Re English & American Insurance Company Limited

OPINION

---

1. I am asked to provide this Opinion to the two trustees of a trust which has arisen in the course of the administration under Schemes of Arrangement of an insolvent insurance company, English & American Insurance Company Limited ("**EAIC**").

2. It is intended that this Opinion will assist the trustees in determining whether to make an application to the High Court pursuant to section 57 of the Trustee Act 1925 and, if the trustees do determine to bring such an application, it is also intended that this Opinion will be placed before the Court as part of the materials in support of the application.

The factual background

3. The relevant factual background is well known to the trustees, who are also administrators of the Schemes of Arrangement. In addition, I understand that if an application is made to the Court in due course, a detailed factual affidavit will be presented, most likely from Mr John Mitchell Wardrop, one of the trustees and a partner in KPMG LLP ("**KPMG**"). I shall not, therefore, reiterate the full factual background in this Opinion. The key elements of the background for the purposes of the legal analysis contained herein are as follows.

The Schemes of Arrangement

4. On 19 March 1993, EAIC acting by its directors presented a petition for its insolvent winding up and provisional liquidators, being two partners in KPMG, were appointed.

5. On 8 February 1995, a Scheme of Arrangement under s. 425 of the Companies Act 1985 became effective, whereby EAIC continued in run-off and was to make payments to creditors pro rata to their agreed claims, which were labelled "Established Scheme Liabilities" (the "**Original Scheme**"). It was later amended with an effective date of 31 August 2000 (from when it was labelled the "**Run-Off Scheme**"). It was further adjusted

with an effective date of 12 October 2010, when a "**Closing Scheme**" took effect. 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 one specific category of policies, which is discussed below.

6. The administrators of the schemes are now working towards the payment of a final dividend to all eligible creditors and hence the conclusion of EAIC's passage through the insolvency process. Very considerable sums have been involved in that process: I am instructed that as at January 2013, for instance, around US$322m had been paid out to creditors under the Schemes.

The Trust

7. EAIC was a member of the Institute of London Underwriters (**"the ILU"**) for a number of years. In that period, EAIC's holding companies or former holding companies, including Marsh & McLennan Companies, Inc ("**Marsh Mac**"), English & American Group Plc ("**Group**") and English & American Insurance Holdings Plc ("**Holdings**"), issued guarantees addressed to the ILU in relation to policies signed and issued on EAIC's behalf by the ILU.

8. Group and Holdings also became insolvent in 1993. Under their schemes of arrangement, they paid £9,783,906 to the then scheme administrators of EAIC, which, on the terms of a trust instrument executed on 29 May 2003 between the then scheme administrators and the ILU (the "**Trust Instrument**"), the scheme administrators were required to hold (together with accrued income) on trust for the beneficiaries of the guarantees given to the ILU by Group and Holdings (the "**Trust**").

9. The intent behind the establishment of the Trust was obviously to ensure that those policy holders intended to benefit from the guarantees obtained a material benefit from them notwithstanding Group's and Holdings' insolvency. The ILU in effect extracted that benefit from the scheme administrators of Group and Holdings by obtaining the payment of £9,783,906 as the price for the release of the guarantees issued by those companies. That cash benefit was then to be sheltered, until it could be paid out, in a segregated trust fund just for them. Hence they would receive their appropriate dividend from the EAIC estate along with all other policy holders but would also receive an additional payment from the trust fund on top.

10. On the terms of clause 2.2 of the trust instrument:

"... 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".

11. The difficulty faced by the trustees, and which gives rise to the potential application to Court, is that a very small pool of "Relevant Liabilities" have not become "Established Liabilities" and are unlikely to within any reasonable period. The consequence of the wording of clause 2.2 is that the administration of the Trust will remain paralysed such that none of the beneficiaries will receive their proper share from the trust fund for an indefinite and potentially lengthy period. The factual reasons for this, which will, I understand, be set out in full in the evidence in support of any application made to the Court, are in brief summary:

(1) 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"*.

(2) 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 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.)

(3) The terms of the Trust Instrument itself contain no "bar date" by which a claim has to be submitted to the trustees in order for a beneficial interest to arise or to continue. For the vast majority of beneficiaries, this does not matter because their claims are subject to the Closing Scheme such that:

(a) if they submitted claims before the bar date, they will, if valid, become Established Scheme Liabilities under the Scheme and thus Established Liabilities under clause 2.2 of the Trust Instrument; or

(b) if they failed to submit claims before the bar date or do so but their claim is rejected (and not upheld in proceedings thereafter), EAIC will cease to be liable to them and hence they will cease to hold Relevant Liabilities under clause 2.2 of the Trust Instrument.

(4) The scheme administrators have elected, however, to exclude the claims of policy holders who have rights under the Marsh Mac Letter of Credit from the Closing Scheme: clause 4.1.2. Hence they are not subject to the bar date set under that Scheme, but will continue to be administered by the Scheme Administrators under the Run-Off Scheme. (I am instructed that the Scheme Administrators will, with actuarial assistance, create a reserve to satisfy such claims before making the final distribution to all other creditors under the Closing Scheme.)

(5) An effect of the exclusion of the claims of policy holders with the benefit of the Marsh Mac Letter of Credit from the Closing Scheme is that the claims of the Overlapping Beneficiaries, being a sub-set of those policy holders, will, therefore, not become Established Liabilities within clause 2.2 of the Trust Instrument or cease to be Relevant Liabilities within the administration of that Scheme, whereas the claims of the vast majority of policy holders who had the benefit of Holdings' and Group's guarantees to the ILU will have done so.

(6) Instead, they will continue to be administered under the Run-Off Scheme, under which no bar date is in place or is likely to be in the foreseeable future.

(7) This, moreover, effectively freezes the trust fund for an indefinite and potentially very lengthy period because, on the terms of clause 2.2, it will not be the case that, as the Closing Scheme reaches its conclusion with a final dividend to all policy holders who are not

beneficiaries of the Trust, *"**all** Relevant Liabilities have become Established Liabilities"* (emphasis added) within clause 2.2 of the Trust Instrument.

12. I am instructed that there are just 19 policy holders (one of which is a dissolved company) who fall within the class of Overlapping Beneficiaries, out of 831 beneficiaries in total. Their likely entitlement to the trust fund is even more modest as a proportion of it. The trustees have obtained an actuarial report from KPMG which provides information (as at 31 July 2011) in relation to the scale of the Overlapping Beneficiaries' potential claims against the Trust as compared to the overall claims of the 831 beneficiaries (the "**Report**"). Significant aspects of that Report are the following:

    (1) The relevant claims on policies issued by EAIC are largely ones arising from asbestos exposure and pollution claims.

    (2) The Report seeks to calculate the likely level of 'incurred but not reported' ("**IBNR**") claims on policies underwritten by EAIC which have the benefit of ILU Guarantees granted by Marsh Mac on a gross basis (i.e. without taking account of reinsurance to which EAIC may be entitled).

    (3) The Report also seeks to calculate the likely level of IBNR claims on policies whose holders also have the guarantees from Group or Holdings (i.e. the potential claims of Overlapping Beneficiaries).

    (4) As set out on page 7 of the Report, the current level of claims 'paid' (which, I am instructed, means in the case of the relevant policies here, agreed as due for payment[1]) on policies subject to the Marsh Mac Letter of Credit overall is US$41,693,524 of which just US$943 were in relation to policies held by Overlapping Beneficiaries, with US$4,499,524 of 'outstanding' claims (i.e. claims still under negotiation or subject to legal proceedings), of which just US$24,367 were in relation to policies held by Overlapping Beneficiaries.

    (5) The Report's medium estimation of IBNR claims is then US$4,209,651 overall and US$14,952 in respect of Overlapping Beneficiaries' claims.

[1] The Report states that "*paid*" means *"the cumulative paid amount to date + the agreed but unpaid amount"* (p. 21 of the Report). In the case of these claims, they have not in fact been, and cannot be, paid out, due to the wording of the trust instrument, but their validity has been accepted by the scheme administrators.

(6) The actuarial estimations contained in the report are not certain: "*The eventual outcome of these liabilities* [of EAIC] *is still uncertain and may be materially different from what we believe is a best estimate of the liabilities given the available information. We highlight this uncertainty to the reader with the aid of high and low estimates to show the potential variation around our central estimate*" (p. 7).

(7) Moreover:

(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).

13. The upshot, bearing in mind the caveats to the Report, is that the entire trust fund of around £1.1m and US$19.7m will remain, effectively, frozen in the hands of the trustees even after the final distribution to the vast majority of policy holders under the Closing Scheme due to the potential interest in it of claims likely (albeit with a degree of uncertainty attaching to the estimation) to amount to only about US$40,262.

Legal principles

14. In light of the above, there is, in my opinion, 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.

15. This is clearly not what was intended by the ILU or anyone else in establishing the Trust and securing the trust fund for their benefit. The Trust arises, of course, in an insolvency context

and indeed within the overall architecture of the Schemes of Arrangement which are intended to achieve the orderly and efficient dispersal of EAIC's assets to its creditors, in particular policy holders, utilising the usual tools (including cut-off dates and the like) by which to achieve practical justice in the complex situation to which an insolvency of substantial insurance business gives rise. The prejudice arises, moreover, due to the unforeseen interplay of factors which arise from the factual complexity involved in the development of the regime intended to deal with the insolvency, and approved by the Court, as outlined above. If an appropriate resolution to the issue is legally available, it would, in my opinion, be something the trustees can quite properly undertake acting in the best interests of the beneficiaries as a whole and something that, if it is necessary to obtain court sanction, the Court would wish to sanction.

16. In my opinion, moreover, the issue is not one the trustees can reasonably be expected to resolve of their own motion, without the Courts' assistance, if such assistance is properly available to them. The Trust Instrument confers on the trustees no power to amend its terms and the effect of clause 2.2 is quite clear and cannot, in my opinion, be overridden by principles of construction, even given the wide ambit of modern construction principles. It is not, that is, possible, in my opinion, to identify a mistake in the drafting of clause 2.2 or elsewhere in the trust instrument which could be said to lead properly to such "rectification by construction" of that clause as to permit a distribution absent the claims of the Overlapping Beneficiaries having become Established Liabilities.

17. Clause 2.2 does raise the possibility of a distribution to beneficiaries taking place following the winding up of EAIC if all the Relevant Liabilities have, on that event, become *"the equivalent"* of Established Liabilities. It is not at all clear, however, that even were the trustees to take steps to cause EAIC to be wound up the effect would be that "the equivalent" of Established Scheme Liabilities would arise in the case of the Overlapping Beneficiaries' claims. As set out above, by clause 2.6.1 of the Original Scheme, Established Liabilities are defined as arising *"when there has been established (whether (i) by agreement or (ii) by Proceedings which are not subject to any appeal) in relation thereto a present obligation of* [EAIC] *to pay an ascertained sum of money after account ..."*.

18. That is not apt to describe the position of the claims of Overlapping Beneficiaries on a winding up if they fail to prove in it. On the other hand, their claims might then perhaps properly be treated as having *"ceased to be Relevant Liabilities"*, as clause 2.2 also provides,

in the event that they do not prove in the liquidation. Hence one option might be for the trustees to seek the liquidation of EAIC simply in order to extinguish the claims of Overlapping Beneficiaries and hence remove the issue their existence causes. It is not, however, in my opinion clear that this would be an appropriate or potentially even a possible course of conduct for the following reasons:

(1) To seek to procure or bring about EAIC's liquidation is something the trustees, both as trustees and as scheme administrators, can properly do only if it is consistent with their offices and the duties they owe under them. It is not at all obvious that engineering the increased costs of a liquidation process would be in the best interests of beneficiaries of the Trust or of the creditors of EAIC as a whole, in particular if some other option is available. And it is far from clear that, acting as scheme administrators, it would be proper for them so to seek exclusion of the Overlapping Beneficiaries' claims when their motivation for doing so would arise from their office as trustees and their desire, contrary to the interests of those beneficiaries, to overcome an administrative issue faced by them.

(2) Yet further, it may well be that the Run-Off Scheme, like the Closing Scheme, would not in any event terminate on a liquidation of EAIC unless it was such a liquidation as fell within the "Termination Events" specified in clause 15.3 of the Closing Scheme[2]. This is because, in the event of inconsistencies between the two Schemes, the terms of the Closing Scheme are to prevail. And the terms of clause 15.3 of that scheme are narrower than the equivalent within the Run-Off Scheme. The relevant sub-clauses in the Closing Scheme, clauses 15.3.1 (b) and (c), would require, under the first, that the scheme administrators conclude that that scheme is no longer in the interests of the Scheme Creditors generally, which would seem difficult, or, under the second, that a winding up resolution be passed by the Scheme Creditors generally, which may be difficult to achieve. Absent satisfaction of those provisions, however, the Closing Scheme will be unaffected by any liquidation of EAIC and the fate of the Run-Off Scheme in that event is uncertain. If, however, the Run-Off Scheme also does not terminate on EAIC's liquidation, it would presumably remain the case that the policy claims of all

[2] Due to the ambiguity in the wording of clause 10.2.1 of the Closing Scheme (in particular, the parenthetical "(but subject to the terms thereof)" and the cross-reference in clause 15.3.1 of the Closing Scheme back to clause 7.2.4 of the Run-Off Scheme.

holders of policies with the benefit of the ILU guarantees would continue to be administered under that scheme, including therefore those of the Overlapping Beneficiaries. In consequence, they would not have to prove in EAIC's liquidation and their claims would remain "Relevant Liabilities" within the meaning of the Trust Instrument.

19. In addition, and more generally, the trustees (who are of course also the scheme administrators) are concerned that using a winding up process to try to resolve the present issue would involve significant additional costs, both from the liquidation process itself and as a result of there being two differently timed sets of sizeable payments to be administered (i.e. one under the Closing Scheme and another, later on, under the winding up process). This would obviously be undesirable and contrary to the interests of all creditors if it is also unnecessary.

20. Furthermore, whilst this is ultimately a matter for the trustees and has been discussed with them, as I understand it, it is not, in my opinion, a situation in which the trustees can reasonably be expected (by the courts or anyone else) to engage in what is sometimes styled a 'judicious breach of trust', by ignoring the terms of clause 2.2 and making distributions to most beneficiaries as though there were no bar on them doing so. The trustees come to be trustees by reason of their role as administrators of the court-sanctioned Schemes of Arrangement that are intended to deal, within the envelope of court sanction and supervision, with the whole universe of claims arising from EAIC's insolvency. If it is possible for them to resolve the issues they face with the assistance of the Court, it is, in my view, appropriate that they should do so.

The prospective application under section 57 of the Trustee Act 1925

21. The issue then is what assistance the Court might be able to offer. A number of possibilities were canvassed in my original Instructions and these have been discussed in conference. The only one which, in my opinion, does provide an avenue by which properly to seek to engage the Court's aid is section 57 of the Trustee Act 1925, which provides:

> *"**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."

22. It might at first sight appear difficult to fit the sort of power the trustees would be seeking here – to put it non-technically, to advance the timing of the payment of monies to most beneficiaries – within the language used by section 57 which, on its face, might appear to be 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. However, it is clear from the authorities 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 [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 [10] and [41] per Mummery LJ).

23. 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..."[3].

24. 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 issue is described in the judgment of Mann J at first instance [2009] EWHC 3270 (Ch) at [9] and [23] to [26].) 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 affected 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 [40] to [43] of his judgment).

25. The Court of Appeal overturned his decision. It noted (at [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.

---

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

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

27. On this basis, and also because it was clear in the Court of Appeal, as it had not been at first instance, that:

    (1) Chief Justice Smellie of the Grand Court of the Cayman Islands, in *MEP v Rothschild Trust Cayman Limited* [2009] CILR 593 , had been prepared to grant powers of apportionment on facts which were "*almost identical to the present case in relevant respects*" (at [25] and [39]); and

    (2) There was no other basis on which the serious prejudice that was likely to be suffered by the US resident beneficiaries could be addressed (specifically, that an application could not be made under the Variation of Trusts Act 1958) (at [40]);

    the Court of Appeal was willing to exercise the jurisdiction under s. 57(1) to grant the power of apportionment sought (at [41]).

28. Two other recent authorities are, in my opinion, relevant to the trustees' decision whether to make an application under s. 57(1) and to the Court's consideration of that application.

29. The first is a decision of Floyd J, *NBPF Pension Trustees Ltd v Warnock Smith* [2008] EWHC 455 (Ch). The central issue before the Court in that case was whether it was proper to bless a proposed scheme by pension trustees for the distribution of residual sums held within the former pension schemes of the National Bus Company, which had been privatised between about 1986 and 1989. In considering that matter, however, an issue arose as to whether it

was proper for the court to exercise its jurisdiction under s. 57(1) so as to permit the trustees to make payments to or for the benefit of beneficiaries in a form prohibited by the trust instrument because, at the time it was drawn up, adverse tax consequences would have ensued had they taken that form. Those tax consequences would no longer ensue and the bar on payments being made in the relevant manner to certain beneficiaries was contrary to their interests and would result in them receiving less than the trustees –and the Court – considered they ought to receive.

30. In these circumstances, the Judge determined that it would be proper for the Court to exercise its s. 57(1) jurisdiction, holding that:

"*The Trustees' proposals are practical ones aimed at getting some money to particular classes of recipient who are otherwise fully entitled to receive benefits under the scheme. The power is not general, but limited to the specific cases set out in the proposals. I am wholly satisfied that what is proposed in merely a variation in the mechanism for getting that money to its intended recipients and does not disturb the underlying interests. I therefore decided to make the order sought on this ground*" (at [28]).

31. Finally, in *Alexander v Alexander*, 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 so as to sell a cottage held in trust, which the testator had assumed his step-granddaughter would want to live in for her life, and in which she was therefore granted a life interest, with her two children taking after her death. In the event neither she nor her children did want to live in or retain the cottage and the trustees therefore sought a power to sell it and reinvest the proceeds of sale.

32. The facts are, therefore, some way from being analogous to the present case. Morgan J, however, helpfully 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 [12]).

33. He went on, also helpfully, 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 [23])[4].

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 [33]).

The powers the Court might grant under s. 57(1)

35. Given the state of the authorities, as set out above, there are, in my opinion, two potential means by which the Court might be persuaded to grant the trustees powers to remedy the position arising from the wording of clause 2.2 of the Trust Instrument.

The first approach: apportionment of the trust fund

36. The first would be to apportion the trust fund so as to create 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.

37. 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

[4] See also *Re Dawson* [1959] NZLR 1360 at 1362, l.40 – 1363, l.23 per F.B. Adams J and *Royal Melbourne Hospital v Equity Trustees* op cit at [166].

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.

38. There is, however, one possible difficulty with this approach. This is that, as set out above, s. 57(1) does not permit the court to grant a power where its effect would be to affect the beneficial interests in the trust, otherwise than incidentally.

39. In the present case, the beneficiaries who are ultimately to benefit from the trust fund are all those whose claims are subject to the Closing Scheme and who are found to hold Established Scheme Liabilities under that scheme together with all those Overlapping Beneficiaries who are found to have Established Scheme Liabilities under the Run-Off Scheme. Each will then take a share *pari passu* with all others of the trust fund. In effect, therefore, each will have a fixed interest in the trust fund, and the trustees have no discretion as to what share each shall receive.

40. 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. As set out above:

    (1) The level of "Outstanding" claims reported by the actuaries in relation the Overlapping beneficiaries only records claims made but not yet determined. Some of those claims may be rejected wholly or in part in due course.

    (2) Moreover, the estimation of IBNR liability to Overlapping Beneficiaries is necessarily uncertain, as the Report sets out and as summarised above.

41. Given this, it is almost certain that, if such apportionment takes place, each beneficiary who is ultimately entitled to a payment from the trust fund will receive more or less than he would have done had no apportionment taken place. It is also the case, however, that:

    (1) the actual marginal difference between what he does receive and what he would otherwise have received ought to be very modest. The variation between the low and

high estimates of IBNR 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 about £1.1 and US$19.7m, i.e. less than one tenth of one percent of the fund).

(2) 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.

(3) Yet further, there is, in my opinion, a real sense analytically in which *any* apportionment of a fund will almost certainly alter the value of beneficiaries' entitlements from those they had previously. This is really, in my opinion, what Goff LJ was concerned about in the *Freeston* case: indeed, it is clear from his judgment that the effect of a *de facto* division of the fund which had taken place in that case had led to very different investment returns as between its divided parts and thus, if it were upheld, as between the beneficial interests to it (see [1978] 1 WLR 741 at 748A-D and 749A-D). The point is that, even if:

   (a) the respective shares of all beneficiaries of a trust to its trust fund are certain at the point of apportionment, and

   (b) the value of all assets within the fund can be valued with absolute certainty at the point of apportionment (which will be doubtful unless they are cash or its equivalent),

   the investment performance of a sub-trust will inevitably depart from that which would have applied to the whole fund prior to division, unless (a) the assets in each are the same, (b) they are held in the same proportions and (c) all perform no differently

regardless of the scale of investment in them. Unless all those conditions are met, which may be very unlikely indeed, the value of the interest of, and the amount of any ultimate distribution to, the beneficiaries of each part of the divided trust fund thereafter will inevitably be in a different amount – it may be less or more – than would have been the case had the fund not been divided.

(4) This, however, did not trouble the Court of Appeal in *Sutton v England*, which was content that such a variation of beneficial entitlement was no more than "incidental" in the context of the expedient grant of the power to apportion.

(5) In my opinion, although the issue is plainly arguable both ways, 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 on apportionment here 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.

42. If the Court does have jurisdiction to grant a power of apportionment, then in my opinion it is very likely indeed to determine that it would be expedient to grant that power and that it would be a proper exercise of its discretion to do so, for all the reasons canvassed already.

The second approach: power to make interim payments

43. It may be that, however, having considered the issues raised by the prospective apportionment of the trust fund, the Court is concerned that such an exercise of its discretionary jurisdiction would not be appropriate, for the reasons canvassed above or otherwise.

44. If that were to be the case, as an alternative, the Court may instead be willing 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. That reserve could be made more substantial than the sub-fund which would naturally arise on apportionment (e.g. it could be based on the "high IBNR" estimation of the Overlapping

Beneficiaries' claims or an even greater cushion, rather than the "medium IBNR" estimation which would seem the most logical figure to include in an apportionment exercise). By this means, the Court might consider there was greater – and sufficient – certainty that the Overlapping Beneficiaries would not ultimately be left short-changed by the exercise.

45. It does also, however, have disadvantages as compared to the apportionment approach:

    (1) It would be less conceptually elegant than apportionment since it would fail to reflect within the trust the division between classes of policy holder which the scheme administrators have developed more generally (i.e. between those with the benefit of the Marsh Mac Letter of Credit, who remain subject to the Run-Off Scheme, and all others, who are subject to the Closing Scheme).

    (2) And it would as a result be less practically efficient, since it would mean that all beneficiaries with valid claims would remain interested in the residual reserve. Hence, if the claims of Overlapping Beneficiaries which ultimately emerged and were accepted or proven fell below the level at which the division of the residue between them would provide each with a distribution *pari passu* to all other beneficiaries with valid claims, there would remain an ultimate residual sum which ought to be subject to a further distribution *pari passu* to all beneficiaries with valid claims – i.e. all such Overlapping Beneficiaries plus all beneficiaries with claims subject to the Closing Scheme. This could well mean that, long after the closure of the Closing Scheme, the trustees were faced with having to locate all such beneficiaries, with whom they may have had no contact for years, in order to distribute what would almost certainly be negligible sums to them. It would indeed be administratively impossible for the trustees to undertake that exercise (leaving orphaned assets in their hands), unless a sufficiently substantial reserve for its cost is created now to ensure that it can be done, which reserve might well exceed the residual amount requiring distribution. In other words, the cost (to all beneficiaries) of distributing a negligible sum to each might well exceed the overall residual sum being distributed to them collectively.

46. Given this, whilst, in my opinion, both approaches should be presented to the Court, it is the former – apportionment – that the trustees should contend was the more expedient solution and that which was more in the interests of the beneficiaries as a whole, with the latter presented as an alternative open to the Court.

The role of the ILU in an application under section 57(1)

47. A further issue which I should address is the following. The court may be concerned that it should hear all such arguments as can be put against its exercise of its discretionary jurisdiction under section 57(1): our system is an adversarial one and, save where the court is exercising a supervisory jurisdiction, it will be concerned about the grant of relief absent satisfaction that it has heard all proper argument against relief being sought from it.

48. This has been referred to in the context of section 57(1) applications in a number of the authorities. In *NBPF Pension Trustees v Warnock-Smith* op cit at [14] (albeit that there the s. 57(1) issue was just one subsidiary matter) Floyd J described it as "*necessary to have parties before it who can present the Court with a critical analysis of the proposals, and who can present any arguments for saying that the proposals are wholly or partially invalid*".

49. In an application such as the present one, this may, with respect, be overstating the position somewhat. Nonetheless, it certainly is the case, as Mummery LJ noted in *Southgate v Sutton* op cit, where all parties supported the application, that:

"*[8] The court must decide, on the particular facts of each case, on which side of the line the application falls. That may be difficult, especially when, as is the case here, the application is not opposed. The court is nervous about the fundamental matter of jurisdiction if it is asked to act without the benefit of adversarial argument that normally disciplines its decision-making processes.*

[9] In those circumstances counsel for the concurring parties bear a special responsibility. It is their duty to give the court all the help that it requires to each the right decision. It must be established to the satisfaction of the court (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."

50. In the present case, the application, if made, will plainly present quite complex legal issues as to the correct approach to the section 57 jurisdiction, which are, moreover, so far as I can ascertain, also novel, at least to some extent. Given that, as discussed previously with my Instructing Solicitors, it would be desirable to locate some suitable person to be joined to the application and to appear at its hearing to present such arguments as ought to be put to

the Court which run contrary to the grant of the relief sought. (Notwithstanding that it is envisaged that this Opinion will also be before the Court.)

51. It may be that some policy holders within the class of beneficiaries will wish to appear on the application. And I understand that any application will be sent to all of the beneficiaries for whom the trustees have what they believe to be correct addresses (some 730 out of the 831 beneficiaries, including the 18 Overlapping Beneficiaries still, to the best of their knowledge, in existence). It may well also be, however, that none will in fact wish to take part in such a court process and, in the context of the insolvency process as a whole, there is no real reason why they should regard themselves as expected to intervene in proceedings. The context is, obviously, very different to a family or private trust. Because of that, and in order to ensure that the contrary position is put properly, I understand that the trustees and my Instructing Solicitors have established contact with the ILU and its solicitors and ascertained that it is willing to assist by arranging the instruction of an advocate to present appropriate argument to the Court as a representative party for the Overlapping Beneficiaries, subject, obviously, to its costs of so doing being met. In my opinion, the ILU's involvement in this way would be desirable and appropriate:

    (1) It was the effective settlor of the Trust and was party to the Trust Instrument: the funds which flowed into the Trust from Group and Holdings were in essence the consideration extracted by the ILU for the release of the guarantees given to it which it held for the benefit of and on trust for the relevant policy holders. (The Trust Instrument recites at clause 1.2.1 that *"the ILU declared that it held the benefit of such obligation* [of Group and Holdings to make payments under the guarantees] *on trust for such persons ... as were entitled to such sums"*.) When it comes to the exercise of the Court's discretion, as indicated by Morgan J in *Alexander v Alexander* referred to at paragraph 31 above, it may also be that the Court would take succour from an indication from the ILU that it supported the application overall (subject to its articulation of such points as ought to be put on behalf of the Overlapping Beneficiaries).

    (2) Whilst, moreover, the ILU itself has no personal interest, of course, in the trust fund, it was instrumental in its establishment and it has acted historically following EAIC's insolvency in the interests of all policy-holders of policies issued through it such that it has sought directly to intervene to protect their interests. It is, therefore, probably more informed about the hinterland of any application than any other person would be,

including any individual policy holder. This may be of assistance to the advocate instructed by it.

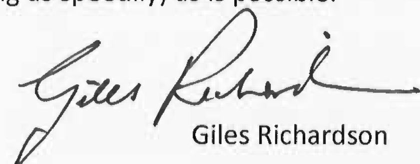
(3) Its involvement will be limited to, in essence, instructing appropriate counsel or advocates to appear on the application to address the legal arguments before the Court. It will not be necessary for it to put in any evidence to do that and its lack of personal interest in the outcome will not affect the ability of the counsel or advocate instructed by it to give the court the assistance it ought to have in relation to the legal issues raised by the application.

(4) Given the above, if the Court is concerned that some alternative representation be present at the hearing of the application and if none of the Overlapping Beneficiaries indicate any interest in appearing themselves, it is likely, in my opinion, to consider the ILU to be a suitable and appropriate person to represent the Beneficiaries' interests, in particular those of the Overlapping Beneficiaries, and would accordingly make an order under CPR Part 19.7(2)(d) appointing it to represent them.

Conclusion

52. In my opinion, it is the case that, whilst the outcome of an application is not certain and the Court will certainly be concerned to ensure that all the somewhat complex and technical issues are fully addressed to and considered by it, the Court is likely ultimately to conclude that this is a case in which it can and should exercise its jurisdiction under section 57(1) to assist the trustees and beneficiaries overcome the real practical issue they face and the real prejudice that a failure to address it would cause policy holders.

53. This is perhaps especially so where those policy holders have already been kept out of monies to which they are entitled for many years as a result of EAIC's, Holdings' and Group's insolvencies and the trust itself is intended simply to be part and parcel of the mechanism by which they obtain what is due to them as efficiently (including as speedily) as is possible.



Giles Richardson

Serle Court

13 March 2013