Neutral Citation Number: [2025] EWHC 2704 (Comm)

Case No: LM-2024-000252

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
LONDON CIRCUIT COMMERCIAL COURT (KBD)

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 21 October 2025

Before:

HIS HONOUR JUDGE KEYSER KC
sitting as a Judge of the High Court

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Between:

(1) ROYAL & SUN ALLIANCE INSURANCE LIMITED
(formerly ROYAL & SUN ALLIANCE INSURANCE PLC)
(on its own behalf and on behalf of all members of the Royal Insurance Group (now RSA Insurance Group) reinsured under reinsurance policies 0512428/R13/81 (M43/81), M43/82, XPM0431/301 (M43/83), 871/XPM043/401 (M43/84) and M56/84, their successors and assigns)

(2) ROYAL INSURANCE (UK) LIMITED
(in liquidation)

(3) ROYAL & SUN ALLIANCE REINSURANCE LIMITED
(formerly ROYAL REINSURANCE COMPANY LIMITED) **Claimants**

- and -

EQUITAS INSURANCE LIMITED **Defendant**

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- -

Sushma Ananda and **Joseph Rich** (instructed by **Bryan Cave Leighton Paisner LLP**) for the **Claimants**
David Scorey KC and **Sarah Cowey** (instructed by **Norton Rose Fulbright LLP**) for the **Defendant**

Hearing dates: 1, 2, 3 and 7 July 2025
Written submissions: 4 July 2025

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Approved Judgment

This judgment was handed down remotely at 10 a.m. on 21 October 2025 by circulation to the parties or their representatives by email and by release to the National Archives.

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HIS HONOUR JUDGE KEYSER KC

Judge Keyser KC :

Introduction

1. These proceedings are a reinsurance dispute between the claimants as insurers and reinsured and the defendant as successor to the liabilities of the reinsurers. In accordance with the order made by Cockerill J at the case management conference on 28 June 2024, I have heard the Phase 1 trial of several disputed issues, with a further two disputed issues to be determined, if necessary, at a Phase 2 trial. The following summary of the background is taken largely, with gratitude, from the parties' Agreed Case Memorandum and counsel's written openings.

2. The claimants are part of the Royal & Sun Alliance Insurance Group, known prior to a merger with the Sun Alliance Group in 1996 as the Royal Insurance Group. As for the most part it is not important, for present purposes, to distinguish among the claimants, I shall generally refer to them simply as RSA. For the four years from 1 October 1981 to 30 September 1985 RSA provided worldwide general third-party liability insurance to a British multi-national manufacturing company, BOC Group Plc (previously BOC International Plc) ("BOC"), and its subsidiaries and associated or affiliated companies. The insurance was provided under global master policies ("the Royal Master Policies"), under which RSA (the first claimant or the second claimant, depending on the period) and an entity in the Eagle Star Group (referred to together as "The Insurers") agreed to provide liability insurance to BOC in equal shares up to £20 million, subject to the specified terms, exclusions, conditions and limitations set out in the Royal Master Policies. The Royal Master Policies contemplated "subordinate policies" that would be issued "by or on behalf of The Insurers in different territories", and the Royal Master Policies would apply only to the extent that an indemnity was not provided under the subordinate policies "by virtue of any limitation of cover". In respect of the United States of America, the relevant subordinate policies ("the Newark Subordinate Policies") were issued to BOC's US subsidiary (Airco, Inc, subsequently known as The BOC Group Inc; here referred to as "BOC US") by Newark Insurance Company ("Newark"), a subsidiary of the first claimant. The Newark Subordinate Policies, which are governed by New Jersey law, provided liability cover for BOC US's personal injury liability caused by an occurrence taking place during the policy period anywhere in the world. The level of cover, which was intended to mirror in US currency the cover in UK currency under the Royal Master Policies, was up to $40 million each occurrence and in the aggregate, save in respect of the fourth policy year, when the limit was $30 million. Defence costs were payable in addition to the limits of liability and without the application of any excess. All premiums, risks and liabilities under the Newark Subordinate Policies were ceded to The Insurers under the Royal Master Policies, so that all liabilities under the Newark Subordinate Policies were ultimately borne and indemnified by The Insurers in equal shares. In respect of RSA, this cession took place by an intra-group reinsurance ("the Intra-Group Reinsurance") made on or prior to 1 October 1981 and continued for the period of the Newark Subordinate Policies, by which the first claimant and/or the second claimant agreed to indemnify and/or reinsure liabilities incurred and/or losses suffered by the insurer under the Newark Subordinate Policies to the extent of RSA's share.

3. From the mid-1980s BOC and its subsidiaries became subject to bodily injury claims in the USA in relation to the use of its products. As a result, BOC and its subsidiaries paid substantial damages and incurred extensive defence costs, for which they sought and obtained insurance recoveries. The first level of insurance was provided by Liberty Mutual Insurance Company ("Liberty") under the "Liberty Mutual Policies", which provided primary layer cover against bodily injury liability and had an aggregate liability of $2 million, which was revised to $3 million in the years 1983-1984 and 1984-1985 (with defence costs payable in addition). The Liberty Mutual Policies were quickly exhausted by the bodily injury claims against BOC's subsidiaries, leaving Newark on risk under the Newark Subordinate Policies.

4. In these proceedings the claimants claim against the defendant under five excess of loss reinsurance policies covering the period from 1 October 1981 to 30 September 1985 ("the Reinsurance Policies"). (There are four policy years but five policies, owing to the structure of cover in the fourth year.) The Reinsurance Policies were underwritten by various Lloyd's syndicates ("the Lloyd's Underwriters") and company market reinsurers ("the Company Market"): together, "the Reinsurers". The Lloyd's Underwriters' liabilities under the Reinsurance Policies were transferred to the defendant by a Part VII transfer effective 30 June 2009. No claim is brought in these proceedings against the Company Market.

5. The liabilities and losses in respect of which the claimants seek recovery from the defendant are those said to be in excess of the £4 million excess in the Reinsurance Policies. They are as follows:

   1) Sums paid pursuant to the Toxic Torts Settlement Agreement entered into on 30 March 2001 ("the TTSA"). The TTSA was concerned with claims against BOC entities for bodily injury alleged to have been caused by exposures to asbestos-containing products and/or welding-related products manufactured, sold, designed or distributed by BOC entities. The TTSA was between BOC entities and a number of BOC's insurers for various periods. These insurers included Newark, the second claimant, and two Eagle Star entities (collectively, the "Newark Insurers"). The Newark Insurers agreed to pay under or pursuant to the Newark Subordinate Policies, for the period 1 October 1981 to 1 October 1985, (i) $7,285,000 (minus $3,000,030 already paid) in respect of defence and indemnity costs incurred and paid by or on behalf of BOC up to 31 December 1999, and (ii) 47% of the defence and indemnity costs incurred and paid by or on behalf of BOC on or after 1 January 2000.

   2) Sums paid pursuant to a settlement agreement made on 19 September 2012 between Linde LLC (as successor to BOC and BOC US), the first claimant and Eagle Star ("the Linde Settlement Agreement"). The first claimant and Eagle Star agreed as reinsurers of Newark to pay BOC a total of $867,150 each in settlement of a dispute as to whether certain welding-related product claims fell within the TTSA.

   3) Sums paid in respect of claims against BOC entities by persons who suffered injury and/or disease as a result of the use of BOC products other than asbestos-producing or releasing products or welding-related products and relating to exposures and/or injuries suffered in the 1 October 1981 to 1

October 1985 period ("the Other Claims"). These losses were incurred in the period prior to the conclusion of the TTSA.

6. The total sum claimed, before interest, is £3,760,574.83. Equitas agrees that this figure reflects the best evidence of RSA's outstanding losses, and to that extent it is agreed. Equitas does not accept that it has any liability for all or any part of those outstanding losses.

7. The order of 28 June 2024 approved an Agreed List of Issues. The issues have narrowed to some extent, and for the purposes of this trial it is necessary to consider the following four issues (my numbering is not that of the Agreed List of Issues):

   1) *The Defence Costs Erosion Issue*: Is the £4 million excess applicable under the Reinsurance Policies (prior to accessing the reinsurance cover of £16 million) eroded by both indemnity payments and defence costs, or by indemnity payments only?

   2) *The Claims Co-operation Clause Issue:* On a proper construction of the Reinsurance Policies, and on the facts of the case, does the Claims Co-operation Clause annul, modify or circumscribe the operation and effect of the Follow the Settlement Clause?

   3) *The Proper and Businesslike Steps Issue*: If the Reinsurers were bound to follow the Insurers' settlements, did The Insurers take proper and businesslike steps in entering into the TTSA?

   4) *The Interest Issue*: To what if any extent is RSA entitled to interest on any recovery it makes under the Reinsurance Policies?

8. In considering these issues, I have been greatly assisted by the extensive, detailed and lucid submissions of counsel: for the claimants, Miss Sushma Ananda and Mr Joseph Rich; for the defendant, Mr David Scorey KC and Miss Sarah Cowey.

Issue 1: The Defence Costs Erosion Issue

9. This issue concerns the proper construction of the Reinsurance Policies. The basic principles of construction are well established. I need only refer, without quotation, to *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2011] 1 WLR 2900; *Arnold v Britton and others* [2015] UKSC 36, [2015] AC 1619; and *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] AC 1173; and to the helpful summaries offered by Sir Geoffrey Vos C in *Lamesa Investments Ltd v Cynergy Bank Ltd* [2020] EWCA Civ 821, [2021] 2 All ER (Comm) 573, at [18], and by Carr LJ in *ABC Electrification Ltd v Network Rail Infrastructure Ltd* [2020] EWCA Civ 1645, [2021] BLR 97, at [18]-[19]. That the general principles apply to the construction of reinsurance policies was confirmed by Foxton J in *Unipolsai Assicurazioni SpA v Covea* [2024] EWHC 253 (Comm) at [36]-[37], with reference also to the summary of principles given by Flaux LJ and Butcher J in *The Financial Conduct Authority v Arch Insurance (UK) Ltd and others* [2020] EWHC 2448 (Comm), [2020] Lloyd's Rep IR 527, at [62]-[70].

10. The Reinsurance Policies are facultative, excess of loss policies, back-to-back with the respective Royal Master Policies (the provisions of which were mirrored in the Newark Subordinate Policies). Both parties referred to the dictum of Lord Griffiths in *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852, at 895:

> "In the ordinary course of business reinsurance is referred to as 'back-to-back' with the insurance, which means that the reinsurer agrees that if the insurer is liable under the policy the reinsurer will accept liability to pay whatever percentage of the claim he has agreed to reinsure. A reinsurer could, of course, make a special contract with an insurer and agree only to reinsure some of the risks covered by the policy of insurance, leaving the insurer to bear the full cost of the other risks. Such a contract would I believe be wholly exceptional, a departure from the normal understanding of the back-to-back nature of reinsurance and would require to be spelt out in clear terms. I doubt if there is any market for such a reinsurance."

11. It is, accordingly, convenient to begin with the provisions of the Royal Master Policies. The principal insuring clause states:

> "IN CONSIDERATION of The Insured [i.e. BOC and its subsidiaries and associated companies] paying the Premium to The Insurers it is hereby agreed that The Insurers will, subject to the terms, exceptions, conditions and limitations contained in any of the Schedules herein or endorsed hereon, which shall all be read as one document, indemnify The Insured against Liability arising from any Occurrence during the Period of Indemnity."

Schedule A, "Definitions", contained *inter alia* the following provisions:

> "2. 'The Arrangements' means this Master Policy and the subordinate policies issued or to be issued by or on behalf of The Insurers in different territories as evidence of insurance for The Indemnity.
>
> 3. 'Liability' means legal liability and shall include payments made by or with the consent of The Insurers before legal liability is established.
>
> 4. 'Occurrence' means any loss injury or damage happening during the Period of Indemnity for which The Insured is or may become liable in contract or tort or by statute or otherwise howsoever.
>
> 5. 'Financial Loss' means a pecuniary loss cost or expense suffered or incurred by a claimant not resulting from Injury or damage to or loss of tangible property.

> 6. 'Injury' means death or bodily or mental injury or disease.
>
> …
>
> 9. 'Products' means goods sold, repaired, serviced, installed or supplied by The Insured.
>
> 10. 'Professional Indemnity' means claims arising from professional advice given in return for a fee."

Schedule D, "The Indemnity Limits", provided in part:

> "1. The Indemnity provided by The Arrangements shall be subject to the following limits:
>
> In respect of any claim or number of claims arising out of any one Occurrence ……………. £20,000,000
> provided that:
>
> (i) in respect of:
>
> (A) Products or
>
> (B) Financial Loss
>
> it shall in either case be limited to £20,000,000 in respect of all Occurrences during any one Period of Indemnity not exceeding 12 months.
>
> (ii) if more than one party is to be indemnified the total amount of indemnity to all such parties shall not exceed the Indemnity Limits.
>
> 2. The Indemnity provided by the Arrangements shall be reduced by:
>
> (a) The following amounts for each and every Occurrence
>
> (i) The first £750,000 in respect of Financial Loss
>
> (ii) The first £750,000 in respect of Professional Indemnity
>
> (iii) For any other liability the first £500,000 in respect of the Indemnity provided to [specified subsidiaries and associated companies]."

(b) The amount of monies receivable and/or deductible [under other insurances]

Provided that these reductions shall not be cumulative.

3. The Insurers will in addition indemnify The Insured against any costs and expenses:

(a) recoverable by any claimant from The Insured and/or

(b) incurred by The Insured with the consent of The Insurers.

…

5. In the event of any claim or claim under The Arrangements, The Insurers may pay to The Insured the relevant Indemnity Limit (deducting therefrom any sum or sums already paid as damages and/or compensation in respect thereof) and The Insurers shall thereafter be under no further liability in respect of such claim or claims except for the payment of costs and expenses under Clause 3 above incurred prior to the date of the payment of such Indemnity Limit."

12. Thus the Royal Master Policy obliged The Insurers to indemnify BOC in respect of third-party claims up to £20 million in any one period of cover. In addition, The Insurers were obliged to indemnify BOC in respect of defence costs—both its own costs of defending claims and any costs liability it incurred to claimants. It is common ground that the liability to indemnify BOC in respect of defence costs was not subject to any financial limit but that it was subject to a temporal limit, in that it would subsist only while the £20 million indemnity limit in respect of third-party claims had not been reached. The question in the Defence Costs Erosion Issue is whether, as Equitas asserts, the £4 million excess in the Reinsurance Policies is eroded only by indemnity payments (that is, payments under paragraph 1 of Schedule D to the Royal Master Policies) or, as RSA asserts, it is eroded also by defence costs (that is, payments under paragraph 3 of Schedule D). Accordingly, I turn to the Reinsurance Policies.

13. The Reinsurance Policies defined the Type of cover as "Excess of Loss Reinsurance". The section marked "CLASS" provided:

> "General Third Party Liability including Products, Employers Liability, Motor Liability, Professional Indemnity, Financial Loss, Aviation and Marine Liability, as per original policy indemnifying B.O.C. International plc including all subsidiary and/or associated and/or affiliated companies."

14. All the Reinsurance Policies except those for 1984/1985 (which were split into two layers of cover) provided as follows in the section marked "LIMIT" (what I shall refer to as "the 'Limit' provisions"):

> "£16,000,000 any one loss or series of losses arising out of one occurrence/unlimited in all for General Third Party Liability, Motor, Aviation, Marine, Employers Liability and Professional Indemnity BUT £16,000,000 IN THE AGGREGATE for Products and Financial Loss
>
> EXCESS OF
>
> £4,000,000 any one loss or series of losses arising out of one occurrence/unlimited in all for General Third Party Liability, Motor, Aviation, Marine, Employers Liability and Professional Indemnity BUT £4,000,00 IN THE AGGREGATE for Products and Financial Loss."

15. The section marked "GEN. CONDS" stated in part: "To follow original terms, conditions and settlements (as far as applicable to the layer)." The section marked "INFORMATION" stated in part: "Copy of original policy seen." It is common ground that the "original policy" was the Royal Master Policy.

16. Equitas has relied on several endorsements to the Reinsurance Policies as being relevant to the Defence Costs Erosion Issue. The first endorsement relates to the General Conditions: "Re P.I. [Professional Indemnity] including claims made in the Period in respect of losses occurring prior to inception."

17. The second endorsement is the Claims Co-operation Clause:

> "The primary insurers shall in the event of an occurrence or series of occurrences consequent upon one original cause which may be the subject of a claim under the policy and where the potential cost may exceed £4m, or in the event of the potential cost of such an occurrence or series of occurrences reac[h]ing £4m give notice to re-insurers as soon as practically possible and furnish all available information respecting such occurrence or occurrences if required.
>
> In either such event the course to be adopted by the primary insurers shall be determined by agreement between the primary insurers and re-insurers and the primary insurers shall not without the consent of re-insurers litigate with regard to such loss but such consent shall not be unreasonably withheld.
>
> In the event of a difference of opinion between the primary insurers and re-insurers in respect of an opportunity whereby settlement of a loss can be obtained by the acceptance of a standing judgment or transaction agreed by the claimant re-insurers retain the right to pay to the primary insurers the amount the equivalent to their liability under this policy according to such standing judgment or transaction and shall thereafter be under no further liability under this policy in respect of the loss."

18. Finally, several endorsements taking effect from inception of the 1981/1982 Reinsurance Policy are headed, "Limit of Indemnity £16,000,000 in excess of £4,000,000" or "LOI £16,000,000 excess of £4,000,000".

19. With respect to counsel, whose submissions on the issue of construction were long, detailed and at times ingenious, I shall not recite or summarise their arguments here. In the end, I regard the interpretation of the provisions to be fairly clear and the construction contended for by Equitas to be correct. The reasons for this conclusion are set out below.

20. First, the Reinsurance Policies are facultative back-to-back policies, which "follow original terms", and the Reinsurers had seen a copy of the "original policy", which is agreed to be the Royal Master Policy.

21. Second, the financial limit of indemnity cover in the Royal Master Policy is £20 million; cover for defence costs sits *alongside and in addition to* the indemnity cover, without financial limit but temporally limited to the subsistence (non-exhaustion) of the indemnity cover. Therefore, in view of the nature of the reinsurance as just mentioned, the natural understanding of the "Limit" provisions in the Reinsurance Policy would be that the £16 million for cover and the £4 million for excess reflect the £20 million in the Royal Master Policy and thus relate to indemnity cover and not defence costs.

22. Third, that understanding is confirmed by the structure of the Royal Master Policy. The Insurers agreed to indemnify The Insured "against Liability arising from any Occurrence" during the relevant period. In the light of the definitions of "Liability" and "Occurrence" in Schedule A, the natural interpretation of the indemnity cover is that it refers to BOC's liability for damages or compensation to third-party claimants. In arguing against this interpretation, Miss Ananda relied on the words "shall include payments made by or with the consent of The Insurers before legal liability is established" in the definition of "Liability" in clause 3 of Schedule A; these words, she contended, referred to, or at least included, defence costs. I do not agree that this is the purpose or referent of the words in question. In my judgment, in agreement with Mr Scorey's submissions, the words relate to payments made pursuant to settlements made without a finding of liability; in their absence from a liability policy governed by English law, the existence of cover would be in doubt. As is made clear by Schedule D, the duty to indemnify relates to third-party claims, and the duty to pay defence costs (whether those of a third party or those of the Insured) is *additional* to the duty to indemnify and not subject to financial limit. The inclusion of defence costs in the cover under the Royal Master Policies is achieved by clause 3 in Schedule D and the temporal limitation in clause 5. The position under the Royal Master Policies is therefore straightforward. To paraphrase: The Insurers agree to indemnify BOC against BOC's liability to compensate third parties who sustain loss during the Period of Indemnity. In addition, The Insurers agree (Schedule D, clause 3) to indemnify BOC against defence costs, but only (Schedule D, clause 5) up to the point where "the relevant Indemnity Limit", viz. under clause 1 or 2 of Schedule D, has been reached. The indemnity in the principal insuring clause relates to the Indemnity Limits in clauses 1 and 2 in Schedule D.

23. Fourth, the Reinsurance Policies follow the terms of the Royal Master Policies, subject of course to the excess. The "Limit" provisions of the Reinsurance Policy are,

on the most obvious reading, reflective of the £20 million of cover in the Royal Master Policies, with that figure divided between a £4 million excess and £16 million of reinsurance cover: that is, the first 20% retained and the next 80% reinsured. The wording of the two parts of the "Limits" provision lends additional support to this conclusion: it refers to cover or excess in respect of *losses*, arising out of *occurrences*, for listed types of liability, which again mirrors the structure of the Royal Master Policies and must in my view relate to the duty to indemnify, not to the additional duty to pay defence costs. Accordingly, the natural reading of the "Limit" provisions is that the £16 million and the £4 million correlate to the £20 million in the Royal Master Policies and, therefore, relate to indemnity payments and not to defence costs.

24. Fifth, there is the simple point that in the Limit provisions the £16 million relates only to indemnity costs; it does not include defence costs, which are additional. It would be surprising if the £4 million related differently. The various endorsements recording "Limit of Indemnity £16,000,000 [in] excess of £4,000,000" tend to confirm that both figures relate to the indemnity rather than the defence costs, as they appear to treat the two figures as relating to the same matter (viz. indemnity).

25. Sixth, further support for the natural interpretation of "loss or series of losses" in the "Limit" provisions of the Reinsurance Policy, namely as relating to the duty to indemnify rather than the duty to pay defence costs, is provided by other provisions of the Reinsurance Policy. In the first place, there is the reference in the General Conditions to P.I. claims "in respect of losses occurring prior to inception"; this cannot relate to defence costs. Again, the meaning of "loss" in the Claims Co-operation Clause is clearly the loss in respect of which the duty to indemnify arises, not a loss consisting of the costs of defending a claim in respect of such loss. (See further the next point.) Strictly speaking, neither of these provisions absolutely precludes a different meaning of "loss" in the "Limits" provisions, but they tend in my view to indicate that the Reinsurance Policy is consistent in its usage and coherent when so interpreted.

26. Seventh, I do not think that the Claims Co-operation Clause ("the Clause") is supportive of either party's case; it certainly does not, in my view, contain anything sufficiently clear to override the interpretation that would be indicated by other provisions of the policies. I make the following observations.

1) Miss Ananda submitted that the words "potential cost" in the first paragraph of the Clause were inapt if only indemnity costs were in view and that they indicated that defence costs could erode the excess. In my view, even if one accepts that erosion of the excess is in view, that places more weight on the particular words than they can bear. I cannot, for my part, see why one may not speak of the potential cost of an unliquidated damages claim, especially if a claimant has done no more than intimate a claim or if one is considering a series of occurrences.

2) Miss Ananda also submitted that the logic of the first and second paragraphs of the Clause meant that defence costs necessarily eroded the excess. For example: if no indemnity costs have been incurred, but a claim is made against BOC for £5 million, RSA will have to notify the Reinsurers and obtain their consent to incurring defence costs. "Therefore, in accordance with the language of this clause, reinsurers' interest in controlling the

incurring of defence costs in litigation of claims starts well before the £4 million excess has been breached, because it says 'potential costs may exceed £4 million' and well before any indemnity payments are incurred. That can only be because defence costs erode the reinsurance excess, thereby affecting the point at which the risk of the underlying liabilities is transferred from Royal and Eagle Star to reinsurers. That is why they are interested in these claims and their litigation from that early point." (Transcript, day 4, pages 14-15) This seems to me to rest at the level of assertion. On the assumption that the Clause is concerned with potential claims that might erode the excess, the Clause would give the Reinsurers a degree of control over litigation decisions when the excess has not yet been eroded, but it does not follow that defence costs, as well as indemnity costs in respect of the underlying claims, erode the excess.

3) However, the Clause actually says nothing about the excess. The assumption that it is concerned with the excess arises from the mention of £4 million, which is the amount of the excess; and this generates the further assumption that the Clause is to do with preventing the Reinsurers from coming on risk (that is, by the erosion of the excess) or at least minimising the extent to which they do so. None of this seems to me to be obvious, and I am not inclined to accept it. Not only does the Clause say nothing about the excess, but its wording does not restrict its operation to the situation where the Reinsurers have not yet been exposed to liability (that is, by the erosion of the excess). The significance, if any, of the figure of £4 million is to be inferred from the Clause as a whole, not from an assumption that it relates to the excess. In fact, I think that it is no more than a threshold for large claims: The Insurers have discretion for small claims, but when the potential reaches £4 million that discretion is subject to controls. This is explained further below.

4) If one gets away from a focus on the excess, it becomes possible to integrate the third paragraph sensibly into the rest of the Clause. It deals with the situation where The Insurers want to litigate claimants' claims against BOC but the Reinsurers want to settle. These must be claims against BOC, relating to injury or damage consequent upon one original cause, with a *potential cost* (as to which, see further below) of at least £4 million; otherwise The Reinsurers' rights to exercise a measure of control would not be engaged. The mechanism laid down is that, though they cannot of course actually effect settlement with the claimant, the Reinsurers can pay the Insurers the amount for which they would be liable under the Reinsurance Policy for the settlement that could be achieved ("the putative settlement"). There is no reason that I can see to restrict the operation of the third paragraph to situations where the excess has not been eroded; indeed, in such situations the paragraph might have very little or even no application, depending on the extent to which there had been any partial erosion of the excess and on the size of the putative settlement. In my view, the third paragraph is simply consequent on the second paragraph, as the second is consequent on the first, and they have nothing to do with the excess. They simply deal with losses of a certain size that may result in claims under the Reinsurance Policy.

5) The first conclusion I would draw is that the Clause has no particular relation to the excess but simply requires the stipulated co-operation (and provides the Reinsurers with the corresponding degree of control) where there is the potential for claims of a certain size on the Reinsurance Policy.

6) However, I think that not only does the Clause have no *particular* relation to the excess; it has no relation *at all* to the excess. The second paragraph gives the Reinsurers an element of control regarding litigation "with regard to such loss"; and "such loss" can only relate to the *claimants'* loss—that is, the loss that would be asserted against BOC and that would engage or potentially engage a liability to indemnify: the litigation would not be litigation "with regard to" defence costs. What, then, is the "potential cost" mentioned in the first paragraph? That is an inapt expression to use for the value of the claimant's claim. In context, the words surely refer to the potential claim on the Reinsurance Policy: in the first paragraph, the word "which" cannot refer to "one original cause" but must refer to "an occurrence or series of occurrences"; therefore in each limb of the first paragraph one is concerned with occurrences that "may be the subject of a claim under the [Reinsurance] policy"; and the "potential cost" is not the value of the claimant's claim against BOC but the potential amount of the claim on the Reinsurance Policy. The amount of a claim on the Reinsurance Policy will only be anything *once the excess has been exhausted*. Then, of course, it may include defence costs. But this tells one nothing at all about whether defence costs erode the excess.

7) The resulting construction of the Claims Co-operation Clause may be paraphrased as follows. When The Insurers are aware that claimants have suffered injuries and damage creating the potential for a big claim on the Reinsurance Policy, namely a claim of at least £4 million, they must notify the Reinsurers and must not litigate the underlying claims against BOC without the Reinsurers' consent, which is not to be unreasonably withheld. If there is disagreement, with The Insurers wanting to litigate the underlying claims and the Reinsurers wanting to settle them, the Reinsurers (who, of course, have no ability actually to settle those claims) can pay to The Insurers the extent of the liability they would have had in consequence of such settlement and thus bring their liability for that claim to a close.

8) An interpretation of the Clause as being concerned with erosion of the excess creates two further problems, as I see it. First, regardless of the question whether defence costs can erode the excess, the second paragraph of the Clause means that the Reinsurers are taken to be able to exercise control over decisions to litigate claims for which it may have no or minimal liability (because they may fall within the excess or only slightly exceed it). Second, as already mentioned, unless the third paragraph of the Clause were divorced from the second paragraph, it would (on such an interpretation) operate strangely, in that the amount that the Reinsurers can pay under the terms of the paragraph will be nil until the excess has been fully eroded.

27. Eighth, I do not regard it as relevant that the Reinsurers made substantial partial payments in the 1990s on the basis that defence costs eroded the insurance excesses. No plea of estoppel has been advanced. The basis on which the partial payments were made indicates what the Reinsurers thought (or, at least, what they failed to think)

about the construction of the Limit provisions in the Reinsurance Policies but not what the proper construction of those provisions actually is.

28. Ninth, the submission on behalf of RSA that from the agreed fact that the Reinsurance Policies cover RSA's liabilities for both indemnity and defence costs "it follows inexorably that both must be capable of eroding the insurance excesses" is a *non sequitur*. The conclusion no more follows from the premiss than would the (false) conclusion that the £20 million limit in the Royal Master Policies includes defence costs follow from the (true) premiss that the cover under the Royal Master Policies extends to both indemnity and defence costs.

29. Tenth, I am unpersuaded by the argument of Miss Ananda and Mr Rich (written closing submissions, paragraphs 2ff) that the only conceivable alternative to their proposed construction of the Limit provisions would be that no limit or excess applied to the Reinsurers' liability for defence costs, so that they are payable by the Reinsurers as soon as they are incurred by The Insurers and for as long as they continue to be incurred. Such a construction might be logically available. But it would divorce the liability to pay defence costs from the exposure to indemnity liability on which it was, in Mr Scorey's word, parasitic. RSA's liability to pay defence costs was dependent on its liability for indemnity costs—it arose when the prior level of BOC's insurance cover, which was provided by Liberty, was exhausted and ended when the limit of RSA's liability for indemnity costs was reached. So too, in my judgment, the Reinsurers' exposure to liability for defence costs arose when the £4 million excess for indemnity costs had been exhausted and would end when the £16 million limit for indemnity costs was reached. This seems to me to be entirely logical, internally consistent and by no means uncommercial.

30. Eleventh, more generally, I do not see that there is anything uncommercial in my interpretation of the "Limits" provisions of the Reinsurance Policies. It is true that the result might be that The Insurers would expend large amounts of money on defence costs without the excess ever being exhausted. But their own obligation under the Royal Master Policies was to pay defence costs without financial limit; only when the indemnity limit had been reached would the obligation to pay defence costs end. On the other hand, once the £4 million excess under the Reinsurance Policy was exhausted the Reinsurers would be similarly exposed to an obligation to pay defence costs without financial limit and until the £16 million of indemnity cover was exhausted. Things could turn out disadvantageously for either party. That is simply a consequence of the combination of (i) The Insurers' obligation to pay defence costs *in addition to* the indemnity and (ii) the back-to-back nature of the reinsurance. In support of their submission that it was implausible that the Reinsurers would be subject to liability for unlimited defence costs despite making clear provision for a £16 million limit (written closing submissions, paragraph 3), Miss Ananda and Mr Rich relied on the dictum of Robert Goff LJ in *The Insurance Co. of Africa v Scor (UK) Reinsurance Co. Ltd ("Scor")* [1985] 1 Lloyd's Rep. 312, at 332-333:

> "Furthermore the implication contended for would give rise to an open-ended promise of indemnity, when the contract of indemnity contained in the policy is expressly limited to $3,500,000; I do not think that it is possible to accept an implication which is inconsistent with that express term of the policy."

Those remarks were in an entirely different context. In *Scor,* the reinsurance policy contained a "follow the settlement" provision but also a clause—considered by the majority of the Court to be inconsistent with and to emasculate the "follow the settlements" provision—requiring reinsurers' consent to any settlement. The reinsurers had refused consent. The argument of the reinsured was *in nuce* that, as a result of the allegedly unreasonable withholding of consent, they had incurred additional loss and expense, for which they could recover under an implied term that the reinsurer would indemnify them for such additional loss or expense. Neither the facts nor Robert Goff's reasoning have anything to do with the issue in the present case. Reliance on the dictum simply begs the question of the proper construction of the Reinsurance Policies.

Issue 2: The Claims Co-operation Clause Issue

31. Each of the Reinsurance Policies contained, whether expressly or by incorporation by reference, the Claims Co-operation Clause set out above. The primary question on this issue concerns the relationship between that clause and the Follow Settlements Clause: "To follow original terms, conditions and settlements (as far as applicable to the layer)."

32. It is common ground that the Claims Co-operation Clause is not a condition precedent to the Reinsurers' liability. However, the submission of Mr Scorey and Miss Cowey on behalf of Equitas is that the Claims Co-operation Clause circumscribed the power of RSA to make settlements binding on the Reinsurers in an analogous manner to the effect of the claims co-operation clause in *Scor* and that, accordingly, Equitas is required to follow settlements only where the adopted course of settlement has been agreed between the Reinsurers and The Insurers.

33. In *Scor* there was a follow settlements clause as follows: "Being a Reinsurance of and warranted same … terms and conditions as and to follow the settlements of the Insurance Company of Africa …" There was also a claims co-operation clause, as follows:

> "It is a condition precedent to liability under this Insurance that all claims be notified immediately to the Underwriters subscribing to this Policy and the Reassured hereby undertake in arriving at the settlement of any claim, that they will co-operate with the Reassured Underwriters and that no settlement shall be made without the approval of the Underwriters subscribing to this Policy."

The Court of Appeal confirmed that the effect of a follow settlements clause was that the reinsurers were obliged to indemnify the insurers in the event that they settled a claim by their assured, provided only (i) that the claim fell within the risks covered by the policy of reinsurance and (ii) that in making the settlement the insurers had acted honestly and taken all proper steps. (See further under Issue 3, below.) However, Robert Goff LJ and Fox LJ held that the claims co-operation clause conflicted with the follow settlements clause and that the latter had to be construed to mean that the

reinsurers were only obliged to follow settlements that were authorised by the policy: that is, settlements that they had approved. At 331 Robert Goff LJ said:

> "There is, I consider, an inconsistency between (1) a follow settlements clause, the underlying philosophy of which is that reinsurers trust insurers to make settlements of claims, and (2) an undertaking in a claims co-operation clause, the underlying philosophy of which is that settlements shall not be made without the approval of reinsurers. Furthermore, it is to be observed that an undertaking by insurers not to make settlements without the approval of reinsurers can only be of relevance in so far as it has an impact upon settlements by insurers which would otherwise be binding on reinsurers. In my judgment the undertaking by the insurers not to make a settlement without the approval of reinsurers must have been intended to circumscribe the power of insurers to make settlements binding upon reinsurers, so that reinsurers would only be bound to follow a settlement when it had received their approval. In other words, the follow settlements clause must be construed in its context in the policy, containing as it does a claims co-operation clause in this form, as only requiring reinsurers to follow settlements which are authorized by the policy, i.e., those which have received their approval, though presumably reinsurers can, if they wish, waive that requirement. This effectively emasculates the follow settlements clause; but it is nevertheless, in my judgment, what the parties to a policy in this form have agreed."

And at 334 Fox LJ said:

> "There is then, on the language of the two clauses, a plain inconsistency between them. The follow settlements clause requires the reinsurers to accept the honest settlements of the insurer arrived at in a businesslike way. The claims co-operation clause (or, more accurately, the second part of it) requires that the insurers shall not make settlements without the approval of the reinsurers. It is a possible view that the two provisions are so much in conflict that both should be disregarded. But I think that reading the two clauses together the proper course is to treat the follow settlements clause as applicable only to such settlements as are approved by the reinsurers. That does least violence to the language. I agree that from the point of view of the insurers that really removes the value of the follow settlements clause but I do not find it possible to give that clause an effect which disregards the clear wording of the claims co-operation clause."

34. The decision in *Scor*, on this point, was thus on the construction of the particular form of claims co-operation clause in the policy in that case. The clause contained an express undertaking not to settle claims without approval. It was materially, though not formally, inconsistent with the follow settlements clause; the only way of holding

the two together was by an interpretation that left the follow settlements clause in place but took away its practical force.

35. In the present case, the Claims Co-operation Clause is in different terms. I have already explained, generally, how I interpret it, but for the purposes of this Issue I make the following particular points.

1) The third paragraph of the Clause is not, in my view, disconnected and free-standing. It is consequent on the second paragraph.

2) There is no express prohibition on settlement without consent. The actual prohibition is on litigating without consent.

3) The stipulation that "the course to be adopted by the primary insurers shall be determined by agreement" raises the question of what is to happen if there is no agreement. The only provision made in that regard addresses the situation where The Insurers want to litigate and the Reinsurers want to settle. The situation where The Insurers want to settle is not separately addressed. In my judgment, that is an indication that the clause is intended to restrict The Insurers' freedom to litigate, not their freedom to settle.

4) Such an interpretation means that the Claims Co-operation Clause can be read consistently with the Follow Settlements Clause.

5) By contrast, to interpret the opening words of the second paragraph (that the course to be adopted be determined by agreement) as meaning that the terms of any settlement have to be approved by the Reinsurers would indeed emasculate the Follow Settlements Clause. Such a result is to be avoided, if possible, and I do not think it necessary. The Clause could easily have said that no settlements could be made without the Reinsurers' approval, but it does not do so. It is, in that regard, very different from the clause in *Scor*. When the second and third paragraphs of the Clause are read together and in the context of the Follow Settlements Clause, the "course" mentioned in the second paragraph is in my view to be understood in terms of strategy: whether or not to litigate over the claims. In that a decision not to litigate is a decision to settle, it could be said that the envisaged agreement extends to settlement. But, if put in those terms, what is envisaged is agreement *to settle,* not agreement *to (terms of) settlement*. And, absent agreement to litigate, the default position is the Insurers' freedom to settle, which respects the underlying philosophy of follow the settlements clauses as identified by Robert Goff LJ. Thus the Reinsurers will be bound by the follow settlements clause, subject only to the two conditions mentioned in *Scor*.

36. In view of my conclusions as to the proper construction of the Claims Co-operation Clause, it is unnecessary to consider the facts relating to this issue; Equitas is bound by the Follow Settlements Clause to its full extent. However, I find that the Reinsurers did on any view agree to the course to be adopted. The extent of the relevant communications is summarised in the schedule comprising Appendix 1 to RSA's written opening submissions. Most importantly, in January 2000 The Insurers sought and obtained the Reinsurers' approval to seeking a settlement at a contribution of up to 55% of the total claims. The Reinsurers did not thereafter resile from that

position, and when in November 2000 they were informed that the Newark Insurers were seeking to settle at 47% and were invited to make any comment, they did not object to the proposed course. (For the details of the settlement, see further below.) The evidence of Mr John Davey, RSA's claims manager who was in charge of the negotiations leading to the TTSA, was that the Reinsurers consistently confirmed that they were content with the way in which the claim was being handled. That evidence is consistent with the documentary record. It is clear, in my view, that the Reinsurers did indeed agree to the course that was adopted. There is nothing at all in Equitas's reliance on the fact that the Reinsurers consistently purported to "reserve [their] rights" as against The Insurers. This meant only that, although the Reinsurers approved the course being taken by the Insurers, they were not committing themselves to accepting a liability to indemnify The Insurers. That was, no doubt, a perfectly reasonable approach to take. But it has no bearing on the present issue.

Issue 3: The Proper and Businesslike Steps Issue

37. This issue concerns the TTSA alone and arises if (as is the case) Issue 2 is determined adversely to Equitas, so that *prima facie* Equitas is bound to follow the settlement.

38. In *Scor*, Robert Goff LJ said at 330:

> "In my judgment, the effect of a clause binding reinsurers to follow settlements of the insurers, is that the reinsurers agree to indemnify insurers in the event that they settle a claim by their assured, i.e., when they dispose, or bind themselves to dispose, of a claim, whether by reason of admission or compromise, provided that the claim so recognized by them falls within the risks covered by the policy of reinsurance as a matter of law, and provided also that in settling the claim the insurers have acted honestly and have taken all proper and businesslike steps in making the settlement."

(Fox LJ agreed, and Stephenson LJ expressed himself in similar terms at 322.)

39. If the insurer discharges the burden of showing that the claim it has settled falls within the risks covered by the policy of reinsurance (which is not in issue in these proceedings), the burden then moves to the reinsurer to plead and prove that the insurer failed to take proper and businesslike steps in settling the claim. See *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2002] EWCA Civ 248, [2002] CLC 870, at [41].

40. An allegation of failure to take proper and businesslike steps is tantamount to an allegation of professional negligence: see *Insurance Co. of the State of Pennsylvania v v Grand Union Insurance Co* [1990] 1 Lloyd's Rep 208 (Hong Kong Court of Appeal), *per* Hunter JA at 223; and *Tokio Marine Europe Insurance Ltd v Novae Corporate Underwriting Ltd (No. 2)* [2014] EWHC 2105 (Comm), [2014] Lloyd's Rep IR 638, *per* Field J at [28] and [31], holding also that, if the final settlement figure was a good one, it cannot be said that there was anything improper or unbusinesslike in not taking points that would not have affected the bottom line,

because the purpose of Robert Goff LJ's second proviso "is to protect reinsurers against prejudicial settlements". Miss Ananda has told me that there is no case in this jurisdiction where a finding has been made of failure to take all proper and businesslike steps; I certainly have not been referred to any such case. (Mr Scorey said that the lack of decided cases was because such disputes all go to arbitration.)

41. Equitas contends that in entering the TTSA the Newark Insurers failed to take all proper and businesslike steps, because they adopted an unreasonable interpretation of the applicable New Jersey law and failed to obtain information relevant to decisions regarding settlement and consequently agreed to bear an unreasonably high proportion of BOC US's losses. Equitas's pleaded case is set out in paragraph 39A.2 of its re-re-amended defence:

> "Further or alternatively, it is denied that in settling the claims on the terms set out in the TTSA, the Newark Insurers (as defined in the TTSA) took proper and businesslike steps in making the settlement:
>
> (i) Before entering into the TTSA, the Newark Insurers took legal advice from Charles W. Miller III. As appears from his reports and witness statement, Mr Miller did not obtain or see copies of the Global Excess Policies yet nevertheless advised that they should be taken into account in relation to the proposed settlement. In particular, Mr Miller failed to verify (i) the policy limits of the Global Excess Policies; and/or (ii) the attachment points for the Global Excess Policies.
>
> (ii) Further or alternatively, as appears from his reports and witness statement, Mr Miller did not obtain or see any primary policies issued to BOC US after 1 October 1988. In the premises, Mr Miller failed to verify (i) the assertion by BOC US that any such primary policies contained pollution exclusions; and/or (ii) that any such pollution exclusions excluded the Asbestos Claims and/or Welding Product Claims, despite Mr Miller recognising in his report dated 16 August 2000 that this cutoff in respect of the primary policies substantially limited the policy limits used for any allocation.
>
> (iii) Further or alternatively, as appears from his reports and witness statement, Mr Miller did not obtain or see any excess policies issued to BOC US after 1 October 1985. In the premises, Mr Miller failed to verify (i) the assertion by BOC US that any such excess policies contained pollution exclusions; and/or (ii) that any such pollution exclusions excluded the Asbestos Claims and/or Welding Product Claims, despite Mr Miller recognising in his report dated 16 August 2000 that this cutoff in respect of the primary policies substantially limited the policy limits used for any allocation.

(iv) Further or alternatively, the TTSA was entered into when the Newark Insurers had filed their brief submitting that the Global Excess Policies should be disregarded for the purposes of allocation, but no opposition briefs had been filed and therefore no reply briefs had been filed either. There was no urgency or need to settle the claims before such opposition briefs had been filed and the merits thereof considered. In the premises, the settlement of the claims pursuant to the TTSA was premature, improvident and did not take into account the full ambit of any arguments as to the extent of the Newark Insurers' legal liability.

(v) Further or alternatively, in the absence of case law as to the allocation of losses amongst 'triggered' policies, the position asserted by BOC US as to allocation and, specifically, the inclusion of the limits of the Global Excess Policies for the purposes of allocation, was not reasonable or principled and resulted in an inequitable and disproportionate allocation of losses to the years in which the Global Excess Policies were included. The Newark Insurers and/or Mr Miller failed to recognise that BOC US's position as to allocation was unlikely to be correct and accordingly advised that the claims were settled at an unreasonably high level which did not reflect the Newark Insurers' actual legal liability to BOC US."

42. On this issue, factual evidence was given by Mr Charles W. Miller III, a New Jersey lawyer, who advised RSA as coverage counsel in respect of the BOC claims before the TTSA was entered into. Expert evidence on New Jersey law was given via video-link by two highly experienced New Jersey lawyers: for RSA, Mr Kevin T. Coughlin; for Equitas, Mr Joseph J. Schiavone.

43. Before considering the specific allegations, I should set out more detail regarding the background to the TTSA.

44. The TTSA was made between BOC entities and its insurers, including the Newark Insurers, and related to claims against BOC entities for bodily injury alleged to have been caused by exposure to asbestos-containing and/or welding-related products. The claims were allocated to the period from 1917 to 1988. The years for which the Newark Insurers were on cover were the years commencing 1 October 1981, 1 October 1982, 1 October 1983 and 1 October 1984. BOC's insurance cover for those years was layered, so that any insurer incurred liability only when the liability of any insurer below it had been exhausted. The bottom layer was under the Liberty Mutual Policies, which provided primary indemnity cover against bodily injury liability up to \$2 million in the first two years and \$3 million in the third and fourth years; defence costs were payable in addition to the limits of liability and without the application of any excess. The next layer of cover was under the Newark Subordinate Policies, which provided indemnity cover of \$ 40 million in each of the first three years and \$30 million in the fourth year. Above this layer cover was provided under certain Global Excess Policies, which were purchased by BOC for the period 1981 to 1985; I

shall say more about these later. Both the Liberty Mutual Policies and the Newark Subordinate Policies were subject to New Jersey law.

45. BOC US first provided RSA/Newark with notice of bodily injury claims arising out of exposure to BOC US's products in February 1984. It was not long before the claims had exhausted the Liberty Mutual Policies: by January 1987 only the policy for 1984/1985 had not been exhausted, and that policy had been exhausted before March 1989. This left Newark on risk under the Newark Subordinate Policies.

46. In 1988 BOC US commenced proceedings in the Superior Court of New Jersey against its primary and excess insurers for the period 1948 to 1986. Newark was one of the defendants. (The second claimant and Eagle Star, as the Insurers under the Royal Master Policies, were also originally named as defendants, but the action against them was dismissed for lack of personal jurisdiction.) In the action, BOC sought declaratory judgments as to coverage for certain environmental damage claims and certain bodily injury claims. The bodily injury claims in question related to allegations of long-term exposure to fumes said to have been produced by BOC's welding products and to asbestos said to have been released by other BOC products: these have been referred to as "toxic tort claims", and there were thousands of them. (The great majority of the bodily injury claims concerned alleged exposures to welding fumes; those relating to asbestos were far fewer.) The particular difficulty raised by those claims was the determination of the time of loss for the purposes of identifying insurance cover, as the alleged exposures were over an extended time and the manifestation of injury was typically many years later than exposure.

47. In April 1993 BOC US filed a motion for partial summary judgment, seeking among other things declarations that the "continuous trigger" theory of liability applied, and that accordingly the bodily injury claims against BOC US triggered the defence obligations of all the policies in force from first exposure through manifestation. In a ruling delivered on 23 January 1996 Judge Weiss handed down his ruling on the motion and granted those declarations. He referred to the decision of the Supreme Court of New Jersey in *Owens-Illinois, Inc v United Ins. Co.* 138 N.J. 437, 650 A.2d 974, given on 22 December 1994 ("*Owens-Illinois*"), and said:

> "The 'overwhelming weight of authority' elsewhere acknowledges the progressive nature of asbestos-induced disease, and affirms that 'bodily injury' occurs when asbestos is inhaled and retained in the lungs.' … [W]e are satisfied, like most American jurisdictions, that medical science confirms that some injury to body tissue occurs on the inhalation of asbestos fibers, and that once lodged, the fibers pose an increased likelihood of causing or contributing to disease. …
>
> The Court went on to say that although asbestos diseases are progressive in nature, the question remains as to when the CGL [commercial general liability] policies should be 'triggered.' In considering this issue, the Justices recognized that any determination on this point is 'necessarily imperfect' due to the lack of scientific certainty as to when the body is irrevocably altered. … However, the Court concluded:

> > ‘[8] To recapitulate, we hold that when progressive indivisible injury or damage results from exposure to injurious conditions for which civil liability may be imposed, courts may reasonably treat the progressive injury or damage as an occurrence within each of the years of a CGL policy. That is the continuous-trigger theory for activating the insurers’ obligation to respond under the policies.’
>
> In the present case, it is clear that the ‘continuous trigger’ theory should apply, as mandated by the New Jersey Supreme Court.”

48. For present purposes, the most important part of Judge Weiss’s ruling concerned the allocation of liability among the triggered policies, and for that reason I shall set it out at some length. The problem of allocation is acute, because the continuous trigger theory means that, where exposure may precede manifestation of injury by many years, liability may potentially be triggered under a large number of policies. Judge Weiss said:

> “After adopting the ‘continuous trigger’ theory, the *Owens-Illinois* Court went on to mandate that losses must be allocated among the various triggered policies with respect to ‘the degree of risk transferred or retained in each of the years of repeated exposure to injurious conditions.’ … Justice O’Hern expounded:
>
> > ‘[10] Because multiple policies of insurance are triggered under the continuous-trigger theory, it becomes necessary to determine the extent to which each triggered policy shall provide indemnity. …[1] A fair method of allocation appears to be one that is related to both the time on the risk and the degree of risk assumed. When periods of no insurance reflect a decision by an actor to assume or retain a risk, as opposed to periods when coverage for a risk is not available, to expect the risk-bearer to share in the allocation is reasonable. Estimating the degree of risk assumed is difficult but not impossible. … Courts must take an active role in the management and resolution of such coverage controversies. A trial court may repose a large measure of discretion in a special master to aid the court in developing a formula for allocation of the costs of defense and indemnity. …’
>
> Justice O’Hern further recognized that such an endeavor involves many complex issues. The Court further admitted:
>
> > ‘We realize that many complexities encumber the solution that we suggest involving, as it does, proration

[1] Ellipses within internal quotations from the *Owens-Illinois* judgment are mine, not Judge Weiss’s, and are with a view to brevity and simplicity.

> by the time and degree of risk assumed – for example, determining how primary and excess coverage is to be taken into account or the order in which policies are triggered. … Still, we do not believe that the issues are unmanageable. Constructing the model for analysis of the self-insurance portion of the risk assumed by O-I is difficult but not impossible. We recognize the difficulties of apportioning costs with any scientific certainty. However, the legal system "frequently resolves issues involving considerable uncertainty." …
>
> This case is undoubtedly more difficult to manage than most because of the great number of claims involved. On the other hand, the record is reasonably well-developed on the measure of risk assumed or transferred, at least since 1963. To extrapolate back from 1963 to establish a rough measure of the risk assumed or retained in the years from 1948 to 1963 should not be difficult. A rough measure is all that we can achieve in the imperfect resolution of these issues. Moreover, we do not have a sense of the extent to which exposures date back to 1948 or to other periods before 1963. …'

To assist in dealing with these admittedly complex issues, the New Jersey Supreme Court provided:

> '… the court shall appoint a master, one skilled in the economics of insurance, to create a model for allocating the claims. Above all, the master should develop a workable system for efficient assignment and administration of the claims. … Those losses for indemnity and defense costs should be allocated promptly among the companies in accordance with the mathematical model developed, subject to policy limits and exclusions. … Exact dates of exposure may not now be available. Available data should enable the master to grasp the generality of the underlying claims and exposures involved. …'

In light of the mandate of the Supreme Court, a special master should be appointed to allocate the claims according to the principles outlined above."

49. Judge Weiss went on to hold, in accordance with the principle of "horizontal exhaustion", that all available primary coverage must be exhausted before BOC could seek to recover from excess policies and that "the distinction between primary and excess coverage must be factored into the time/risk allocation mandated by *Owens-Illinois*."

50. Settlement discussions between BOC and the various insurers, and by the insurers among themselves, began in about 1997 and proceeded slowly thereafter, the court

granting extensions from time to time to facilitate negotiations. For the Newark Insurers, decisions were made by RSA's London office. Legal advice was received from Mr David Reston, a partner in Herbert Smith, and in respect of New Jersey law from Mr Miller.

51. On 8 July 1998 the New Jersey Supreme Court gave judgment in *Carter-Wallace, Inc. v. Admiral Insurance Company et al.* 712 A.2d 1116. The Court affirmed the approach it had espoused in *Owens-Illinois* and confirmed that the methodology of allocation according to "the degree of risk transferred or retained" intentionally assigned a greater part of the losses to years in which greater amounts of insurance were purchased. Importantly, however, the Court rejected the requirement, according to the horizontal principle adopted by Judge Weiss, that all available primary coverage be exhausted before an excess policy could be triggered; instead, it held that the court should first quantify the loss to be allocated to each policy year, and should then allocate the loss to the policies within that year, piercing excess policies in the normal way ("vertical exhaustion"). It followed that some policies might have no losses allocated to them, even though the limits in those policies had been taken into account in allocating losses to that particular policy year. Accordingly, referring to the application of the principle to the facts of that case:

> "we perceive that this solution is consistent with the contract language, as Commercial Union's second-level excess policy will not be pierced unless and until the primary and first-level excess policies in effect for a given year have been expended."

52. The judgment in *Carter-Wallace* caused BOC to contend that the Global Excess Policies should be included in the allocation as available coverage, because they evidenced "the degree of risk transferred" in the years 1981 to 1985 as required by *Owens-Illinois*. The limits of the Global Excess Policies were substantial: in 1981-2, $394,000,000; in 1982-3, $412,100,000; in 1983-4, $395,250,000; in 1984-5, $269,000,000. These limits greatly exceeded the total limits in the other years between 1979 and 1990. This fact and its significance were adverted to by Mr Miller in his report dated 16 August 2000:

> "BOC USA and most of the other carriers in this litigation have taken the position that, for purposes of allocation of the Bodily Injury Claims, costs should be allocated utilizing the policy limits not only of all primary and excess policies issued to BOC USA which are at issue in this litigation, but also the policy limits of all of the Global Policies issued to BOC plc, its parent. [Footnote: It should be noted that the policy limits of the coverage available to BOC USA for the years 1981 to 1985 when the Global Policies are not included are at levels similar to those levels of the policy limits purchased in earlier years. More specifically, BOC USA had total policy limits of $52 million for 1978 to 1979, $52 million for 1979 to 1980, and $52 million for 1980 to 1981.]
>
> However, inclusion of the Global Policies in any allocation calculation substantially increases the allocation to the 1981 to 1985 years of coverage, since the Global Policies were,

apparently, first purchased by BOC USA in 1981. More specifically, by inclusion of the limits of all of the Global Policies, in addition to the policy limits of the coverage issued to BOC USA itself (which are at issue in the litigation), the total policy Limits in effect for 1981 to 1985 increase as follows: [there followed a table showing the limits of the Global Excess Policies].

…

Thus, inclusion of the Global Policies coverage for BOC plc increases the policy limits for the 1981 to 1985 time frame from $220 million to more than $1.47 billion - nearly seven times as great.

Given, that BOC USA's total policy limits per year prior to 1981 never exceeded $52 million per year, inclusion of the policy limits of the Global Policies has a tremendous impact on the percentage of allocation to the years 1981 through 1985. Without the Global Policies, the total coverage limits which BOC USA alleges to be available to provide coverage for the Bodily Injury Claims from 1917 through 1988 total $952.79 million. The coverage provided to BOC USA during the years 1981 to 1985, which totals $200 million, constitutes a proximately 23% of the total insurance coverage of BOC USA, which BOC USA claims provides coverage for the Bodily Injiny Claims ($220 million out of $952.79 million total).

However, when the coverage limits of all of the Global Policies are included in the total coverage limits available to BOC USA for the Bodily Injury Claims, the total coverage limits that BOC USA alleges should be used for allocation calculations increases to $2,054,102,500 because of the inclusion of the limits of all of the various Global Policies whose policy limits allegedly exceed $1 billion. By inclusion of the Global Policies for 1981 to 1985, the percentage of coverage limits provided during the years 1981 to 1985 increases dramatically. When the policy limits of all of the Global Policies are included in allocation calculations, the policy limits for coverage from 1981 through 1985 constitutes nearly 72% of all policy limits ($1,470,350,000 out of $2,054,102,500). Thus, the mere inclusion of the Global Policies in allocation calculations, using BOC USA's own calculations, increases the percentage of the overall policy limits provided during the years 1981 to 1985 (and, accordingly, the allocation to those years of coverage), from approximately 23% to nearly 72%, more than a threefold increase in allocation."

53. Thus the inclusion of the limits of the Global Excess Policies in the allocation exercise would place 72% of BOC's total coverage limits in the four-year period covered by the Reinsurance Policies, leaving 28% of the liability to be allocated to the

years 1917 to 1981 and 1985 to 1988. (In the event, the TTSA adopted an allocation of 47% to the 1981-1985 policy years.) Accordingly, not just BOC but also most of the other Insurers were pressing for the inclusion of the Global Excess Policies' limits, which would significantly increase the allocation to the years of the Newark policies and correspondingly reduce the allocation to the years in which the other Insurers had been on risk.

54. In a letter dated 23 February 1999 to Mr Reston, Mr Miller gave his opinion on the issue. This letter and the letter mentioned in paragraph 58 below are protected by legal professional privilege belonging both to the claimants and to Eagle Star, and they were referred to at the trial subject to and in accordance with the terms of the order made, by consent, by His Honour Judge Pelling KC on 14 May 2025. For that reason, I shall not set out the terms of either letter. It suffices to say here that Mr Miller mentioned the argument that BOC's approach to allocation would yield an inequitable result but that his assessment of that argument was consistent with the assessment later communicated by RSA to the Reinsurers (see paragraph 56 below). It is also relevant to note that Mr Miller confirmed that he had asked counsel for BOC to provide him with a listing of the policies that BOC had included in its allocation proposal as total coverage limits for the years 1981 to 1985, as well as copies of those policies, in order that the accuracy of the policy limits being used by BOC could be verified.

55. Because the question of the inclusion of the limits in the Global Excess Policies in the allocation calculation was a major issue in the ongoing negotiations, Judge Weiss directed the parties to file briefs setting out their positions on the issue. On 22 September 1999 Newark filed its brief in support of the exclusion of the Global Excess Policies' limits from the allocation calculations. The key argument, among others that were put forward, was that the inclusion of the Global Excess Policies' limits would result in an inequitable allocation to the years in which Newark was on risk, namely 1981 to 1985. In October 1999 Judge Weiss gave further directions for the filing of opposition briefs by 22 November 1999 and oral argument to follow shortly thereafter. In the event, opposition briefs and reply briefs were never filed, because all the interested insurers, including Liberty Mutual, Northbrook and London Markets as well as Newark, agreed to seek settlement of the allocation issue before it was decided by the court.

56. On 20 December 1999 Mr John Davey, RSA's Technical Claims Manager, with overall charge of RSA's handling of the bodily injury claims, reported to the Reinsurers and summarised the position as it then stood:

> "Reinsurers will recall that both BOC and Newark have, on the basis of the possible inclusion or otherwise of the global excess policies, prepared various allocation calculations. Reinsurers will have seen a copy of the Newark's Illustrative Alternative Allocation Calculation, sent to you under cover of my letter of 26 May 1999 (a further copy was supplied to you under cover of my fax dated 23 August). That calculation, which was based on the premise of the global excess policies not being included in an allocation, had the Newark's share of the losses at approximately 25%. Should the global excess policies be included in an allocation, the Newark's UK lawyers' view is

that the proportion of the losses the New Jersey Court will find applicable to the Newark is likely to be as high as 72%.

My fax to you of 23 August also included a copy of the Carter-Wallace Appeal decision. At the meeting at your London offices on 25 August you will recall that Mr Miller advised those present that it would be an uphill struggle to convince the Court in New Jersey that the inclusion of the global excess policies in an allocation would be inequitable. In the context of the Liberty Mutual proposal, Mr Miller has advised that even if the Newark were able to convince an allocation master (the judicial officer deciding the allocation issue in New Jersey) that a 72% share of the losses would be an inequitable allocation, it is very unlikely that the allocation master would reduce the Newark's allocation to 45%. In short, the settlement proposal advanced by Liberty Mutual would see the Newark contributing less to the bodily injury costs than the Newark are advised is the likely outcome of a determination by the New Jersey Court.

…

At a subsequent meeting of insurers' lawyers, those representing Liberty Mutual advised they had revisited their calculations which has resulted in the Newark contribution increasing from 45% to 55%. This figure of course remains well below the 72% we are advised is likely to be attributed to Newark by the Allocation Master. A further settlement meeting of the insurers' lawyers is being arranged and is likely to be held during the first week of January 2000. We are told that the 'window of opportunity' for the settlement negotiations is likely to close at that time as the brief to the Court opposing the Newark's brief on the allocation issue is to be filed by 17 January (and that date had already been put back to accommodate the settlement negotiations). The judge in charge of this case is now apparently keen to push the litigation forward and a decision on the allocation issue could be made relatively quickly.

You will appreciate that together with our co-insurers Eagle Star/Zurich we must give very serious consideration to the Liberty Mutual's settlement approach in view of the advice received from the Newark's lawyers. Our combined view is that faced with this advice there is no option but to seek to settle the allocation issue along the lines put forward by Liberty Mutual. Such a settlement would, of course, also be of benefit to our reinsurers on the basis that, as we contend is the case, these sums are payable under the reinsurance policies. Whether a settlement at a 55% contribution by the Newark is achievable remains to be seen. …"

57. On 4 January 2000 the response of the Reinsurers' leader, Equitas Limited, was sent to Mr Davey:

> "Welcome update & on balance of info. contained herein would agree that it would appear sensible for RSA/ESZ to consider settlement approach at 55% iro Newark. Notwithstanding R/I's maintain stance that we reserve our rights with regard to coverage etc. …"

58. Further negotiations resulted in Newark offering a contribution of 45%, subsequently increased to 47%. In a letter to Mr Reston dated 21 June 2000, Mr Miller explained the state of the negotiations (which at that stage were solely among the several insurers, who were seeking an agreed position to propose to BOC) and his approach to them. I have regard to the detailed contents of the letter but, for reasons explained above, shall not set them out here. Suffice it to say that Mr Miller considered the offered contribution of 45% to be very reasonable and to represent advantageous terms of settlement. He also commented on the period for the allocation, extending back to 1917, and commented on what he regarded as the improbability of either the Judge or the Allocation Master conducting the allocation by reference to each of the many individual claimants.

59. The TTSA was eventually signed between 28 March 2001 and 24 April 2001. The parties were BOC, BOC US, Liberty Mutual, Newark, the second claimant, Midland Assurance Limited and Eagle Star Insurance Company Limited (both Eagle Star entities), Affiliated FM Insurance Company, and Appalachian Insurance Company. The TTSA allocated 47% of past and future costs to Newark under the Newark Subordinate Policies. That allocation was split among the four policy years to which those policies related: 12.5% to 1981-2, 12.5% to 1982-3, 12.5% to 1983-4, and 9.5% to 1984-5.

60. On 26 November 2001 BOC's action in New Jersey against Newark and the other insurers was dismissed by consent, in accordance with the TTSA.

61. In the light of that background, I turn to address the pleaded allegations that the Newark Insurers, by their agents, failed to take proper and businesslike steps in making the TTSA. At this stage, however, it is relevant to note that the matter of settlement was considered in detail by Mr Miller in conjunction with Mr Reston and was referred both to Eagle Star and to the Reinsurers, both of whom were content with the approach being taken. As for the particular matters raised by Equitas, for convenience of exposition I shall take the final pleaded allegation first, as it concerns the overarching approach to allocation and took up most time at trial.

(v) Inclusion of the limits of the Global Excess Policies was neither reasonable nor principled

62. This complaint concerns the way in which the Newark Insurers ought reasonably to have understood and applied *Owens-Illinois* and *Carter-Wallace* in settlement negotiations. The issue may best be approached by first setting out some extended passages from the judgments in those two cases, as they are the territory over which battle is being fought. (I shall omit most of the references as being unnecessary for present purposes.)

63. *Owens-Illinois*

> "We will not attempt a universal resolution of all issues of coverage for gradual release of pollutants or toxins. At least in the context of asbestos-related personal injury and property damage, the rules that we adopt will attempt to relate the theory of a continuous trigger causing indivisible injury to the degree of risk transferred or retained in each of the years of repeated exposure to injurious conditions. In the absence of a satisfactory measure of allocation …, we believe that straight annual progression is not an appropriate measure of allocation. The degree of risk transferred or retained in the early years of an enterprise like O-I's obviously was not at all comparable to that sought to be insured in later years. Hence, any allocation should be in proportion to the degree of the risks transferred or retained during the years of exposure. We believe that measure of allocation is more consistent with the economic realities of risk retention or risk transfer. That later insurers might need to respond to pre-policy occurrences is not unfair. 'These are "occurrence" policies which, by their nature, provide coverage for pre-policy occurrences (acts) which cause injury or damage during the policy period." … In this case, the year-by-year increase in policy limits must have reflected an increasing awareness of the escalating nature of the risks sought to be transferred. We believe that a better formula (putting aside for a moment the problem of periods of self-insurance) is that developed in California. In *Armstrong World Industries*, supra, 26 Cal. Rptr. 2d at 57, the court allocated the losses among the carriers on the basis of the extent of the risk assumed, i.e., proration on the basis of policy limits, multiplied by years of coverage."

The court explained this approach by an example, which was set out before the passage just cited and analysed after that passage:

> "Assume that a group of workers occupied an office building for nine years under the following circumstances. For the first three years, the building owners had no liability insurance, assuming any risk of loss. During each of the middle three years, the owners were insured under a CGL policy with the Trustworthy Insurance Company for $5,000,000 per occurrence. For the remaining three years of the period, the owners were again uninsured. Assume, too, that during the first three years the building occupants were exposed to asbestos fibers in the ceilings and insulation but that all asbestos products were removed at the end of the third year. During the first three years, no occupants of the building manifested any symptoms of disease. During the fourth, fifth, and sixth years, there was 'exposure in residence,' that is, some building occupants began to develop breathing problems, but

no disease was diagnosable. In the final three years, some of the building's occupants were diagnosed with asbestos-related diseases.

In the tenth year the owners received claims from thirty people who had worked in the building during the entire nine years asserting that they were suffering from asbestos-related disease as a result of their work environment. The owners, when presented with the claims, no longer had insurance. They sought coverage, however, for all the claims from the Trustworthy Insurance Company, which had insured the owners for three of the nine years – years when the building contained no asbestos. Must Trustworthy respond to the claims? If so, to what extent?

…

If we were to accept the constant levels of the policy limits as evidence of constant risks assumed over the nine-year span from exposure to manifestation (in the case of disease manifested in the ninth year), the carriers on the risk in years four, five, and six would each pay one-ninth of the loss, or collectively thirty-three percent. If the facts of coverage had been otherwise – let us say policies had been in effect for years one through three in the amount of two million per year and in years four through six at three million per year – we might assess the risk assumed in years seven through nine at four million per year. Carriers during the first three years would bear roughly twenty-two percent (6/27ths); carriers covering the middle three years would bear thirty-three percent (9/27ths); and the building owners would bear forty-four percent of the risk (12/27ths). Of course, policy limits and exclusions must be taken into account. We recognize that such even mathematical proportions will not occur, and so we must repose a substantial measure of discretion in a master who must develop the formula that fairly reflects the risks assumed or transferred.

We realize that many complexities encumber the solution that we suggest involving, as it does, proration by time and degree of risk assumed – for example, determining how primary and excess coverage is to be taken into account or the order in which policies are triggered. … The parties did not focus on those issues. Still, we do not believe that the issues are unmanageable. Constructing the model for analysis of the self-insurance portion of the risk assumed by O-I is difficult but not impossible. We recognize the difficulties of apportioning costs with any scientific certainty. However, the legal system 'frequently resolves issues involving considerable uncertainty.' …"

64. *Carter-Wallace*

First, referring to its earlier decision in *Owens-Illinois*:

> "[O]ur resolution of the issue [that is, the issue of allocation] was guided by our concern for the efficient use of resources to address the problem of environmental disease and by the demands of simple justice. We also observed that '[b]ecause insurance companies can spread costs throughout an industry and thus achieve cost efficiency, the law should, at a minimum, not provide disincentives to parties to acquire insurance when available to cover the risks.' We determined that 'any allocation should be in proportion to the degree of the risks transferred or retained during the years of exposure,' and concluded that the better formula' was to 'allocate[] the losses among the carriers on the basis of the extent of the risk assumed, i.e., proration on the basis of policy limits, multiplied by years of coverage.'"

The Court continued:

> "Nevertheless, we expressly declined to address how the solution we crafted would affect excess insurers:
>
> > 'We realize that many complexities encumber the solution that we suggest involving, as it does, proration by time and degree of risk assumed—for example, determining how primary and excess coverage is to be taken into account or the order in which policies are triggered. The parties did not focus on those issues.'
>
> At issue in this appeal is how excess insurance is to be considered when allocating responsibility under a continuous trigger of liability."

Having considered the allocation methods proposed by the parties, the Court explained its conclusion on the issue:

> "We therefore reject each alternative advanced by the parties to this appeal. Instead, we are confident that another allocation method more faithful to the principles articulated in *Owens-Illinois* is available to resolve this issue. In *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty & Surety Co.*, 978 F.Supp. 589 (D.N.J.1997), Judge Brotman relied on *Owens-Illinois* in allocating coverage between various levels of excess insurance. Not unlike this appeal, *Chemical Leaman* involved a plaintiff that sought coverage for costs incurred as a result of environmental contamination. The insurers argued that each layer of insurance must be exhausted across all of the triggered policy years before the next layer would be allocated, a contention that Commercial Union echoes here. Using the

example we provided in *Owens-Illinois*, the court observed that '[t]he *Owens-Illinois* method intentionally assigns a greater portion of indemnity costs to years in which greater amounts of insurance were purchased, based on the view that this measure of allocation is more consistent with the economic realities of risk retention and risk transfer.' The court therefore rejected the theory of horizontal exhaustion by layer, and 'direct[ed] apportionment of damages among policy years without reference to the layering of policies in the triggered years.' However, the court did note that within any given year, each layer of excess coverage must be depleted before the next level is pierced.

…

We believe Judge Brotman's well-reasoned opinion in Chemical *Leaman* represents a natural extension of *Owens-Illinois*, one that is entirely consistent with our belief that 'any allocation should be in proportion to the degree of the risks transferred or retained during the years of exposure.' Owens-Illinois, supra, 138 N.J. at 475, 650 A.2d 974. In *Owens-Illinois* we identified several public interest factors relevant to the appropriate method of allocating insurance coverage, including the efficient use of available resources, the interests of simple justice, and the need for an 'efficient response' to the logistical challenge posed by environmental insurance litigation. We are confident that the *Chemical Leaman* solution best serves those interests. Firstly, this approach makes efficient use of available resources because it neither minimizes nor maximizes the liability of either primary or excess insurance, thereby promoting cost efficiency by spreading costs. That method also promotes 'simple justice,' by respecting the distinction between primary and excess insurance while not permitting excess insurers unfairly to avoid coverage in long-term, continuous-trigger cases. Additionally, adoption of that allocation method will introduce a degree of certainty and predictability into the complex world of environmental insurance litigation in continuous-trigger cases. Moreover, we perceive that that solution is consistent with the contract language, as Commercial Union's second-level excess policy will not be pierced unless and until the primary and first-level excess policies in effect for a given year have been expended.

Our jurisprudence in this area has not been marked by rigid mathematical formulas, and we do not advocate any such inflexibility now. Rather, our focus remains on '[a] fair method of allocation . . . that is related to both the time on the risk and the degree of risk assumed.' Nevertheless, we anticipate that the principles of *Owens-Illinois*, as clarified by our decision

> today, represent the presumptive rule for resolving the allocation issue among primary and excess insurers in continuous trigger liability cases unless exceptional circumstances dictate application of a different standard. See Comment, *Allocating Progressive Injury Liability Among Successive Insurance Policies*, 64 U. Chi. L.Rev. 257, 259 (1997) (noting that '[t]he magnitude of the losses in [progressive injury] cases further illustrates the need for courts to choose one method, and apply it consistently, when allocating liability for progressive injuries')."

65. Mr Miller's understanding of those decisions and how a court dealing with the BOC claims would be likely to apply them appears from his report cited in paragraph 52 above and his letters mentioned in paragraphs 54 and 58 above, as well as from Mr Davy's report to the Reinsurers in December 1999, quoted in paragraph 56 above.

66. The expert witnesses took differing positions on the principles and allocation methodology to be derived from the cases. The bottom line was that Mr Coughlin was of the opinion that the full limits of the Global Excess Policies should have been included in the BOC allocation calculations, and Mr Schiavone was of the opinion that they should not have been included at all.

67. Mr Coughlin's conclusion was that "there was a very high likelihood that the limits of the Global Excess Policies would be included in determining the appropriate allocation to the Newark Insurers" and that "based on the information provided and the principles of New Jersey law as they stood in March 2001, the appropriate allocation to the Newark Insurers of the defense and indemnity costs for the Toxic Tort Claims would have exceeded the 47% level agreed to in the TTSA" (report, paragraphs 4.1.1 and 4.1.2). Indeed, he expressed the view that "the issue was far less uncertain than Mr Miller described … [and] that the Global Excess Policies' limits almost certainly would have been included in the allocation calculations had the issue been decided by the Court in accordance with New Jersey law" (report, paragraph 6.2). Mr Coughlin's reasoning may be summarised as follows. The Supreme Court decisions were "policy driven" (report, paragraph 6.5.5.1 and *passim*). They established a presumptive allocation method, involving allocation by time on risk and the degree of risk transferred or assumed ("i.e. pro rata by time weighted by policy limits"). This intentionally assigns a greater portion of loss to years in which higher levels of insurance were purchased. "Whether specific policy limits are to be included in the calculation of the degree of risk transferred is not dependent on whether the policies are likely to be reached by a loss" (joint statement; also, for example, report, paragraph 6.5.7.1, citing the judgment in *Chemical Leaman Tank Lines*). Accordingly, the decision on allocation does not require prior ascertainment of the size of the claim (report, paragraphs 6.5.9 and 6.5.10). Once the allocation has been made, policies in each period respond layer by layer, as though they are responding to an occurrence solely in their period. But the likelihood of a layer being reached is irrelevant to the inclusion of the limits in the allocation; all policy limits are to be included. At the allocation stage itself, only broad exclusions would be taken into account (that is, such exclusions as would preclude coverage for the relevant class of claims). Otherwise, the terms, conditions, exclusions, attachment points and limits of the excess policies were only, and then fully, to be taken into account at the

stage of response of the policies within each year. The court did have a discretion to depart from the presumptive allocation method, but only if exceptional circumstances dictate such a departure. Both the Supreme Court in *Carter-Wallace* and subsequent first-instance decisions had recognised the need for consistent application of a single allocation method (report, paragraph 6.5.16.1). In the present case, the "spike" of coverage in the years 1981-1985 is not an exceptional circumstance that justifies departure from the presumptive allocation method. Indeed, the Supreme Court in *Owens-Illinois,* having noted that the "degree of risk transferred in the early years of an enterprise like O-I's obviously was not at all comparable to that sought by the insured in later years" (because increases in policy limits reflected an increasing awareness of the escalating nature of the risks sought to be transferred), concluded: "Hence, any allocation should be in proportion to the degree of the risks transferred or retained during the years of exposure." In conclusion, "it would be improper to exclude excess policy limits in some years in order to achieve a more equal allocation across the triggered years" (joint statement).

68. Mr Schiavone, by contrast, concluded that it was "very unlikely that a Court would have allocated 47% or more of the bodily injury losses to the 1981-1985 policy years. Correctly excluding the Global Excess Policies from the final allocation calculation would mean that it was much more likely that approximately 23% of the losses would have been allocated to the 1981-1985 policy years" (report, paragraph 18). He stated: "There is no 'presumptive rule' for allocating claims under the continuous trigger theory" (joint statement; see also report, paragraph 78). His position was, however, more nuanced than that statement, taken by itself, might suggest. He acknowledged that the court in *Carter-Wallace* had said that the principles in *Owens-Illinois*, as clarified by its own judgment, "represent the presumptive rule for resolving the allocation issue among primary and excess insurers in continuous trigger liability cases". But he said that this only gave presumptive force to the guiding "polestars" in *Owens-Illinois* (namely, maximising resources to cope with environmental injury or damage, providing an incentive to insureds to acquire insurance, and notions of simple justice: report, paragraphs 26 and 41; also at paragraphs 48 to 51, with specific reference to the subsequent decision of the Supreme Court of New Jersey in *Spaulding Composites Co. v Aetna Casualty and Surety Company* 178 N.J. 25 (2003); and again at paragraph 81), and he observed that the Court had anyway qualified its statement by saying "unless exceptional circumstances dictate application of a different standard". The approach in *Owens-Illinois* was designed to promote reasonable and fair allocations. The very point of leaving allocation issues to be decided in the first instance (subject to final decision of the trial judge) by a Special Master with expertise in insurance matters was that he would have "a substantial measure of discretion [to] develop a formula that fairly reflects the risks assumed or transferred" (*Owens-Illinois*). "The allocation approach adopted in *Owens-Illinois* was designed to promote reasonable and fair allocations. After *Owens-Illinois*, it was expected that continuous trigger allocations would need to pass the test of fairness" (joint statement; also report, paragraph 20). In marked contrast to the present case, the cases considered by the Supreme Court had involved only a very modest difference between the coverage included in the allocation and the coverage that the insurers sought to exclude (report, paragraph 61). The Supreme Court in *Carter-Wallace* had not dealt with the issue of disproportionate or "spiked" cover in a small number of years, as that was not an issue in the case (report, paragraph 37). But the Supreme Court there was "attempting to balance respect for the integrity of excess of

loss policies and the concern that the excess coverage should be made available, *if the excess cover was actually needed*, to cover the losses at issue" (report, paragraph 38; my emphasis). Mr Schiavone's primary opinion was that there was no requirement to include excess policies' limits (with different attachment points and limits) in an allocation exercise. But he thought that, even if such excess policies' limits were presumptively to be included, there were exceptional circumstances in the present case that would lead to the exclusion of the excess policies' limits: the very high attachment points of the Global Excess Policies, the excess availability of coverage to pay the claims without recourse to them, and the absence of any evidence that a spike of losses actually occurred in the years 1981-1985. Further, there was no rule of law that excluded consideration of the terms, conditions, exclusions, attachment points and limits of the excess policies from the allocation exercise, and the Special Master had discretion to consider those matters when determining an equitable allocation. "[I]t is appropriate and necessary for the Court to take into account the size of the losses. This is a fundamental part of the allocation process" (joint statement). In the present case, to achieve a reasonable and fair outcome it was necessary to exclude the Global Excess Policies from the allocation process. Mr Miller "recommended settlement at a level of payment that I do not consider to be reasonable or based upon an appropriate allocation as a matter of New Jersey law" (report, paragraph 19).

69. It is not the function of this judgment to decide which of these two opinions is preferable. Rather, I am concerned with whether the advice on which the Newark Insurers acted, and for which they and the claimants must take responsibility in these proceedings, was such as no careful lawyer, reasonably competent in the law of New Jersey, could have given, so as to make the decision to settle on the basis of it a failure to take proper and businesslike steps. In short: was the settlement based on the negligent adoption of a wrong method of allocation? In my judgment, it was not.

70. I shall briefly identify the factors that seem to me to be important and explain such firm conclusions as I have reached.

- "The level of appropriate settlement, and the point at which insurers should dig their heels in, in relation to a disputed insurance claim are often difficult matters of judgment or feel, on which different people may well hold different views": *Gan Insurance Company Ltd v Tai Ping Insurance Company Ltd (Nos. 2 and 3)* [2001] EWCA Civ 1047, [2001] Lloyd's Rep IR 667, 699, *per* Mance LJ at [77].

- The decisions in *Owens-Illinois* and *Carter-Wallace* did not give an express and definitive answer to the question whether the Global Excess Policies should be counted in the allocation process. (Mr Schiavone himself states, in paragraphs 22 and 44 of his report, that there was not at the time of the TTSA and is not now any New Jersey case law that determines the point. In cross-examination he accepted that it was a "novel issue", though he went on to say that he did not regard the settlement actually achieved as being within the "range of [reasonable] possible outcomes".) That was why the insurers and BOC were negotiating with specific reference to the question, and why the question turns on judgements formed on the basis of contested interpretations of such case law as there was. In the absence of a definitive answer, it was

necessary to form a view as to what the trial court (initially the Special Master, and ultimately the Judge) would be likely to do.[2]

- On my interpretation of the authorities (which, unsurprisingly, I think to be an interpretation that could reasonably have been held), the Supreme Court clearly did lay down a presumptive method, and that method involved allocation by time on risk and the degree of risk transferred or assumed and also involved the inclusion of excess policies at the allocation stage. Insofar as Mr Schiavone opines that no method but merely underlying principles had presumptive force, I consider that his reading of *Carter-Wallace* is clearly wrong and that Mr Coughlin's reading is clearly correct. At the very least, Mr Coughlin's reading, which was that of Mr Miller, was a reasonable one.

- It is also clear that the Supreme Court was not mandating a rigid and inflexible approach. There are, in my view, two aspects to this point. First, the Special Master was expected to bring expertise and judgement to bear on the matter. But this was, at least primarily, within the basic approach established by the Supreme Court: as stated in *Owens-Illinois,* his task was to "develop the formula *that fairly reflects the risks assumed or transferred*" (my emphasis). Second, if there were "exceptional circumstances" the court could depart from the presumptive method. This leaves two potential routes of analysis of the basic question of inclusion or exclusion of the Global Excess Policies: whether they should be excluded by a proper application of the presumptive method; and whether the circumstances were exceptional so as to justify a departure from the presumptive method.

- Whichever route of analysis one chooses, the basic question seems to me to be one on which opinions could reasonably differ.

- There are factors that might militate in favour of exclusion of the Global Excess Policies from the allocation exercise. In particular, they caused a great spike in coverage for the years 1981 to 1985, and the limits in those policies were far in excess of any losses in those years, so that the lower layers of cover were not in fact exhausted and were highly unlikely to be exhausted (so that it would not have been necessary to quantify the bodily injury claims in detail to know that the cover under the policies would not in fact be triggered).

- However, there were factors pointing in favour of the inclusion of the Global Excess Policies in the allocation calculation. I note in particular the following points.

    a) The Supreme Court, though not intending to mandate an inflexible approach, was clearly concerned "to choose one method, and apply it consistently" on account of "several public interest factors relevant to the appropriate method of allocating insurance coverage, including the efficient use of available resources, the interests of simple justice, and the need for an 'efficient response' to the logistical challenge posed by

[2] I note in passing that, during cross-examination, Mr Scorey put to Mr Coughlin that he was treating one point as though it were black and white, "whereas both you and I have paid our mortgages and put food on the table because we work in a penumbral world where there's always grey." That has some resonance in the present context.

environmental insurance litigation." A nuanced approach to every case in the interests of fairness would tend to undercut the aim of "certainty and predictability"; the requirement of "exceptional circumstances" to justify departure from the presumptive rule is important.

b) For similar reasons, although in principle it would be possible to argue that lower levels of cover in earlier years should be seen as a deliberate decision to minimise insurance and, in that sense, to self-insure, the encouragement of detailed investigation of such matters at the allocation stage would tend to undermine the Supreme Court's desire to establish an efficient and streamlined allocation process as a matter of policy. Absent clear indications to the contrary, such lower levels of cover in previous years are explicable in terms of lack of awareness until later of the scale of the risk, and it seems unlikely, or at least doubtful, that a Special Master or Judge would entertain a detailed investigation of the point. (In this regard, I note Mr Coughlin's evidence in re-examination: transcript, day 2, pages 111 – 113.)

c) Cases such as *Owens-Illinois* and *Chemical Leaman Tank Lines* involved situations where, as was noted in *Owens-Illinois,* the coverage level in early years "was not at all comparable" to that in later years. I bear in mind that, as Mr Coughlin accepted, the risk-allocations in *Owens-Illinois* and in *Carter-Wallace* did not involve a "disproportionate" spike in any one year. However, the worked example in *Chemical Leaman Tank Lines* at 605-606 involved allocation of 0.29% to the year 1960-1961 and 14.21% to the year 1980-1981 on the basis of the difference in coverage between the polices in those respective years.

d) There is force, accordingly, in Mr Coughlin's contentions, drawn from the judgment in *Owens-Illinois,* that the appropriate measure of "proportionality" "is with respect to the degree of risks transferred by the insured in each year and is not concerned with whether the allocation of losses to one year is comparable to that in another". There is force, further, in Mr Coughlin's view that the public policy interest in "fairness" had been taken into account by the Supreme Court in fixing an allocation method, so that it was inappropriate for successive courts to weigh the public policy factors afresh in each case (supplemental report, paragraphs 3.3.1 and 3.4 – 3.5; see also *Chemical Leaman Tank Lines, per* Judge Brotman at 603-604).

e) Thus, there is force in Mr Coughlin's opinion that the expertise of the Special Master is properly brought to bear, in the exercise of his discretion, not, or not primarily, with regard to questions of fairness or policy but rather in respect of complexities of detail relating, for example, to large numbers of bodily injury claims stretching over a long period, where issues of incomplete claims data, differing claim values, differing policy inception and end dates, projections for future claims and so forth arise (supplemental report, paragraph 4.5).

- The evidence shows that Mr Miller had considered the arguments on allocation methodology, including those advanced by Mr Schiavone in these proceedings and that he and Mr Reston had them in mind and formed a view on their prospects of success. In particular, Mr Miller pressed the argument that inclusion of the Global Excess Policies would lead to an inequitable result; he thought this Newark's strongest argument but considered that it was unlikely to succeed. Further, as I have mentioned, Newark's views were made known not only to RSA but to Eagle Star and the Reinsurers, all of whom were content with the way the matter was being handled.

- Also relevant are considerations mentioned by Mr Miller in his evidence: he said that New Jersey was a favourable jurisdiction for insureds in relation to environmental and toxic tort claims against insurers, as the trend in the courts was towards maximizing coverage for insureds; and he was mindful, in conducting the defence of the bodily injury claims, that BOC had previously conducted environmental claims with great vigour and at great expense, and he anticipated that it would adopt a similar approach to the bodily injury claims. These are matters relevant to a decision how far to press arguments in which one does not have confidence, particularly in view of the relatively modest amounts of money involved in the TTSA.

- Mr Schiavone accepted in cross-examination that, so far as he knew, in the years since the decision in *Owens-Illinois* there had been no New Jersey cases in which a court or allocation Master had found there to be exceptional circumstances leading to the disapplication of the proration method of allocation. This evidence of what has happened subsequently tends to support the conclusion that Mr Miller was reasonable in thinking that the odds were heavily against a finding of exceptional circumstances in this particular case.

(i) Mr Miller failed to verify the policy limits and attachment points of the Global Excess Policies.

71. Mr Miller accepted that he did not review every one of the Global Excess Policies. He stated (witness statement, paragraph 45): "However, I understand David Reston did. The detailed evaluation of the Global Excess Policies, which included verifying their attachments points and limits, was done by David. My focus was on assessing how the attachment points and limits, which David had verified, impacted the allocation calculations applying New Jersey law." I accept this evidence, which is supported by the contemporaneous documentation that shows that the policies were provided to Mr Reston.

72. Mr Scorey submitted that it was unreasonable for Mr Miller to attempt to "shift the responsibility" for advice onto Mr Reston, who was not a New Jersey lawyer. I regard that as an unfair criticism. Mr Miller did not suggest that Mr Reston was responsible for advising as to the application of New Jersey law. What he said was that his own advice as to the application of New Jersey law was based (as regards the present matter of policy limits and attachment points) on Mr Reston's examination of the Global Excess Policies. As Mr Reston was a senior and experienced commercial solicitor and the Global Excess Policies were governed by English law, this division of labour seems to me to be perfectly reasonable.

73. Further and in any event, the alleged failure on Mr Miller's and Newark's part would not have made any difference to the ultimate settlement figure in the TTSA, because the policy limits and attachment points of the Global Excess Policies are not alleged to differ from those relied on by Newark in entering the TTSA.

(ii) Mr Miller failed to verify the position regarding pollution exclusions in BOC US's primary policies post-October 1988.

(iii) Mr Miller failed to verify the position regarding pollution exclusions in BOC US's excess policies post-October 1985.

74. These two allegations may be considered together, because they both concern the quantification of the policy limits included in the allocation calculation for the settlement in the TTSA. The cut-off dates used for that purpose were 1 October 1985 in the case of excess policies and 1 October 1988 in the case of primary policies. This was because BOC did not include any excess or primary coverage after these respective dates in its allocation calculations on the basis that later policies contained absolute pollution exclusions. Equitas makes two complaints: first, that Mr Miller did not verify the existence of the alleged pollution exclusions; second, that he did not verify that such exclusions, if they existed, excluded the asbestos claims and the welding product claims.

75. Mr Miller's relevant evidence in his witness statement gives the context for this issue and sets out his own position.

> "21. BOC commenced litigation against a number of its insurers, including Newark, in 1988. The litigation was originally focused on insurance coverage for environmental claims. After several years of intense litigation, a settlement was reached of those environmental claims. Subsequently, the focus in the litigation shifted to bodily injury claims against BOC caused (or alleged to have been caused) by exposure to asbestos containing products and/or welding related products (the 'Bodily Injury Claims'). The vast majority of the Bodily Injury Claims were related to alleged exposures to welding fumes. The asbestos related Bodily Injury Claims were much smaller in number.
>
> 22. Whilst I understand that the environmental claims are not the subject of these proceedings, these claims were significant and 'set the scene' for the Bodily Injury Claims. The litigation of the environmental claims was extremely expensive for the defendant insurers. There were several months of depositions in various states throughout the United States and the discovery was incredibly voluminous. The defendant insurers were therefore well aware of the lengths that BOC would go to in litigating their claims and seeking to maximise their coverage. It was thought that a similarly intense approach to litigation would be taken by BOC for the Bodily Injury Claims.

23. The policies at issue were also the same for the environmental claims and the Bodily Injury Claims (save for certain global excess policies, which I deal with below). During the ‘environmental’ stage of the litigation, the parties had spent a significant amount of time collating, reviewing and determining the limits and coverage position of BOC’s policies that were at issue in the litigation. By the time the focus shifted to the Bodily Injury Claims, the parties were aware of and were agreed on the coverage position under the policies that were the subject of the litigation, and whether any of BOC’s policies contained applicable exclusions.

…

72. In my experience as an environmental coverage lawyer, from 1986 ‘absolute’ pollution exclusions began to feature in commercial general liability (‘CGL’) policies (i.e. policies that would otherwise respond to the Bodily Injury Claims). By 1988, virtually all CGL policies contained such exclusions.

73. It was my experience that, prior to 1986, most CGL policies contained ‘sudden and accidental’ pollution exclusions, which I recall had been introduced in the 1970s and which excluded cover for pollution claims unless the pollution was ‘sudden and accidental’. However, there was an enormous increase in environmental and asbestos related litigation in the 1970s and 1980s, not just in New Jersey, but across the US. As I have explained above, New Jersey was a very favourable jurisdiction for insureds in respect of mass torts claims. The New Jersey court had previously held sudden and accidental exclusions did not exclude coverage for pollution/environmental clean up claims, even if there had been dumping of hazardous waste over a number of years. The New Jersey court had also determined that sudden and accidental pollution exclusions did not exclude coverage for bodily injury claims arising out of pollutants such as asbestos.

74. In my experience as an environmental coverage lawyer, I saw that insurers began to replace sudden and accidental exclusions with absolute pollution exclusions, beginning in 1986. I understood this to be in response to the adverse legal rulings against insurers in New Jersey.

75. The introduction of absolute pollution exclusion was significant in determining an appropriate end date for the trigger period. There had been extensive litigation in relation to the interpretation of these exclusions and the New Jersey courts had held that absolute pollution exclusions did exclude coverage for asbestos claims. It was also generally accepted in the insurance legal profession (and the parties were in agreement) that the release of welding fumes would be

> considered a 'pollutant' similar to asbestos and the New Jersey courts would very likely rule on welding claims in the same way they had on asbestos claims, i.e. that coverage for claims arising from exposure to welding fumes would be excluded by absolute pollution exclusions.
>
> …
>
> 77. I do not now recall whether I personally reviewed all of BOC's post-1985 excess covers and all of BOC's post-1988 primary covers during the Bodily Injury Claims' settlement discussions. However, as I have explained above, by this point BOC's coverage position had already been considered and reviewed at length by the parties when the environmental claims were being litigated/settled. In particular, the presence of absolute pollution exclusions in BOC's policies would have also excluded BOC's environmental claims, so this had been a key issue at that stage of the litigation too. I participated in the review of BOC's policies undertaken by the defendant insurers during the environmental phase of the litigation. Where BOC's policies contained absolute pollution exclusions, I recall that these were excluded from providing cover for the environmental claims. By the time we were considering these pollution exclusions in the context of the Bodily Injury Claims, applicable exclusions in BOC's policies had already been established and were accepted to have excluded the Bodily Injury Claims, as they had done for the environmental claims."

76. So far as concerns the existence of the pollution exclusions, I accept Mr Miller's evidence that, whether or not he specifically looked at the policies in the context of the bodily injury claims (as to which, unsurprisingly, he has no firm recollection), the extent of coverage and of exclusions had been considered in detail in the environmental litigation and was known. In cross-examination Mr Miller said that he was "very familiar" with all of the relevant policies. There are two further points. First, the documents show that in December 1998 those acting for BOC sent to Mr Miller a cover note for 1985-1986, which contained an absolute pollution exclusion as well as an asbestos exclusion, and they confirmed to him that the coverage "continued, essentially unchanged, through 1988." Second, in his report, paragraph 7.2.8.4, Mr Coughlin remarks on "the general adoption of asbestos exclusions and the 'absolute' pollution exclusion by the insurance industry in the mid to late 1980s", which is consistent with the evidence of both Mr Miller. It is inherently probable that the policies in question did contain absolute pollution exclusions, and Equitas has not asserted or proved that they did not.

77. There remains the question whether it was reasonable for Mr Miller to proceed on the basis that absolute pollution exclusions would exclude cover for the bodily injury claims based on exposure to asbestos or, in particular, welding fumes in the course of employment. A later decision of the Supreme Court of New Jersey, overturning a judgment of the Appellate Division, held that the purpose of absolute exclusion clauses in comprehensive general liability policies was to have a broad exclusion for traditional environmentally-related damages, not (on the facts of that case) to bar

coverage for personal injuries arising from exposure to toxic fumes emanating from a floor coating-sealant operation performed by the insured: *Nav-Its, Inc. v Selective Ins. Co.* (2005) 183 N.J. 110. This does not, however, indicate that Mr Miller was wrong to take the view he did at the time of the TTSA. I make the following observations. First, the issue concerns only exposure to fumes from welding operations (most of the claims), as coverage for bodily injury resulting from exposure to asbestos was excluded by specific provision. Second, Mr Miller's own evidence is that the view he took accorded with what was "generally accepted" in the legal profession in New Jersey. Third, Mr Coughlin's opinion was that "Mr Miller's view was reasonable at the time" and that "the position taken by Newark was … entirely reasonable": report, paragraphs 7.2.8.8 and 7.2.8.12. It is right to observe that he accepted that contrary arguments could have been made (report, paragraph 7.2.8.12) and that "when the TTSA was being negotiated and signed, the issue of whether the absolute pollution exclusion was limited to traditional environmental pollution was an open one in New Jersey" (report, paragraphs and 7.2.8.7). But he also opined that "the consensus as at March 2001 was that absolute pollution exclusions would likely be effective to exclude asbestos and welding claims" (report, paragraph 7.2.8.12). In cross-examination, Mr Coughlin acknowledged that by 2001 "cracks were beginning to show" in the consensus position; yet, despite rigorous questioning, he did not materially depart from the conclusion expressed in his report. See report, paragraphs 7.2.8.4 to 7.2.8.13; transcript, day 2, pages 104-108. Fourth, Mr Schiavone did not cover this issue in his evidence and so did not contradict Mr Coughlin's opinion, either in his report or in the experts' joint statement. Fifth, insofar as it was put or suggested to Mr Coughlin that the point ought to have been determined before settlement, that would obviously be a risky course, especially if the consensus opinion was against Newark on the issue. Sixth, all the other insurers who were party to the TTSA, with the exception of Liberty, would have gained advantage by the inclusion of the policies in question. The fact that they all took the same position on the absolute pollution exclusions is a reason for thinking that Mr Miller's approach was not unreasonable. Seventh, Mr Miller observed that, regardless of absolute pollution exclusions, post-1988 policies would have been unlikely to respond to bodily injury claims because the insurers would have had the "known loss" defence, which precludes cover for losses that are already known by the insured when the policy is taken out: statement, paragraph 80. Eighth, Equitas has not demonstrated that the point would have made a material difference to the ultimate settlement.

(iv) The TTSA was entered into prematurely, before opposition briefs had been filed.

78. In respect of this complaint, Mr Miller said that the arguments being deployed by BOC were already well known as a result of the prior negotiations, so that there was no need to await the filing of opposition briefs. In response, Mr Scorey pointed to Mr Miller's acceptance in cross-examination that what parties say in negotiations is not always what they say when they have to pin their colours to the mast of a pleading or written brief; and he said that, as there was no urgency to conclude a settlement, it was unreasonable to do so without awaiting BOC's formal response. This submission was supported by the opinion expressed by Mr Schiavone in paragraph 76 of his report.

79. I do not consider that Equitas's complaint in this respect has any merit. Very many commercial disputes are settled without any recourse to litigation; the absence of

formal pleadings or other documents filed in court is not a reason for thinking that this practice is unreasonable or improvident or that such settlements are premature. When to seek settlement is a matter of judgement in each case. There is, in general, no particular reason to defer settlement on the off chance that the opposing party, having presumably put forward its best case in negotiations, will shoot itself in the foot when it comes to filing its formal submissions. In my judgment, the decision to settle before opposition briefs were filed is clearly not a case of failing to take all proper and businesslike steps.

Conclusion on Issue 3

80. Equitas has not proved its pleaded allegations of failure to take proper and businesslike steps. Therefore it is fully bound by the follow settlements clause.

81. For the avoidance of doubt, I make clear that I have disregarded other complaints raised in evidence but not pleaded. Several such allegations were raised in the course of evidence, including failure to take a late notice defence, failure to ascertain the available insurance cover between 1917 and 1988, failure to investigate the reasons behind BOC's purchase of the Global Excess Policies, and a flawed approach to sampling of the bodily injury claims against BOC to ascertain exposure dates. This dispute has been maturing over many years. Equitas has amended its defence three times. Disclosure was conducted on the basis of the issues as they arise from the statements of case. No application was made for a further amendment. If allegations are not set out in the re-re-amended defence, they cannot be relied on.

Issue 4: The Interest Issue

82. RSA claims, on all sums awarded to it, compound interest at common law or, alternatively, simple interest under section 35A of the Senior Courts Act 1981, in either case to run from the dates of the respective losses.

83. Equitas contends, first, that an award of interest ought to be refused either entirely or largely on account of delay in particularising and pursuing the claim and, second, that an award of compound interest is inappropriate in this case.

Period of interest

84. The usual position, namely that interest ought to run from the date of loss, was stated by Robert Goff J in *BP Exploration Co (Libya) v Hunt (No. 2)* [1979] 1 WLR 783 at 847:

> "The basic principle, is, however, that interest will be awarded from the date of loss. Furthermore, the mere fact that it is impossible for the defendant to quantify the sum due until judgment has been given will not generally preclude such an award. Thus, in Admiralty, in collision cases where the ship is totally lost, interest has been held to run from the date of the loss (see e.g. *The Berwickshire* [1950] P. 204 and *Owners of Liesbosch Dredger v. Owners of S.S. Edison* [1933] A.C. 449,

> 468), and in the case of a salvage award, from the date of the rendering of the salvage services: see *The Aldora* [1975] Q.B. 748. There must have been many cases in the commercial court in which, although the quantum of damages was in doubt until the date of judgment, interest was awarded from the date of loss. Similarly, the mere fact that it is doubtful whether the plaintiff's claim will succeed, and it is reasonable to contest his claim, will not generally require any departure from the general principle; nor generally will any doubt, however justified, as to the principles of law which will be applied."

85. Mr Scorey relied, as being illustrative of an appropriate approach to the exercise of the court's discretion, on the judgment of Thomas J in *Quorum A.S. v Schramm (No. 2)* [2002] 2 Lloyd's Rep 72. In that case, the claimant, which had suffered loss in consequence of a fire, was awarded recovery under a policy of insurance. However, Thomas J did not award interest for the full period but only from the later date at which the underwriters had been able to come to an informed decision as to the value of the claim. He cited passages from the judgment of Robert Goff J in *BP Exploration Co (Libya) v Hunt (No. 2)*, including the passage set out above, and continued:

> "6. I therefore turn to apply these principles to the present claim. The first question is to determine when the sum became due under the policy. As a matter of technical and legal analysis, I accept an insurer is in breach in failing to pay the assured the sum due under the policy at the date of the loss. I agree with the view of Mr. Justice Mance in *Insurance Corporation of the Channel Islands v. McHugh* [1997] L.R.L.R 94 at p. 137, where he said that insurance contracts are treated in law as contracts to hold the insured harmless against liability or the loss insured against; therefore insurers are in the absence of contrary provision in breach of contract as soon as the insured liability or loss occurs.
>
> 7. However, although the date of the loss is when the sum became due under the policy, it does not follow that the Court awards interest in every case from the date of the loss. For example in *The Popi M*, [1984] 2 Lloyd's Rep. 555 the assured put forward a claim on a basis substantially different to that which proved successful at trial. The trial Judge (Mr. Justice Bingham) awarded interest from a period about four years and four months after the loss. The Court of Appeal awarded interest commencing two years after the date of the loss; Sir John Donaldson, M.R. (with whom Lord Justice O'Connor agreed) considered that the case was unusual and underwriters therefore needed time to make up their minds. Lord Justice May, though not differing from the other Judges in the result, expressed the view that although in most cases insurers would need to investigate claims, prima facie interest ought to be awarded from the date of the loss. Another example is *McLean*

> *Enterprises Ltd. v. Ecclesiastical Insurance Office plc* [1986] 2 Lloyd's Rep. 216, where interest was awarded by the trial Judge (Mr. Justice Staughton) from a date some five weeks after the loss. In *Kuwait Airways Corporation* (to which I have referred) the loss occurred shortly after the invasion of Kuwait by Iraq on Aug. 2, 1990, but interest was only awarded from Dec. 5, 1990; the Judge found that it was not clear that until Nov. 12, 1990 that a claim in respect of loss of spares was being pursued and insurers needed a little time to appreciate that fact and consider the claim.
>
> 8. The decisions to which I have referred are but examples common in the experience of the Commercial Court in relation to insurance claims in unusual cases or those that are not straightforward. In such cases, the Court usually exercises its discretion on the basis it is proper to allow insurers some time to consider the claim. The time varies accordingly to the nature of the loss, the way the claim is presented and the circumstances that require investigation. In many cases the time may be quite short. The Court will always have regard to the particular circumstances specific to that claim.
>
> 9. In this particular case, the fact of the fire was known immediately to underwriters; loss adjusters were on the scene almost immediately (see par. 31 of the judgment). However it was not obvious what, if any, damage *La Danse Grecque* [a painting by Degas] had suffered. Discussions also took place with underwriters about the terms of the policy; on Jan. 17, 1992 the claimants' brokers and underwriters agreed the partial loss clause (see par. 69 of the judgment). Furthermore at some stage prior to the trial, the parties agreed that the damaged value should be 'after restoration but assessed as at immediately after the fire' (see par. 93 of the judgment). As I held at pars. 94 and 95 of the judgment, I considered that it was not possible immediately after the fire to express a view on the extent of the damage and the risk of deterioration; that would only be possible after restoration was complete.
>
> 10. In my view therefore, in this highly unusual case, it would be right to award interest only from a date at which restoration was complete and underwriters had had time to consider the matter."

86. Thomas J cited the dictum of Colman J in *The Athenian Harmony* [1998] 2 Lloyd's Rep 425, at 427:

> "In cases where the delay and the degree of fault are so substantial that the predominant cause of the plaintiff being out of his money can be seen to be his own failure to prosecute the claim, rather that the defendant's maintenance of his defence, it is not difficult to see that the policy should be that a successful

> plaintiff should not be compensated for loss of use of the money. However, in order for it to be said that the plaintiff's fault has displaced the defendant's fault as the predominant cause of the plaintiff being kept out of his money, the delay in question would have to be very substantial and not merely relatively short periods of weeks or months during which in commercial litigation lulls in activity inevitably occur and the plaintiff's fault would have to be very substantial, as where an action has inexcusably been allowed to go to sleep for years."

87. I also note the dictum of Aikens J in *The 'Vergina' (No. 3)* [2002] 1 Lloyd's Rep 238, where he said at [33]:

> "33. The claimant submits that the Court will not disallow interest for a period unless there has been both very substantial delay and also very substantial fault on the part of the claimant. Mr. Kenny relied on statements to that effect made by Mr Justice Colman in *Derby Resources A.G. v. Blue Corinth Marine Co. Ltd. (No. 2) (The Athenian Harmony)*. I respectfully agree with the approach of Mr Justice Colman in that case. In my view the Court should not disallow interest unless it can be shown that the 'predominant cause' of the claimant being kept out of money that the Court has held he is entitled to is the claimant's own failure to prosecute the claim, as opposed to the defendant's maintenance of its defence."

88. In the present case, the earliest date of loss for the years 1981/1982, 1982/1983 and 1983/1984 was 12 June 2001, and the earliest date of loss for the year 1984/1985 was 28 February 2002.

89. The arithmetically agreed losses of £3,760,574.83, mentioned in paragraph 6 above, are, subject to some later modification, extrapolated from RSA's Final Transaction List, which was finalised on or about 27 February 2024 and formed the basis of the amendment of the quantum of the claim in RSA's response on that date to a Part 18 request for further information. On 20 June 2025 RSA produced an Updated Final Transaction List when it became apparent that twenty transactions relating to RSA's own legal fees, which were not intended to be included in the transactional data, had been included by mistake. This resulted in a reduction of the claim by £22,500.44.

90. Mr Scorey submitted that no award of interest should run from a date earlier than the date on which RSA properly particularised the quantum of its claim, being either the date of the Updated Final Transaction List (20 June 2025) or, at the earliest, the date on which the Final Transaction List was produced (27 February 2024). He accepted the general principle that interest runs from the date of loss, but he submitted that "a more subtle discretionary approach" was appropriate in reinsurance cases, where a reinsurer—unlike, for example, a person responsible for causing damage to another's vessel—might have no idea of the existence of any loss but is dependent on the presentation of a claim and the data relied on in support of it. In the alternative, Mr Scorey submitted that interest should be denied for three periods during which RSA did nothing to pursue its claim:

i. The period between 27 November 1997 and 15 July 2017, when there was a standstill agreement between Equitas (on behalf of itself and the Lloyd's Underwriters) and RSA.

ii. The period between 15 July 2017, when the standstill came to an end, and 28 August 2019, when RSA's solicitors wrote to Equitas's solicitors with an updated claims presentation and additional evidence.

iii. The period from January 2020 until next communication from RSA's solicitors on 7 September 2023, some six weeks after the issue of the claim form.

91. The following is a very short chronology of the main points in the progress of the claim.

- March 1986: first notice of potential loss under the Reinsurance Policies
- December 1995: first claims presentation
- November 1997: standstill agreement between RSA and Equitas (on behalf of the Lloyd's Underwriters)
- June 2006: letter before action to Reinsurers: the quantum then stood at £1,184,907.24, and losses were continuing to accrue.
- February 2007: Presentation to Reinsurers: the quantum then stood at £1,595,345.29, and losses were continuing to accrue.
- August 2013: Updated Presentation to Reinsurers: the quantum then stood at £4,360,073.82.
- May 2017: Reinsurers gave notice to terminate the standstill. Time began to run for limitation purposes on 15 July 2017.
- July 2023: claim form: the amount claimed was stated to be £4,050,256.35. (The reduction from the figure in 2013 was due to the application of different exchange rates.)
- September 2023: letter from RSA's solicitors to Equitas's solicitors, notifying them of the issue of the claim form.
- December 2023: particulars of claim: the amount claimed was stated to be £3,773,286.78. (The process that led to this adjustment is described in paragraphs 52 to 79 of the first witness statement of Mr James Thrower, a Reinsurance Claims and Treaty Manager with RSA.)
- February 2024: RSA produces its Final Transaction List, which provides the basis of Part 18 Further Information and amended particulars of claim that month. The amount claimed was adjusted to £3,783,075.27 – a negligible adjustment.

- June 2025: RSA produces its Updated Final Transaction List, which removed 20 entries wrongly included in respect of RSA's own legal fees; this brought the figure to £3,760,574.83. (The correction was explained by Mr Thrower in his second witness statement, dated 20 June 2025, and in oral evidence.)

92. Although I bear in mind the very protracted history of this matter as briefly outlined above, in the exercise of my discretion I shall not restrict the time for which interest runs but shall order it to run from the date of each respective loss. My reasons are as follows.

    1) The basic rule that interest runs from the date of the loss is neither arbitrary nor a mere matter of technical and legal analysis. It reflects the fact that the insurer (or reinsurer) has undertaken an obligation to hold the insured harmless against the loss insured against and is in breach in failing to pay at the date of the loss. That is important, because interest is not penal but compensatory. Delay in payment, for whatever reason, does in fact keep the insured out of its money by reason of an ongoing breach of a strict contractual obligation; by the same token, it preserves money in the hands of the insurer. Although the court can and sometimes does refuse to award interest for the full period since the date of the loss, these legal and practical starting points indicate (in my respectful view) that the restrictive approach to disallowing interest of Aikens J is principled.

    2) Uncertainty of the quantification of the claim is not itself a reason for disallowing interest. Nor is the fact that the figure has been subject of downward amendments. This follows both as a matter of principle and from the case-law, including in particular the judgment in *BP Exploration Co (Libya) v Hunt (No. 2)*. Further, RSA has kept those acting for the reinsurers informed of the claims and the running totals of the losses (which continued to accrue until 2013) and has responded to requests for information and made available the data for audit by the reinsurers. (Thus, for example, in 2014 RSA responded to 23 questions regarding its claim. There has been substantial *inter partes* correspondence, both before and since.) Mr Thrower's evidence in cross-examination was that the figures remained "largely static" after 2013, such changes as there were in the meantime being the result of queries made by the reinsurers and further scrutiny by Mr Thrower and RSA's legal representatives.

    3) Anyway, despite Equitas's complaints about lack of particularisation, neither has Equitas asserted or proved that the reason it has not paid RSA is lack of knowledge of how much is to be paid, nor has particularisation of the quantum resulted in payment. (Cf. *The 'Vergina' (No. 3), per* Aikens J at [26].) In fact, Equitas has disputed liability on principle. It is not the case, therefore, that non-particularisation is the "predominant cause" of non-payment.

    4) The period of the standstill between 1997 and 2017 was consensual and, presumably, mutually beneficial. Mr Scorey submitted that RSA could have given notice of termination of the standstill at any point but chose not to. The same, however, is true of Equitas. I do not agree with Mr Scorey's jocular suggestion that to award interest in respect of this period would demonstrate that no good deed goes unpunished. The standstill was proposed, through

Equitas, by the Lloyd's Underwriters in order to achieve "an orderly run-off, without the need for the commencement of legal or arbitration proceedings". Accordingly, the standstill (during most of which losses continued to accrue) was not a period of dormancy but was actively used by RSA to seek payment. It also resulted in the reinsurers retaining the use of the moneys that would otherwise have been paid to RSA.

5) Although it may be that RSA could have pressed its claim with greater promptness after the termination of the standstill, the subsequent period has to be seen in the context of Equitas's maintained repudiation of liability. Thus it was necessary for RSA, which had repeatedly presented its claim over many years, to prepare for the litigation that has proved necessary. I am not persuaded that the delay in commencing proceedings was unreasonable in the circumstances. Moreover, the fact remains that, as Equitas maintained a wholescale denial of liability, it retained the benefit of the moneys during the relevant period.

Compound Interest

93. RSA's claim for compound interest rests on the decisions of the House of Lords in *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561, and of Males J in *Equitas Ltd v Walsham Brothers & Co. Ltd* [2013] EWHC 3264 (Comm), [2014] Lloyd's Rep IR 398.

94. In *Sempra Metals* the taxpayer claimant sought what amounted in effect to compensation for having been unlawfully required to make payments to the Inland Revenue prematurely. One of the forms of relief claimed was damages for tort. The House of Lords held that a claimant was in principle entitled to plead and prove its actual interest losses caused by late payment of a debt and that recovery would be subject to the normal principles in damages claims, including remoteness. Lord Nicholls of Birkenhead said:

> "94. … [I]f your Lordships agree, the House should now hold that, in principle, it is always open to a claimant to plead and prove his actual interest losses caused by late payment of a debt. These losses will be recoverable, subject to the principles governing all claims for damages for breach of contract, such as remoteness, failure to mitigate and so forth.
>
> 95. In the nature of things, the proof required to establish a claimed interest loss will depend on the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will, here as elsewhere, draw from the approved or admitted facts such inferences as are appropriate.

> That is a matter for the trial judge. There are no special rules for the proof of facts in this area of the law.
>
> 96. But an unparticularised and unproved claim simply for 'damages' will not suffice. General damages are not recoverable. The common law does not assume that delay in payment of a debt would of itself cause damage. Loss must be proved."

Lord Hope of Craighead said:

> "17. I also agree with Lord Nicholls that the loss on the late payment of a debt may include an element of compound interest. But the claimant must claim and prove his actual interest losses if he wishes to recover compound interest, as is the case where the claim is for a sum which includes interest charges. The claimant would have to show, if his claim is for ancillary interest, that his actual losses were more than he would recover by way of interest under the statute. In practice, especially where the period over which interest is sought is short or where the claimant does not have to borrow money to replace the debt, simple interest under section 35A of the Supreme Court Act 1981 is likely to be the more convenient remedy."

95. In *Equitas Ltd v Walsham Brothers,* Equitas, as successor to certain syndicates, sued to recover funds held by brokers, Walsham Brothers, and received by them from reinsurers. Males J held that the brokers were under a continuing duty to remit the funds. Having cited extensively relevant passages in *Sempra Metals,* he discussed Equitas's claim for compound interest in an instructive passage at [123]-[126]:

> "123. … In the light of the judgments in *Sempra Metals* I would summarise the position as follows.
>
> > (i) First, it is clear that damages are in principle recoverable, subject to ordinary principles of remoteness and mitigation, for breach of an obligation to remit money, where the failure to remit has caused a loss.
> >
> > (ii) Secondly, unless there is some positive reason to do otherwise, the law will proceed on the basis, at any rate in the commercial context, that a claimant kept out of its money has suffered loss as a result. That represents commercial reality and everyday experience. Specific evidence to that effect is not required and, even if adduced, may well be somewhat hypothetical and thus of little assistance. For example, a businessman may well be unable to say precisely what he would have done differently if a particular payment had been made to him when it ought to have been, especially if (as apparently in this case) he was unaware that the money was being

withheld. Extensive disclosure, which would no doubt be demanded by the defendant, is unlikely to assist. But that does not mean that no loss has been suffered. In the present case the general evidence of the importance attached in the market to prompt remittance of funds is more than sufficient to justify the conclusion that the syndicates did suffer a loss by being kept out of their money. Accordingly the question in such a case is not whether a loss has been suffered, but how best that loss should be measured.

(iii) A solvent claimant who seeks to recover damages which exceed the cost of borrowing to replace the money of which it has been deprived is likely to be met with the defence that the claim is too remote or that it has failed to mitigate by borrowing in order to replace the money lost, in which case its recovery may be limited to that borrowing cost, which will include the need to pay compound interest, that being the only basis on which money can be borrowed commercially. The position may, however, be different if there is a good reason why the claimant should not have gone into the market to borrow the missing money, for example if it did not know and should not reasonably have known that the money was missing. …

(iv) In other cases I consider that it is not necessary for the claimant to produce specific evidence of what it would have done with the money or what steps if any it took to borrow or otherwise to replace the money of which it was deprived. As noted above, it may often be impossible or at any rate extremely difficult to produce such evidence, especially if that would mean attempting to disentangle a claimant's overall business operations in an artificial attempt to attribute specific activity such as borrowing to the non-remittance of specific funds. Instead, at any rate in commercial cases and unless there is some positive reason to do otherwise, the law will proceed on the basis that the measure of the claimant's loss is the cost of borrowing to replace the money of which the claimant has been deprived regardless of whether that is what the claimant actually did. A conventional rate will be used which represents the cost to commercial entities such as the claimant and is not necessarily the rate at which the claimant itself could have borrowed or did in fact borrow. This avoids the need for protracted investigation of the particular claimant's financial affairs. As with other conventional measures (for example, the assessment of damages by reference to a market price in sale of goods cases) this approach has the advantage of certainty and predictability which is always important in the commercial context, as well as being

broadly fair in the great majority of cases and avoiding expensive and often ultimately unproductive litigation.

(v) If a conventional borrowing cost is to be adopted in this way, the question whether interest should be simple or compound answers itself. While simple interest has the virtue of simplicity as Lord Hope observed, it also has the certainty of error and injustice. As their Lordships noted, it is impossible to borrow commercially on simple interest terms. I respectfully agree with Lord Nicholls that the law must recognise and give effect to this reality if it is to achieve a fair and just outcome when assessing financial loss. To conclude that, at least in a typical commercial case, the normal and conventional measure of damages for breach of an obligation to remit funds consists of compound interest at a conventional rate is therefore both principled and predictable, as well as being in accordance with what was actually awarded in *Sempra Metals*.

124. I referred above to the possibility that in some cases there may be a positive reason not to approach the assessment of damages in the manner suggested. I would not wish to exclude that possibility and in any event the assessment of damages should not be fettered by unduly rigid rules. But there is no reason in this case (and none was suggested) to think that this approach would result in an unfair result so far as losses in the period before 1 September 1996 are concerned.

125. Accordingly I conclude that losses suffered by the syndicates in the period before September 1996 are to be measured by reference to the cost of borrowing in the market, and that Equitas is in principle entitled (subject to the limitation issues yet to be considered in this judgment and those to be determined at the next stage of this action) to recover damages in respect of losses in this period at the rate of LIBOR plus a margin of 1 per cent, compounded with appropriate rests.

126. The question of what rests are appropriate is for decision at a later stage if the parties cannot agree. It will depend on evidence as to what borrowing terms were available in the market at the relevant time. As already noted, Equitas's calculation of its claim has used monthly rests and, if necessary, that may need to be revised. I would add, however, that at least in my experience the usual practice of London arbitrators (who have had power to award compound interest under section 49 of the Arbitration Act 1996 since 31 January 1997) is to award compound interest with three-monthly rests. I add also that the parties will need to agree which of the various LIBOR rates is appropriate to be used."

96. The availability of compound interest as damages has recently been considered by Foxton J in *4VVV Ltd and others v Spence and others* [2024] EWHC 2434 (Comm). He noted that, although the principles stated by Males J in *Equitas Ltd v Walsham Brothers* have been cited with approval in several first-instance decisions where compound interest has been awarded, it had not become routine for claims for compound interest to be advanced. Foxton J referred to the judgment of the Judicial Board of the Privy Council in *Sagicor Bank Jamaica Ltd v YP Seaton and others* [2022] UKPC 48. There the Board said:

> "31. It is clear from the judgments of the House of Lords in *Sempra Metals* that to claim compound interest as damages for a breach of contract which has deprived the plaintiff of money it is necessary to plead and prove that the plaintiff has suffered the relevant loss. For example, the plaintiff may plead and prove that it has had to borrow money on which it has incurred interest charges as a borrower or that it has lost the opportunity to invest the promised money or that, in the absence of the money of which it has been wrongfully deprived, the plaintiff has had to use funds that otherwise would have earned such interest: Lord Hope at paras 16 and 17, Lord Nicholls at para 95, Lord Scott at para 132, and Lord Mance at para 216. If these strictures in *Sempra Metals* are good authority, Mr Seaton's third and fourth claims must fail."

The Board referred to Males J's judgment in *Equitas Ltd v Walsham Brothers* and, after setting out his statement of principles, continued:

> "33. The Board agrees with Males J that, in assessing a claim for financial loss caused by the failure to pay money that is contractually due, the law does not require a detailed examination of a plaintiff's financial affairs and that an extensive process of disclosure by the plaintiff to make or verify that assessment is likely to be unhelpful and is in any event disproportionate. The question of what evidence is required from which a court can infer that a plaintiff has suffered financial loss in the form of the incurring of borrowing costs will depend upon the circumstances of the particular case, as Lord Nicholls recognised in para 95 of his speech in *Sempra Metals* (para 25 above). The Board also does not question the judge's view that in the *Equitas Ltd* case the state of the insurance market at the relevant time and the evidence which was available of the importance in that market of prompt cash flow supported the inference that the claimant had suffered financial loss in the form of incurring borrowing costs to replace the withheld money. But the Board does not agree with Males J's conclusion that the common law has gone so far as to recognise that a claimant or plaintiff kept out of his or her money in a commercial context is as a norm entitled to claim and receive as damages for breach of contract interest on the withheld sums that is calculated by reference to the cost of

> borrowing such sums at a conventional rate without evidence from which such a loss can be inferred. As the Board stated in its discussion of *Sempra Metals* in *National Housing Trust v Y P Seaton & Associates Co Ltd* [2015] UKPC 43; [2016] BLR 215, para 31, it is open to a plaintiff to plead and prove an actual loss of interest caused by late payment of a debt: '[s]uch claims are for actual or real damages, not theoretical and non-existent loss.'
>
> 34. The Board has reached this view for the following four reasons. First, the existence of such a general rule is inconsistent with the speeches of the House of Lords in *Sempra Metals*. See Lord Hope at para 17 of his speech which is quoted in para 24 above and Lord Nicholls at paras 95 and 97 of his speech which is quoted in para 25 above. The Board notes that in *JSC BTA Bank v Ablyazov* [2013] EWHC 867 (Comm), in a judgment handed down several months before the *Equitas Ltd* judgment, Teare J correctly and clearly stated the effect of the *Sempra Metals* judgment on this matter: see paras 12-13 and 18-19 of his judgment. Secondly, while such a norm might promote legal certainty in relation to such claims, there is no principle on which it is based. Thirdly, one cannot now pray in aid, as Males J did, the outcome in *Sempra Metals*, which was to award compound interest as part of a claim for unjust enrichment. The United Kingdom Supreme Court overruled that element of the decision in *Sempra Metals* in its judgment in *Prudential Assurance Co Ltd v Revenue and Customs Commissioners* [2018] UKSC 39; [2019] AC 929, a ruling that post-dated Males J's judgment by several years. Fourthly, so far as the Board can ascertain, the approach of Males J has not been followed in the practice of the commercial court in England and Wales. It was adopted by Stuart-Smith J in *Peacock v Imagine Property Developments Ltd* [2018] EWHC 1113 (TCC), para 143, as Mr Salter points out. But there is no general practice that follows the approach in *Equitas Ltd*, which is not consistent with principle or with the speeches of the House of Lords in *Sempra Metals*. The Board is therefore satisfied that the case of *Equitas Ltd* does not assist Mr Seaton's claim."

97. Having referred to the dicta in the *Sagicor Bank Jamaica* case, Foxton J continued, with reference to the facts of the case before him:

> "64. The present case involves claimants who say that they disbursed cash as a result of a legal wrong which would otherwise have been available to them. The Claimants are not commercial entities operating in a commercial market like the insurance market, but mostly retail investors (although some of the claimants are special purpose vehicles set up to hold those investments). None of the Lead Claimants have alleged, still

> less established, that funds had to be borrowed as a result of the wrongs complained of. I am not persuaded in these circumstances that I can simply infer a loss in the form of the compound interest which would have been earned on the funds. For compound interest to be recovered as damages at common law, the relevant loss must be pleaded and the facts from which the loss can be inferred proved."

98. The conclusion I draw from these cases is that there is no default rule that, in a commercial case, compensation for being kept out of one's money will be awarded on the basis of the cost of commercial borrowing, i.e. by way of compound interest. The legal position is simply that compensation on that basis will be awarded if the facts pleaded and proved are sufficient to justify the inference that such an award does indeed reflect the claimant's actual loss. It may be that the burden of proof will be easily discharged in some cases, where the inference can readily be drawn; and a detailed examination of the claimant's financial affairs, with substantial disclosure in that regard, will generally be neither necessary nor appropriate. But still: "The question of what evidence is required from which a court can infer that a plaintiff has suffered financial loss in the form of the incurring of borrowing costs will depend upon the circumstances of the particular case": *Sagicor Bank Jamaica* at [33]. If and insofar as Males J in the *Equitas Ltd* case was purporting to state a default rule in a commercial context, then for the reasons given by the Privy Council the statement was unnecessary to the actual decision, which was justified by the evidence adduced in the case, and was inconsistent with the speeches in *Sempra Metals*.

99. In the present case, the re-amended particulars of claim simply claim compound interest at common law or, alternatively, simple interest under section 35A of the Senior Courts Act 1981: paragraph 74. No particular facts are pleaded in support of the claim for compound interest, though the nature of the claimants as insurance and reinsurance companies is set out in paragraph 2 and is, of course, apparent from the statement of case as a whole. Miss Ananda's submission was to the effect that RSA operates in the commercial insurance market, which was recognised by Foxton J as very different from the circumstances of the case before him, and that the inference properly drawn by Males J in the *Equitas Ltd* case is equally justified here and on the same grounds. She went so far as to submit that I was bound to follow the decision in that case to award compound interest.

100. For Equitas, Mr Scorey submitted that the Commercial Court remained generally reluctant to award compound interest, that RSA had neither pleaded nor proved that compound interest was in the reasonable contemplation of the parties when they entered into the Reinsurance Policies, and that RSA has made no attempt, as it could have done, to explain why compound interest would reflect the loss it has actually suffered.

101. In my judgment, the appropriate award in this case is of simple interest at 2% above base rate. I am prepared to accept that insurance markets are an area in which actual losses may more commonly be reflected by compound interest than is the case in other areas of activity. But I do not think that it suffices for a claimant simply to assert that it operates in the insurance market. In the *Equitas Ltd* case Males J noted at 417 that there was no evidence of the investment returns previously achieved by the

syndicates, or of the rates at which they were able to borrow money, or that they had in fact borrowed money. But he also noted:

> "It was, however, part of Walsham's own evidence that as a broker it came under considerable pressure from syndicates to ensure the prompt collection of claims and to fund claims where payment had not yet been made by reinsurers, all because of the supreme importance of cash flow to those syndicates. This is not surprising, particularly in the market conditions which existed at the time."

In the *Sagicor Bank Jamaica* case the Board referred at [33] to this passage as justifying the inference that compound interest reflected the syndicates' actual losses in *Equitas Ltd*. The Board did not suggest or imply that it would suffice simply to be an insurer or reinsurer. In this case I have been referred to no evidence to justify departure from the general practice of awarding simple interest under section 35A of the Senior Courts Act 1981.

Conclusions

102. On the Defence Costs Erosion Issue, I hold that the £4 million excess applicable under the Reinsurance Policies is eroded by indemnity payments only.

103. On the Claims Co-operation Clause Issue, I hold that the clause did not annul, modify or circumscribe the operation and effect of the Follow the Settlements Clause and that, subject to my determination of the Proper and Businesslike Steps Issue, the Reinsurers were bound to follow the TTSA.

104. On the Proper and Businesslike Steps Issue, I hold that Equitas has failed to show that there was a failure to take all proper and businesslike steps.

105. On the Interest Issue, I hold that RSA is entitled to simple interest at the rate of 2% above the Bank of England base rate from the date of each respective loss.

106. I shall adjourn consideration of all consequential matters, including the precise terms of the order giving effect to the foregoing decisions, to a further hearing as proposed by counsel.