



IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
ROYAL COURTS OF JUSTICE

Claim No. HC13C02801 of 2013

11-7-13

CLAIM FORM
(CPR Part 8)

IN THE MATTER OF ENGLISH & AMERICAN INSURANCE COMPANY
LIMITED AND
IN THE MATTER OF THE TRUSTEE ACT 1925

Claimants

(1) John Mitchell Wardrop

- and -

(2) Michael Steven Walker

of

KPMG LLP
8 Salisbury Square
London EC4Y 8BB



Defendant

Issued without naming a Defendant by Order of Master Marsh of 3 July 2013

Does your claim include any issues under the Human Rights Act 1998? [x] No

Details of claim (see also overleaf)

The Claimants, John Mitchell Wardrop and Michael Steven Walker, who are the trustees of the trust defined herein (the "Trustees" or "Claimants" and the "Trust", respectively), licensed insolvency practitioners and partners in the firm of chartered accountants KPMG LLP of 8 Salisbury Square, London, EC4Y 8BB, hereby apply to the Court for an Order granting powers to the Trustees of the Trust pursuant to Section 57 of the Trustee Act 1925 (the "Act") which they do not currently have either under the trust instrument or at general law (the "Application").

Defendant's Name and Address

N/A

£

Court fee	£465
Solicitor's costs	to be assessed
Issue date	

The Court offices at The Royal Courts of Justice, Strand, London WC2A 2LL are open between 10.00am and 4.30pm (2.30pm during August) Monday to Friday. When corresponding with the Court, please address forms and letters to the Court Manager and quote the claim number.

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Claim No.

Details of claim (continued)

1. This Application concerns the trust fund held by the Claimants (in their capacity as Trustees) on the terms of the Trust, which was 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**") to deal with claims from certain insurance policyholders against English & American Insurance Company Limited ("**EAIC**"), an insurance underwriter. The specific relief sought by the Claimants is as follows:
 - 1.1 Pursuant to the jurisdiction of the Court under section 57 of the Act, the Trustees seek an Order in the form of the draft attached hereto, so as to allow them to deal with the property subject to the Trust in a more expedient manner than currently permitted and in a manner which benefits the vast majority of beneficiaries without material impact on the interests of the small residue of beneficiaries, whose interests will be protected.
 - 1.2 The Trust was created in the course of the management of EAIC's liabilities under various schemes of arrangement approved by the Court pursuant to the Companies Act 1985. The history of these schemes is, in summary, as follows. On 19 March 1993, a winding up petition was presented by EAIC acting by its directors and a run-off plan was developed by the provisional liquidators, appointed pursuant to that petition, under which EAIC continued to operate in run-off and to make payments to creditors pro rata to their agreed claims (defined in the scheme documentation as "**Established Scheme Liabilities**"). This Scheme (the "**Original Scheme**") became effective on 8 February 1995, although it was later amended with an effective date of 31 August 2000 (from

when it was labelled the "**Run-Off Scheme**") and further adjusted with an effective date of 12 October 2010, when a "**Closing Scheme**" took effect.

- 1.3 By the Closing Scheme (1) a bar date of 11 April 2011 for the submission of claims and (2) a "once and for all" valuation of all EAIC's remaining liabilities (including contingent and prospective liabilities) were imposed on all potential policy-holders' claims, with the exception of policy holders who have the benefit of a letter of credit issued by Marsh & McLennan Companies Inc (the "**Marsh Mac Letter of Credit**")
- 1.4 A small number of these excluded policy holders also fall within the beneficial class of the Trust. The beneficial class overall is made up of policy holders with policies issued through the Institute of London Underwriters (the "**ILU**"), who had the benefit of guarantees issued by the group of which EAIC was part. In the case of such policy holders whose policies were issued between 1 September 1983 and 6 October 1983 (both dates inclusive), they also have the benefit of the Marsh Mac Letter of Credit and, due to Marsh Mac's refusal to provide an undertaking that it would follow the valuation of claims under the Closing Scheme, their claims have been excluded from the Closing Scheme in order to avoid claims from these beneficiaries being potentially disadvantaged (the "**Overlapping Beneficiaries**"). As a result no bar date currently applies to their claims. A consequence of this is that their claims need not become Established Scheme Liabilities under any of the schemes and, on the terms of the Trust Deed, have not become what are defined as "Established Liabilities".
- 1.5 The present Application is brought because, by a quirk of the Trust Deed explained at paragraph 1.6 below, the existence of this small subset of potential beneficiaries (i.e. the Overlapping Beneficiaries) means the Claimants are unable to make any distribution due to the vast majority of beneficiaries whose claims have been ascertained. Moreover, this will continue to be the case, absent assistance from the Court, potentially for years to come. This is obviously prejudicial to the vast majority of the beneficiaries. That prejudice can, the Claimants and their advisers believe, be overcome with the Court's assistance in a manner which ensures that prejudice is not caused to the Overlapping Beneficiaries.
- 1.6 The terms of the Trust (namely clause 2.2 of the Trust Deed) prohibit a payment being made until all beneficiaries' claims have become Established Liabilities or have ceased to be "Relevant Liabilities" as defined by the Trust Deed. As set out at paragraph 1.4 above, in the case of most the Overlapping Beneficiaries, their claims have not become Established Liabilities and, moreover, they will not cease to be Relevant Liabilities for the foreseeable future because of the lack of a bar date to them.
- 1.7 In the Application, the Claimants are seeking to resolve these difficulties by obtaining power from the Court so to enable a payment to be made to those beneficiaries whose claims have become Established Scheme Liabilities and to set aside a reserve amount to cover the claims of the Overlapping Beneficiaries (the "**Reserve**"). In summary, therefore, the Application seeks to amend the Trust Deed as follows:

- (a) to allow the Claimants to make a payment to those beneficiaries whose claims are ascertained as Established Scheme Liabilities and which can be paid from the funds held in the Trust; and
- (b) to allow the Claimants to operate the Reserve with the remaining funds in the Trust to cover the claims of the Overlapping Beneficiaries.

1.8 The Court is invited to consider two methods of giving effect to the Application. The first is to order an apportionment of the Trust, whilst the second involves giving the Claimants the power to make interim payments out of the Trust to beneficiaries with Established Scheme Liabilities.

- (a) Under the first method, the Trust Fund would be apportioned so as to create a sub-trust for the Overlapping Beneficiaries (the "**Reserve Fund**"), ensuring that, in relation to the majority of beneficiaries, the Trust would continue to operate as it presently does (the "**Apportioned Fund**"). Once the Claimants are satisfied that all liabilities of the Apportioned Fund beneficiaries have become Established Scheme Liabilities or have ceased to be Relevant Liabilities of EAIC, after payment of or allowance for all costs, charges, expenses and disbursements, the Apportioned Fund will be distributed among the Apportioned Fund beneficiaries *pari passu*.

The claims of the Overlapping Beneficiaries would continue to be dealt with under the Run-Off Scheme, as presently, with reference to the Reserve Fund. On the eventual conclusion of that Scheme, a payment out of the Reserve Fund would then be made, *pari passu*, to such of the Overlapping Beneficiaries as had been found to have Established Scheme Liabilities under that Scheme, after payment of or allowance for all costs, charges, expenses and disbursements.

- (b) Under the second, alternative method, the Claimants would be empowered to make interim payments from the Trust Fund to those beneficiaries whose claims are subject to the Closing Scheme. Rather than apportioning the Trust Fund into two wholly separate funds with distinct classes of beneficiaries, payments would be made out of the existing, undivided Trust Fund to Beneficiaries with Established Scheme Liabilities, on the basis of actuarial advice, leaving a sufficient amount as a reserve within the Trust Fund to cover any potential future payment that may become due to such Overlapping Beneficiaries as come to have Established Scheme Liabilities. The Claimants propose to make provision for a "cushion" (based on actuarial advice) in the Trust Fund against the risk that there would not be sufficient funds left in the Trust for payment to Overlapping Beneficiaries after the accelerated distribution to beneficiaries whose claims have already been ascertained.

Final payments under this method would be made only once the Claimants are satisfied that all liabilities of EAIC to all beneficiaries have become Established Scheme Liabilities (or the equivalent in the event of the winding up of EAIC) or have ceased to be Relevant Liabilities of EAIC to such beneficiaries.

2. Part 8 of the CPR applies to this claim pursuant to Part 64 and PD 64.

STATEMENT OF TRUTH

The Claimants believe that the facts stated in this Claim Form are true.

I am duly authorised by the Claimants to sign this statement

Full Name: Giles Allison

Name of Claimants' Solicitor's firm:

CLIFFORD CHANCE LLP

Signed: 

Solicitors for the Claimants

Position or Office held: Senior Associate

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Claimants' Solicitors address to which documents should be sent if different from address overleaf including (if appropriate) details of DX or fax.

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