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

SKELETON ARGUMENT

FOR THE CLAIMANT

Reading time and list

Time estimate

The Claim appears to be unopposed but is factually and legally relatively complex. The overall time estimate is 4 hours and, assuming the Court will not wish to deliver an *ex tempore* judgment, if time permits, reading time of 2h 30 mins and a hearing time of 1h 30 mins is suggested.

Reading List (in suggested order):

1. Claim Form (**hearing bundle tab 1**)
2. Skeleton Argument (and the sections of Counsel's Opinion to the Trustees referred to herein, which is exhibited at JMW1, p. 155 (**tab 4**))
3. Witness Statement of John Wardrop (**tab 3**)
4. Declaration of Trust dated 29 May 2003 (**tab 4**, pp. 31 – 39)
5. Draft Order (**tab 2**)

Introduction and factual background

1. As set out in the Claim Form, the Claimants to this Part 8 Claim are the current trustees of a trust. The trust was inserted into Schemes of Arrangement which have been put in place to deal with the insolvency of EAIC.

2. The factual background to the trust, to the issues facing the Claimants as trustees and thus to the present proceeding is relatively complicated. It is summarised in the Claim Form and set out more fully in the statement of one of the Trustees, Mr Wardrop, at para.s 3 and 6 – 36, which it is suggested the Court review after this Skeleton.

3. In very brief summary, however, the key facts relevant to the issues facing the Claimants as trustees are as follows:

   3.1 EAIC was a long standing insurance business based in London, dating from 1929.

   3.2 By 1992, it was clear to it 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).

   3.3 In March 1993, accordingly, its directors petitioned for its liquidation. Provisional liquidators were appointed from KPMG. They developed a run-off strategy involving a reserving scheme of arrangement under s. 425 CA 85. This was approved by the Court and became effective from 8 February 1995 (the "**Original Scheme**").

   3.4 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 at tab 4, p. 34.)

3.5 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.

3.6 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**" in the evidence. 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.)

3.7 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.

3.8 An effect of this has been, as it has transpired, 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**"). 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".

3.9 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*".

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.

5. It is against this context, therefore, that the Trustees bring the present proceedings.

Issuing the Claim Form: lack of a defendant

6. Master Marsh' Order of 3 July 2013 directing, inter alia, the issue of the Claim Form without naming a defendant is at tab 5 of the hearing bundle and followed an oral hearing before him.

7. There are, obviously, in essence two classes of beneficiary and potential beneficiary affected by the Trustees' proposed partition of the trust fund or accelerated distribution of the bulk of it: on the one hand, there are the rump of the Overlapping Beneficiaries whose claims are subject to the Run-Off Scheme and, on the other, there are the other beneficiaries who are within the Closing Scheme and whose claims were (a) submitted before the cut-off date in April 2011 under the Closing Scheme and (b) have been found to be valid.

8. The proceedings seek, in essence, to bring about a situation which is obviously in the interests of the majority of beneficiaries. It is also intended not to materially affect or prejudice the interests of the Overlapping Beneficiaries. Nonetheless, it would obviously have been appropriate for one or more of them to have been joined as a defendant if they had wished to be. Notification has been given of the proceedings to all beneficiaries and potential beneficiaries for whom the Trustees have contact details. These include all of the Overlapping Beneficiaries (save that one appears to have been dissolved) (JMW, [61] – [66]).

9. In the event, unsurprisingly perhaps given the very modest quantum of their prospective entitlements, none of the Overlapping Beneficiaries has notified the Trustees of a desire to be joined to the proceedings. The ILU was approached with a view to it potentially acting as a representative defendant to represent the interests of the Overlapping Beneficiaries, but it ultimately declined to participate.

10. The relief sought is, therefore, unopposed. The Trustees are obviously conscious of the need to ensure the Court is accordingly fully informed of the relevant factual background and the law before reaching its decision and are mindful of the observations of Mummery LJ in *Southgate v Sutton* [2011] EWCA Civ 637 at [8] and [9], set out in the Opinion at [49] (JMW1, p. 173 (**tab 4**).

Quantification of beneficial entitlements

11. The EAIC estate overall is a substantial one: to January 2013, the scheme administrators had distributed c. US$322m on claims subject to the Schemes, those claims amounting to c. US$716m in total (JMW, [10]).

12. The trust fund, as at 31 December 2012, was valued at £1,053,269 and US$19,745,039 (JMW, [31]).

13. 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 (JMW, [39]).

14. 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 (JMW, [40]). Of this, just US$20,430 is referable to claims of the Overlapping Beneficiaries (JMW, [42], [44]) and these are paid claims, which have been satisfied.

15. KPMG has undertaken an actuarial review, moreover, 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 JMW1, p. 123, within the second box on the page, headed "Total by Guarantor". As set out there[1]:

    (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 is 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. The medium IBNR figure shows a claims figure of just US$14,952 for the Overlapping Beneficiaries. It is this figure which would usually be used for provisioning by insurance companies (JMW, [54]).

    (3) 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 just under US$15,000. (And the range between the high and low IBNR projections is itself very small, being a little under US$16,000.)

16. As set out at JMW, [46], the anticipated rateable pay out to beneficiaries is c. 28% of the face value of their overall claims. Hence, as set out at JMW, [55], 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.

Section 57 of the Trustee Act 1925

17. The principles applicable to the application for additional powers under section 57 of the 1925 Act are set out in the Opinion I prepared for the Trustees at JMW1, pp. 163 – 168 at [21] – [34], which the Court is asked to review.

[1] The figures at JMW, [53] and [54] are slightly wrong, being based on an earlier draft of the Review.

18. As set out in the Claim Form, the Trustees seek the grant by the Court of one of two alternative possible new powers:

    (1) A power to partition the fund (as in *Southgate v Sutton* [2011] EWCA Civ 637); or
    (2) A power to make interim distributions to beneficiaries with claims which have been accepted as valid.

19. Arguments for and against the grant of each of these additional powers are set out in the Opinion at [36] – [42] and [43] – [46] (JMW1, pp168 – 172. The authorities referred to therein appear in the Authorities Bundle in the same order). For the reasons set out there, it is submitted that the grant of a power to partition is both something that on the facts of this case the Court has jurisdiction to confer under section 57 and the alternative which is commercially most sensible and most cost efficient. This is not least since:

    (1) The prudent reserve to meet continuing administration expenses in the event of partition is identified as being just US$25,000 (JMW, [55]); whereas

    (2) The prudent reserve to meet such expenses in the event of a power to make an interim distribution only being granted is identified as being US$150,000 (JMW, [60]).

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20. As a further alternative to the grant of new powers under section 57, were the Court unprepared to grant such powers, the Trustees will seek a direction from the Court[2] 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) (**Auth tab 10**).

21. 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. David Richards J noted at [29] that:

    "*That part of the proposed order which would permit the administrators to distribute the client money held by them, without providing for those claims which are rejected*

[2] This is not formally sought by the Claim Form which can, of course, be amended if the Court requires (the form of relief sought pursuant to it is essentially identical to that at para 1.8(b) of the Claim Form).

in whole or in part but in respect of which no appeal to the court is made, would not simply be an application of the decision in Re Benjamin and the subsequent similar cases. Those cases permit the trustee to act on a presumed fact in circumstances where it is impossible or impracticable to establish the fact one way or the other. In the case of rejected claims, there is no doubt that the claimant exists and that they have asserted claims which have not been finally been determined by agreement, withdrawal or decision of the court."

22. Similarly, in the present case, it is not that the Trustees have no idea whether the Overlapping Beneficiaries exist or continue to exist. And they have the actuarial Review which indicates that it is probable that some (albeit) very modest valid claims will be made by the Overlapping Beneficiaries to the trust fund. Nonetheless, it is respectfully submitted that, as in this *MF Global* decision, the Court has an inherent jurisdiction to approve by a direction a distribution by the Trustees to the majority of beneficiaries.

23. 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.

24. Such a direction would be less satisfactory than 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 same increased administrative costs as are identified in the Opinion at [45] (JMW1, p. 172) and para 19 above

25. What it would do is 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 [30] of the David Richards J's judgment.)

Conclusion

26. In all the circumstances, it is respectfully submitted 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 IBNR claims held by Overlapping Beneficiaries.

27. And it is further submitted that this approach would be the most expedient one, being both 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, and the more cost effective and administratively efficient means of proceeding.

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