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Case No: 2006 Folio No 34

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20 December 2006

Before :

MRS JUSTICE GLOSTER, DBE

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Between :

English and American Insurance Company Ltd (in a scheme of arrangement)	**Claimant**
- and -	
Axa Re SA	**Defendant**

- -
- -

Richard Southern Esq, QC (instructed by **Beachcroft Wansboroughs**) for the **Claimant**
Stephen Phillips Esq, QC (instructed by **Holman Fenwick Willan**) for the **Defendant**

Hearing dates: 18 September 2006
(further written submissions 20 September 2006)

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Judgment

Mrs Justice Gloster, DBE :

1. There are two applications before the court. The first is an application by the claimant, English & American Insurance Company Limited ("EAIC"), for summary judgment pursuant to CPR Part 24 for payment of the sum of US$ 772,538 which is part of its claim in the action. The second application is an application by the defendant, Axa Re S.A. ("Axa"), that certain paragraphs of EAIC's evidence served in support of its summary judgment application be struck out on the basis that Axa contends that those paragraphs refer to without prejudice correspondence and are accordingly inadmissible.

Factual Background

2. EAIC was at all material times a company registered in England carrying on insurance and reinsurance business. On 19 March 1993 provisional liquidators were appointed, and, since 1995, EAIC has been subject to a scheme of arrangement pursuant to s425 of the Companies Act 1985. The run-off of EAIC is handled by the scheme administrators, Tony McMahon and Tom Riddell, partners in KPMG, with the assistance of Participant Run-Off Limit ("PRO"), the appointed run-off managers. On 10 June 1993, following an application made by EAIC pursuant to s304 of the United States Federal Bankruptcy Code, the United States Bankruptcy Court issued a preliminary injunction which restrained the commencement or continuation of legal proceedings against EAIC.

3. Axa is, and was at all material times, a company registered in France carrying on insurance and reinsurance business. It has taken over and succeeded to the liabilities of Abeille Réassurance SA, formerly known as Abeille Paix Réassurance SA (together "Abeille"), pursuant to a merger agreement dated 18 April 1996.

4. In the early 1980s EAIC, as insurer, subscribed to shares in ten contracts of insurance ("the Insurance Contracts") whereby the Dow Chemical Company, Dow Corning Corporation and certain associated companies ("Dow"), as assured, were insured against the risk of certain losses and liabilities on an excess of loss basis for various periods and for various limits. In essence the Insurance Contracts provided cover for US$ 25 million in excess of US$ 100 million.

5. By ten contracts of reinsurance contained in or evidenced by slip policies ("the Reinsurance Contracts"), Abeille reinsured EAIC for 100% of the latter's subscription to each respective Insurance Contract, save in respect of one contract, in respect of which Axa reinsured EAIC only as to 40%. Each of the Reinsurance Contracts included the following express condition:

> "Subject to all terms, clauses and conditions as original and to follow the settlement of original Underwriters in all respects within the terms of this reinsurance.
>
> …
>
> All terms and conditions as original and to strictly follow the fortunes of the E&A [i.e., EAIC] in all things."

6. There were no material differences for present purposes between the respective Reinsurance Contracts. In effect, EAIC was fronting for Abeille.

7. Dow has incurred liability to numerous claimants for damages on account of personal injuries which arise out of Dow's manufacture and sale of breast implant devices and materials and out of the use of silicon manufactured by Dow for the purposes of breast augmentation ("breast implant claims").

8. As a result of the claims made against Dow and other liabilities, Dow Corning filed for Chapter 11 bankruptcy protection in the United States in about May 1995. The breast implant claims against Dow led in turn to very significant claims being presented by Dow to its liability insurers. In order to deal efficiently and cost effectively with the very large claims faced by a number of London market insurers, a London market grouping was formed, with a view to defending claims and negotiating a settlement with Dow on behalf of all participating London market insurers.

9. On 3 October 1995, a settlement was agreed between Dow and certain solvent London market insurers. This was referred to as the London Market Settlement Agreement, or the LMSA. The LMSA was a final compromise and settlement of all past, pending and future known or unknown claims by Dow against the London market insurers in respect of breast implant claims and associated costs. The settlement figure was in the sum of US$ 233 million. The LMSA was, in effect, a commutation of Dow's anticipated claims (including IBNR, i.e. incurred but not

reported claims) rather than a compromise settlement of then-existing liabilities of insurers. EAIC, along with a number of other insolvent London market insurers of Dow were not party to the LMSA, although participants settled liabilities on a number of insurance contracts in relation to which EAIC had written a line, including the Insurance Contracts which are the subject of this claim. No insolvent London market insurers were party to the LMSA.

10. At the date of the LMSA, EAIC had no then existing liability to Dow in respect of paid claims or on any of the Insurance Contracts reinsured by Axa. In other words, if any payment had been agreed by EAIC to Dow in respect of the Insurance Contracts at the time of the LMSA, such payment would have been a payment purely in respect of future claims by Dow against EAIC.

11. Following the conclusion of the LMSA, Dow pursued claims against certain solvent insurers, not including EAIC, through the Michigan courts and the Michigan Court of Appeals. Those courts gave judgments that were substantially favourable to Dow in relation to a number of issues, including coverage issues, defence costs, cover for certain types of injuries and number of occurrences. In particular, the Michigan Court of Appeals confirmed, with only minor adjustments, the validity of the model used by Dow to allocate its liabilities to the various policy years and layers of its insurance cover. On 22 August 2000, the Michigan Supreme Court refused permission for any further review of the model.

12. Following the decision of the Michigan State Court of Appeals, from 12 October 1999 thereafter, Dow pursued EAIC in correspondence in respect of EAIC's liability under the Insurance Contracts. EAIC made claims against Axa, as successor to Abeille, on the back-to-back reinsurances. By letter dated 17 August 2000, Dow sent the scheme administrators a bill said to comply with the final judgment entered by the trial court, as modified by the 1999 decision of the Michigan Court of Appeals. Correspondence then followed between EAIC and Axa on the one hand, and EAIC and Dow on the other. On 14 June 2001, there was a meeting between representatives of EAIC and Dow. Dow advised that its claims against EAIC after the Michigan proceedings were based on the model that had been approved by the Michigan courts. Dow offered EAIC the opportunity to inspect the model for themselves, but informed EAIC that, subject to a few refinements, the model had withstood all inspections and investigations.

13. In correspondence between EAIC and Axa, Axa expressed concern that EAIC had not participated in the London Market Settlement negotiations, and that the latter was not covered by the LMSA. After various discussions, a meeting took place on 8 November 2001, between representatives of EAIC and Axa. It is common ground that that meeting was without prejudice. Following the meeting Axa confirmed its position in writing by a letter dated 4 December 2001. The letter was not marked "Without Prejudice", and was in the following terms:

> "… You have stated that EAIC did not participate because of its status as an insolvent market. In fact, KPMG declined to pay EAIC's share of the costs of legal representation provided by the LMCS. Although this may have preserved assets for the creditors of EAIC in the short term, the result was to cut off EAIC and therefore its fronted reinsurers' ability to manage

claims, including the possibility to participate in the London Market settlement activities. The clear effect was a serious prejudice to the fronted reinsurers' rights.

However, if the market intends that, under a Scheme of Arrangement, the insolvent market shall follow the solvent markets' lead in Market settlements and that all parties are so bound, then Down Corning and the solvent markets are obliged to offer AXA, as successor to Abeille Re, the same terms as agreed to in the 1999 Market Settlement. In this manner, the global long term credibility interests of the market is served. The insolvent company assets are preserved for the benefit of the insured creditors by limiting outside legal costs, the twin objectives of stability and finality of settlements are realised, and the interests of the insolvent company's reinsurers are protected at least to the same extent as are the solvent company's reinsurers. Otherwise, under a Scheme of Arrangement, a reinsurer might be encouraged to settle directly with a Scheme creditor, which would stand to recover significantly more than under the Scheme of Arrangement, even applying the terms of the Market settlement.

You have stated that the involvement of EAIC in the Dow Corning policies reinsured with Abeille Ré was a fronting arrangement whereby the broker, CT Bowring used EAIC as a conduit to European reinsurers. In our view, reasonable and businesslike practices required that EAIC keep its fronted insurers, the true risks carriers, fully informed as to developments relating to the Dow Corning claims. That however was not possible here because KPMG, by its decision to terminate EAIC's legal representation, cut-off EAIC and therefore its fronted reinsurers' links to all current claims developments. Moreover, this failure to advise reinsurers eliminated any possibility that the reinsurers had to manage their Dow Corning exposure fronted through EAIC, including participation in the London market settlement in 1995.

In the circumstances, we do not accept that the Dow Corning claims have been handled in a proper and businesslike manner. However, without prejudice to our right to deny liability for losses arising out of EAIC settlement with Dow Corning, we will support a settlement up to the present value of what our share of the 1995 Market Settlement would have been. We understand that were EAIC to settle on the basis of the Market Settlement, its total liability on the relevant policies would be $3,772,761, of which Abeille Ré's share would be $772,538. [my emphasis]

Should EAIC have taken the necessary steps to participate in the London settlement in line with its obligations to its fronted reinsurers, Abeille Ré would have settled its share in May 1996

> along with the other participating insurers. Accordingly, we are prepared to settle the Dow Corning claim for an amount of $1.018.574 corresponding to our share of the London Market settlement plus interests based on a 5% rate over 5 years and 8 months. To the extent that EAIC settles with Dow Corning at any higher level than the London Market Settlement, Axa Corporate Solutions will not bridge the gap.
>
> Please note that the terms of our offer must remain confidential between AXA Corporate Solutions SA as successor in interest of Abeille Réassurance and EAIC and does not constitute an admission of liability.
>
> *Nothing in this letter is intended to waive any of our rights or defenses* [sic] *to EAIC's claims relating to Dow Corning. Rather, we continue to fully reserve all of our rights and defences, including such defences as further investigation may reveal.*"

14. Following this letter, on 29 January 2002, the scheme administrators: recognised and acknowledged to Dow that EAIC had a liability to Dow of at least US$ 3,772,760.93 under the ten Insurance Contracts and others; admitted that amount as an established scheme liability, as defined in the scheme ("the Interim Settlement"); and thereafter made payment to Dow of a dividend of 25% (US$ 943,790.23) in accordance with the terms of the scheme of arrangement. That settlement reflected the terms of the LMSA; in other words, it reflected the amount that EAIC would have paid, had it been party to the LMSA. The actual amount as at that date being claimed by Dow as against EAIC in respect of costs and paid claims on the ten Insurance Contracts pursuant to the decisions of the Michigan courts and the model approved in that litigation was US$ 1,552,788; that was reflected in a "current bill" submitted by Dow through to December 2001.

15. As pleaded in the Amended Particulars of Claim (and there is no dispute about this as a matter of arithmetic), Axa's proportion of the Interim Settlement amount is US$ 772,538, i.e. the amount claimed by way of summary judgment. That figure reflects Axa's share on four of the ten Insurance Contracts which were the subject of the Interim Settlement on the assumed basis that EAIC had settled on LMSA terms. The evidence shows that, as at 29 January 2002, Axa's proportionate share of the amount actually billed by Dow in respect of those four contracts was US$ 1,048,949, i.e. in excess of the amount claimed by way of summary judgment. The evidence also shows that, as at the date of the Interim Settlement, US$ 673,808 of Axa's share of the Interim Settlement amount (i.e. US$ 772,538) represented paid claims and US$ 98,730 represented IBNR.

16. Dow's most recent "current bill" through to December 2004 claims sums against EAIC on six of the ten Insurance Contracts in a total sum of US$ 2,932,476. The evidence shows that Axa's share of this amount is at least US$ 2,257,476. The correspondence shows that Dow's current position is that, in the light of the judgments of the Michigan courts, it could ultimately enforce claims of US$ 10,894,017 against EAIC, representing Dow's estimate of its current and future liabilities according to the model.

Axa's application to strike out EAIC's evidence

17. In essence, Axa applies to strike out certain paragraphs of evidence in witness statements sworn on behalf of EAIC which refer to the without prejudice meeting and the without prejudice correspondence. Axa also applies to strike out references to the letter dated 4 December 2001, to which I have already referred, as well as a subsequent letter dated 4 July 2005, also not marked "Without Prejudice", in which Axa referred to the sum of US$ 772,538 and said the following:

> "We refer to your letter of 14 June 2005 in which you request payment of the sum of $772,538 in respect of the above-mentioned claims. Firstly, please note that we only received your letter by mail, on 23 June 2005. We did not receive it by fax because you sent it to the wrong fax number, The correct fax number is 33 1 58 36 75 98.
>
> Axa does not admit liability in respect of these claims. Nevertheless, in the interests of resolving this matter and avoiding unnecessary future costs, Axa confirms that it is prepared to pay EAIC the sum of $1,018,574 in full and final settlement of all claims arising from the Dow breast implant claims. This sum comprises the principal sum of $772,538 together with an element of interest, which Axa first offered EAIC in December 2001.
>
> This confirmation is subject to the execution of a satisfactory settlement agreement, and, as noted above, is made without any admission of liability in respect of the subject contracts and on a full and final basis.
>
> Finally, you should note that Axa will vigorously contest any legal proceedings brought against it by EAIC in respect of these claims."

18. The evidence of EAIC's witnesses does not refer to what was said at the meeting on 8 November 2001 because it is common ground that the discussions at this meeting were without prejudice. However, their evidence does refer to the contents of the two letters which contain offers by Axa to settle EAIC's claim on certain terms. Axa's submission is that these two letters should be regarded as without prejudice because they were part of the ongoing settlement negotiations. Mr. Phillips, on behalf of Axa, contended that it is well-established that the application of the without prejudice rule is not dependent on the use of the words "Without Prejudice". He referred to *Rush & Tompkins v GLC* [1989] 1 AC 1280 and, in particular, the passage at 1299 in the speech of Lord Griffiths. He rightly emphasised that the key issue is whether it is clear from the surrounding circumstances that the parties were seeking to compromise the claim; in other words, whether the relevant correspondence or discussion was part of negotiations genuinely aimed at settlement. He also referred to the principle that, if a letter is sent in reply to a letter written without prejudice, or as part of a continuing series of negotiations, whether conducted by correspondence or orally, it can be treated as without prejudice, notwithstanding that it is not expressly so marked: see *Dixon Stores Group Ltd v Thames Television plc* [1993] 1 All ER 349 at 351 per

Drake J. Mr. Phillips contended that the two letters were part of the continuing negotiations for settlement, and therefore should be treated as without prejudice.

19. Mr. Southern, on behalf of EAIC, referred to the relevant principles as set out in Hollander *Documentary Evidence* 9th Edition 2006; first, that correspondence will only be protected by without prejudice privilege if it is written for the purposes of a genuine attempt to compromise a dispute between the parties; second, that it does not follow that correspondence with a view to settlement is necessarily without prejudice - that depends upon the intentions of the parties, which must be determined objectively; third, where, as here, the situation arises in a two-party situation, the basis for the exclusion of without prejudice material is likely, but not inevitably, to be an implied or deemed contract between the parties that they will not make use of the communications in court; fourth, the without prejudice status of correspondence can be waived, but only by both parties; see 1605 to 1632 of Hollander, *op cit*.

20. In my judgment, looking at the evidence objectively, it is not appropriate to characterise either of the letters as without prejudice. The evidence shows that at the end of the without prejudice meeting on 8 November, Mr. Heitlinger, a representative of PRO asked Axa to set out its position in writing. The obvious purpose of this request was so that the scheme administrators had a statement on the record of Axa's position, which implicitly was to be an open statement. The letter, with its introduction: "This is to confirm our position in the captioned matter …" does just that. Although the letter goes on to make certain reservations of rights, and to state that Axa will support a settlement up to the LMS amount, but "… without prejudice to our right to deny liability …", the letter itself is not without prejudice. What the letter is clearly stating is that, without prejudice to any of Axa's rights to deny liability, it would support a settlement up to the present value of what its share of the LMSA would have been. The letter dated 4 July 2005 is in similar terms. In my judgment neither can be characterised as without prejudice. They are properly to be viewed as open offers, albeit hedged about with conditions and constraints. They expressly reserve the right to deny liability in full, notwithstanding the offer is made. Accordingly, I have taken that evidence into consideration.

EAIC's application for summary judgment

21. EAIC's application is, as I have said, for summary judgment in the amount of US$ 772,538. This sum represents Axa's share of the sum which EAIC would have been liable to pay under the LMSA, and which EAIC has accepted as a scheme liability under the terms of the interim settlement. It does not represent EAIC's full claim against Axa, since EAIC is also claiming in the proceedings a declaration that Axa is liable to make payment to EAIC of its specified share of such further amounts as EAIC properly settles under the terms of the Insurance Contracts.

22. In summary, in the action, Axa alleges that EAIC, as fronting insurer, owed certain duties to Axa in connection with the settlement of the breast implant claims, and that EAIC acted in breach of its duties when, without consulting Axa, it took the decision to cease participation in the London Market Group formed to investigate the claims and to cease receiving reports prepared by attorneys acting on behalf of the London Market. Axa contends that this resulted in Axa being exposed to liabilities significantly in excess of those to which it would have been exposed had EAIC not been in breach of its duties.

23. Mr. Phillips, on behalf of Axa, contends that its offer, as set out in the correspondence, to pay the sum of US$ 772,538 plus interest thereon was only on the basis: (a) that EAIC did indeed settle with Dow on LMSA terms; and (b) that EAIC would not seek any further payments from Axa, in other words that EAIC's claims would be limited to the sum of US$ 772,538 plus the relevant interest. Accordingly, Axa contends that it is entitled to dispute liability in its entirety because its position as set out in the correspondence was: "If you, EAIC, settle your liability for US$ X, I will agree to follow that settlement, but in circumstances where you do not settle for US$ X, I now require you to prove to me that I am obliged to follow the settlement which you have made".

24. In my judgment, the correct analysis of the Axa offer was as follows: Axa was not contractually binding itself to follow any interim settlement that EAIC might make with Dow in any circumstances. The terms upon which Axa was offering to pay the sum of US$ 1,018,574 was subject to EAIC accepting that such payment would be in full and final settlement of Axa's liability to EAIC, irrespective of whether EAIC achieved a settlement on LMSA terms with Dow. In my judgment, therefore, EAIC is not entitled to rely on the offers made in correspondence as an irrevocable agreement by Axa that it would indeed follow the settlement and not dispute liability up to an amount of US$ 1,018,574. Nor, in my judgment, can EAIC rely on those letters as providing the basis for any estoppel or representation by Axa that it would pay under the Reinsurance Contracts in the event that a sum in that amount was paid. However, as I explain below, I consider that EAIC can nonetheless rely on such offer as evidence in support of its contention that there is no defence up to that amount.

25. I turn now to consider the substance of EAIC's application for summary judgment.

26. There was little dispute between counsel as to the relevant principles to be followed under the settlement clauses of the type under consideration in the present Reinsurance Contracts. A good summary of the relevant principles, which I respectfully adopt, is set out in paragraphs 95-98 of judgment of Cresswell J in *CGU International Insurance plc and Others v Astra Zeneca Insurance Company Ltd* [2005] EWHC Comm 2755:

> "95. A reinsurer is not liable to pay the reinsured until the amount of the reinsured's liability has been ascertained by judgment, award or settlement. (*Versicherungs und Transport A/G. Daugava v Henderson* (1934) 49 LI L Rep 252 at 254 Scrutton LJ).
>
> 96. The fact that the reinsured has paid under the policy reinsured does not enable the reinsured to substantiate its claims against the reinsurer. Subject to any provision to the contrary in the reinsurance policy the reinsured, in order to recover from the reinsurer, must prove the loss in the same manner as the original insured must have proved it against the reinsured, and the reinsurer can raise all defences which were open to the reinsured against the original assured. (Mr. Justice P. O. Lawrence in *Re London County Commercial Re-*

> *Insurance Office Ltd.* (1992) 10 LI.L.Rep. 370 at p. 371).
>
> 97. Where a reinsured seeks to recover under a policy of reinsurance, the reinsurer cannot be held liable unless the loss falls within the cover of the policy reinsured and within the cover created by the reinsurance. (Lord Mustill in *Hill v Mercantile and General Reinsurance Co plc* [1996] 1 WLR 1239, 1251).
>
> 98. The effect of a clause binding reinsurers to follow settlements of the reinsured is that the reinsurer agrees to indemnify the reinsured in the event that the reinsured settles any claim by their assured, i.e., when the reinsured disposes, or binds itself to dispose, of a claim, whether by reason of admission or compromise, provided (i) that the claim as so recognised falls within the risks covered by the policy of reinsurance as a matter of law and (ii) that in settling the claim the reinsured has acted honestly and has taken all proper and businesslike steps in reaching the settlement. (Robert Goff LJ in *Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* [1985] 1 Lloyd's Rep. at p. 330)."

27. Mr. Phillips submits that a settlement arises for the purposes of the settlements clause when the reassured disposes or binds itself to dispose of a claim whether by reason of admission or compromise; see *Assicurazioni Generali SpA v CGU International Insurance plc* [2003] 1 Lloyds R 725 at 736 per Mr. Gavin Kealey QC, sitting as a Deputy High Court Judge. Mr. Phillips submitted that the terms of EAIC's agreement to pay US$ 3,772,760.93 to Dow made it clear that EAIC was not disposing of any claims or even binding itself to dispose of any claims; he submitted that by the Interim Settlement, EAIC was merely making an interim good faith payment without any admission of liability on a without prejudice basis, with a full reservation of rights; he referred to the terms of the scheme administrators' fax to Dow dated 29 January 2002, which was in the following terms:

> "**1. Interim Distribution**
>
> We intended to agree terms on which a partial good faith dividend payment could be made to Dow Corning Corporation, but this has become confused with efforts to agree a mutually acceptable mechanism to resolve the full value of the Dow Corning claim.
>
> Without prejudice and subject to full reservation of EAIC's rights, the Scheme Administrators recognise and acknowledge that EAIC has a liability to Dow Corning Corporation of at least US$3,772,760.93. Therefore, this amount will be admitted as an Established Scheme liability (as defined in the scheme of arrangement to which EAIC is subject) and on which Dow Corning Corporation shall receive a dividend. The

> current dividend rate is 25% giving a dividend amount of US$ 943,190.23.
>
> Payment of such a dividend does not need any legal agreement between us."

28. Mr. Phillips contended that, at most, all that EAIC had done was to make a subjective estimate of the minimum sum for which the scheme administrators believe EAIC will be liable when it eventually does come to consider whether the claims are properly payable. He also referred to the scheme administrators' fax to Axa dated 16 September 2002, which states:

> "The payment was made on the basis, and accepted by Dow … on the basis, that the scheme administrators agree that the Dow claim is at least equal to EAIC's share of the Dow Corning LMS and that pending resolution of the greater claim by Dow …, the scheme administrators could not justify failure to pay dividends on the lower amount."

Mr. Phillips contended that such an agreement to pay that sum to Dow, on a good faith basis, but without prejudice and subject to a full reservation of rights, was not a payment which settled anything. He referred to paragraph 126 of the judgment of Cresswell J in *CGU International* (*supra*), where the judge stated that the fact of payment by itself, without fulfilling the other requirements agreed in a reinsurance contract for reinsurer's liability to arise was not sufficient to constitute a settlement. He further submitted that the payment of US$ 3,772,760.93 by the scheme administrators to Dow was not in any way allocated to any particular claims presented by Dow under the contracts of insurance, but rather a lump sum payment based on EAIC's estimate that liability for all claims would indeed exceed that amount. He submitted that, on the information presently available, there can be no determination as to whether the claims alleged to have been settled by EAIC are recoverable under the reinsurance, or whether, for example, they relate to IBNR or *ex gratia* claims. Accordingly, Mr. Phillips submits that there has been no identification of claims properly falling within the terms of the reinsurance for the purposes of the summary judgment application. He also submits that the requirement that there should be proper and businesslike steps to settle the claims has not been established. He further contends that EAIC has not as yet taken any proper and businesslike steps to determine its own liability in respect of any claims which it says have been presented, let alone to determine its liabilities in a way which binds Axa. He contends that EAIC cannot possibly have done so when it cannot even identify which of the underlying claims has been settled. He complains that at the time when EAIC made its payment to Dow it had not at that stage obtained advice from the claims evaluation experts in the USA engaged to review the implant claims and the model put forward by Dow. He complains that as at 14 June 2005, EAIC had received no legal advice in relation to the Dow claims at all, and that EAIC accordingly made its payment to Dow without having made any proper evaluation of whatever claims it is which are said to have been settled.

29. Accordingly, he contends that EAIC has no right to require Axa to follow the interim settlement because: first, the application is made before EAIC had actually entered into any settlement agreement with Dow; second, because the application for

summary judgment has been made before EAIC indicated which claims it says it has settled and demonstrated that those claims fell within the terms of the Reinsurance Contracts; and third, because the application for summary judgment has been made before EAIC has taken any proper and businesslike steps to settle whatever the claims are which are being made against it. He contends that the resolution of the action calls for proper disclosure to be given and for EAIC to provide proper evidence in relation to the claims which it does settle.

Determination

30. In my judgment, Mr. Southern is right, and there has been a settlement here which satisfies the requirements of being the settlement of a claim which falls within the risks covered by the Reinsurance Contracts as a matter of law, and that EAIC has acted honestly and taken proper and businesslike steps in reaching the settlement. It is clear from the evidence relating to the interim settlement that at the date that payment was made to Dow there were paid claims in respect of four of the relevant ten Insurance Contracts in the sum of US$ 673,808, if one excludes the IBNR reflected in the settlement payment of US$ 98,730 (as Mr. Southern conceded should be done). There can be no real dispute that amounts in relation to these claims have been settled. By the Interim Settlement EAIC was in effect recognising that it had a liability to Dow of at least US$ 3,772,760.93 under the ten Insurance Contracts in relation to the bills submitted by Dow. It is also clear in my judgment that they have been properly settled, since not only the London Market but also Axa's own willingness to settle in these amounts must indicate at least that payment in such amount is proper.

31. But even if I were wrong on that, and, because of the way in which the interim settlement was described as a "partial good faith dividend payment", as opposed to a settlement of any particular claim, there has been no actual settlement of identified claims, such as to trigger the "follow the settlement" clauses, in my judgment Axa has advanced no plausible basis for asserting that in the circumstances it has a realistic prospect of defending EAIC's claim for at least US$ 673,808. On the evidence, there is no realistic prospect of Axa establishing that it does not have a liability to EAIC in respect of at least the paid claim amounts in relation to the four Insurance Contracts which were the subject of the December 2001 bills submitted by Dow. The so-called concerns raised by solicitors acting for Axa and the Axa representatives are not in reality concerns that go to the underlying merits of, or documentation in relation to, Dow's claims or the method of their determination. The *gravamen* of Axa's complaint is that EAIC, although it was insolvent and prevented by the injunction of the American courts from being sued, had failed to settle the claim earlier on the more favourable terms of the LMSA. The evidence in relation to the numerous proceedings in the Michigan courts and the approval by those courts of the computer model which allocates claims to various different policy years shows that in reality it would be impossible for EAIC or Axa to assert that EAIC had no liability to Dow in respect of a minimum amount of US$ 772,538 plus interest thereon. Moreover, the fact that I have held that Axa had not contractually bound itself by the two letters dated 4 December 2001 and 4 July 2005 to follow the Interim Settlement does not mean that the court cannot look at the commercial reality of those letters. They reflect the recognition by Axa that it is indeed liable to pay in that amount without further inquiry or determination. The correspondence does not show any substantive basis

for challenging the detail of the claims made by Dow, at least up to that amount, or for challenging the proposition that payment to Dow of amounts based on the LMSA could in any way be challenged.

32. In my judgment, Axa has no realistic prospect of successfully defending the claim against it in respect of those aspects of the four contracts which relate to outstanding amounts. It is just about conceivable, although unlikely, that Axa might have a defence in relation to settlement amounts paid in respect of IBNR, as opposed to paid claims, and I give Axa the benefit of the doubt in that respect, as Mr. Southern effectively conceded in his supplementary submissions on this point, and in the post-hearing submissions that he provided.

33. Accordingly, it follows that EAIC is entitled to summary judgment in the sum of US$ 673,808, together with interest on that amount from 29 January 2002.