

No. of 2013

**IN THE HIGH COURT OF JUSTICE**

**CHANCERY DIVISION**

**ROYAL COURTS OF JUSTICE**

**IN THE MATTER OF  
ENGLISH & AMERICAN INSURANCE COMPANY LIMITED**

**AND**

**IN THE MATTER OF THE TRUSTEE ACT 1925**

**BETWEEN**

**(1) JOHN MITCHELL WARDROP**

**(2) MICHAEL STEVEN WALKER**

Claimants

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**FIRST WITNESS STATEMENT  
OF GILES ALLISON**

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I, **GILES ALLISON** of 10 Upper Bank Street, London, E14 5JJ, a solicitor in the firm of Clifford Chance LLP, of the above address, **WILL SAY AS FOLLOWS:**

1. I am a solicitor employed by Clifford Chance LLP ("**Clifford Chance**"). I qualified as a solicitor in September 2000. Clifford Chance are the legal advisers to the trustees of the Trust, as defined in paragraph 13 below, (the "**Trustees**"). I am a senior associate in the team of lawyers that is advising the Trustees on these proceedings and I work on this matter subject to the supervision of the partners of

Clifford Chance. I am duly authorised to make this statement on behalf of the Trustees.

2. I make this statement in support of a proposed application by the Trustees pursuant to section 57 of the Trustee Act 1925 (the "**Act**") requesting that this Honourable Court grant powers to the Trustees which they do not currently have either under the trust instrument or at general law (the "**Section 57 Application**"). The purpose of the Section 57 Application is to allow the Trustees to deal with the property subject to the Trust in a more expedient (being both more practical and efficient) manner than is currently permitted and in a manner which benefits the vast majority of beneficiaries of the Trust ("**Beneficiaries**") without material impact on the interests of a small residue of Beneficiaries.
3. In summary, the Section 57 Application is being brought 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 term become ascertained. Moreover, this will continue to be the case, potentially, for years to come. This is obviously prejudicial to the vast majority of the Beneficiaries. Consequently, the Trustees intend to ask the Court for whatever powers are appropriate to enable them to make payments from the Trust's assets to those Beneficiaries whose claims have already become ascertained, rather than delay making payments to those Beneficiaries until such time as all the Trust's Beneficiaries become eligible to receive payments. Accelerating payment in this way will require a variation of the Trustees' powers.
4. The Section 57 Application will be made by way of a Part 8 Claim Form. Before that Claim Form is issued, however, the Trustees intend to apply to the Court for preliminary directions on how to deal with certain issues arising from the Section 57 Application (the "**Directions Application**"). The directions sought, in summary, are that the Institute of London Underwriters (the "**ILU**") is an appropriate entity to be appointed Defendant in the Section 57 Application;
5. The information set out in this witness statement is derived from my own knowledge and from information provided to me by the following sources: The Trustees, members of staff at KPMG who have been assisting the Trustees and Pro Insurance Solutions Limited ("**Pro**"), who maintain the books and records of English & American Insurance Company Limited ("**EAIC**"). Where within my own knowledge, I confirm that the facts and matters set out in this statement are true. Where not within my own knowledge, they are true to the best of my knowledge, information and belief and are derived from the sources hereinafter referred to.

6. A bundle of copy documents is exhibited to this witness statement, marked "GA1". References to page numbers in this statement are references to pages of "GA1".

### **Background**

7. The full background to the Section 57 Application and EAIC's insolvency is set out in the First Witness Statement of John Mitchell Wardrop, who is one of the two Trustees ("**Mr Wardrop's Statement**"). A copy of the final draft of Mr Wardrop's Statement is exhibited, at pages 1 to 20. Mr Wardrop's Statement is made in support of the Section 57 Application and I do not propose to repeat its contents, as the purpose of my statement is to explain why the Trustees are making the Directions Application. However, in the paragraphs below I repeat relevant paragraphs of Mr Wardrop's Statement where they are of relevance to the Directions Application.

### *EAIC's Schemes*

8. 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). In July 1980, Bowring Services Limited, together with EAIC, was acquired by Marsh & McLennan Companies, Inc ("**Marsh Mac**"). In October 1983, Marsh Mac sold EAIC to English & American Group PLC ("**Group**"), which provided insurance-related services through its subsidiary companies. At some stage thereafter, a corporate restructuring took place which saw the insertion of another company, English & American Insurance Holdings PLC ("**Holdings**"), between Group and EAIC, with the effect that Holdings became EAIC's immediate parent company.
9. EAIC ceased underwriting in November 1992 and on 19 March 1993 a winding-up petition was presented by EAIC acting by its directors. Anthony James McMahon and Roger Smith, partners in what was then 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. The Original Scheme was amended by an amending scheme of arrangement which became effective on 31 August 2000 (the "**Run-Off Scheme**"). By 2009 the scheme administrators decided that it was no longer cost-effective to continue the Run-Off Scheme and proposed a "closing" or "cut-off" scheme which would have the effect of imposing a "once-and-for-all" valuation of all of EAIC's remaining (including

contingent and prospective) liabilities with the exceptions of two specific categories of liabilities: the Protected Scheme Claims of EAIC's Protected Policyholders and the Marsh Mac Protected Liabilities (both as defined in the Scheme). On 9 October 2010 the High Court sanctioned a further amending scheme proposed in respect of EAIC (the "**Closing Scheme**") that was designed to assist with the closure of various pools of business in which EAIC and other insurance companies had written business.

10. The Bar Date for the submission of claims in the Closing Scheme was 11 April 2011. Since that date, the scheme administrators have been assessing and agreeing the claims of Scheme Creditors. The scheme administrators have made an interim payment to those Scheme Creditors whose claims had been agreed, in January 2012. A further interim dividend was paid in December 2012 and it is intended that a final dividend will be paid at a later stage once Pro and the scheme administrators have agreed all Scheme Creditors' claims, and such claims have become "Established Scheme Liabilities" ("**ESLs**") for the purposes of the Closing Scheme. It is anticipated that this final dividend will be paid at some stage in 2013. The Closing Scheme will have fulfilled its purpose after that final payment has been made.

### *The Trust*

11. EAIC was a member of the ILU for a number of years. During the period of EAIC's membership a number of EAIC's holding companies or former holding companies, including Marsh Mac, Group and Holdings, executed guarantees addressed to the ILU in relation to certain of EAIC's liabilities arising under policies signed and issued by the ILU on EAIC's behalf. EAIC was not itself party to any of these guarantee agreements.
12. Group and Holdings executed guarantees addressed to the ILU in June 1987 (the "**Guarantees**"). These instruments (as amended) provided for those companies to guarantee the obligations of EAIC to those holders of policies issued through the ILU during the period of their ownership of EAIC - essentially from 1 September 1983 onwards.
13. Group and Holdings became insolvent and went into administration in April 1993. Under a scheme of arrangement promulgated for those companies by the insolvency officeholders appointed to run their affairs, those companies paid a cash sum of £9,783,906 to the then scheme administrators of EAIC. Under the terms of a trust deed executed on 29 May 2003 between the scheme administrators and the ILU (the "**Trust Deed**"), the scheme administrators are required to hold that cash payment (plus income accruing thereon) upon trust for the Beneficiaries of the guarantees given to the ILU by Group and Holdings - i.e. the holders of policies issued by

EAIC through the ILU from 1 September 1983 onwards (the "**Trust**"). A copy of the Trust Deed is at pages 21 to 30.

14. One group of EAIC creditors who are potential beneficiaries under the Guarantees are those who have Marsh Mac Protected Liabilities (as defined below). Marsh Mac secured an irrevocable letter of credit in favour of the ILU (the "**Letter of Credit**") which is available to satisfy EAIC's proportion of any valid claim of a creditor of EAIC properly due and payable by EAIC under policies signed and issued by the ILU on EAIC's behalf with an inception date between 3 July 1980 and 6 October 1983 (both dates inclusive) (the "**Marsh Mac Protected Liabilities**"), the period during which Marsh Mac was the parent company of EAIC.
15. The then provisional liquidators of EAIC were informed by the ILU that payment under the letter of credit would be made to entitled creditors of EAIC - through the offices of the ILU - upon submission to the ILU by the EAIC creditor of a duly executed subrogation receipt in favour of Marsh Mac. The Letter of Credit was procured and issued pursuant to an agreement between the ILU, Marsh Mac and Bowring Services Limited (which was EAIC's immediate holding company between those dates). That agreement recorded the surrender and discharge of guarantees addressed to the ILU and executed by Bowring Services Limited and by Marsh Mac on 7 July 1980 and 23 July 1980 respectively.
16. Pursuant to these arrangements, policyholders of EAIC may, depending upon the dates when their policies incepted or were issued, have rights of recourse to the Letter of Credit. The scheme administrators approached Marsh Mac to seek an undertaking that they would agree to follow the valuation of claims under the Closing Scheme but they declined to provide any such undertaking. As a result the scheme administrators decided, in order to avoid the claims from these Beneficiaries being potentially disadvantaged, to exclude such claims from the Closing Scheme. As a result, claims arising under these policies which have not crystallised into "Established Scheme Liabilities" under the Closing Scheme will remain subject to the Run-Off Scheme and will continue to be adjusted by EAIC in the ordinary course.
17. The scheme administrators will reserve a sufficient amount of assets to provide for the cost of adjusting these creditors' claims under the Run-Off Scheme and of making payment to those creditors as their claims become established liabilities under the Run-Off Scheme.
18. The scheme administrators also decided, however, to allow holders of policies giving rise to Marsh Mac Liabilities to participate in the Closing Scheme through an

"opt-in" procedure. I understand from Pro that five holders of these policies have opted-in to the Closing Scheme.

19. The dates of the policies covered by the Guarantees (from 1 September 1983 onwards) and the Letter of Credit (3 July 1980 and 6 October 1983) suggest that there is an overlap period of approximately five weeks with the effect that policies written between 1 September 1983 and 6 October 1983 would be covered both by the Guarantees and the Letter of Credit. I refer to creditors with such policies as "**Overlapping Beneficiaries**". As explained in paragraph 27 of Mr Wardrop's Statement, the Overlapping Beneficiaries have various means of recourse to payment depending on the nature of their claims: (i) from EAIC by opting-in to the Closing Scheme; (ii) from EAIC through its participation in the Original and/or Run-Off Schemes; (iii) from Marsh Mac under the Letter of Credit; (iv) from the Trust, as being a Beneficiary under the Guarantees.

### **The Section 57 Application**

20. Paragraphs 31 to 36 of Mr Wardrop's Statement explain the mechanics for making payments to Beneficiaries. The timing of payments is regulated by clause 2.2 of the Trust Deed, which states:

"Subject to clause 2.5, payments shall be made to Beneficiaries only after the Trustees are satisfied that all Relevant Liabilities have become Established Liabilities (or the equivalent in the event of the winding up of EAIC) 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*".

"Relevant Liability" is defined as "a liability of EAIC to a Beneficiary" and "Established Liability" is defined as being "an Established Scheme Liability in accordance with the Terms of the EAIC Scheme".

21. The Trustees have been advised by Clifford Chance that the wording of clause 2.2 of the Trust Deed means, in effect, that the Trustees are unable to make any payments to any Beneficiaries until all Beneficiaries' claims have become established claims in the relevant EAIC scheme. This creates a difficulty for the Trustees as, whilst the great majority of Beneficiaries' claims against the Trust are likely to be crystallised in the short term under the Closing Scheme, the claims of the Overlapping Beneficiaries may not be agreed in the short term because they fall to be determined in the ordinary course under the Run-off Scheme. That would mean that EAIC's liabilities to such creditors may never crystallise under the schemes and so become "Established Liabilities" for the purposes of clause 2.2 of

the Trust Deed. As a consequence, the Trustees would be unable to make payments to any Beneficiaries until such claims had become "Established Liabilities" in this manner.

22. As stated above, the purpose of the Section 57 Application is to enable the Trustees to make payments to those Beneficiaries whose claims have become "Established Liabilities" without having to wait until this has happened to all Beneficiaries' claims. The Trustees intend to operate a reserve from which future payments to Overlapping Beneficiaries or any other Beneficiaries whose claims are not yet "Established Liabilities" can be made. The amount of that reserve has been calculated with actuarial assistance.

### **The Directions Application**

23. As stated in paragraph 4 above, the Section 57 Application is required to be made by way of Part 8 Claim Form (the "**Claim Form**"). A draft of the Claim Form that the Trustees intend to issue is at pages 31 to 37. A key issue for the Trustees to determine before the Section 57 Application is made is who to name as the defendant on the Claim Form. Therefore, the main purpose of the Directions Application is to seek the Court's confirmation that the ILU is the appropriate entity to be named as defendant in the Trustees' proposed Section 57 Application.
24. The Trustees have considered their options in respect of naming a defendant. The Trustees are not seeking redress as against any particular entity, so there is no easily identifiable "defendant" as such. One option would be to seek the Court's permission pursuant to CPR Rule 8.2A to issue the Claim Form without naming a defendant, on the basis that the Trustees would then seek to present all relevant arguments to the Court at the hearing of the Section 57 Application, both in favour of and against the relief sought. However, the Trustees are reluctant to proceed in this manner because they consider that the complexity of the Section 57 Application and the fact that the relief sought by the Trustees is for amendments to the terms of a trust warrant the involvement of an independent party who could argue any alternative position to that taken by the Trustees. Such a party would be a "representative defendant" and the Court has power to appoint such a person pursuant to CPR Rule 19.7.
25. The question then arises as to who would make an appropriate representative defendant. Possible defendants would include one or more Beneficiaries, as being the persons who would be affected by the Section 57 Application, or the ILU, as being the original signatory to the Trust Deed, which was instrumental in its establishment. Indeed, it was precisely because the policies held by the

Beneficiaries were ones issued for them through the ILU that the Trust and its trust fund came into existence at all.

26. There are 5,652 policies potentially covered by the Guarantees and Pro has identified that these policies relate to 831 creditors of EAIC across two areas of business, aviation and marine. Some creditors appear in both aviation and marine policy lists and therefore are "doubled-up". Consequently, the number of unique Beneficiaries who are potentially affected by the Section 57 Application is 782, of whom 19 are Overlapping Beneficiaries. One Overlapping Beneficiary, Davies & Newman Holdings, is now known to have been dissolved in 1995.
27. Pro is confident that the likelihood of any 'new' Beneficiaries, in addition to the 782 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). Underwriting records held by Pro include the complete underwriting records for the years 1990, 1991 and 1992, such that Pro is able to identify all policies with values in terms of unpaid balances on the Ledger or an Outstanding Claim advice at the time the records were transferred onto the current system operated by Pro, even where there has been no subsequent activity on these claims. Claims made on policies not previously on Pro's system have resulted in the policy being added to its system, thus any policy with claims activity in the past 20 years will be present.
28. Pro advises that addresses for all but five of the 782 identified Beneficiaries have been located. Given that those addresses are taken from historical information held in EAIC's records, it is inevitable that some addresses are no longer extant. Therefore, and to the extent possible, Pro has attempted to verify as many of these addresses as it can. Pro began this process by referring to its "Established Scheme Liability" schedule which sets out all scheme claims at a creditor level, with both current contact details and relevant banking information where available. A large number of the 835 were found using this resource, and Pro are reasonably confident that the addresses held for those Beneficiaries are valid (not least because these addresses have been used recently in order to issue dividend payments). Any Beneficiaries that were not identified on this schedule were then compared to a "Names & Address Access Database" that Pro has developed to cover the EAIC schemes and continues to update with any address amendments that are advised. There were approximately 40 Beneficiaries that were not found in the database, and an Internet search was then undertaken in order to identify the remainder. Unfortunately, there is no information held at all in respect of five Beneficiaries.
29. If, and in the event that, an appropriate person from amongst the Overlapping Beneficiaries were to wish to be appointed as a defendant to the application, the



Trustees will, obviously, re-address the question of the most appropriate representative defendant to the Section 57 Application. It is not anticipated, however, that any of them will wish to engage so extensively in relation to the application, given how modest are the sums to which their potential claim give rise and that all Beneficiaries' interests are simply commercial: they are all, including the Overlapping Beneficiaries, simply interested in the process in order to receive the ultimate dividend arising from EAIC's insolvent administration that is due to them, at such time as it can be paid to them.

30. Therefore, the Trustees consider that the ILU is an appropriate defendant and is likely to be the most appropriate (indeed the only feasible) one in these circumstances. The ILU was involved in the formation of the Trust and is represented by lawyers who were involved in the drafting of the documentation. The ILU acted in the interests of all Beneficiaries in putting the trust arrangements in place. To the extent that there are counter-arguments against the proposed Section 57 Application, such arguments can well be articulated by the ILU.
31. The ILU has indicated provisionally that it is willing to be named as defendant in the Section 57 Application, provided that no Overlapping Beneficiary wishes to appear as a defendant in these proceedings. As stated in more detail in paragraphs 33 and 34 below, the Trustees will provide notice of the Directions Application to the Overlapping Beneficiaries in order to ascertain their interest and to provide them with the opportunity to appear. It is anticipated that by the time the Directions Application is heard I will have filed a second witness statement which confirms the position in respect of the Overlapping Beneficiaries and the ILU.
32. Should the Court agree that the ILU is an appropriate representative defendant, the Trustees will in any event provide the Beneficiaries with full notice of the Section 57 Application. Further, I confirm that the Trustees will in any event provide the Beneficiaries with notice of the Directions Application.
33. The Trustees will send a letter to all those Beneficiaries for whom a reliable address is available informing them of the time and place when the Directions Application hearing will take place, appending the application notice and the Claim Form and directing them that they should contact the Trustees if they require further information (the "**Letter**"). A copy of the Letter is exhibited at pages 38 to 41. In the event that any Beneficiaries or other persons with an interest in the Directions Application do then make contact with the Trustees, they will be offered copies of the other papers in support of the Directions Application, including this Statement and its accompanying exhibit. They will also be informed by the letter that they

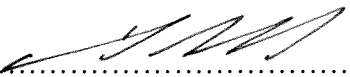
have a right to seek to appear at the hearing, about which they can also contact the Trustees.

34. A website is operated by the Scheme Administrators in respect of the Pools Schemes, at [www.englishandamericanpools.com](http://www.englishandamericanpools.com). It is proposed that notice of the Directions Application (along with the documents in support) and the hearing date will additionally be posted to that website. The Letter will also direct the Beneficiaries to this website and the information displayed there.
35. The Trustees have also considered whether it would be more appropriate for advertisements to be placed in certain newspapers and periodicals which have global circulation within the insurance industry, in order to notify Beneficiaries of the Directions Application. This was the method used to notify potential Scheme Creditors of the relevant meetings convened in respect of the Closing Scheme, as it would not have been practical or indeed possible to ensure that each Scheme Creditor received individual notification of the meetings and the proposed schemes. However, the Trustees have been advised by Pro that the costs of placing such advertisements are considerable – the cost of placing advertisements in the Financial Times and Wall Street Journal, for example, would together be approximately £60,000. Therefore, the Trustees consider that it will be more cost-effective to provide the Beneficiaries with personal notice than to place advertisements in newspapers and trade publications.

### Conclusion

36. For the reasons stated above, the Trustees consider that the ILU is an appropriate person to be named as defendant in these proceedings. Therefore, subject to such communications as may be received from Beneficiaries prior to the Directions Application hearing, the Trustees respectfully ask that at that hearing the Court make an order that the ILU be joined as defendant.

I believe that the facts stated in this witness statement are true.

Signed.  .....

**GILES ALLISON**

Dated *13 May 2013* .....

No. of 2013

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**FIRST WITNESS STATEMENT**

**OF GILES ALLISON**

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