearing counsel for the Claimants

AND UPON reading the Witness Statement of the First Claimant

AND UPON the Court being satisfied that the transaction referred to hereunder is expedient but cannot be effected without the assistance of the Court by reason of the wording of clause 2.2 of the Trust Deed

IT IS ORDERED that:

1. The Trustees shall hereby have conferred on them the power to apportion the trust fund held by the Trustees on the terms of the trust declared on 29th May 2003 by Anthony James McMahon, Thomas Alexander Riddell and the Institute of London Underwriters (the "**Trust Fund**" and the "**Trust Deed**") so that from the whole of the present Trust Fund:

   (1) assets to the value of US$32,000 (the "**Reserve Fund**") may be apportioned from the Trust Fund by the Trustees so as to be held on the trusts set out in the Trust Deed subject to this Order for the benefit of those Beneficiaries whose claims are as at the date hereof not subject to the Scheme of Arrangement sanctioned by the High Court and with an effective date of 12 October 2010 (the "**Closing Scheme**") because their claims are excluded from it by reason of their being entitled under an irrevocable letter of credit issued in their favour by Marsh & McLennan Companies Inc as described in the First Claimant's Witness Statement (the "**Reserve Beneficiaries**"); and

   (2) the balance of the assets of the Trust Fund as at the date of this Order (the "**Closing Scheme Fund**") may be apportioned by the Trustees so as to be held on the trusts set out in the Trust Deed subject to this Order for the benefit of those Beneficiaries (as defined in the Trust Deed) whose claims are as at the date hereof subject to the Closing Scheme (the "**Closing Scheme Beneficiaries**").

2. Upon and following such apportionment taking place:

   (1) payments shall be made from the Closing Scheme Fund to the Closing Scheme Beneficiaries only after the Trustees are satisfied that all liabilities of EAIC to them have become Established Liabilities, as defined by the Trust Deed, (or the equivalent in the event of the winding up of EAIC) or have ceased to be liabilities of EAIC to them, whereupon the Closing Scheme Fund shall, after payment of or allowance for all costs, charges, expenses and disbursements, be distributed amongst the Closing Scheme Beneficiaries *pari passu*; and

(2) payments shall be made from Reserve Fund to the Reserve Fund Beneficiaries only after the Trustees are satisfied that all liabilities of EAIC to the Reserve Fund Beneficiaries have become Established Liabilities, as defined by the Trust Deed, (or the equivalent in the event of the winding up of EAIC) or have ceased to be liabilities of EAIC to Reserve Fund Beneficiaries, whereupon the Reserve Fund shall, after payment of or allowance for all costs, charges, expenses and disbursements, be distributed amongst the Reserve Fund Beneficiaries *pari passu*