

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**

B E T W E E N

**(1) JOHN MITCHELL WARDROP
(2) MICHAEL STEVEN WALKER**

Claimants

-AND-

THE INSTITUTE OF LONDON UNDERWRITERS

Defendant

**FIRST WITNESS STATEMENT
OF JOHN MITCHELL WARDROP**

I, **JOHN MITCHELL WARDROP**, of 8 Salisbury Square, London, EC4Y 8BB, a licensed insolvency practitioner and partner in the firm of chartered accountants KPMG LLP **WILL SAY AS FOLLOWS:-**

Introduction

1. I am a trustee of the trust defined in paragraph 19 below. The other trustee is Michael Steven Walker, a licensed insolvency practitioner and also a partner

in KPMG LLP ("**KPMG**"). I am duly authorised to make this witness statement on behalf of myself and Mr Walker (together, the "**Trustees**").

2. I make this witness statement in support of an 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. This 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 currently permitted and in a manner which benefits the vast majority of beneficiaries without material impact on the interests of a small residue of beneficiaries (the "**Application**").
3. In essence, very briefly, the Application is made because the existence of a small subset of beneficiaries who potentially have rights to benefit from the trust fund means the Trustees are unable to make the anticipated distribution to the vast majority of beneficiaries whose claims will in the near future become ascertained. Moreover, absent assistance from the Court, this will continue to be the case potentially for years to come. This is obviously prejudicial to the vast majority of the beneficiaries. That prejudice can, the Trustees and their advisers believe, having considered legal advice from chancery counsel set out in an opinion at pages 155 to 175, be overcome with the Court's assistance in a manner which ensures that prejudice is not caused to the small residual pool of potential beneficiaries.
4. The information set out in this witness statement is derived from my own knowledge and from information provided to me by the following sources: members of staff at KPMG who have been assisting the Trustees; Pro Insurance Solutions Limited ("**Pro**"), who maintain the books and records of English & American Insurance Company Limited ("**EAIC**"); and the Trustees' counsel, Clifford Chance LLP. 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.
5. A bundle of copy documents is exhibited to this witness statement, marked "JMW1". References to page numbers in this statement are references to pages of "JMW1".

Background: EAIC

6. The Application concerns trust arrangements that were established to deal with certain protected liabilities of EAIC. EAIC was incorporated in England & Wales on 28 June 1929 to write insurance business and was initially a subsidiary of Bowring Services Limited (formerly C.T. Bowring & Co

Limited). 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.

7. EAIC commenced underwriting in 1929 and since that date had been involved in a number of underwriting activities. EAIC's active underwriting operations included participation in a number of "pools" of business which underwrote marine, aviation and non-marine insurance and reinsurance business (the "**Pools**"). Pooling is a method of spreading risk whereby a combination of insurers, writing a specific class of insurance, agree to share the premiums and losses in agreed proportions. EAIC also had a number of discontinued or run-off operations.
8. EAIC experienced an increase in claims notifications during 1992. In particular, EAIC's marine account experienced a substantial volume of additional losses, largely unprotected by EAIC's reinsurance programme. The adverse claims development resulted in a significant deterioration in the company's financial position. As EAIC had a significant share of the Pools' liabilities, it was agreed that the Pools would cease taking on new business. It was also agreed that EAIC would cease underwriting completely with effect from 23 November 1992.
9. On 19 March 1993, a winding-up petition was presented by EAIC acting by its directors, and Anthony James McMahon and Roger Smith, partners in KPMG Peat Marwick, were appointed as provisional liquidators by order of the court. The provisional liquidators developed a run-off plan for EAIC which included the implementation of a "reserving" scheme of arrangement under section 425 of the Companies Act 1985 under which EAIC continued in run-off and made payments to creditors pro rata on their agreed claims known as "Established Scheme Liabilities" ("**ESLs**"). This Scheme (the "**Original Scheme**") became effective on 8 February 1995 and is exhibited at pages 1 to 56 of this Statement.
10. The Original Scheme was amended by an amending scheme of arrangement which became effective on 31 August 2000 (the "**Run-Off Scheme**"), exhibited to this Statement at pages 57 to 105. The current Scheme Administrators of the Run-Off Scheme are myself and Mr Walker (the "**Scheme Administrators**", which term as used herein encompasses former scheme administrators as well). It is by reason of our roles in that office that

we have also become the Trustees, as I set out further below. As at January 2013, EAIC had made scheme payments of approximately US \$322 million on Established Scheme Liabilities of approximately US \$716 million. The current Payment Percentage under the EAIC Scheme is 45%.

11. Since EAIC became insolvent in 1993, good progress has been made in the realisation of its assets. Receipts totalling approximately US \$620 million have been collected. A small amount of remaining assets are considered to be collectable which consist primarily of reinsurance claims that the Scheme Administrators will pursue through normal credit control procedures under the Scheme, through the application of set-off and asset sales in due course.
12. 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).
13. The Marsh Mac Protected Liabilities are discussed in more detail in paragraphs 21 to 25 below. The Protected Policyholders are those who may be eligible to receive payments from the Financial Services Compensation Scheme Limited ("**FSCS**") pursuant to the Policyholders Protection Act 1975 and the Financial Services and Markets Act 2000. The FSCS has taken over the functions of the former Policyholders Protection Board ("**PPB**") which, under the terms of the Run-Off Scheme, would provide "top up" payments to Protected Policyholders who had received payments from EAIC. Those "top up" payments would bring the amount received by the relevant policyholders to the maximum percentage which would be paid by the PPB if EAIC had been placed into liquidation (which is 90%). In consideration for making the "top up" payments, the PPB would take an assignment of the Protected Policyholders' claims. The statutory functions of the PPB have now been transferred to the FSCS.
14. Also in 2009, some of the other companies that were participants in the Pools decided to propose schemes in respect of their Pools' liabilities. On 6 October 2010 the High Court sanctioned the amending scheme proposed in respect of EAIC (the "**Closing Scheme**") and the other schemes in respect of the Pools business. These schemes became effective on 12 October 2010 (the "**Pools Schemes**"). (One amendment brought about by the Closing Scheme was the manner in which Protected Policyholders are paid. Under the Closing Scheme, these policyholders no longer receive payments from EAIC. Instead, once a present obligation of EAIC to pay an ascertained sum of

money has been established in respect of a Protected Policyholder's claim and the FSCS has accepted it as eligible for protection, the FSCS pays the relevant percentage of the claim to the Protected Policyholder.)

15. 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

The ILU guarantees and the formation of the Trust

16. It is against this background of the wider Schemes that have been developed to deal with the fall-out from EAIC's insolvency that the Trust was established.
17. EAIC was a member of the Institute of London Underwriters ("**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.
18. 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.
19. 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 31 to 39.

20. The original Trustees of the Trust were Anthony James McMahon and Thomas Alexander Riddell. Mr McMahon and Mr Riddell were the Scheme Administrators at the time the Trust was created in 2003. Clause 3.1.3 of the Trust requires new Trustees to be Scheme Administrators. Since that time, Mr McMahon has retired as a Scheme Administrator and is no longer a Trustee. Mr McMahon was replaced as a Scheme Administrator by Mr Walker on 12 October 2006 (by the passing of a resolution of the Creditors' Committee of the Scheme (the "**Creditors' Committee**")), but no replacement Trustee was appointed. Mr Riddell wished to retire from his position as Scheme Administrator and Trustee of the Trust and it was decided that Mr Walker and myself would be appointed as Trustees in place of Mr Riddell. In order to comply with clause 3.1.3 of the Trust I was appointed as a Scheme Administrator by a resolution of the Creditors' Committee passed on 5 December 2011, such appointment taking effect on 6 December 2011. A Creditors' Committee resolution accepting Mr Riddell's resignation as Scheme Administrator was also passed on 5 December 2011, with effect from 31 December 2011. A deed appointing Mr Walker and myself as Trustees in place of Mr Riddell was executed and delivered on 21 December 2011 (a copy of which is at pages 106 to 112).

Marsh Mac Protected Liabilities

21. 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.
22. 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.

23. 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.
24. 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.
25. 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. As at the Bar Date for claims under that scheme, five holders of these policies have opted-in to the Closing Scheme.
26. 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) show 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.
27. Therefore, a creditor of EAIC with Marsh Mac Protected Liabilities whose policy was issued during this overlap period has four potential means of securing payment, depending on the nature of its claim: (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. In this statement I refer to these creditors as "**Overlapping Beneficiaries**".
28. As far as the Trustees are aware, Marsh Mac is a solvent entity and therefore should be in a position to satisfy any claims made under the Letter of Credit

in full, which would not be the case in respect of a claim made in any EAIC scheme or under the Trust. Therefore, an Overlapping Beneficiary who has not opted-in to the Closing Scheme might reasonably be expected to claim from Marsh Mac rather than EAIC.

29. However, such a creditor may, for whatever reason, prefer to receive a dividend from either the EAIC scheme or the Trust rather than from Marsh Mac under the Letter of Credit. If Marsh Mac does pay an Overlapping Beneficiary, Marsh Mac will then have a claim by way of subrogation against the Trust (the creditor is required to execute a "subrogation receipt" prior to receiving payment) and against EAIC through its participation in the Original and/or Run-Off Schemes.
30. It is important to note, however, that beneficiaries of the Trust (the "**Beneficiaries**") whose claims have been accepted as ESLs are entitled to receive dividends from EAIC under the terms of the EAIC Scheme in the usual course. Such Beneficiaries will then be entitled to a "top-up" payment from the assets held by the Trust (provided, of course, that the aggregate amount of the "top-up" and EAIC Scheme dividend payments does not exceed each Beneficiary's total claim).

Making payments under the Trust

31. The value of the funds held in the Trust as at 31 December 2012 was the sum of £1,053,269 and US \$19,745,039. The Trustees are obliged, pursuant to the Trust Deed, to distribute the trust funds rateably amongst Beneficiaries according to the value of their claims which were subject to the Guarantees. In practice, this means that once Beneficiaries' claims are agreed pursuant to the Run-Off Scheme or Closing Scheme (as applicable, but in effect the two schemes are being managed as one), the Trustees will be able to distribute the trust funds rateably amongst those Beneficiaries by reference to their claims as agreed under the schemes (subject to first paying the costs associated with establishing and managing the trust funds), as an additional payment on top of any payments which the Beneficiaries receive from EAIC under the Run-Off Scheme or Closing Scheme.
32. As stated in paragraph 15 above, the Scheme Administrators made a further interim dividend payment to Scheme Creditors in December 2012 with a final dividend payment likely to be made some time in 2013. There would be material costs savings and administrative benefits in final payments under the Closing Scheme and payments under the Trust being effected at the same time, as explained further below. All Beneficiaries subject to the Closing Scheme and who have or come to have an ESL will be entitled to a dividend payment as well as payments under the Trust. There are obvious costs

savings of these payments being combined into one settlement and one notification rather than two as well as obvious prejudice to them if they receive only part of what they are owed and are required to wait indefinitely for the remainder.

33. The Trustees and their legal advisers have examined the terms of the Trust Deed to see how a distribution of funds from the Trust can be made and at what time. 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".

34. 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 Overlapping Beneficiaries may not be agreed in the short term or indeed for the foreseeable future, because they fall to be determined in the ordinary course under the Run-off Scheme. Consequently, 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. The effect of this is that the Trustees would not be able to ascertain the final provable value of those claims and, on the language of clause 2.2 as drafted, would be unable to start making payments to any Beneficiaries. In other words, the terms of the Trust Deed do not provide for any "Bar Date" mechanism that the Trustees can use to crystallise unascertained Beneficiary claims and then start distributing the Trust's assets.

35. The only caveat to this is that clause 2.2 does refer to the winding up of EAIC as a potential means by which the equivalent of Established Liabilities could become ascertained. Whilst the terms of the Scheme allow key operating provisions to survive EAIC entering into liquidation, the Trustees and Scheme Administrators consider that placing the company into liquidation is unattractive and not in any of the Beneficiaries' interests for the reasons set out below. It is also not, of course, something the Trustees can achieve in their capacity as Trustees and given the factors set out below, the Scheme Administrators do not consider that it is something they could engineer

simply in order to resolve the timing issue created by clause 2.2 of the Trust Deed.

- 35.1 In the first place, placing EAIC into liquidation would incur significant extra costs, both as a result of the mechanics of appointing liquidators (i.e. the convening of creditors' meetings) and the additional reporting requirements placed on liquidators.
- 35.2 In addition, a liquidation of EAIC is likely to cause concern to the company's creditor population. Whilst the Scheme Administrators would do their best to explain the reasons behind the liquidation, it is inevitable that some creditors would perceive the liquidation as being a failure of the Scheme with unintended and potentially damaging consequences.
36. Furthermore, it is not clear that a liquidation of EAIC would in fact result in all potential Beneficiaries' claims being ascertained and quantified, and there would remain no mechanism under the Trust Deed permitting the Trustees to make provision for those Beneficiaries whose claims are unquantified and then make distributions to those Beneficiaries whose claims have either crystallised or been agreed. Therefore, even if EAIC were to be placed into liquidation, it appears that the Trustees may well still be unable to make a distribution to any Beneficiaries until the claims of all Beneficiaries had been determined within both the Closing and the Run-Off Schemes.

Quantum of the Beneficiaries' claims

37. I set out below details of the estimated quantum of Beneficiaries' claims against EAIC which are covered by the Trust. A spreadsheet produced by Pro and an actuarial report (the "**Actuarial Report**") produced by KPMG LLP ("**KPMG**") from which the information in paragraphs 38 to 44 below is taken are exhibited at pages 113 to 116 and 117 to 151, respectively.

The Beneficiaries generally

38. There are 5,652 policies potentially covered by the Guarantees (inclusive of those policies that relate to the Overlapping Beneficiaries) which have been identified based on data available to the Trustees, which Pro estimates cover the 782 Beneficiaries. Pro is confident that the likelihood of any 'new' Beneficiaries, in addition to the 831 identified to date, making a claim against the Trust in the future is minimal, especially considering the fact that underwriting ceased some 20 years ago (in 1992). 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.

39. In order for a new policyholder to be identified, over and above the holders of the 5,652 policies identified, it would have to have policies written prior to 1990, have had no claims values at the time of conversion to Pro's old system in 1990, and have had no claim movements in the period 1990 to the Bar Date of 11 April 2011, the possibility of which is negligible. The total number of creditors under those policies stands at 831. Of these, 497 relate to marine pools policies and 334 relate to aviation pools policies (some Beneficiaries have claims in both the marine pool and aviation pool). Due to a certain amount of "doubling-up", the 831 creditors equate to 782 actual distinct Beneficiaries.
40. The current level of claims "admitted as Established Scheme Liabilities" (i.e. the sum of the amount paid to date under any Scheme and claims agreed but as yet unpaid) on these policies is US \$73,411,712.

The Overlapping Beneficiaries

41. There are 33 policies that relate to the overlap period have been identified based on data available to the Trustees. Of these, 16 relate to aviation policies and 17 to marine policies. Pro have determined that these 33 policies cover 19 Overlapping Beneficiaries. As explained in paragraph 39 above, Pro is confident that the possibility of there being any further Overlapping Beneficiaries is negligible.
42. The current level of claims "paid" (which means the sum of any amounts paid to date under any Scheme, whilst EAIC was solvent, and claims agreed in any Scheme but as yet unpaid) on policies in the overlap period overall was US \$20,430, as follows:
 - (a) Marine – US \$20,430;
 - (b) Aviation – US \$0.
43. Total values for claims outstanding (i.e. claims made but not yet assessed or subject to final determination in proceedings) on policies issued in the overlap period are as follows:-
 - (a) Marine – US \$0;

(b) Aviation – US \$0.

44. To date, claims of Overlapping Beneficiaries totalling US \$20,430 have been agreed as ESLs.

Indicative payments to Beneficiaries

45. Funds held under the Trust are approximately US \$21m and so the indicative payout under the Guarantees is estimated to be around 28%.

46. In summary, therefore, the claims likely to arise in the overlap period are relatively immaterial as a proportion of the total liabilities covered by the Guarantees. In addition, the distribution by EAIC (currently 45%, but could be ultimately around 50%) together with the Guarantees'/Trust's payment of around 28% should mean a total distribution for these creditors of around 73-78%.

The Application

47. As stated at paragraph 32 above, the Trustees consider that it would be advantageous to the vast majority of Beneficiaries to make a distribution of trust assets at the same time that a distribution under the Closing Scheme is made, which would result in substantial payments to them of monies to which they are entitled far sooner than if they have to wait for the final resolution of the residual claims within the Run-Off Scheme. However, for the reasons discussed above, there are obstacles to this as a result of the very tight payment mechanics in the Trust. The terms of the Trust prohibit a payment being made until all Beneficiaries' claims have become Established Scheme Liabilities but there is no means in the Trust of providing for the submission of all Beneficiaries' claims by a certain date. This is a particular problem in respect of the Overlapping Beneficiaries due to the uncertainty (for the Trustees) of whether those creditors will actually ever claim against the Trust.

48. In the Application, the Trustees are seeking to resolve these difficulties by applying to the Court for the grant of appropriate powers to enable a payment to be made to those Beneficiaries whose claims have become Established Scheme Liabilities and to set aside a reserve amount to cover the potential claims of the Overlapping Beneficiaries (the "**Reserve**"). In summary, therefore, the Application seeks powers:

(a) to allow the Trustees to make a payment to those Scheme Beneficiaries whose claims are ascertained as Established Scheme Liabilities and which can be paid from the funds held in the Trust; and

- (b) to allow the Trustees to operate the Reserve with the remaining funds in the Trust to cover the claims of the Overlapping Beneficiaries and any other Beneficiaries whose claims cannot be paid at this time.

Proposed grant of powers

- 49. The Trustees have been advised as to the potential powers the Court might be able to grant them in order to expedite the payment process. The Trustees have been advised that there are two potential options. The first option is to divide the funds held by the Trust (the "**Trust Fund**") into two (i.e. "apportionment"). The second option is for the Trustees to be empowered to make interim payments to those Beneficiaries who have ESLs and to create a reserve of funds sufficient to pay Overlapping Beneficiaries at a later date.

Apportionment

- 50. So that the Court may understand the nature of what the Trustees would propose, in fact, to do were they granted the power of apportionment, it is the Trustees' intention that the resulting two apportioned funds be dealt with as set out below.
 - 50.1 Assets to the value of more than 99.9% of the Trust Fund ("**Apportioned Fund**") would be held on the current terms set out in the Trust for the benefit of those Beneficiaries whose claims are subject to the Closing Scheme and for Dravo Corporation, which was the only Overlapping Beneficiary which chose to opt in to the Closing Scheme (together, the "**Apportioned Fund Beneficiaries**").
 - 50.2 The residue of the assets of the Trust Fund (the "**Reserve**") will be held for the benefit of those Beneficiaries whose claims are as at the date hereof not subject to the Closing Scheme (the "**Reserve Beneficiaries**"). It is anticipated that the Reserve Beneficiaries will be the Overlapping Beneficiaries (save for Dravo Corporation, which chose to opt-in to the Closing Scheme).
 - 50.3 Payments shall be made from the Apportioned Fund to the Apportioned Fund Beneficiaries only after all claims within the Closing Scheme have been accepted or rejected with finality, such that the final total of Established Liabilities held by Apportioned Fund Beneficiaries is certain. At that point, the Apportioned Fund shall, after payment of the Trustees' costs and expenses from the date of apportionment, be distributed amongst the Apportioned Fund Beneficiaries *pari passu* on the terms of the Trust.
 - 50.4 Similarly, payments shall be made from the Reserve to the Reserve Beneficiaries only after the Trustees are satisfied that all liabilities of EAIC to

the Reserve Beneficiaries have become Established Liabilities or have ceased to be liabilities of EAIC to Reserve Beneficiaries, whereupon the Reserve shall, after payment of or allowance for all costs and expenses from the date of apportionment, be distributed amongst the Reserve Beneficiaries *pari passu*.

- 50.5 It is proposed that any ultimate residual funds left in the Reserve be distributed pro rata to their entitlements to all Beneficiaries, if there are sufficient resources left over to make that administratively workable.

The Reserve, apportioned for Overlapping Beneficiaries

51. The Trustees will clearly need to ensure that sufficient funds are retained in the Reserve to ensure that any other Reserve Beneficiaries are not in any way disadvantaged by a payment to the Apportioned Fund Beneficiaries.
52. An exercise has been undertaken to establish the required reserve by KPMG, the Scheme actuaries. The Actuarial Report considers the three values that are used to calculate EAIC's potential liabilities in relation to the Marsh Mac Protected Liabilities and including to the Overlapping Beneficiaries: (i) paid claims, that is claims that have been accepted as valid and either payment has already made on them or is to be made on them; (ii) outstanding claims that have yet to be settled and paid and (iii) "IBNR" (incurred but not reported) amounts in respect of claims that have yet to be made by Marsh Mac and Overlapping Beneficiaries. These figures are set out in the "Executive Summary" at the beginning of the Actuarial Report, at page 117.
53. The Actuarial Report states that the value of outstanding claims against EAIC in respect of Marsh ILU Guaranteed Policies as at 31 July 2011 is US \$4,499,524, none of which relates to the claims of Overlapping Beneficiaries.
54. In respect of the IBNR figures, the calculation of likely future claims is not an exact exercise and KPMG's Actuarial Report provides a range of possible outcomes, from low to high. It is customary for a mid-range figure to be used when making provisions in insurance companies' books. That is the approach which the Trustees propose to adopt here. The "key findings" summary states that the mid range valuation of IBNR in respect of all Marsh Mac Protected Liabilities including the Overlapping Beneficiaries' claims is US \$4,209,651. Of this total IBNR figure, the amount of just US \$14,952 relates to the claims of the Overlapping Beneficiaries. The variance between the low and high IBNR estimates, moreover, for the Overlapping Beneficiaries' claims is just US \$15,684.
55. Therefore, when the outstanding claims and IBNR figures for the Overlapping Beneficiaries are added together the resultant total is US

\$14,952. The Reserve that needs to be retained in respect of these claims is equal to this total multiplied by the anticipated distribution rate from the Trust Fund (say 30%). The result of this calculation is US \$4,485, which the Trustees propose to round up to arrive at a proposed Fund of US \$5,000. The Trustees consider that it is prudent to maintain in the Reserve an amount of US \$25,000 to cover their reasonable costs in maintaining the Trust Fund and in making further payments to Reserve Beneficiaries. Consequently, the Trustees propose to keep the total sum of US \$30,000 in the Reserve.

The Alternative Power: power to make interim payments

56. In case the Court would be concerned that the apportionment exercise outlined above would not be appropriate, and in order to give the Court an alternative, the Trustees will also ask the Court to consider granting a power to make interim payments to those Beneficiaries whose claims are already or become ESLs.
57. Rather than apportioning the Trust Fund into two wholly separate funds with distinct classes of beneficiaries, payments would be made out of the existing, undivided Trust Fund to Beneficiaries with ESLs on the basis of actuarial advice and leaving a sufficient amount as a reserve within the Trust Fund to cover any potential future payment that may become due to Overlapping Beneficiaries who come to have ESLs. Under this alternative option, there is no need for the Trustees to apportion a percentage of the Trust Fund into a specific reserve, as Beneficiaries will receive exactly what they would had the Trust continued to operate as it does currently; the only change is that the majority of Beneficiaries receive an accelerated distribution.
58. To ensure that the amounts paid by way of accelerated distributions do not prejudice the interests of the Overlapping Beneficiaries, the Trustees would propose that if this alternative option is ordered they provide a greater "cushion" against the risk that there would not be sufficient funds left in the Trust for payment to Overlapping Beneficiaries. The Trustees propose to do this by calculating all payments to Beneficiaries with regard to the high IBNR figures (US \$23,010) specified in the Actuarial Report, as opposed to the medium IBNR figures which the Trustees propose to use when calculating the Reserve for the apportionment option.
59. If, when the claims of all the Overlapping Beneficiaries are ultimately determined, it transpires that the use of high IBNR figures results in a residue in the Trust Fund, there would then be a further division of and distribution *pari passu* to all Beneficiaries with ESLs (the "**Ultimate Distribution**"). Technically, this may mean that most Beneficiaries will not receive final settlement of their share of the Trust for many years. This could also mean

that, years after the termination of the Closing Scheme, the Trustees were faced with having to locate all Beneficiaries who had previously been entitled to a distribution due to their ESL, with whom they may have had no contact for years, in order to distribute the remainder of the assets in the Trust Fund.

60. The Trustees are of the view that any Ultimate Distribution would be negligible, since the maximum it could be would be the equivalent of the total Reserve. As a result it would likely not be cost effective to make another distribution. In the event that a distribution is sensible however, the Trustees consider that it is prudent, in light of the potentially very onerous administrative burden of making the Ultimate Distribution to Beneficiaries, to maintain in the Trust an additional amount of US \$150,000 to cover their reasonable costs in making further payments to Beneficiaries, which would be material given the likely administrative costs of tracking-down all the Beneficiaries at such an uncertain future date. Consequently, the Trustees propose to keep the total sum of US \$182,000 in the Reserve. This is comprised of claims of US \$23,010 at the anticipated distribution rate of 30% (say US \$7,000), together with estimated costs of maintaining the Trust Fund and making further payments to Beneficiaries of US \$175,000 (US \$25,000 and US \$150,000, respectively).

Notice of the Application

61. The Trustees intend to take steps to seek to ensure that the Application and its hearing dates (i.e. the directions hearing date and the final hearing date) are publicised and brought to the attention of the Beneficiaries. It is envisaged that by the time the Application is heard by the court the steps identified in paragraphs 63 to 64 below will have been taken. Confirmation of such will be provided to the court at or prior to the hearing of the Application.
62. The Trustees have addresses for approximately 777 of the 782 known Beneficiaries, including all 19 known Overlapping Beneficiaries, of which one Overlapping Beneficiary, Davies & Newman Holdings, is known to have been dissolved in 1995. Many of these addresses are, however, very old, dating back to the 1980s, but they represent the best information available to the Trustees as to the whereabouts of those potential claimants to the Trust Fund. Where possible, Pro has attempted to verify these addresses to confirm that they are still current, and Pro is confident that at least 75% of the addresses, including all 18 existing Overlapping Beneficiaries are still valid. Pro's confidence derives from the fact that it handled the Scheme notification process and the process by which Beneficiaries with ESLs received their dividend payments, during which processes Pro refined and corrected the addresses on their system and made a record of those Beneficiaries which were ultimately untraceable.

63. The Trustees intend to send a letter to all Beneficiaries for whom a reliable address is available informing them of the time and place when the initial directions hearing will take place and when the Application itself will be heard, appending the Claim Form and directing them that they contact the Trustees if they require further information. In the event that any persons with an interest in the Application do then make contact with the Trustees, they will be offered copies of the other papers in support of the Application, including this Statement and its accompanying. They will also be informed by the letter that they have a right to seek to appear at the directions hearing and the hearing of the Application, about which they can also contact the Trustees.
64. A website is operated by the Scheme Administrators in respect of the Pools Schemes, at www.englishandamericanpools.com. It is proposed that notice of the Application (along with the documents in support of the Application) and the hearing dates will additionally be posted to that website.
65. 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 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. Indeed, it would appear disproportionate to expend around £60,000 advertising what is in effect a proposed reserving exercise of less than US \$40,000.
66. For the reasons stated above, the ILU and Marsh Mac have particular interest in the Trust. The ILU was one of the parties to the Trust Instrument and acted to benefit all potential Beneficiaries in arranging for the Trust to be put in place. The Trustees have therefore approached it and it has agreed to be joined as representative Defendant in this application, if the Court considers it appropriate at the directions hearing, in order to put forward any counter-argument to those made by the Trustees on behalf, in particular, of the Overlapping Beneficiaries. In addition, the Trustees will write to Marsh Mac to inform them of the Application and provide confirmation of the hearing dates as well as a copy of this Statement and its exhibits. Marsh Mac will

therefore have the opportunity to attend the hearing and/or to prepare written submissions or a letter to the Court.

Conclusion

67. For the reasons stated above, the Trustees consider that this Application is expedient in the best interests of the Beneficiaries and for the efficient and desirable administration of the Trust. Therefore, the Trustees respectfully ask the Court to make an order for the relief sought, in the form of the draft order at page 152 to 154.

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

Signed.....

JOHN MITCHELL WARDROP

Dated

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**

B Y

- (1) JOHN MITCHELL WARDROP**
- (2) MICHAEL STEVEN WALKER**

Claimants

- and -

**THE INSTITUTE OF LONDON
UNDERWRITERS**

Defendant

**FIRST WITNESS STATEMENT OF JOHN
MITCHELL WARDROP**

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