Neutral Citation Number: [2008] EWHC 1671 (Comm)

Case No: 2008 FOLIO 241

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/07/2008

Before :

THE HONOURABLE MR JUSTICE BEATSON

- -

Between :

EQUITAS LIMITED	**Claimant**
- and -	
ALLSTATE INSURANCE COMPANY	**Defendant**

- -
- -

MR J LOCKEY QC (instructed by **Ince & Co**) for the **Claimant**
MR A SCHAFF QC & MR S KERR (instructed by **Slaughter & May**) for the **Defendant**

Hearing dates: 17-19 June 2008

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Judgment

Mr Justice Beatson :

Introduction

1. On 14 April 2008 the defendant, Allstate Insurance Company ("Allstate"), applied for a stay of all further proceedings in this action brought by the claimant, Equitas Limited ("Equitas"), pending the determination of an arbitration in Texas between Allstate and Highlands Insurance Company, a Texas based company, which went into receivership in November 2003.

2. This action, filed on 10 March 2008, concerns the scope of a commutation agreement dated 16 December 2004 entered into by the claimant, the underwriting members of Lloyd's reinsured by Equitas Reinsurance Limited in respect of the 1992 and prior years of account, and the defendant, which had reinsured the Lloyd's syndicates. That agreement released and discharged the parties from all liabilities under or related to reinsurance agreements defined in it. It is governed by English law and contains an exclusive English jurisdiction clause.

3. The dispute between Allstate and Equitas became apparent during the course of the Texas arbitration. That arbitration concerns common account excess of loss reinsurance contracts (the "CAXOL contracts") Highlands made with Allstate pursuant to its obligations under a number of quota share reinsurance contracts (the "Quota Share contracts") made between 1977 and 1984. The Quota Share reinsurers included certain Lloyds syndicates. Substantial claims had been made against Highlands by Dynalectron Corporation (the "Fuller-Austin claim"), the Bergstrom Paper Company, and Coltec Industries Inc. After Highlands went into receivership, its Special Deputy Receiver ("SDR"), with the approval of the Texas Receivership Court, entered into funding arrangements with the Quota Share reinsurers to enable the claims to be settled. Early in 2006, and after the claims were settled, Highlands billed the CAXOL reinsurers including Allstate for sums due in respect of the claims. Allstate did not pay any of the invoices and raised a number of objections to the Fuller-Austin claim. On 8 March 2006 it informed Mr Charles Fortune, the Syndicates' US counsel, that as a result of the commutation agreement, it owed no monies to Equitas in respect of Equitas' interest in the common account protection under the CAXOL contracts. On 4 January 2007 Highlands commenced Texas arbitrations in respect of the non-payment of the three claims. On 9 February 2007 the parties agreed to consolidate the arbitrations.

4. Allstate maintains that the claim in these proceedings, the applicability of the commutation agreement to the Syndicates' interest in the CAXOL contracts, whether the Syndicates were party to those contracts, and whether Highlands can claim and recover in full (including the Syndicates' interest) is the subject of the Texas arbitration, and has been advanced by Equitas through Highlands or by Highlands on Equitas' behalf in that arbitration. Mr Lockey QC, on behalf of Allstate, relied on Equitas' involvement in the selection of Highlands' nominated arbitrator Mr Cole, and in the discussions as to whether, in the light of Highlands' receivership, all or part of Mr Cole's fee might be paid by Equitas. He also relied on Equitas being kept up to date with developments and knowing at the time (or soon after) of positions taken by Highlands, including the parties' statement of the issues (in particular the agreed issues) that arose in the arbitration, and the motion filed by Highlands in October 2007 to dismiss Allstate's commutation agreement defence. Mr Fortune was aware of Highlands' position before the motion to dismiss the defence was filed.

5. Equitas relies on the exclusive jurisdiction clause in the commutation agreement, the fact that it is not a party to the Texas arbitration, the desirability of resolving the issues between it and Allstate in proceedings to which it is a party, and because further settlements are likely to give rise to the issue in the future. Mr Schaff QC, on behalf of Equitas, submitted that Highlands' obligation to consult it and its awareness of developments in the arbitration, including the motion to dismiss the commutation defence, reflected its status as one of the Quota Share reinsurers, was not unusual, and does not mean that it has forfeited its right to have its dispute with Allstate adjudicated in the contractually agreed form.

6. The evidence before me consists of a witness statement (dated 16 April 2008) by Mr Noone, Allstate's in house counsel, three statements (dated 17 April, 20 May and 9 June 2008) by Mr Heuvels, a partner of Ince & Co, Allstate's solicitors, two statements (dated 1 May and 12 June 2008) by Mr Michael, a partner of Slaughter and May, Equitas' solicitors, and a statement (dated 1 May 2008) by Mr Fortune, a partner of Day Pitney LLP, the United States firm of attorneys representing the Lloyd's syndicates that were Quota Share reinsurers of Highlands.

7. I first set out the material provisions of the commutation agreement, the Quota Share contract, and CAXOL contracts. I then set out the background in a broadly chronological way, and the relief sought in the present proceedings.

The contracts

The commutation agreement

8. The recitals to this state:

> "…
>
> (3) Allstate and the Syndicates have entered into various reinsurance agreements ("the Reinsurance Agreements") as more fully defined in Article 1, below, whereby Allstate reinsured the Syndicates.
>
> (4) There are outstanding claims due from Allstate to the Syndicates.
>
> (5) The Parties desire to terminate the Reinsurance Agreements and fully and finally settle and commute (by means of the payment referred to in Article 2 hereof) all of the rights, privileges, duties, obligations and liabilities under the Reinsurance Agreements, and to fully and forever release and discharge one another with respect to the Reinsurance Agreements.
>
> (6) The Parties do not have a complete list of all contracts constituting the Reinsurance Agreements, and it is not known whether the listed Syndicates in Schedules A & B attached hereto and incorporated herein constitute an exhaustive list of

> all Syndicates which are parties to the Reinsurance Agreements, as defined in Article 1 below.
>
> (7) Nevertheless, it is the intention of the Parties that pursuant to the terms of this Agreement, all Reinsurance Agreements falling within the definition in Article 1 below, whether currently known or unknown, be fully and finally settled and commuted under the terms of this Agreement."

9. The material terms of the agreement are:

> "ARTICLE 1. DEFINITIONS
>
> …
>
> B "Reinsurance agreements" shall, subject to the exclusion of reinsurances, reinsurance business and agreements referred to in paragraph C below mean all reinsurance and retrocession treaties and facultative acceptances (collectively "reinsurance") whereby Allstate reinsured the Syndicates under reinsurances responding to 1992 and Prior Business, the benefit of which have been assigned by the Names to ERL and subsequently assigned by ERL to Equitas under the Equitas Retrocession…."

10. The treaty reinsurances which have been identified as falling within the definition are listed in Schedule A to the agreement. The facultative reinsurances which are identified as falling within it are listed in Schedule B. Paragraph C of Article 1 states that the agreement does not include the types of reinsurance, reinsurance business or agreements listed in it, which fall outside the definition of Reinsurance Agreements. The first category is "Unknown Facultative Business". This is stated to be all Facultative Business not listed and identified in Schedule B. Facultative Business is defined in paragraph C. The second excluded category is any reinsurances, reinsurance business and agreements having an inception, anniversary or renewal date on or after 1 January 1985 that were sold by Allstate in 1996 to SCOR US Corporation and/or assumed by Allstate Reinsurance Company Limited through its branch offices in London and Zug and any of their subsidiaries.

11. By Article 2(A) Allstate undertook to pay Equitas US$14.5 million in consideration of the release. By Article 3:

> "(i) … [the parties agreed to] release and forever discharge each other… from any and all liabilities and obligations arising under or related to the Reinsurance Agreements, whether known or unknown, reported or unreported and whether currently existing or arising in the future… [and] acknowledge that full payment… will be complete accord, satisfaction, settlement and commutation all of their respective liabilities and obligations under the Reinsurance Agreements, and
>
> (ii) the Parties acknowledge that most, if not all, of the Reinsurance Agreements are governed by English law. The Parties releasing claims expressly assume the risk that acts, omissions, matters, causes, or things may have occurred which are not known or are not suspected to exist by one or more of them. The Parties to the fullest extent permitted by law hereby waive the terms and provisions of any statute, rule or doctrine of common law which either: (a) narrowly construes releases purporting by their terms to release claims in whole or in part based upon, or arising from, or related to such acts, omissions, matters, causes or things, or, (b) which restricts or prohibits the releasing of such claims."

12. By Article 4(F):

> "This Agreement shall be governed by and construed in accordance with English law. The Parties hereto agree to submit the exclusive jurisdiction of the English High Court in respect of any dispute, controversy or claim arising out of or in connection with this Agreement, or its breach, termination, formation or validity."

The Quota Share reinsurance contract

13. At the head of the first page of this contract it is stated: "This contract is subject to arbitration under the Texas General Arbitration Act". The parties to the contract are nine Highlands insurance companies and Aberdeen Insurance Company, Houston, the reinsured, and the subscribing reinsurers. The subscribing reinsurers included certain Lloyd's syndicates, New England Reinsurance Corporation ("NERCO"), AXA Re, Markel and Allstate. Article I provides that the reinsured obligates itself to cede to the reinsurer and the reinsurer obligates itself to accept from the reinsured 80% of the net retained liability of the reinsured under all the defined insurance business effective on or after 1 January 1982. Article VI is headed "Reinsurance for Common Account". It provides:

> "1. The Reinsured shall maintain, for the common account of the Reinsured and the Quota Share Reinsurer, Excess of Loss Reinsurances aggregating $9,750,000 in excess of $250,000 each occurrence each claim made, or in the aggregate where applicable, each subject of insurance, each original Insured."

14. Article XVII deals with arbitration. Paragraph 1 of this article provides that any dispute with reference to the interpretation of the contract or the rights of either party with respect to any transactions under it shall be referred to three arbitrators. Paragraph 5 provides:

> "Any such arbitration shall take place in Houston, Texas unless some other location is mutually agreed upon by the parties. It is agreed that for all purposes this Article shall be deemed by the parties to be subject to the laws of the state of Texas."

The excess of loss reinsurance contracts

15. Two CAXOL contracts are relevant to these proceedings. The first contract, in relation to the period from 1 January 1977 to 31 March 1982, was for US$ 250,000 excess of US$ 250,000 per occurrence or in the aggregate where applicable. The third CAXOL contract, in relation to the period from 1 January 1977 to 31 December 1979, was for US$ 4 million excess of US$ 1 million per occurrence or in the aggregate where applicable.

16. The parties to the two agreements are the nine named Highlands companies and the Aberdeen Insurance Company, Houston, (the Reinsured), and the subscribing Reinsurers, which included Allstate. There is no material difference in the wording of the clauses relevant to these proceedings. The numbering of some of the Articles of the third CAXOL contracts differ from those of the first one and, where different, the number in the third contract is in brackets. Article I defines the business covered. Article II, headed "Reinsurance for common account" provides:

> "…this Reinsurance is effected for common account of the Reinsured and their Quota Share Treaty Reinsurers and, therefore, applies to that part of the original policies which the Reinsured retains for their own account together with their Quota Share Treaty Reinsurers."

17. Article IV is concerned with the amount of cover. Article VIII (IX) provides:

> "1. The term "Ultimate Net Loss" as used in this contract shall mean actual loss or losses paid or payable by the Reinsured (excluding expenses) in satisfaction of judgments. Salvages and recoveries, whether recovered or received prior or subsequent to a loss settlement under this contract, including amounts recoverable under all reinsurances (except recoveries from its Quota Share Reinsurance contract and underlying Excess of Loss Reinsurance contract) whether collected or not, shall be applied as if recovered or received prior to the aforesaid settlement and shall be first deducted from the actual loss sustained to arrive at the amount of ultimate net loss…."

18. Sub-paragraph 1 of article IX (X) provides;

> "The Reinsured may or may not maintain Quota Share Reinsurance with respect to business the subject matter of this Reinsurance. However, if such Quota Share Reinsurance is maintained it shall be disregarded for purposes of this contract."

19. Article XVIII (XIX) deals with arbitration. It provides:

> "If any dispute shall arise between the Reinsured and the Reinsurer… the dispute shall be referred to three Arbitrators…. The Arbitrators shall consider this contract an honourable engagement rather than merely a legal obligation; they are relieved of all judicial formalities and may abstain from following the strict rules of law. The decision of a majority of the arbitrators shall be final and binding on both the Reinsured and the Reinsurer. … Any such arbitration shall take place in Houston, Texas unless some other location is mutually agreed upon by the parties."

20. The CAXOL contracts do not contain a choice of law clause but it is common ground that they are governed by Texas law.

Chronology

21. Highlands' liabilities under commercial umbrella liability and excess liability policies issued to Dynalectron/Fuller-Austin, Bergstrom Paper, and Coltec Industries were significant. Highlands' SDR was able to settle the claims advantageously. The Dynalectron/Fuller-Austin settlement was US$30.5 million, of which the Syndicates' share under the Quota Share reinsurances was US$8.7 million. The Bergstrom Paper settlement was US$2.2 million, and the Coltec settlement was US$7.9 million. The settlements gave rise to total recoveries against Allstate under the CAXOL reinsurances of approximately US$1.4 million. Of this, the Syndicates' share is in the region of US$700,000.

22. As a result of the receivership, some of Highlands' reinsurers, including both those participating in the Quota Share reinsurance and in the CAXOL contracts were concerned that any recoveries under the CAXOL contracts would become part of Highlands' general receivership estate. On 10 March 2005 Anthony Pye, Highlands' lawyer, circulated a proposal to each of the major Quota Share reinsurers representing some 98% of the gross reinsurance recoverable under such contracts. The proposal aimed to achieve the simultaneous settlement of the full balances owed by the Quota Share reinsurers to Highlands, while providing for the immediate credit of CAXOL balances owed by the Quota Share reinsurers to Highlands and to each other, whether by offset or cash payments. The aim of the proposal was to persuade the Quota Share reinsurers to pay under this agreement before Highlands claimed under the CAXOL contracts.

23. The proposal included an assurance by the SDR that balances collected by Highlands under the CAXOL contracts on behalf of Highlands' Quota Share reinsurers would not become part of its general receivership estate and available to its general creditors but would be held separately and distributed directly to the Quota Share reinsurers in the appropriate proportions. To this end the SDR proposed that an order of the Texas Receivership Court approving the establishment of a segregated account would be sought. The SDR stated that he was prepared to take the position that "the Quota Share reinsurers are, at a minimum, third party beneficiaries of the CAXOL contracts, and that any amounts collected from CAXOL reinsurers … are only assets of the Highlands receivership estate to the extent they constitute reinsurance of Highlands' net retention under its Quota Share contracts".

24. Mr Pye's letter deals with a suggestion that an application be made for an order approving the SDR's interpretation that the Quota Share reinsurers have a legally enforceable right to a proportionate share of all CAXOL recoveries. He states that he believes the Receivership Court would reject such an application on the ground that it was a request for an advisory opinion. The letter also states that, notwithstanding the SDR's interpretation of the CAXOL contracts as affording Quota Share reinsurers contractual rights enforceable on their own behalf, "the fact remains that CAXOL contracts themselves name only Highlands in the definition of the reinsured party."

25. The letter also addresses concerns expressed by some reinsurers that because the Highlands receivership would only benefit from a small fraction of any CAXOL recoveries, in the future the SDR might decide not to expend receivership funds in pursuit of CAXOL balances. The SDR proposed two mechanisms to address this; first that the Quota Share reinsurers agree to fund the costs of collection proportionately. Secondly, if the SDR should decide in future not to pursue collection, he would provide an undertaking and the consents necessary to enable the Quota Share reinsurers to proceed in Highlands' name.

26. This proposal related to the Dynalectron/Fuller-Austin claim. As a result of discussions following it and similar proposals in respect of the Bergstrom and Coltec claims, the parties entered into agreements for the funding of the settlement subject to approval of the Texas Receivership Court. Part 5 of the funding agreement for the Fuller-Austin settlement signed on behalf of Equitas on 21 October 2005 is headed "Common account reinsurance". Section b of Part 5 is headed "Enforcement of CAXOL contracts". This states *inter alia*:

> "The SDR and the Quota Share Reinsurers agree that, since the CAXOL contracts were entered into both for the benefit of Highlands and for the benefit of its Quota Share reinsurers, each of the Quota Share reinsurers and Highlands retains the right to effectuate recoveries under the CAXOL contracts for its own respective account."

27. The agreement also made provision for a procedure for the collection of recoveries under the CAXOL contracts and consultation between Highlands and the Quota Share Reinsurers. Section c of Part 5 provides for the establishment of a segregated escrow account solely for the receipt of recoveries subject to the joint control of the SDR and the Quota Share Reinsurers. Section b of Part 5 also provides:

> "The SDR and the Quota Share reinsurers agree to consult with each other with respect to the manner in which the Collecting Agents shall pursue the CAXOL recoveries, including whether proceedings may be required and how such proceedings are to be conducted. In the event that proceedings are commenced against any of the CAXOL reinsurers, such proceedings shall be brought on behalf of both Highlands for itself and as the representative of all of its Quota Share reinsurers that have not declined to proceed through the Joint Collecting Agent."

28. The Texas Receivership Court approved the funding agreements for the settlement of the three claims on 31 October 2005, and 3 and 13 April 2006 respectively. Following the orders of the court the settlements were entered into.

29. Highlands' amended rehabilitation plan refers to the agreements with the Quota Share reinsurers to ensure the continuation of their business relationship. A new section, section 8.6, was inserted. This, *inter alia*, states that "amounts collected pursuant to the common account contracts for the benefit of Highlands' reinsurers do not constitute and shall not be considered assets of the estate. Each of the Quota Share reinsurers and Highlands retains the right to effectuate recoveries under the common account contracts for its own respective account."

30. After the funding agreements were in place, Highlands billed the CAXOL reinsurers including Allstate for sums due under the CAXOL contracts. The court's agreement to the funding agreement for the Dynalectron/Fuller-Austin claim was given some 6 months before its approval to those for the other two claims. After the approval of that funding agreement, on 15 February 2006 representatives of Highlands and its Quota Share reinsurers, Equitas and NERCO, met representatives of Allstate to discuss the balances they maintained were owed on that claim. Mr Ryske, Allstate's in-house managing counsel, Mr Pye, counsel for Highlands, and Mr Fortune, the Syndicates' US counsel were present. Some three weeks later, in the letter dated 8 March 2006 to which I have referred, Mr Ryske wrote to Mr Fortune stating "Allstate owes no monies to Equitas relative to the common account protection afforded by the XOL treaties" because of the commutation agreement between Allstate and Equitas.

31. Mr Fortune replied in a letter dated 28 March 2006. This states that Equitas does not agree that the commutation agreement was intended to commute Lloyd's interests in the CAXOL contracts that are at issue in relation to the Dynalectron/Fuller-Austin claims. The letter states that Equitas is continuing to look into the issue and "I would think that we will be able to make a further response to your claims within a few weeks. In the interim, if you are relying on some specific facts to support your conclusion… we would ask you to identify to us that information." No further response was made. Mr Fortune states that this was because he "never became aware of any specific basis for the Allstate position". On the same day Mr Pye, on behalf of Highlands, wrote to Allstate stating that neither Highlands nor its major Quota Share reinsurers intended to allow the balances billed in respect of the Dynalectron/Fuller-Austin settlement to remain unpaid indefinitely and that, if Allstate did not agree to pay the balances by close of business on 31 March 2006, it "would leave Highlands and its Quota Share Reinsurers no choice other than to commence arbitration proceedings against Allstate". Allstate responded (on 5 April 2006) stating that it did not consider it was liable to pay Equitas' share of the Dynalectron/Fuller-Austin billing.

32. On 4 January 2007 Highlands commenced arbitration in Texas under the CAXOL reinsurance agreements. Equitas was not and never has been a party to this arbitration. This was specifically confirmed to the Arbitration Tribunal by Allstate's counsel at an organisation meeting on 28 June 2007 in response to a disclosure and questions by Mr

Cole, the arbitrator nominated by Highlands. Highlands sought arbitration of the CAXOL billings in respect of the Dynalectron/Fuller-Austin, Coltec and Bergstrom settlements. The sums claimed included the Quota Share reinsurers' portion of these three settlements. On 9 February 2007 it was agreed to consolidate the three disputes. The Agreement to Consolidate stated *inter alia* that "…this Agreement shall apply only to those claims identified in the Arbitration Demand", that is the three identified settlements.

33. Allstate prepared an initial position statement for an organisational meeting that took place on 28 June. The position statement *inter alia* said that:

> "Allstate objects to those portions of the billing that represent common account recoveries pursued by Highlands on behalf of Equitas, which represents various Lloyd's Syndicates that were among Highlands' Quota Share Reinsurers. Equitas previously commuted Lloyd's ceded reinsurance contracts with Allstate, including the Common Account first XOL and third XOL contracts at issue here."

34. Allstate counterclaimed for a declaration that the commutation agreement precluded Highlands recovering common account recoveries due to Equitas. Mr Fortune confirmed that Equitas was kept informed of developments in the Texas Arbitration and it is not disputed that it was informed of Allstate's position on this matter. At the organisational meeting in June 2007, the arbitration tribunal was informed by Highlands that it would be seeking a partial summary judgment dismissing Allstate's commutation defence.

35. Allstate and Highlands prepared a Joint Statement of Issues after the organisational meeting. This is dated 3 August 2007. The heading to section II is "Equitas commutation with Allstate". The agreed issues listed under the is Issues II.A(3) (Highlands' formulation) and II.B(3) (Allstate's formulation) are in identical terms and agreed. The agreed issue is:-

> "With respect to the portion of billings attributable to common account recoveries due to Equitas, does Allstate's commutation agreement with Equitas preclude Highlands' recovery of those amounts?"

36. The issues listed in section II which are not agreed include: who are the contract parties to the First and Third Excess Agreements (Highlands' formulation); does Highlands have standing and entitlement to pursue common account recovery of

amounts owing to Quota Share reinsurers; is Highlands' authority in that regard subject to the defences and offsets that Allstate has against those Quota Share reinsurers; and, if Highlands is not required to establish standing and entitlement to pursue common account amounts for the benefit of Quota Share reinsurers, can Highlands still pursue these amounts in this proceeding without the Quota Share Reinsurers being joined to the proceeding as necessary and indispensable parties (Allstate's formulation).

37. The heading to section VII of the Joint Statement is "Declaratory Relief". There are two agreed issues. VII(1), whether $250,000 is the maximum reinsurance coverage available under the First XOL Contracts for aggregate losses sustained by a single original insured, is not relevant to this application VII(2) states:-

> "Is Allstate entitled to a declaration that Allstate's commutation agreement with Equitas precludes recovery by Highlands of any common account recoveries due to Equitas?"

38. It is submitted by Mr Lockey that the word "any" shows that the issue was not confined to recovery in respect of the Dynalectron/Fuller-Austin, Bergstrom and Coltec settlements. He also relied on the reference in issue VII(1) which, though not agreed, was an issue formulated and proposed by Highlands. This states:-

> "Is Highlands entitled to a declaration that Allstate must… pay all future billings under the first and third excess agreements…"

39. Mr Lockey argued that the scope of the agreed issues is therefore wide enough to encompass claims for future recoveries. The submission is that, if the original reference to arbitration and consolidation agreement did not include declaratory relief in respect of future claims, the effect of the Statement of Issues signed on behalf of Highlands and Allstate was to broaden the issues before the arbitration to include items marked "agreed". He argued that section VII of the statement of issues shows that it was plain that Highlands and Allstate were asking the tribunal to give declaratory relief for future claims. It is not in issue that Equitas, which had an entitlement to be consulted in advance under the funding agreements, was informed of the statement of issues.

40. Highlands' motion for partial summary judgment and the dismissal of Allstate's commutation defence was filed in October 2007. Highlands and Allstate made extensive written submissions to the arbitrators but the commutation agreement itself was not before them. Highlands argued that the arbitral tribunal did not have

jurisdiction to determine the construction of the commutation agreement because it was not a contract pursuant to which the tribunal had been appointed and because the Syndicates and Equitas were not parties to the CAXOL contracts pursuant to which the tribunal had been appointed. Highlands also sought dismissal of the defence on the ground that the commutation agreement between Equitas and Allstate did not affect Highlands' right to recover the full amount owing under the CAXOL contracts, including the portion that reflected the interest of its Quota Share reinsurers, who were not parties to the CAXOL contracts but third party beneficiaries. Charles Fortune, the Syndicates' US lawyer, was made aware of Highlands' position before this motion was filed. The motion, originally to be heard by 25 October 2007, was fixed for hearing on 12 March 2008.

41. On 6 March, shortly before the scheduled hearing, Equitas' North American claims manager informed Terry Kelaher of Allstate that Equitas was "in the process of filing an action in England over whether the CAXOL recoveries due by Allstate to Highlands are commuted as part of Allstate's commutation with underwriters at Lloyd's". Mr Kelaher had apparently first heard of this at a dinner meeting. Mr Page's email states that, as Allstate knew, Equitas contended that the recoveries are not commuted, and:

> "… it has become apparent to us, through the process of the arbitration between Highlands and Allstate, that Allstate believes they are commuted. As such, it appears that there is a clear dispute between us which we believe must be resolved under English law, as the commutation agreement contains a clear English law and jurisdiction provision."

42. The claim form in these proceedings was filed on 10 March 2008. Highlands' motion to dismiss the commutation defence was heard on 12 March. It was rejected by the tribunal on 14 March, but this was "without prejudice to [Highlands] renewing its motion at the close of all the evidence at the final evidentiary hearing in this matter". On 31 March Mr Fortune wrote to Allstate's US lawyers seeking a stay of the arbitrators' consideration of Highland's claim for recovery of the Syndicate's share of the applicable CAXOL reinsurance pending the determination of the English proceedings. Allstate responded on 8 April stating that it would resist any application for a stay. Allstate said that the Syndicates had actively engaged in the US arbitration for a year and a half, had engaged in efforts to initiate that arbitration by contacting an arbitrator to serve as the party appointed advocate for their position, had discussions with their arbitrator about possible umpires, and an offer of a form of personal financial guarantee to facilitate the arbitrator's availability to serve. The letter states that Allstate would not support Equitas' attempt to distance itself from the arbitration and to engage in blatant forum shopping. The Particulars of Claim in this action were also served on 8 April and shortly afterwards on 14 April Allstate filed its application seeking a stay of the English proceedings. On 16 April the claimant gave notice that it would seek expedition of the English proceedings. However, it has since decided not to seek expedition.

43. The material paragraphs of the Particulars of Claim are:

> "5. Upon the proper construction of the said Commutation Agreement, the phrase "Reinsurance Agreements" did not extend to contracts of reinsurance and retrocession to which the Syndicates were not a party and, in particular, did not extend to contracts of excess of loss reinsurance or retrocession between a reinsured (who was not party to the Commutation Agreement) and Allstate, notwithstanding that any such contract may have been effected by such a reinsured for the common account protection of itself and of Quota Share reinsurers who included (amongst their number) one or more of the Syndicates who were party to the Commutation Agreement."

> "6. Allstate disputes the aforesaid construction of the Commutation Agreement. In particular, Allstate asserts but the claimant disputes that certain contracts of Common Account Excess of Loss Reinsurance… [the first and third CAXOL contracts] between Highlands Insurance Company ("Highlands") as reinsured and Allstate as reinsurer, fall within the scope of the said Commutation Agreement, by reason of the fact that one or more of the Syndicates were Quota Share reinsurers of Highlands and that the CAXOLs were effected by Highlands for the Common Account of Highlands and its Quota Share Reinsurers (including one or more of the Syndicates)."

> "7. The CAXOLs did not include the Syndicates (or any of the Quota Share reinsurers of Highlands) within the definition of the "reinsured" which was contained therein… [Articles I, II, IV, IX, X of the third CAXOL are then set out]."

> "8. Upon the proper construction of the CAXOLs:

> (1) The Syndicates were not parties thereto; and

> (2) Notwithstanding the fact that the CAXOLs inured to the Syndicates' benefit as Quota Share reinsurers of Highlands,

> Highlands (as reinsured) was entitled to claim and recover in full for any and all sums payable under the CAXOLs."

> "9. In the premises, the CAXOLs did not fall within the meaning of the phrase "Reinsurance Agreements" (as defined in Article I(B) of the said Commutation Agreement) and accordingly did not fall within the scope of the said commutation agreement. In particular, the CAXOLs were not agreements entered into by Allstate and the Syndicates whereby Allstate reinsured the Syndicates (recital 3 and Article I(B)) in relation to which there were outstanding claims due from Allstate to the Syndicates (recital 4) and which could be terminated and made the subject of a full release and discharge by the Syndicates (recital 5 and Article III)."

44. Allstate filed its application for a stay on 14 April. Paragraph 1 of the relief sought was an order that "the claimant's claim be stayed generally, alternatively the claim be stayed pending determination of the issues in arbitration proceedings in Texas USA between Highlands Insurance Company (in Receivership) and others and the defendant". As a result of the withdrawal of the money claims in the Texas arbitration, on 12 June Allstate's solicitors wrote to Equitas' solicitors stating that they considered it appropriate for these proceedings to be stayed pending the Texas Tribunal's ruling on the effect of the "purported withdrawal of Highlands' money claims and the status of the claims for declaratory relief". Mr Lockey stated (skeleton argument paragraph 80) that the question of any further stay could be considered after the Texas Tribunal has ruled, in the light of the ruling and any statement of intention as to the pursuit of further claims. The application also sought an order that the defendant is not required to serve a defence while the application for a stay is being considered. There is, however, before the court, a draft defence, apparently not served and intended to be without prejudice to this application.

45. Allstate's evidence in support of its application seeking a stay (the statements of Mr Noone and Mr Heuvels) was served on 17 April 2008. Equitas' evidence in response, (the statements of Mr Michael and Mr Fortune) was served on 1 May 2008. Equitas accepted that the determination by the English court of the issues regarding the scope of the commutation agreement to a certain extent involves a consideration of the scope of the CAXOL contracts, particularly in circumstances where Highlands was claiming full recovery under the CAXOL contracts. Notwithstanding this, Equitas resists the application for a stay. It does so principally because the Syndicates are not parties to the CAXOL contracts under which Highlands claims in the Texas arbitration or parties to that arbitration, the commutation agreement is expressly made subject to English law and to the exclusive jurisdiction of the English court, and it is more appropriate for its construction as a matter of English law to be determined by the English court in proceedings between the parties to it. Mr Michael's first statement (paragraph 8(f)(ii)) stated that the overlaps could be dealt with by the

proceedings in England going forward on the basis of assumptions about the construction of the CAXOL contracts. This would enable matters (including matters of Texas law) as to Highlands' rights under the CAXOL contracts to be left to be decided in the arbitration. In a letter dated 1 May 2008 Highlands agreed to be bound by the outcome of the English proceedings.

46. On 15 May Allstate made an application to the arbitrators that the caption of the arbitration be amended to reflect its submission that Highlands was acting on behalf of itself and the Quota Share reinsurers.

47. On 30 May 2008 Highlands wrote to the arbitrators stating that it had decided to withdraw from its demand in the arbitration "all amounts that Highlands has demanded from Allstate constituting amounts due from Allstate under the Dynalectron, Bergstrom Paper and Coltec billings… relating to the Quota Share participation of Lloyd's underwriters. This withdrawal is with prejudice with respect to Highlands, and Highlands will not seek to recover those amounts from Allstate in this or any other tribunal."

48. The letter states that, although as a matter of custom and practice Highlands followed industry practice and collected inuring common account recoveries for the benefit of itself and all of its Quota Share participants, Highlands found itself in the middle of a dispute between its Quota Share participant, Lloyd's underwriters, on the one hand, and its Common Account Reinsurer, Allstate, on the other. The letter states:

> "This is a dispute in which Highlands itself has nothing to gain, since even if it prevailed, under applicable law and orders of the Texas Receivership Court overseeing Highlands' rehabilitation, any recovery upon the portion of the disputed billings now being withdrawn beneficially belongs to underwriters and cannot become part of Highlands' receivership estate…"
>
> and
>
> "Regardless of custom and practice, however, Highlands is in receivership, and its Special Deputy Receiver is charged not only with collecting its assets, but also with preserving the same. Accordingly, the SDR has concluded that in this instance, expending legal assets in a cause for which there is not even incidental benefit for the Highlands estate can no longer be justified. The SDR has informed underwriters that it can no longer shoulder the burden of attempting to collect from

> Allstate the Lloyd's underwriters' share of the Disputed Billings, and have agreed that Highlands is under no obligation to do so."

49. Allstate relies on the email dated 6 March (paragraph 41 above) to show that the English proceedings were a response to the Texas arbitration which Equitas had been content for Highlands to pursue and about which (at a minimum) it had been kept fully informed. It is suggested by Allstate that Equitas had done more and had indirectly participated in the arbitration. It is also suggested that Equitas caused or encouraged Highlands to abandon the money claims relating to the Syndicates' "share participation" to mitigate the extent of its forum shopping and to overcome the significant overlap there has been between the proceedings in this court and the relief it had been seeking through Highlands in the Texas arbitration (defendant's skeleton argument, paragraph 59).

50. In a letter dated 5 June to the arbitrators Allstate stated that Highlands could not unilaterally withdraw from the arbitrators' jurisdiction issues which had been put before them. It stated that the withdrawal of the money claims did not purport to affect the declaratory relief which both parties had claimed in the arbitration in relation to future claims. On 6 June Highlands informed the Tribunal that the disputes concerning the Bergstrom and Coltec settlements had been settled. The only issue in those disputes had been the commutation defence to the Syndicates' share.

51. Allstate's letter of 5 June also questioned the purpose of these proceedings since Highlands' money claims had been abandoned and asked Equitas whether they would be discontinued. A letter from Slaughter & May dated 9 June states that, although the three claims had been abandoned by Highlands, Equitas anticipated that there would be further, more significant claims which would be pursued under the CAXOL contracts. Paragraphs 7 and 21(d) of Mr Fortune's statement refer to settlements relating to losses by Flintkote and Foster Wheeler. Mr Michael's second statement states Allstate has been notified of the first of these. Allstate has not argued that these settlements are before the Texas arbitrators. Mr Schaff's written submissions state that the figures given by Mr Michael should be reduced and estimates Equitas' share of the sum claimed in respect of the Flintkote settlement as about US$446,000 and its share of the sum to be claimed in respect of the Foster Wheeler settlement to be about US$571,582. Mr Michael's second statement also says that there are likely to be further claims under the CAXOL contracts in relation to losses which have not yet been settled by Highlands.

Discussion

52. Allstate's application for a stay is based on the court's case management powers and not on any residual power based on *forum non conveniens* principles. It is thus not

founded on a jurisdictional basis. Mr Lockey stated that it is not an attempt to force Equitas to pursue its claim in another jurisdiction but only to stay Equitas' action pending the completion of proceedings which Equitas has had a hand in pursuing through Highlands in the Texas arbitration.

53. Mr Lockey relied on two decisions of the Court of Appeal; *Reichhold Norway ASA v Goldman Sachs International* [1999] 2 Lloyd's Rep. 567, and *Konkola Copper Mines plc v Coromin Ltd* [2006] 1 Lloyd's Rep. 410. In *Reichhold's* case Moore-Bick J's decision staying proceedings in the Commercial Court pending final determination of an arbitration in Norway was upheld. Reichhold began the Norwegian arbitration six months after it had begun the English proceedings. The Norwegian arbitration was against a company which had sold Reichhold a polymer company. The sale agreement contained an express choice of Norwegian law and an agreement for arbitration in Norway. Goldman Sachs acted on behalf of the seller in finding a buyer for the polymer company. The seller had agreed to indemnify Goldman Sachs against liabilities arising out of that engagement, the defendant in the Commercial Court proceedings. Both the arbitration and the Commercial Court proceedings concerned a summary of the financial performance of the polymer company which Goldman Sachs furnished to Reichhold shortly before the sale agreement was signed and completed. The information was provided pursuant to an agreement between the seller and Reichhold setting out the basis on which the seller would make available confidential information. That agreement provided that neither the seller nor its agents, representatives and advisers were to be under any liability resulting from the use of material supplied. Goldman Sachs sought a stay of the English proceedings until after the determination of the arbitration between Reichhold and the seller.

54. Moore-Bick J recognised that, where a plaintiff has founded jurisdiction in this country as of right, there is a real burden on a defendant who seeks a stay to satisfy the court that the ends of justice would be better served by granting a stay. He found the burden was satisfied in that case as a result of what he described (at 575) as its somewhat unusual circumstances. These were that Reichhold had commenced proceedings in this country and subsequently in Norway. It did not put forward any reasoned grounds as to the practical advantage of pursuing the action in this country in advance of the arbitration. It did not suggest that it would suffer prejudice if the action was stayed pending the determination of the arbitration in what was, as between it and the seller, the agreed forum. The Court of Appeal held that the order was one which the judge could properly and lawfully make. It accepted that the Court had jurisdiction to manage proceedings before it in order to ensure that justice was achieved as between the parties while at the same time safeguarding the interests of other litigants. Lord Bingham CJ stated (582) that "stays are only granted in cases of this kind in rare and compelling circumstances".

55. In *Konkola Copper Mines plc v Coromin* [2006] 1 Lloyd's Rep. 410 Colman J refused to stay Part 20 proceedings brought by the defendant, the reinsurer of Zambian insurers, against its reinsurer. Coromin was reinsured by Lloyd's Syndicates and other

reinsurers domiciled in England, other European Union states and Switzerland. The reinsurance was placed in London. Konkola's primary insurance was with Zambian Insurers and was subject to an exclusive Zambian jurisdiction clause. Colman J held that the reinsurers had not shown a strong enough case that Coromin's reinsurance was subject to Zambian law and jurisdiction. He also stated that, had they done so, he would have refused a permanent stay despite the weight to be given to the location of the evidential centre of gravity of the dispute and the interest of Zambian law being administered in Zambian courts. He would have refused to stay the English proceedings because of a desirability of permitting the joinder of the brokers in the English proceedings. Proceedings in England would also enable the issues between Konkola, Coromin and the reinsurers to be decided by one tribunal and in proceedings in which they were all entitled to participate.

56. An appeal was dismissed. Rix LJ, giving the leading judgment in the Court of Appeal, stated ([2006] 1 Lloyd's Rep. at [63]) that "a case management stay is possible, but… it requires rare and compelling circumstances". His Lordship observed that in *Reichhold's* case:

> "The claimants in both the action and the arbitration were the same parties making essentially the same claims: in the arbitration they claimed against the Norwegian seller of a company under a Norwegian law contract in respect of that seller's contractual warranties; and in the action they claimed against the seller's agents, Goldman Sachs, in tort for negligent misstatement. The judge described the two set of proceedings as concurrent with a significant degree of overlap."

In *Konkola's* case, however, Coromin was not making concurrent claims but seeking to respond to Konkola's claim by passing it onto a reinsurer. Coromin would be prejudiced if Konkola succeeded in the Zambian proceedings but the reinsurers wished to dispute that result, as they did in their defence to the Part 20 proceedings.

57. Rix LJ considered that it would be unfair to stay Coromin's Part 20 claim even temporarily and leave it exposed to Konkola's claim unless either it was possible to stay Konkola's English claim as well, or there was good reason to believe Konkola's real interest was in the Zambian claim and it would not carry forward the English claim pending the resolution of that. Rix LJ also stated (at [66]) that it was not feasible to anticipate the course of the Zambian proceedings and not profitable to speculate on certain contingencies, such as whether the Zambian claim would be prosecuted speedily, or that its outcome might settle the litigation as a whole.

58. Allstate's case rests on what it describes as Equitas' participation "through Highlands" in the Texas arbitration for 14 months and its failure to institute the English proceedings until shortly before Highlands' dismissal motion was rejected but after extensive briefs had been submitted to the arbitrators. Mr Lockey submitted that, as a result of Equitas' participation, if the arbitrators make the declaration that Allstate seeks, Equitas would be bound by it as a privy. This is, however, contested: see the evidence of Messers Fortune and Michael.

59. Mr Lockey submitted that the removal of the money claims (by Highlands with Equitas' agreement) from the Texas arbitration does not remove the overlap with the English proceedings. The real issue in the English proceedings, he submitted, is whether Highlands can claim under the CAXOL contracts in respect of Equitas' share. He argued that it was not open to Highlands, by withdrawing the money claims to Equitas' share in respect of the three settlements, to remove Allstate's application for a declaration from the arbitrators. The parties had agreed that one issue before the arbitrators was whether Allstate's commutation agreement with Equitas precluded Highlands recovering the portion of billings attributable to common account recoveries due to Equitas. Allstate is entitled to the decision of the arbitrators on this agreed issue, and the arbitrators are entitled to decide it.

60. One matter in the proceedings in this court is whether Highlands can claim and recover in full in its own name: see paragraph 8(2) of the Particulars of Claim. Since that is clearly a matter for the Texas arbitrators, Mr Lockey argued it would be just and convenient for the English court to know the outcome of the Texas proceedings. In so far as Equitas relies on the need to resolve its dispute with Allstate because of the prospect of future claims on the CAXOL contracts, in the light of the letter from Highlands' SDR dated 30 May, Mr Lockey suggested that Highlands may not pursue such claims. In any event the English court cannot decide the rights of Highlands and Allstate under the CAXOL contracts. If these proceedings are stayed until the decision of the Texas arbitration, there would be no need for this matter to be considered in them.

61. Moreover, Mr Lockey submitted that, whatever the outcome of the Texas arbitration, it will affect the shape and content of the English proceedings. If the arbitrators decide that Highlands cannot claim and recover in full in respect of the Syndicates' interests, there would be little point in the English proceedings. If they decide that Highlands can recover, there would, he argued, equally be little point in the English proceedings. This is because any future claims made on the CAXOL contracts would have to be arbitrated in Texas and could not be settled by the English proceedings. He also submitted that there would be no prejudice to Equitas if these proceedings are stayed until the conclusion of the arbitration. In the light of the withdrawal of the money claims and the settlement of the Bergstrom and Coltec claims the arbitration is likely to conclude before December 2008 and it is unlikely that these proceedings will be heard before then.

62. Undoubtedly, there are a number of factors which are pointers in favour of Mr Lockey's submissions. The strongest of them, as Mr Schaff accepts, is Equitas' failure to initiate English proceedings for almost exactly two years after Allstate first raised the commutation agreement defence in the context of Highlands' claim under the CAXOL contracts. The involvement of Equitas in the early stages of the arbitration in suggesting Mr Cole as a person Highlands might nominate as an arbitrator, and, in the light of Highlands' receivership, contemplating paying all or part of his fee, are also pointers favouring Mr Lockey's submissions, but, having regard to all the circumstances, for the reasons I give below, are of less weight.

63. As to the overlap between the arbitration and this action, it is true that, as is seen from section II of the Joint Statement of Issues, the Equitas commutation with Allstate loomed large in the arbitration. Issues II.A(3) and VII(2), which are set out in paragraphs 35 and 37 above, related to whether the commutation agreement precludes recovery by Highlands of common account recoveries due to Equitas. Mr Lockey relied on the words "any common account recoveries" in agreed issue VII(2) to show that the issues before the arbitrators included recovery in respect of settlements other than the three settlements which had given rise to the arbitration. That the parties to the arbitration were contemplating future recoveries is also indicated by Highlands' proposed issue VII(1), which asked whether Highlands was entitled to a declaration that Allstate must "pay all future billings". Although this was not an agreed issue, it is some indication of what the parties had in mind in relation to agreed issue VII(2) by their use of the word "any" in relation to common account recoveries. Mr Lockey's submissions also gained support from paragraph 8(2) of the Particulars of Claim in this action (see paragraph 43 above).

64. Notwithstanding these factors, I have concluded that Mr Schaff's submissions are more compelling. These proceedings are brought pursuant to an English exclusive jurisdiction clause under a contract between Equitas and Allstate governed by English law: see Article 4(F) of the commutation agreement, paragraph 12 above. The effect of Article 4(1) and Article 23 of the Judgments Regulation is that in a case such as this the jurisdiction of this court is exclusive, the clause has mandatory effect, and the weight of the authorities suggests the court is deprived of its common law discretion to stay proceedings in favour of another jurisdiction on classic *forum non conveniens* grounds: see *Owusu v Jackson* [2005] QB 801, the *dicta* in *Gomez v Encarnacion Gomez* [2008] EWHC 259 (Ch) at [112], and *Dicey, Morris and Collins, The Conflict of Laws*, 14th ed., paragraphs 12-124 and 12-127. For the purposes of this application, Mr Lockey was prepared to accept that in the light of the clause, there is no jurisdictional basis to stay the English action. He relied on the court's case management powers. I note that the authorities on which he relied, *Reichhold* and *Konkola*, are cases which were or were assumed to be outside the Brussels Convention. Langley J in *CAN Insurance Co Ltd v Office Depot International (UK) Ltd* [2005] EWHC 456 (Comm) at [26(v)] stated that a stay should not be granted in the exercise of the court's case management powers where the effect of so doing would in substance be permanent because *Owusu* outlaws that. It was, no doubt, for

this reason that Mr Lockey emphasised that the stay he was seeking was temporary and was not an attempt to require Equitas to litigate in another jurisdiction and not in this one.

65. The fact that the proceedings which it is sought to stay are brought in this country pursuant to an exclusive jurisdiction clause is also of relevance in the context of the exercise of case management powers. There was no such clause in *Reichhold* and *Konkola'*s cases. The effect of the stay in *Reichhold's* case was in favour of the forum in which Reichhold had agreed disputes with the seller would be determined. The statements of Lord Bingham in *Reichhold's* case and of Rix LJ in *Konkola's* case that a case management stay requires "rare and compelling circumstances" are similar to the test used in the context of *forum non conveniens*. It is clear that the burden on a defendant who seeks a stay where a plaintiff has founded jurisdiction in this country as of right, is particularly significant where the jurisdiction of the English court is founded on a contractual provision.

66. In the context of the *forum non conveniens* jurisdiction this is so whether the jurisdiction clause is exclusive or not. In *Antec International Ltd v Biosafety USA Inc* [2006] EWHC 47 (Comm) Gloster J stated (at [7(i)]) that the fact that parties have freely negotiated a contract providing for the non exclusive jurisdiction of the English courts and English law "creates a strong *prima facie* case that the English jurisdiction is the correct one" and, ([7(ii)]) in such cases "the general rule is that the parties will be held to their contractual choice of English jurisdiction unless there are overwhelming, or at least very strong, reasons for departing from this rule". The case in favour of the English jurisdiction must be even stronger where the contract stipulates for the exclusive jurisdiction of the English courts. At common law an English court will enforce the exclusive jurisdiction clause unless there is a strong or compelling reason not to do so: *The 'Chaparral'* [1968] 2 Lloyd's Rep 158; *OT Africa Line v Magic Sportswear* [2005] 2 Lloyd's Rep 170 at 177; *Antec International v Biosafety* [2006] EWHC 47 (Comm). Where there is such a clause, in view of the presumption that parties should litigate where they have agreed to litigate, the circumstances in which a case management stay would be possible must require rarer and more compelling circumstances than those envisaged by Rix LJ in *Konkola's* case, in the absence of such a clause.

67. Secondly, notwithstanding paragraph 8(2) of the Particulars of Claim, the focus of the English proceedings is not on what Highlands' rights are under the CAXOL contracts. It is whether the CAXOL contracts fall within the definition of "Reinsurance Agreement" in Article 1(B) of the commutation agreement. The heart of these proceedings is to be found in paragraphs 5-7 of the Particulars of Claim. The significant issue is the scope of the commutation agreement, not whether Highlands is entitled to recover in its own name in respect of Equitas' interest.

68. Moreover, now that the money claims have been withdrawn from the Texas arbitration there is little if any overlap with this action. The withdrawal of the money claims was described by Mr Lockey as directed by Equitas or at least approved in advance by it to mitigate the extent of Equitas' forum shopping and to overcome the extent of the overlap between the relief sought in the Texas arbitration by Equitas through Highlands and these proceedings. But the effect of the withdrawal of the money claims undoubtedly simplified the issues and may have contributed to the settlement of the Bergstrom Paper and Coltec claims. The withdrawal only related to Equitas' share: it did not affect the shares of the other Quota Share reinsurers. There is now only a narrow issue (regarding aggregation) between the parties to the arbitration as to the Dynalectron/Fuller-Austin claim because of the withdrawal of the money claims, and the other claims have been settled.

69. The overlap is confined to Allstate's counterclaim for declaratory relief. As to that, Allstate has stated that it will apply to the arbitrators to confirm that the commutation agreement issues raised in the counterclaim remain issues in the arbitration. It had not, however, done so at the date of the hearing. Highlands' position is that the tribunal should not decide the effect of the commutation agreement because it is unnecessary to do so to resolve the questions of its rights to recover Equitas' share. The court should not speculate as to how the arbitrators will treat such an application if it is made by Allstate or, if it is successful, how the arbitrators would treat the counterclaim: see *Konkola's* case at [66].

70. Thirdly, as far as Equitas' involvement in the Texas arbitration is concerned, the evidence does not support the submission that this went beyond what was appropriate for a Quota Share reinsurer in circumstances where the Quota Share reinsured is in receivership. Equitas was not running the arbitration and Mr Fortune's evidence is that he would have made additional arguments if he was running it. In particular, he would have relied on the exclusive jurisdiction clause in the commutation agreement. In the light of Highlands' receivership and the Quota Share reinsurers', including Equitas', involvement in the settlement funding arrangements in Texas, further consultation with Quota Share reinsurers by a reinsured in receivership is to be expected. Equitas was only one of those Quota Share reinsurers. There is no evidence that it was consulted to a greater extent or more involved than other Quota Share reinsurers. There was nothing unusual in the Quota Share reinsured pursuing a claim under the excess of loss reinsurance and collecting common account amounts. Indeed, Allstate, in its capacity as one of Highlands' Quota Share reinsurers, expected Highlands to continue to collect such sums.

71. I do not consider that Equitas' awareness of the positions Highlands was taking, including the dismissal motion, preclude it from having its substantive dispute with Allstate about the commutation agreement adjudicated in the agreed forum. Equitas' knowledge that Highlands was seeking summary dismissal of this defence and its failure to institute proceedings in this jurisdiction until very shortly before the outcome of that application does not in my judgment lead to it forfeiting its rights.

There may have been an element of strategic behaviour on its part, but this does not, in all the circumstances of this case, justify granting a stay. While the dismissal motion was not strictly a jurisdictional issue, it is fair to describe an application for summary dismissal as a threshold issue. Although the English proceedings were instituted after briefs had been submitted for the dismissal hearing, they were instituted before that hearing and before the rejection of Highlands' application. Moreover, for reasons I shall give below, granting a stay in the terms sought by Allstate would prejudice Equitas and would have the capacity to subvert the *Owusu* principle.

72. As to prejudice, if these proceedings are stayed pending the resolution of the Texas arbitration, Equitas will either have to intervene in that arbitration or to leave matters (including whether the commutation agreement applies to the CAXOL contracts) to Highlands. Highlands might either fight the matter out, or might, in the light of its letter dated 30 May 2008 to the arbitrators (paragraphs 47-48 above) let it go by default. In the light of Highlands' obligations under the Flintkote and other funding arrangements, the latter may be unlikely. However, there are indications that Allstate will argue that Equitas would be bound by the outcome of the arbitration as a privy: see Mr Heuvels' second statement, paragraph 27, and Allstate's application to amend the caption of the arbitration: paragraph 46 above. This is contested (see Mr Fortune's statement, paragraphs 13(j) and 18(c)) but it is clear that leaving matters to Highlands would be a risky course of action for Equitas. Moreover, if Equitas would be bound, Mr Schaff is correct in submitting that Allstate is seeking to achieve the determination of an issue (Equitas' entitlement to sums claimed under the CAXOL contracts) in a Texas arbitration to which it is not a party. The effect would be to take the litigation out of the English courts altogether. This would subvert the principle in *Owusu's* case. The effect of staying the proceedings pending the arbitration would thus in substance bind Equitas to a proceeding to which it is not a party. I accept Mr Schaff's submission that seeking to do this is not a juridical advantage to which Allstate is legitimately entitled.

73. There is, moreover, advantage in the construction of a contract governed by English law coming before the English court, especially where the parties have agreed that court shall have exclusive jurisdiction. The fact that the arbitration tribunal might reach the same result as a result of expert evidence as to English law is no reason for the case not being heard in the jurisdiction that the parties have chosen: see by analogy *Raiffeisen Zentralbank v Five Star Trading LLC* [2001] 1 QB 825 at [85]. Mr Lockey relied on the fact that the English court cannot decide the rights of Highlands and Allstate under the CAXOL contracts. There is, however, a certain tension between this and his arguments for a stay. The impact of his arguments would be to let the Texas arbitration make the first decision as to the scope of the commutation agreement and the rights of Equitas and Allstate under it. If that bound Equitas, it would be to allow the Texas arbitration rather than the contractually agreed forum to decide the rights of Equitas and Allstate.

74. Allowing these proceedings to continue will result in a final binding determination about the commutation agreement between the parties to that agreement. A decision in favour of Allstate would mean that no claim would thereafter be made by either Equitas or Highlands in respect of Equitas' share of the losses that are still to be arbitrated. A decision in favour of Equitas would be determinative in any arbitration brought by Equitas under the CAXOL contracts on the assumption that Equitas could claim directly. Staying this proceeding pending the outcome of the Texas arbitration leaves open a number of unpalatable alternatives. If Equitas does not intervene, there would be a major question as to whether it was bound by the outcome of the arbitration. That would be likely to give rise to further litigation or arbitration. If Equitas seeks to intervene in an arbitration to which it has not been and is not a party, that means it must give up the benefit of the exclusive jurisdiction clause it negotiated and to which Allstate agreed.

75. For these reasons this application is dismissed.