Claim No. 2005 Folio 614

Neutral Citation Number: [2007] EWHC 2321 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 October 2007

Before :

JONATHAN HIRST QC SITTING
AS A DEPUTY JUDGE OF THE HIGH COURT

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Between :

LIMIT NO. 2 LIMITED **Claimant**
(Suing on its own behalf and on behalf of the Underwriters at Lloyd's subscribing to the Lloyd's Syndicates nos. 1036 and 1037 in respect of the relevant years of account)

– and –

AXA VERSICHERUNG AG
(formerly ALBINGIA VERSICHERUNG AG) **Defendant**

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JOHN LOCKEY QC and PETER MACDONALD EGGARS (instructed by **Clyde & Co**) for the Claimant
NICHOLAS HAMBLEN QC and CHARLES KIMMINS (instructed by **Kennedys**) for the Defendant
Hearing dates: 25-28 June and 2-6 July 2007

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JUDGMENT

Mr Hirst QC:

1. The main issue in this case is whether the Defendant ("Albingia") is entitled to avoid first loss fac/oblig reinsurance treaties protecting the energy accounts of Syndicates 1036 and 1037 at Lloyd's ("the Syndicates") for 12 months effective 1 July 1996 (later extended for a further seven months to 31 January 1998) and 12 months effective 1 February 1998. There are subsidiary technical issues.

The primary facts

2. Albingia was a long established insurance and reinsurance company with its head office in Cologne. In about 1999, Albingia was taken over by the Axa Group and changed its name. It has since ceased to underwrite. In the relevant period, the inwards reinsurance account was written by Thomas Holzapfel, assisted by Silvia Rauser-Dittman (née Jerabek). They were based in the Hamburg office. She had joined Albingia in September 1995 from Thuringia Versicherung where she had gained considerable experience in underwriting property reinsurance. She had no experience of underwriting marine and energy business.

3. The Syndicates are managed by Limit Underwriting Limited (now QBE Management Limited). At the relevant time, Neil Copping was the active underwriter. Colin O'Farrell was responsible for underwriting the energy account as class underwriter – about 50% of the Syndicates' stamp comprised energy risks, onshore and offshore. He subsequently became the Deputy Syndicate Underwriter and he is now the active underwriter of the Syndicate 1037. Syndicate 1036 is in run-off.

The 1996 Treaty

4. On 4 July 1996, Newman Martin and Buchan Limited ("NMB"), reinsurance brokers retained by the Syndicates, approached Herr Holzapfel by fax to offer Albingia a participation in the N.C.Copping Construction Treaty. The fax

consisted of a cover sheet, a slip and an information sheet with attached statistical information. The information sheet had been prepared by Mr O'Farrell. Essentially what was being proposed was a first loss 12 month fac/oblig reinsurance treaty effective 1 July 2006 with a limit of $2,500,000 any one unit and/or item and/or structure. The proposed slip included the following terms:

Reassured:	N.C.Copping Esquire and Others, Syndicate Numbers 1036 and 1037 and/or his successor and/or their Quota Share Reinsurers, if applicable.
Type:	Construction, Installation, Commissioning and Maintenance, plus Operating Exposures as advised, Reinsurance Declaration Treaty.
Form:	J(A) Slip Policy
Period:	Losses occurring on risks attaching during the period twelve months effective 1st July 1996 or as original. Maximum original policy period 48 months. Plus discovery/maintenance period as original, unless otherwise agreed by underwriters.
Limit	US$2,500,000 any on unit and/or item and/or structure or currency equivalent each and every loss, any one accident or occurrence based on EML/PML at Reassured's discretion.
Bordereaux:	Quarterly detailed risk and premium bordereaux.

A deposit premium of $375,000 was payable quarterly. This was adjustable on a complicated formula which depended on whether it was a construction or operating risk and what proportion of the primary limit (as part of the overall original line) was ceded by the Syndicates. The slip estimated that the net premium income on the construction account would be US$1,000,000 – $1,500,000 and on the operating account $250,000 – $375,000.

5. The underwriting profile stated as follows:

> "In a difficult energy market the syndicate has maintained its tough underwriting stance in all aspects of the account. The account written is principally of an excess nature on operating policies. It is this area of the account that has come under the most pressure recently, causing the syndicate to look at other areas of the energy portfolio that are not subject to such severe strain as the higher level operating policies. One such area is on the construction account where the syndicate has been offered a wide variety of risks in the past but have largely concentrated on the operating policies. It is now apparent that this stance needs to be looked at afresh and the syndicate have decided to write a broader spread of risks in this class. The results they have achieved to date have been excellent with only three major losses having an impact on the class. They wish to develop this account in partnership with professional reinsurers and have agreed to include a share of the operating policies to give an additional benefit to provide a further spread of exposures within the overall treaty.

6. In an attachment headed Construction Risk History, the Syndicates listed the projects which they had insured. One column listed the policy excesses. In most cases these were very large figures, but there were a few entries with a "–" or "*" in the column. At the bottom of the table was the entry:

> "N.B. Above figures are based upon the syndicate analysis of exposures written and applicable deductibles."

7. The narrative on the fax cover sheet sent by NMB made the following points:

> "To put this treaty in context, they write a normal maximum line of $20m on construction at time of placement but will go up to as much as $40m at a later stage. The 'later stage' is usually towards the middle to end of construction where a following underwriter may be overlined and willing to reinsure part of his exposure on 'more advantageous' terms.
>
> As a matter of principle they maintain high standards and would not normally write construction risks unless the original deductible were at least £500,000 and preferably £1,000,000.
>
> To make a comparison we have also enclosed a copy of the Reassured's Whole Energy A/C Q.S. [shorthand for Whole Account Quota Share] which is placed with a couple of Continental Reinsurers. Unfortunately we can not offer you a share of this contract but when you compare the energy A/C Q.S. results to the construction a/c you can see, broadly speaking, they run at similar loss ratios."

This document is at the forefront of Albingia's avoidance case.

8. Albingia's initial reaction, conveyed in a fax sent by Fr. Jerabek to NMB, was to decline the offer "due to the striking imbalance of the treaty". After a telephone conversation between Stephen Card of NMB and Fr. Jerabek, NMB indicated that they had managed to obtain "leader only indications" offering (in two layers) excess of loss reinsurance of $2.25 million excess $250,000. In response, Fr. Jerabek confirmed an indication of a 50% line on the Treaty subject to some improvements being achieved on the excess of loss reinsurance. Although NMB was successful in achieving some improvement, Fr. Jerabek stated that Albingia was still unenthusiastic, because the inwards deposit premium "is completely eaten up by the xl minimum premiums without having paid any r.p.p premium". Mr Card was able to reassure Fr. Jerabek that the settlement dates for the inwards and outwards deposit premiums were the same. This enabled Fr. Jerabek to confirm a 50% line.

9. However, complications ensued. NMB persuaded Herr Holzapfel to front another 25% line for Chatham Re (whose security was unacceptable to the Syndicates), but it turned out that the Syndicates were reluctant to accept a fronted line. So NMB proposed to amend the Treaty to reduce the limit to $1,500,000 and that Albingia should write a 100% line. A telephone conversation took place between Mr Stephenson of NMB and Herr Holzapfel on 5 August 1996. In the broker's handwritten note, Herr Holzapfel is recorded as saying:

> "We don't want to write 100% $1½m. I don't know Neil Copping, I don't really know the risk well enough. I need some added comfort. Also this is not a Q.S. how does it work. Please provide breakdown of a/c protections to show N.C.Copping retention." [*sic*]

In a fax sent to Mr Card later that afternoon, Mr Stephenson reported that:

> "His [*viz.* Herr Holzapfel's] response was one of nervousness:
>
> 1. The cedant who he does not know.

2. The class of business in which he has no experience.

3. Accordingly the rating schedule.

4. The fact that the Reassured does not seem to retain anything."

10. However, the next morning, Herr Holzapfel faxed NMB to confirm that Albingia would write a 100% line on the Treaty, although he repeated his request for an explanation of where the Treaty fitted into the Syndicate's reinsurance programme. Having received a graphic representation of the Syndicates' energy account protections, Herr Holzapfel stamped and signed the slip on 7 August 1996. He faxed it back to NMB. On 13 August, at NMB's request he initialled the information sheet and the statistics relating to the construction account. He was not asked to initial the cover sheet of the fax dated 4 July 1996, and did not do so. Excess of loss reinsurance was placed with Axa Re, France.

Extension of the 1996 Treaty by the 1997 Endorsement

11. The 1996 Treaty was due to expire on 30 June 1997. On 25 June 1997, NMB faxed Albingia in the following terms:

> "Further to our meeting in London recently, I mentioned that we had received renewal information on the above account. Please see up to date statistics for the above-mentioned treaty. As you will see from this the premium income is somewhat lower than originally envisaged. The estimated income for the 1996/7 year is US$650,000 for the full year. This is due to the Reassured being selective in the writing of the original business to maintain the loss record he has achieved on this type of business in the past. The impact only really falls on the excess of loss you purchase which becomes rather more penal than might be ideal. As a consequence, and after discussion with the Reassured, the suggestion is to extend the expiry of this contract to 31st January 1998 by which time the Reassured feels that the income would have safely developed to at least US$1,000,000. Accordingly, we have taken the opportunity to approach the Axa Re to obtain their agreement to this. They have agreed to amend the terms and conditions as the attached schedule which, coupled with the excellent record, we hope will allow you to agree to the enclosed extension endorsement."

The point NMB was making was that, as Herr Holzapfel was painfully aware, because of a shortfall in income under the Treaty, the minimum and deposit premiums payable under the excess of loss reinsurance had exceeded Albingia's income.

12. Attached to the fax was a sheet of statistics for the Treaty prepared as at 31 May 1997. This showed that the Syndicates had written a mix of operating and construction risks and earned premiums of £97,251 and $237,384 on construction risks and £857 and $109,944 on operating risks. There was one outstanding claim estimated at £1,071. Three policies were noted to have excesses of between $1,000,000 and $50,000,000. Otherwise there was an entry of "0".

13. On 26 June 1997, Fr. Jerabek stamped and initialled the endorsement on behalf of Albingia. It altered the period clause of the 1996 Treaty to nineteen months effective 1 July 1996. So the Treaty was extended until 31 January 1998

1998 Treaty

14. On 10 February 1998, NMB approached Herr Holzapfel by fax, inviting Albingia to renew the Treaty for 12 months. Attached to the fax, was "all relevant account information including schedules of the Operating and Construction risks written since 1st July 1996, a detailed split of the account by area and estimated income both also split by Operating and Construction, and treaty statistics". Premium income was estimated to be between $600,000 and $750,000. Quotes had already been obtained from Axa Re for renewals of the excess of loss reinsurance.

15. The documentation enclosed included two sheets setting out the performance of the Syndicates' energy construction treaty for the period 18 months at 1 July 1996. The information was divided between construction risks and operating risks. The figures were as at 31 January 1998. 38 construction risks

and 27 operating risks had been written. In the column headed "Policy XS", there were figures for 6 construction risks and 2 operating risks. Two were below £1,000,000. The lower was £25,000. For the other 57 risks there was an entry "0". The figures showed that there were 6 outstanding claims, totalling about £158,000 for construction risks and £6,500 for operating risks.

16. Herr Holzapfel's response on 11 February 1998 was that the chances of a renewal were "rather difficult". Taking into account "the XL premium and claims, we currently stand at a 26% loss which will not be offset by the remaining premium to come." His calculations showed that losses were running at 49.36% of premium. The overall loss was caused by the cost of the excess of loss reinsurance which would not respond to the claims, because they were individually below the attachment point. Herr Holzapfel asked for further information about the largest loss and stated that Albingia would not be able to offer renewal.

17. NMB replied the same day, indicating that they could find no fault with Herr Holzapfel's mathematics. They explained:

> "What in fact has happened, is that the business offered to them was not deemed to be of sufficient quality to be worthy of writing. They were not tempted to write and cede the risks to you as they might have done, purely to achieve premium income estimate."

NMB repeated an offer that had, apparently, been made earlier, of a share of the Syndicate's energy construction quota share treaty and indicated that NMB would look for alternative excess of loss quotations.

18. Herr Holzapfel visited London where he met Mr O'Farrell and Mr Godfrey of NMB. On 27 February, Mr Godfrey sent him an improved quotation for excess of loss insurance and a triangulation of the Syndicates' energy account over the previous eight years, prepared as at 31 December 1997. These listed four major losses – the smallest was £51,566. Mr Godfrey commented that the account showed very little deterioration on claims since the position a year before. He went on:

> "Neil, as you know, has an excellent reputation in the energy market and it has been his refusal to write any other than quality business which has kept down his premium income, however this has produced excellent results for his account.
>
> We feel that further to your meeting with Colin O'Farrell this week and your new participation on his energy Quota Share, you would wish to cement the relationship by offering a renewed line on this contract.
>
> Notwithstanding your recent meetings with the syndicate and the improved XLs, we note your concerns but would urge you to reserve your position for another year and offer a reduced line of say 50%. We have received significant interest from Chatham Re who wish to write 50% of this contract.
>
> Assuming that you are prepared to renew the contract, Chatham Re have requested that we ask you to 'front' for them subject to a suitable fee!"

19. On 2 March, Herr Holzapfel responded repeating his request for information about the largest of the four major losses and asking for a list of the largest single losses to the account, as this would enhance the decision whether to buy the excess of loss reinsurance. Albingia was not prepared to front. In reply NMB supplied a list of the largest losses on 3 March – the smallest was the £51,566 loss.

20. On 9 March 1996, Fr. Jerabek wrote to NMB indicating that Albingia did not wish to leave the Syndicates "out in the rain", but "we should not be the only one left holding the baby". She indicated that Albingia would be prepared to write a 30% line subject to excess of loss protection.

21. Another meeting took place between Mr Card of NMB and Herr Holzapfel. On 16 March, NMB wrote again to Herr Holzapfel pressing him to commit Albingia to write a 100% line, of which 50% would be a front for Chatham Re. The fax suggests that Herr Holzapfel had indicated at the meeting that he would be willing to do this, if required.

22. Thus, as a result of persistent and determined brokerage, Albingia was persuaded into writing the 1998 Treaty, which Herr Holzapfel stamped and signed on 17 March 1998.

The avoidances and other issues

23. The results on the 1996 Treaty, including the 1997 Endorsement, and the 1998 Treaty have been fairly disastrous – losses are of the order of US$10 million. Dissatisfaction with the results and what it saw as inadequate accounting by the Syndicates led Albingia to instruct Mr Jim Hunt to conduct an inspection in January 2005. In the course of this investigation, it became clear that the Syndicates had not been following a policy of underwriting construction risks with deductibles of at least £500,000, let alone £1 million. Typically, the main deductibles (there were some specific deductibles which were lower) were in the range of £100,000 – £200,000. A significant proportion were below £100,000.

24. Following Mr Hunt's findings, Kennedys (acting for Albingia) wrote to Clyde & Co. (acting for the Syndicates) on 19 August 2005 raising a large number of issues. Most significantly for these proceedings, Albingia sought to avoid the 1996 Treaty (plus the 1997 Endorsement) and the 1998 Treaty for misrepresentation and non-disclosure of material facts. The basis for the avoidance, as developed in the pleadings and argument is:

    (1) For the 1996 Treaty, the Syndicates through NMB misrepresented that their practice was in July 1996 and/or it was the intention of the Syndicates to write and declare construction risks the great majority of which had a deductible of at least £500,000, and of which a substantial number had a deductible of over £1 million. Further there was a misrepresentation that the Syndicates' alleged previous and/or current practice of writing risks could be relied upon as an indication of its future practice, and/or that the syndicates had reasonable grounds for so believing. Alternatively, the Syndicates failed to disclose its

intention to write and declare risks without the stated level of deductibles.

(2) For the extension of the 1996 Treaty by the 1997 Endorsement, the misrepresentations were continuing; alternatively the Syndicates failed to disclose that they intended to write and declare risks which would not fulfil these criteria, that it had written risks that did not do so, and that its underwriting policy had changed.

(3) For the 1998 Treaty, the same misrepresentations and non-disclosures were repeated. Additionally, there was non-disclosure of the existence of a number of incidents and losses which had arisen or were likely to arise under the 1996 Treaty and 1997 Endorsement.

25. The main issues debated at the trial involved these avoidance issues, but Albingia advanced a number of additional points, assuming, contrary to its submissions, that it was bound wholly or in part. I shall revert to these issues later in this judgment but, in summary, they were:

(1) Whether some risks had been validly ceded to the 1998 Treaty.

(2) Whether late notification of some cessions under both Treaties entitled Albingia to decline the risk.

(3) Whether the Syndicates have properly accounted for premium.

26. In the course of the trial, I heard factual evidence from Mr O'Farrell and Colin Crowley for the Syndicates, and Herr Holzapfel and Mr Hunt for Albingia. I was satisfied that all these witnesses gave their evidence honestly and to assist the Court. Additionally, I read witness statements from Fr. Rauser-Dittman (Jerabek) and Brigitte Selbach for Albingia. Fr. Rauser-Dittman had important corroborative evidence to give about how the Treaties (especially the 1997 Treaty) were underwritten. The reason she gave for not being willing

to give oral evidence was that she did not wish to leave Germany because she is sole carer of her 2½ year old son and her husband is in full time employment. Moreover there were building works at home which she wished to supervise. I quite understand why she did not wish to leave Germany, but I cannot see why it would not have been possible to arrange for her to give evidence by a video link, perhaps one evening. I regard her untested evidence as being of little weight.

27. I also heard expert evidence from Michael Allan, formerly senior marine and energy underwriter for the Wellington syndicate, called on behalf of the Syndicates, and Christopher Compton-Rickett, senior energy underwriter to J.R.L. Youell, Syndicate 79, called on behalf of Albingia. Both had a great deal of experience as underwriters in the energy market, although in the direct market rather than as reinsurers, and I found their evidence helpful, although both strayed into areas which are really for the Court rather than experts. Mr Allan's evidence suffered from the fact that he did not seem to understand properly the insured's duty of disclosure and from the fact that his oral evidence was in some respects not consistent with what he had stated in his reports. Mr Compton-Rickett, although perhaps rather argumentative, showed a much better grasp of principle. This has more much more relevance when I come to consider the alternative case of non-disclosure in relation to losses and incidents on the placement of the 1998 Treaty.

Avoidance of the 1997 Treaty

Counsels' submissions

28. Unsurprisingly, there is no dispute as to the basic legal principles, which are well summarised in *MacGillivray on Insurance Law* (10th ed., 2003) §16-10:

> "In order for an innocent misrepresentation to entitle a party to avoid the contract of insurance it must satisfy the following conditions:

(1) it must be a statement of fact or, in relation to the insurer's remedy under section 20 of the 1906 Act only, a statement of opinion or belief;

(2) it must be untrue;

(3) if made to the insurer, it must be material to his appraisal of the risk, and in other cases material in the wider sense;

(4) it must be a statement as to present or past fact and not *de futuro;*

(5) it must have induced the aggrieved party to enter into the contract of insurance."

29. Mr Nicholas Hamblen QC submitted on behalf of Albingia that, by their fax cover sheet dated 4 July 1996, NMG represented on behalf of the Syndicates that the Syndicates intended to stick to their stated principle of maintaining high standards and writing construction risks of which the great majority would have deductibles of at least £500,000. These words were "designed to encourage the recipient to participate in the reinsurance" (cf. Saville LJ in *Hill v. Citadel Insurance Co. Ltd* (CA) [1997] Lloyd's Rep. IR 167,170 col.2) and, whilst they must be read in the context of the other placing information, there was nothing to qualify what was said in the fax. On the contrary, the statement about deductibles appeared on the front page of the presentation. The words spoke for themselves, and the phrase looked to the future, as well as the present and the past. A statement of current intention or policy was a statement of fact, and is not one of expectation or belief.

30. Alternatively, the fax was a representation by the Syndicates that their previous or current practice of writing risks with the stated level of deductibles could be relied upon as an indication of their future practice and/or that the Syndicates had reasonable grounds for doing so.

31. These representations were false. It was not Mr O'Farrell's policy or intention to write construction risks, the great majority would have deductibles of at least £500,000. On the contrary, he expected (as it transpired) that he would

normally write with much lower deductibles. The falsity of the representations was not as a result of bad faith on the part of Mr O'Farrell – he did not appreciate what representation that was being made by NMB on behalf of the Syndicates.

32. Mr Hamblen also ran alternative case based on non-disclosure. He submitted that the Syndicates failed to disclose their intention to write and declare risks without the stated level of deductibles.

33. The representations were obviously highly material. First, the Treaty was first loss in nature, so Albingia was exposed to losses from the ground up and the smaller the deductible, the greater Albingia's exposure. Second, construction risks tend to produce a high frequency of claims (particularly as compared with operating risks) and deductibles of £500,000 or more would protect Albingia against high frequency lower level claims.

34. Herr Holzapfel, who underwrote the Treaty for Albingia did read the presentation documents and was involved in the underwriting from the outset. He would not have written the risk if he had known that the Syndicates did not intend to adhere to their stated principle as to the level of deductibles on construction risks. He relied on the representation and was induced to write the risk, to which Albingia became bound on 7 August 1996.

35. In those circumstances, Albingia was entitled to avoid the 1996 Treaty.

36. Mr John Lockey QC appeared on behalf of the Syndicates. His first main submission was that no relevant representation was made. He argued that the placing information must be read as a whole. It was neither sensible nor appropriate to focus only on the covering fax. A prudent reinsurer would study all the attachments, including the underwriting profile. The profile stated what should have been obvious in any event: the energy market at the time was difficult for insurers. High level operating risks had come under most pressure and the Syndicates had had to look at other areas of the energy

market not under such strain, such as construction risks. The previous stance of concentrating on operating risks needed to be looked at afresh. The message could not have been clearer. In a difficult market, the Syndicates were going to have to be flexible and they could no longer afford to focus on operating policies written at an excess level. There were five fallacies in Albingia's case as to the representation made:

(1) The Syndicates made no representation as to deductibles. This was an observation by the brokers. The Syndicates' statements were contained wholly in the account presentation.

(2) The statement in the covering fax that the Syndicates "would not normally write construction risks unless the original deductible were at least £500,000 and preferably £1,000,000" was plainly a statement as to their prior underwriting practice. It was pointing out that, where the Syndicates had written primary construction risks in the past, they had generally done so with a minimum original deductible of £500,000. There was no promise that these deductibles could be maintained in the future in the difficult marketing conditions. If it was so important for Albingia that the Syndicates should achieve minimum original deductibles of £500,000, it should have asked for a warranty to that effect in the Treaty.

(3) The information in the covering fax was much less important than the account presentation by the Syndicates. Most of it was of no real relevance to the risk. It was really "brokers' waffle" or puff.

(4) Read with the underwriting profile, especially the statement that the operating risk market had been subject to "severe strain" and "pressure", what NMB was saying was that the Syndicates did not write a wide variety of the construction risks offered to them "in the past", except risks with a deductible over £500,000, because they preferred to concentrate on the higher level operating policies. In the future, the Syndicates intended to write a "broader spread of risks" within the construction account.

(5) Albingia had ignored the market conditions which confronted all participants in the energy market. The state of the market was such that no reasonable direct insurer or prudent reinsurer could reasonably have understood that the Syndicates were both able to write construction risks involving a "broader spread of risks" and yet insist on deductibles of at least £500,000. Such a combination was palpably and inherently unlikely, if not impossible. An underwriter could not reasonably have understood the Syndicates to be making a positive statement that they intended to write construction risks with deductibles of a certain order, when it was evident to all who participated in the energy market at the time, that market conditions were deteriorating with a direct impact on premium rates, coverage and deductible levels.

37. So, Mr Lockey submitted, there was no relevant representation. The misrepresentation case failed at the outset.

38. Second, Mr Lockey submitted that if any representation was made, it was a statement of NMB's belief or expectation. In order to be actionable, the representation must have been made otherwise than in good faith, i.e dishonestly: see section 20(5) of the Marine Insurance Act 1906 and *Economides v. Commercial Union Assurance Co Plc* [1998] QB 587, 598-600. The statements as to past practice were correct. It was not suggested that Mr O'Farrell had acted dishonestly, nor was it established that NMB acted otherwise than in good faith. So, it was not shown that any representations were false.

39. As to materiality, there was nothing unreasonable or unusual about the deductibles achieved. Any implied statement that the Syndicates' past practice could be used as a guide to the future was immaterial because such an assessment was a matter of underwriting judgment which was the responsibility of Albingia.

40. As to inducement, Mr Lockey submitted that Albingia bore the burden of proof. It had to establish as a minimum that Albingia's underwriter, Herr

Holzapfel, understood the placing information in the way in which Albingia contended it should be construed. Herr Holzapfel was not in fact induced to write the Treaty by reference to any misrepresentation – he had no personal involvement in the underwriting. This submission turned substantially on disputed facts, to which I will return later in this judgment. Further, Albingia knew the Treaty was likely to be loss-making. Albingia's decision to write the 1996 Treaty was not influenced at all by any consideration of the statement by NMB as to the Syndicates' approach to underwriting construction risks and deductible levels.

41. There was therefore no right to avoid the 1996 Treaty. I should add that the Syndicates pleaded affirmation in the alternative. Mr Lockey did not pursue that argument.

My judgment on the 1996 Treaty

42. I shall set out my conclusions in the following order:

(1) What representation (if any) was made by NMB;

(2) Falsity;

(3) Materiality;

(4) Inducement.

The representation

43. The package of documents sent by NMB to Albingia must be read as a whole and in the light of market conditions and other external facts, either known to both parties, or which could reasonably be expected to be known to both

parties. These were dealings between market professionals – Herr Holzapfel had written a number of other energy treaties – and Albingia should not be treated as some innocent abroad. I did not understand Mr Hamblen to suggest otherwise. However, Mr Lockey's submissions as to the five fallacies in Albingia's case go too far. First there are dangers in an over-refined analysis of the documents. The package of documents sent by NMB were intended to be read by a working underwriter, not construed over several days argument by a commercial silk. Whilst Albingia and Herr Holzapfel could be expected to be generally aware of the conditions in the London energy market, and could have been left in no doubt from the underwriting profile that the market was under some strain, as a *reinsurer* based in Germany, it could not be expected to be knowledgeable about the details of the direct market, such as the levels of deductible available on particular risks, which would be known by the direct underwriters in London. The purpose of the brokers' statement was to reassure Albingia that, in these difficult market conditions, the Syndicates were maintaining high standards. In my judgment, Albingia was entitled to take what it was told at face value.

44. NMB's fax cover sheet was the first document in the package. It was not mere broker's waffle or puff. It was intended, as it stated, to put the proposed Treaty into context and to convey some important headline messages to Albingia. There is no reason to treat the cover-sheet as less important than the rest of the package. It gave Albingia information which was not available elsewhere in the package as to the normal maximum lines and normal deductibles. This was information that a competent reinsurer was bound to want to know. Had the crucial sentence just stated that "as a matter of principle [the Syndicates] maintain high standards", it could perhaps be treated as a general statement of little worth, but the sentence went on to justify the general statement by reference to a particular feature of the Syndicates' underwriting. A reinsurer considering the fax would be bound to take the statement seriously, and not as mere flannel.

45. I cannot accept that the sentence can simply be read as a statement of past practice or a statement of NMB's opinion. As a matter of ordinary English

grammar, the statement that the Syndicates "*would* not normally write construction unless the original deductible were at least £500,000 and preferably £1,000,000" (my emphasis) is expressed in the present conditional tense. It refers to the present, and not just the past. Indeed, it is difficult to see what the point was of giving Albingia this information if it was irrelevant to the present. As Herr Holzapfel put it with some emphasis in his evidence:

> "Why on earth would the Syndicates say this unless it was to tell reinsurers about the account which they were being asked to participate in. I am not interested in a history lesson"

46. So, in my judgment, the sentence, fairly read in context, was a statement of the Syndicates' current policy as regards deductibles. The qualification introduced by the word "normally" did not rob the sentence of meaning – cf. *Hill v. Citadel Insurance Co. Ltd* (CA) [1997] Lloyd's Rep IR 167 at p.170 (col.2), per Saville LJ:

> "The Judge accepted, as do I, that words such as "*approximated*" and "*around*" must be given due weight, but this does not mean that they deprive what they qualify of any effect, for all they do is to give a measure of flexibility to the stated percentage.

The word "normally" also provided a limited flexibility to the policy. It was a representation that, as underwriters maintaining high standards as a matter of principle, their policy was not normally to write construction risks unless the original deductible were at least £500,000 and preferably £1,000,000. That is how a reinsurer would naturally read the fax cover sheet, in the context of the whole presentation. It was a statement of fact, not opinion – see e.g. *Traill v. Baring* (1864) 4 de GJ & S 318 and *Kingscroft v. Nissan Fire & Marine (No. 2)* [1999] Lloyd's Rep. IRLR 603 where Moore-Bick J. stated at p.627 (col.2):

> "It is well settled that a statement of present intention amounts to a statement of fact".

I think that is even more so as regards a statement of policy.

47. I prefer this analysis of the faxed cover sheet to the alternative put forward by Mr Hamblen that the sentence is to be read as a representation that the previous or current practice of writing risks with the stated level of deductibles could be relied upon as a guide to its future practice. I think this is an over-elaborate reading of what was stated in the fax cover sheet. What Albigia was given was a statement of current policy by Syndicates which professed to maintain high standards. Albingia was not given a warranty for the future. It would have to judge the level of risk that the Syndicates might decide, perhaps in the face of deteriorating conditions, to alter their policy.

Falsity

48. Mr O'Farrell was absolutely frank in his evidence. In July 1996, it was not the Syndicates' policy normally to write construction risks unless the original deductible was at least £500,000 and preferably at least £1,000,000. In the past, the Syndicates had managed to maintain the policy, but by July 1996, the prevailing market conditions were such that these deductibles could not be achieved. This is borne out by the Syndicates' actual underwriting of construction risks. The vast majority of the risks ceded to the Treaty had deductibles well below £500,000. The central range for the main deductible (many policies contained subsidiary deductibles for some risks) was of the order £100,000-£200,000 and there are many where the deductibles are considerably lower. The Syndicates accept that 45 out of 66 construction risks had deductibles of less than £500,000. Mr Hunt's evidence suggested that actually it was more like 52 out of 66 risks, but the precise proportion does not really matter. On no basis could it be said that the Syndicates were following a policy of normally writing risks with a deductible of at least £500,000, let alone at least £1,000,000. That is because they had no such policy.

49. It follows that the fax cover sheet misrepresented the Syndicates' policy as regards deductibles. Mr O'Farrell acted in perfect good faith. He did not see the NMB cover sheet at the time. Had he done so, I am sure that he would have corrected the representation. The information sheet which he had prepared was an entirely fair presentation of the risk. It is unfortunate that the

brokers' cover sheet significantly altered the balance and fairness of the presentation.

Materiality

50. The Treaty is a fac/oblig treaty. The essential difference between quota share treaties and fac/oblig treaties was explained by Lord Millett in *Aneco Reinsurance Underwriting Ltd (in liq) v. Johnson & Higgins Ltd* [2001] UKHL 51; [2002] Lloyd's Rep IR 91, 105 as follows:

> "Under a quota share treaty, the insurer is obliged to cede to the treaty a fixed proportion of every risk which falls within the limits of the treaty. Under a fac/oblig treaty the insurer has a choice whether to cede any given risk to the treaty. He cannot cede it unless it falls within the limits of the treaty, but he is not obliged to cede it if it does. The reinsurer has no choice; he cannot insist on a risk being ceded, and cannot refuse to accept his share of a ceded risk … Fac/oblig treaties are naturally less attractive to reinsurers than quota share treaties. They are subject to the obvious risk that the insurer will retain good business for his own account and cede poor business to the treaty. There is, or at least is assumed to be, no obligation of good faith on the part of the ceding party when exercising his discretion whether to cede or retain a risk. The only constraint upon him is that he must exercise some restraint if he wishes to maintain a good reputation in the market and any hope of doing future business with existing and prospective reinsurers."

In the absence of express terms, the reinsurer has very limited protection indeed: *Bonner v. Cox* [2005] EWCA Civ 1512; [2006] 2 Lloyd's Rep. 152, 172-3 §110.

51. Additionally, the Treaty was a first loss treaty. The Syndicates were entitled to cede the first $1,500,000 of a risk, leaving them to bear the rest. In effect, it enabled the Syndicates to create an excess of $1,500,000 above the original deductible, which meant that they were much further removed from the dangers of attritional losses. These would be borne by Albingia. The effect of the retrocession arranged by NMB was that Axa France would bear Albingia's losses excess $150,000, but this left Albingia exposed to the first $150,000 of loss.

52. Mr Compton-Rickett's clear evidence was that:

> "The level of a deductible is obviously of importance to an underwriter. The underwriter is not exposed until the deductible has been eroded. The level of deductible is of particular significance in a first loss treaty of this kind. As a general rule, smaller losses which impact on the lower levels of cover are more frequent than larger losses impacting on higher levels of cover. The level of deductible is therefore of particular significance to an underwriter who is writing on a first loss basis."

Mr O'Farrell and Mr Allan accepted this proposition. Mr Allan added that:

> "the level of deductible is always significant, and if you are a first loss underwriter, you are going to be the one taking the pain. Yes it would be important to you".

This all the more so in the context of construction risks, as distinct from operating risks. The evidence was that construction risks tended to produce a greater volume of incidents and claims.

53. I accept that evidence. In my judgment it is has been clearly established that the level of deductibles written by the Syndicates would be highly material to a prudent reinsurer considering underwriting the Treaty. The smaller the underlying deductible, the more exposed the reinsurer would be to attritional loss. I am sure that is why NMB felt it necessary to explain the Syndicates' policy about deductibles.

Inducement

54. Was Albingia induced to write the Treaty as a result of the material misrepresentation made by on behalf of the Syndicates as to their policy on deductibles? Herr Holzapfel contended in his evidence that he was greatly influenced. He said:

> "I mean, the question of a high deductible of high involvement of a client in the first place was of absolute importance and distance ourselves from attritional losses and that is why the 500,000 or a million pounds was simply of utmost importance" … "the 500,000

threshold was an absolute essential feature of writing the business and distancing ourselves from attritional claims." (*sic*)

55. However, there was an important issue of fact as to the extent to which Herr Holzapfel was really involved in the underwriting of the Treaty. I now turn to that issue. As is apparent from the correspondence I have summarised in paragraph 8 above, whilst the original presentation dated 4 July 1996 was addressed to Herr Holzapfel and Fr. Jerabek at Albingia, all the initial correspondence was conducted by Fr. Jerabek, including the confirmation of a 50% line. The first written evidence of Herr Holzapfel's involvement was on 31 July 1996.

56. Mr Lockey submitted that Herr Holzapfel actually had no personal involvement in the underwriting of the Treaty. As became apparent in the course of his evidence, he was on holiday between 5 and 29 July 1996. Fr. Jerabek made the underwriting decisions and had effectively committed Albingia on 12 July to a 50% line on the proposed Treaty subject to the then limit of $2.5 million. When Herr Holzapfel returned from holiday, he did become involved but the principal decision had already been taken and he never familiarised himself with the proposed treaty, as is evidenced by the telephone conversation with Mr Stephenson of NMB on 5 August, in which he is recorded as having said he did not really know the risk well enough or how it worked. On this basis, Mr Lockey argued that Albingia failed to establish that Herr Holzapfel was induced to write the Treaty by any misrepresentation.

57. Herr Hozapfel's evidence was initially somewhat confused, largely because it was unclear where he was between 4 and 29 July 1996 – his diary had not been reviewed. He was however clear that he had seen and relied on the presentation, including the representation about deductibles. Once his diary became available, he was able to reconstruct his whereabouts. He was in the office on Thursday 4 July and went on holiday on 5 July – it is unclear whether he worked that day. He spent his holiday at home in Hamburg, returning to the office on Monday 29 July. In his absence Fr. Jerabek had general authority to accept, hold in abeyance or decline risks. However, she

would not have accepted marine or energy business without Herr Holzapfel's prior approval. The practice in the office was that, whilst he was on holiday in Hamburg, the office would send him copies of presentations and he would look at them. He injured his hand chopping firewood on 8 July and remembered spending time reading papers at home, holding his thumb up. He was absolutely certain he went through the presentation and looked at it carefully.

58. In her statement, Fr. Jerabek stated she would only ever have written business in the marine and energy fields with Herr Holzapfel's prior approval. She would have definitely have discussed the risk with Herr Holzapfel, as energy risks were in a field that she was not familiar with. She would not have indicated a 50% acceptance without Herr Holzapfel's authority. Although consistent with Herr Holzapfel's evidence, I place little weight on it for reasons already given.

59. I have given very careful consideration to whether I can accept Herr Holzapfel's evidence, especially given that the contemporary documents are consistent with Mr Lockey's submission. However, my assessment of Herr Holzapfel was that he was an honest, careful and reliable witness. He struck me as a conscientious underwriter and I think it highly unlikely that the inexperienced Fr. Jerabek would have been prepared to commit Albingia to this risk without the prior approval of Herr Holzapfel. I am sure he would not have given his approval without reading the (comparatively slim) file first. The notes of the telephone conversations 5 August could be read as indicating ignorance on his part about the nature of the risk, but the makers of the notes have not been called to give evidence and, in my judgment, even at face value, they do not show that Herr Holzapfel failed to read the file. Overall, I think they display a degree of nervousness on his part, rather than a cavalier refusal to familiarise himself with the risk.

60. Mr Lockey's second point was that, from the outset, it was apparent that the Treaty was likely to be loss-making – Fr. Jerabek described it as having an imbalance and subsequently said that Albingia was not very enthusiastic about

the profitability of the business. The only explanation for the writing of the treaty was (he said) as a means of capturing more lucrative energy accounts of the Syndicates, such as part of the Quota Share Energy Treaty, by cementing a relationship with the Syndicates. Herr Holzapfel strongly denied that Albingia wrote the risk as a favour to NMB, or to chase premium or to obtain a line on the Quota Share.

61. In my judgment, whilst Herr Holzapfel was certainly keen to develop Albingia's energy business and had concerns as to whether the Treaty would prove profitable, the representation made about the Syndicates' policy on deductibles was an important factor in his underwriting considerations. There is inevitably a degree of speculation as to what would have happened if the misrepresentation had not been made. I think it highly likely that he would have asked about deductibles and that, had he been told the correct position, he would have appreciated that Albingia would be much more exposed and have declined the business, or at least written it on significantly different terms. The representation was a real and substantial cause of Albingia underwriting the business on terms it would not have accepted if it had been appraised of the truth: cf. *Edgington v. Fitzmaurice* (1885) 19 Ch. D 459, 481 and *St Paul Fire & Marine Ins. Co. v. McDonnell Dowell* [1995] 2 Lloyd's Rep. 116, 124-5.

Conclusion on the 1996 Treaty

62. In my judgment, Albingia has established that a material misrepresentation was made which induced it to write the Treaty. It is entitled to avoid the Treaty. The non-disclosure case does not therefore arise, but I should make it clear that I would have rejected it. There was nothing exceptional about the Syndicates' actual deductible policy such as to require disclosure, and if nothing had been said about the policy, the onus would have been on Albingia to ask questions if it required more information.

The 1997 Endorsement

63. Two questions arise:

(1) Whether it falls with the 1996 Treaty or can survive its own;

(2) Whether, alternatively, Albingia is entitled to avoid the endorsement for misrepresentation or non-disclosure. Essentially Mr Hamblen's case was that the representation as to the Syndicates' policy on deductibles was continuing or, alternatively, the Syndicates' ought to have disclosed that the stated policy on deductibles had changed.

Can the 1997 Endorsement survive avoidance of the 1996 Treaty?

64. The 1997 Endorsement, accepted and stamped by Albingia on 26 June 1997, was in the following terms:

Energy Construction Treaty

Limit: US$1,500,000

Twelve Months AT 1st July 1996

It is hereby noted and agreed that the "PERIOD" clause is amended to read as follows:

PERIOD: Losses occurring on risks attaching during the period nineteen months effective 1st July 1996, or as original. …"

All other terms, clauses and conditions remain unaltered"

65. Mr Hamblen submitted that this was a variation of the existing contract. There was no new contract and the endorsement had no independent life of its own. He cited, by way of analogy, *Royal Exchange Assurance v. Hope* [1928] Ch 179, in which a life policy had been extended for three months. The assured died during the extended period. The issue was whether an assignment of the original policy also applied to the extension so that the

assignee was entitled to receive the proceeds of the policy. The Court of Appeal held that she was. Lord Hanworth M.R. said (at p.191)

> "It is, in my opinion, impossible to hold that the insurance for the later three months was a new and separate contract. The terms offered and accepted were for a short extension of the contract of insurance which was then in being and unexpired. No suggestion was made for a new and independent policy. There was no fresh stamp, as there must have been if a new policy had been effected. There was no new number assigned to the fresh contract; but the old policy was indorsed with a new time limit for the risk, and the old limit was "altered." This alteration is subsidiary to the main purpose of the contract as it stood originally - the subject-matter of the risk was not changed. The observations made by Lord Sumner in *British and Beningtons, Ld. v. N. W. Cachar Tea Co.* [1923] A. C. 48, 68, 69http://www.justis.com/document.aspx?doc=a2CdoXaJnSuetsnsm5idoJmtmJeZiXCto&relpos=0 - footnote_1#footnote_1 appear to me in point. The variation may be in strict logic a new contract, but the discharge of an old contract is a matter of intention. So far as it was possible to indicate it, the insured and the Society appear to me to have expressed an intention to maintain the old contract, to continue and to extend it.
>
> There was no new policy issued and the requirements of the Stamp Act were not complied with. In *Morris v. Baron & Co.* [1918] A. C. 1 the question of the rescission of an old contract upon the making of a new one was considered, and it was held that where there is a clear intention to rescind, as distinguished from an intention to vary, the old contract will be rescinded. In the present case there was the clearest intention to maintain the contract and to vary one term of it only. The distinction between an extension of the time of insurance upon the old subject of insurance, and an extension which makes the policy cover a different risk from that originally embraced, is well pointed out by Lord Ellenborough in *Kensington v. Ingis* 8 East 273, 293 where the quantum of the risk was not altered, but the dates of sailings extended, leaving "the insurance on the same thing, if the underwriters should agree by a memorandum to continue insurers on it." It was thus held that a fresh stamp was not required, because an alteration of the dates of sailing did not alter the nature of the risk and was merely "a lawful alteration in the terms or conditions of the policy," and so within the exception of s. 13 of the statute 35 Geo. 3, c. 63, which excuses the necessity of a fresh stamp in such cases.

66. In response, Mr Lockey submitted that the 1997 Endorsement extended the Treaty for a further seven months and represented a new risk. The fact that it was recorded as an endorsement to the 1996 Treaty was merely a matter of form. It operated in the same way as a renewal and was an entirely new contract. Albingia had to exercise an independent underwriting judgment.

The policy period of both contracts was different. A single risk could be declared to only one contract, and not both. The premium was calculated and paid in relation to each ceded risk. The contracts were independent and severable: see *The "Siboen" and The "Sibotre"* [1976] 1 Lloyd's Rep. 293, 340; *Container Transport International Inc v. Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1982] 2 Lloyd's Rep 178, 191-192 ; *The "Star Sea"* (CA) [1997] 1 Lloyd's Rep. 360, 370 and *The "Mercandian Continent"* [2001] EWCA Civ 1275; [2001] 2 Lloyd's Rep. 563 where Longmore LJ said (at §22(2)):

> "A duty of good faith arises when the assured (or indeed the insurer) seeks to vary the contractual risk. The right of avoidance only applies to the variation not to the original risk. … There is no authority for a proposition that a fraudulent misrepresentation leading to a variation will avoid the original contract as well as the variation".

If a misrepresentation/non-disclosure in relation to a variation will not allow the underwriter to avoid the original contract, this must be because the variation is severable from the original contract.

67. Neither counsel could point to any direct authority on the point. In my judgment:

(1) The effect of the endorsement was to replace the original 12 month Treaty period from 1 July 1996, with a 19 month period. That is how the endorsement was expressed and it reflected the rationale for the endorsement. There was a premium shortfall under the Treaty and by extending the period it was hoped that the original premium indication would be met. This was not a mere matter of form, although I accept that the parties' intentions could have been achieved by concluding a fresh Treaty for a further 7 months.

(2) The endorsement was not a separate contract. It was part of and amended the original Treaty: cf. *Royal Exchange Assurance v. Hope* (*supra*), although parts of the reasoning in that case were perhaps

influenced by stamp duty considerations. I do not accept Mr Lockey's submission that a risk could be declared to the Treaty or the endorsement, but not both. On amendment of the Treaty, there remained a single contract to which all risks would be declared.

(3) The Syndicates owed a duty to give a fair presentation of the risk when seeking the extension and Albingia had to exercise a fresh underwriting judgment. Had they failed to do so (as to which see below in relation to the placement of the 1998 Treaty) the extension could have been avoided. This would not have impacted on the original Treaty.

(4) In that sense, the endorsement was a separate contract from the original Treaty. If the endorsement was avoided, the parties would revert to the original contract position. But I do not think that it at all follows that, if the Treaty is avoided, the endorsement can survive. The endorsement is part of the Treaty and would have to be re-written if it was to survive, so that it read "seven months effective 1 July 1997". I accept that it would not be difficult to manipulate the wording to achieve that result, but it demonstrates that, as amended, this was one Treaty.

(5) In short, the endorsement depends on and forms part of the 1996 Treaty. It cannot survive the avoidance of the Treaty as a whole.

Conclusion on the 1997 Endorsement

68. It follows that the avoidance of the 1996 Treaty necessarily involves avoidance of the 1997 Endorsement.

69. In those circumstances, I do not need to consider, at this stage of the Judgment, Albingia's alternative submission that the misrepresentation made on 4 July 1996 was a continuing representation or that the Syndicates were under a duty to disclose that their earlier stated policy on deductibles no

longer applied. I consider these issues fully in connection with the 1998 Treaty below and I can see no purpose in repeating my reasoning in this section. My conclusions apply *a fortiori* in relation to the 1997 Endorsement, given that it was closer in time and substance to the misrepresentation made in relation to the 1996 Treaty. In my judgment, the Syndicates ought to have disclosed that the deductibles policy (as originally represented) no longer applied. Had they done so, this would have affected Albingia's judgment. If the 1997 endorsement survives the avoidance of the 1996 Treaty (contrary to my conclusion), Albingia could have avoided it on the merits of its presentation.

Avoidance of the 1998 Treaty

70. On any basis, the 1998 Treaty was an entirely separate contract from the 1996 Treaty, although it was closely related, and the avoidance of the 1996 Treaty does not directly impact on the 1998 Treaty.

71. Mr Hamblen advanced two main grounds which, he submitted, entitled Albingia to avoid the 1998 Treaty:

(1) Failure to inform Albingia that the Syndicates' policy as to deductibles was not as stated at placement in 1996 in the fax cover sheet dated 4 July 1996. The case was argued on the basis of implied or continuing misrepresentation by the Syndicates or non-disclosure of material facts (*viz* the change in policy);

(2) Non-disclosure of previous claims and incidents before 1998.

I will consider these two claims separately. As will become apparent, there is one issue relating to the second ground which I am unfortunately unable to resolve in this judgment.

Deductibles

72. Mr Hamblen argued that, at the placement of the 1998 Treaty, the misrepresentation as to the Syndicates' policy as to deductibles originally made in the 1996 fax cover sheet was continuing and, further, the Syndicates should have disclosed that they had written risks below the stated deductibles and that their underwriting policy had changed, but failed to do so. The deductibles policy remained highly material and Herr Holzapfel was induced by the misrepresentation/non-disclosure to write the 1998 Treaty.

73. In response, Mr Lockey argued:

(1) The representation made in July 1996 no longer applied. If the broker's fax was to be treated as repeated, so would the underwriting profile, yet this would obviously be different in 1998. Albingia's arguments involve mutating the original representation. The original representation was that, as at July 1996, the Syndicates had written risks in the past which had deductibles of at least £500,000. That had to be transmuted into a representation that, as at February 1998, the Syndicates had written risks in the past which had deductibles of at least £500,000 and that it intended to do so in the future. The underwriting presentation made in February 1998 (and in June 1997) made no mention of the level of deductibles achieved or the Syndicates' intentions. Moreover, it must have been known to Albingia that market conditions were becoming more difficult and the prospect of writing with high deductibles was becoming ever more remote.

(2) If Albingia wanted to know about the Syndicates' policy on deductibles, it should have asked. Albingia was on notice from bordereaux sent in June 1997 and February 1998 that risks were being written without substantial or any deductibles. Failure to ask more amounted to a waiver by Albingia of any disclosure of the Syndicates' past or present practice.

(3) Albingia was in fact aware of the deteriorating market conditions, and therefore knew or must be treated as knowing that the Syndicates might well write to deductible levels less than £500,000.

(4) The circumstances allegedly not disclosed essentially amounted to the provision of professional underwriting advice to Albingia. This is well outside the duty of disclosure: see e.g. *Iron Trades Mutual Co Ltd v. Companhia de Seguros Imperio* [1991] 1 Re LR 213, 224.

(5) There was nothing unusual or unreasonable about the deductibles achieved in the market conditions at the time, and whatever had been said about the Syndicates' practice in 1996 was no longer material (if it ever had been).

(6) Albingia was not induced. Albingia knew that the Treaty would be loss-making and wrote the 1998 Treaty as means of getting a share of the Quota Share Treaty.

Was the misrepresentation made in July 1996 continuing in 1998 or was there an obligation to disclose the change in policy?

74. I have already held that the 4 July 1996 fax cover sheet represented that the Syndicates' policy was not normally to write construction risks unless the original deductible were at least £500,000 and preferably £1,000,000. Contrary to Mr Lockey's submissions, there is no need to manipulate the representation when considering the representation in 1998. The critical question is whether this representation made in 1996 still held validity in 1998. If it did, then whether one looks at it as a case of a continuing representation or non-disclosure, the position ought to have been corrected.

75. I start by considering the context in February 1998. Undoubtedly market conditions had become more difficult than in 1996. This was known to Herr Holzapfel from his own general market knowledge. However, as before, Herr

Holzapfel did not have a detailed knowledge of the conditions in the direct market and could not be expected to do so. The placing information did not paint a bleak picture of the current market conditions. On 25 June 1997, when approaching Albingia in connection with the 1997 Endorsement, NMB explained the reduced income to the Treaty as being "due to the Reassured being selective in the writing of the original business to maintain the loss record he has achieved on this type of in the past". In the offering the 1998 Treaty on 10 February 1998, NMB stressed the good loss record to date and (in the course of the negotiations) on 11 February 1998, NMB explained the failure to achieve the $1 million estimated premium income as follows:

> "What in fact has happened is that the business offered to them was not deemed to be of sufficient quality to be worthy of writing. They were not tempted to write and cede the risks they might have done, purely to achieve premium income estimate."

On 27 February 1998, NMB repeated this point:

> "Please see the updated statistics on the account which show very little deterioration on the claims from last years' position. Neil [Copping], as you know, has an excellent reputation in the energy market and it has been his refusal to write any other than quality accounts which has kept down his premium income, however this has produced excellent results for his account."

76. In considering a renewal, as both experts agreed, a competent and conscientious underwriter would review the underwriting file including previous placing information. Herr Holzapfel said (as I accept) that this is what he did. The file was a slim one and the original representation would be quite obvious even on a swift review. There was nothing in the material supplied in 1997 or in 1998 to suggest that the Syndicates' policy had changed. On the contrary, the passages I have quoted above were entirely consistent with high standards still being maintained.

77. Mr Compton-Rickett's evidence was that if circumstances existing at the time of the original underwriting had changed or were changing, an underwriter

would reasonably expect to be told about it. This approach, which seems to me to be obvious common sense, has some support in authority.

78. In *Traill v. Baring* (*supra*) at p.330, an insurer had stated its intention to retain £1,000 of a £3,000 life insurance risk when re-insuring a £1,000 line with the reinsurers. Before the risk was committed, the remaining £1,000 was placed with another insurer. Turner LJ said:

> "I take it to be quite clear, that if a person makes a representation by which he induces another to take a particular course, and the circumstances are afterwards altered to the knowledge of the party to whom the representation is made, and are so altered that the alteration of the circumstances may affect the course of conduct which may be pursued by the party to whom the representation is made it is the imperative duty of the party who has made the representation to communicate to the party to whom the representation has been made the alteration of those circumstances; and that this Court will not hold the party to whom the representation has been made bound unless such a communication has been made."

It must be emphasised that this case was concerned with a change of intention after initial presentation but before the original policy was placed, not a renewal. But the principle is clear and the next two authorities concern renewals.

79. In *The "Moonacre"* [1992] 2 Lloyd's Rep. 501, the proposer's signature had been forged on the proposal form. Mr Anthony Colman QC (as he then was) held the forgery to be a material fact which ought to have been disclosed, as it would have caused a prudent underwriter to refuse to insure until the insured had approved the proposal in writing. On renewal, there was no new proposal form. He held (at p. 521):

> "There being no subsequent proposal tendered [to underwriters] at the time of renewal, there must, in my judgment, have been a continuing reliance by the underwriters on the proposal and accordingly a continuing duty to disclose any material facts omitted from that proposal and to correct any misrepresentation included on it. It follows that the initial non-disclosure relating to the signature was of continued effect in relation to the policy as renewed. So also was the

> misrepresentation as to the same matter. It further follows that the insurers were entitled to avoid [the renewed] policy on those two further grounds."

80. In *Hill v. Citadel Insurance Co. Ltd* (CA) (*supra*), the insured had represented in placing information for the first year that the cost of XL protection had approximated within recent years to around 20% of gross net premium income. This was held to be a misrepresentation. On renewal, the placing information stated that the XL protection had been placed at a very reasonable cost ratio. The Judge at first instance and the Court of Appeal (at p.231) endorsed counsel's concession that both sets of placing information should be read together and that, put together, the placing information imported an implied representation that there had been no material change to nor any inaccuracy in the original placing information, unless corrected. The two sets of placing information could not be divorced.

81. The position here is very similar. A clear representation was made on original placement in 1996. The placing information in 1997 and 1998 was wholly consistent with the Syndicates maintaining their high standards and deductibles policy. The case is put in continuing misrepresentation and non-disclosure, but these seem to me to be really two sides of the same coin. As Lord Lloyd put it in *Pan Atlantic Insurance Co. Ltd v. Pine Top Insurance Co. Ltd* (HL) [1995] 1 AC 501, 554H - 555A:

> "Often, as here, the alleged misrepresentation adds nothing. It is but the converse of non-disclosure …"

In my judgment, Albingia was entitled to assume, as Herr Holzapfel did, that the Syndicates' policy as to deductibles was being maintained. It should have been told that this was not so.

82. The next question is whether Herr Holzapfel knew or ought to have known that the deductibles policy no longer applied. Mr Lockey treated this as a question of waiver, but it seems to me to go just as much to the question whether the original representation was actually corrected. The first argument

was that the bordereaux supplied to the Syndicates in June 1997 and February 1998 showed that risks were being written without substantial or any deductibles. These bordereaux contained a column headed “Policy XS”. For most contracts the figure 0 was entered, but for a few there were figures such as 10,000,000. Mr Allan stated that in his opinion this meant that for each risk with a zero entry the Syndicates were on risk from the ground up and there was no original deductible. Mr Lockey argued that the entries at least gave rise to a query as to what the zero entries meant.

83. In my judgment, these contentions are without any merit. It would be unheard of for a construction risk to be written without any original deductible at all. It is perfectly obvious that the column was identifying, as it stated, those policies which were excess policies (giving the level of the excess) as opposed to first layer policies. It said nothing about the level of deductibles on first layer policies. In support of his argument that there was at least an ambiguity which should have triggered questions from Herr Holzapfel, Mr Lockey argued that the bordereaux should be read with the entry at the bottom of the construction risk history supplied in July 1996 which stated “N.B. Above figures are based upon the syndicate analysis of exposures written and applicable deductibles”. It is not at all clear what this sentence means in the context of the figures given. The figures in the construction risk history gave a figure for policy excess (almost all very substantial) but no deductibles. The sentence was not repeated in the bordereaux. The question is whether this rather obscure note in the construction risk history ought to have raised a query in Herr Holzapfel’s mind that the zero figures might mean there was no deductible from the ground up. I think the answer is clearly in the negative.

84. Mr Lockey ran a more general argument on waiver. He said that Herr Holzapfel should not have assumed that the policy on deductibles remained unchanged and should have asked questions to check the position. Having failed to make a basic enquiry, Herr Holzapfel must be treated as having waived disclosure. I disagree. For the reasons I have already given, in my judgment, Albingia was entitled to proceed on the assumption that the

Syndicates' stated practice on deductibles was unchanged. The onus was on the Syndicates to correct it.

85. As to Mr Lockey's other points:

(1) Whilst Albingia knew that market conditions had generally deteriorated, this cannot be treated as having placed it on notice that the Syndicates' policy on deductibles could not be maintained;

(2) The nature of the continuing representation that I have found was made did not amount to the mere provision of professional underwriting advice to Albingia;

86. I turn to materiality. Mr Lockey is right that there was nothing unusual or unreasonable (in themselves) about the deductibles achieved by the Syndicates in the market conditions at the time. If nothing had ever been said about the deductibles policy, there would have been no need for disclosure to be made. However, it does not follow that the representation made about the Syndicates' practice in 1996 had ceased to be material, or that the need to correct it had passed. On the contrary, the policy of normally writing construction risks with deductibles of at least £500,000 and preferably £1,000,000 was highly material to a prudent underwriter being asked to write a first loss fac/oblig reinsurance of construction risks.

87. There is force in the argument that Albingia knew that the Treaty would be loss-making and wrote the 1998 Treaty as means of getting a share of the Quota Share Treaty. It is apparent from the contemporary correspondence that Herr Holzapfel was distinctly reluctant to renew the Treaty. His initial evaluation was that the 1996 Treaty, as extended, would make a 26% loss – arithmetic which NMB were unable to fault. Eventually, after meetings with the underwriters and NMB, he was persuaded to renew. I am sure that Herr Holzapfel believed that the Treaty was likely to make a fairly modest loss overall after the costs of xl reinsurance, but the offer of a share in the

Syndicates' Quota Share was enough to tip the balance in favour of renewal. It was a means of cementing Albingia's business relationship with the Syndicates. However the following points must also be made:

(1) The results of the 1996 Treaty as extended were good so far. The underlying business looked reasonably sound although the claims position was bound to deteriorate;

(2) The main reason why the 1998 Treaty was likely to be loss-making overall, as perceived by Herr Holzapfel, was the high cost of the excess of loss insurance, which became proportionately greater if the Treaty failed to produce the income that had been indicated (as happened in 1996 and 1997);

(3) Herr Holzapfel's approach shows him to be a careful underwriter. He was not writing for the sake of premium in the short term.

88. The decision to renew the Treaty for 1998 was a closely balanced decision. If Herr Holzapfel had been told that the policy on deductibles no longer applied, I am certain that he would have required full disclosure of the deductibles that were actually being written on the construction account. It is speculative whether the Treaty would have been renewed at all. I doubt that it would have been. I think that proper disclosure would probably have tipped the balance the other way, but if the Treaty had been renewed, I am sure that the terms would have been substantially different. Either the premium would have been increased or requirements would have been introduced to impose minimum deductibles. I am satisfied that the continuing representation and non-disclosure did induce Albingia to write the 1998 Treaty.

Non-disclosure of claims and incidents

89. The presentation for the 1998 Treaty included separate bordereaux for the 36 construction and 27 operating risks written in the 18 month period from 1

January 1996. The bordereaux were prepared as at 31 January 1998, shortly before the presentation. The figures showed for construction risks 1 paid claim of £465 and 3 outstanding claims of £157,725. For operating risks, there were 2 paid claims totalling £176 and 1 outstanding claim of £6,493. From Albingia's perspective, this was a loss ratio of 49.36% against signed premium before reinsurance. The only substantial loss to date was the Kinabalu loss (consisting of 2 claims) which was reserved for £137,103, so accounting for most of the outstanding loss on the operating account. Herr Holzapfel asked for and was provided with more information about historic losses. He was provided with a triangulation which listed the 5 major losses between 1990 and 1996. The smallest was £51,566.

90. There is no complaint made about the fairness of this presentation. Albingia's complaint is that, after presentation but before the Treaty was written, there was a sharp deterioration in the account, and this should have been disclosed.

91. First, a number of claims had been reported. These are tabulated in the Table below:

Risk no	**Risk name**	**Date of Loss**	**Date Limit allegedly aware of claim from Sceptre system**	**Details of Limit's knowledge of claim pre 17/3/98 from Sceptre system**	**Likely claim against Limit and Axa**
12	Hibernia	25/09/97	05/03/98	"Paid to date USD988.29"	Line of 3.245% = exposure of US$32.07
22	Petro Canada	03/03/97	24/02/98	"Official O/S: NOK32,855.00" [= £2,662.47]	Line of 46.6667% = exposure of £1,252.48
		01/04/97	24/02/98	"Official O/S: NOK1,446,429 [= £117,215]	Line of 46.6667% = exposure of £54,700.37
		01/07/97	24/02/98	"Official O/S: NOK2,362,500" [= £191,450.56]	Line of 46.6667% = exposure of £89,343.66

24	Texaco	03/12/97	09/02/98	"Official O/S of US$135,000"	Line of 7.5% = exposure of US$10,125
Total					**c.£145,286.51 plus US$10,157.07**

92. It will be seen that there were two substantial losses involving Petro Canada estimated to give rise to losses to the Syndicates of some £144,000 in total, on the basis of the estimates of leading underwriters or the Lloyd's Claims Office. The overall effect was to increase the loss ratio from 46.93% to about 93%. None of the new loss would have been covered by Albingia's reinsurance.

93. Second, a number of incidents had been reported. These are tabulated in the table below:

Risk no	**Risk name**	**Date of Incident**	**Dates of Sceptre entries pre 17/3/98**	**Details of Limit's knowledge pre 17/3/98 from Sceptre entries**
5	Elf	08/10/97	31/10/97	"First advice – PNC – await further"
6	Nat Petroleum	06/12/96	04/02/97	"1st advice – Matthews Daniel instructed"
			18/02/97	"Preliminary reports from Matthews Daniel reviewed"
			03/06/97	"No formal claim presented, assd maintaining low profile"
			09/07/97	"Fees authorized for STG 16640"
			22/07/97	"For sett of previously agreed fees see 97/07"
			09/02/98	"Still no formal clm. Matt Dan. Continue to monitor".
		07/03/97	22/05/97	"1st advice to COSS – await full details and est"
		08/11/97	30/01/98	"1st advice to COSS – await full details and est"
12	Hibernia	06/06/97	25/09/97	"1st advice to COSS. Await BCL report and est."
			14/10/97	"BCL advise highly abrasive magnetite slurry"
			20/01/98	"File seen. Reserve potential remains as prev advise"
22	Petro	19/01/98	09/03/98	"First advice – BCL appointed,

	Canada			await further”
Total				**6 incidents**

94. Essentially therefore 6 incidents had been reported which occurred between December 1996 and January 1998. Assessors had been appointed in some cases, but no reserves had been made. As it has turned out, 2 of the incidents developed into significant losses for the 1996 Treaty as extended (US$56,281 and £36,651), and the total loss arising from the incidents, including professional expenses, was about $120,000.

95. The claims and incidents had been entered on the Sceptre computer system on which the Syndicates recorded claims, incidents and reserves but, shortly before trial, it became apparent that there was a real issue as to what the Syndicates should be treated as having actually known. The parties agreed that this issue could not be resolved at this trial and I was asked to adjourn the issue for a further hearing. With some reluctance I agreed to do so. The result is that I proceed on the assumption that the Syndicates are to be treated as knowing about these claims and incidents, but the accuracy of that assumption may have to be tested later.

96. Based on the evidence of Mr Compton-Rickett, Mr Hamblen submitted that there had been a very significant deterioration in the account over a month. Outstanding losses had nearly doubled and a number of incidents had occurred that might develop into further substantial losses. The Syndicates should have disclosed the claims and incidents, and had they done so, it would have made a difference on an already wavering Herr Holzapfel.

97. In answer, Mr Lockey submitted:

(1) The undisclosed claims were not material. Three were very small. The two Petro Canada claims were larger but still unremarkable in the context of the energy business. They were normal losses which occur in the ordinary course of events. They did not alter the picture painted

in the presentation. Further, the first substantial Petro Canada loss had been disclosed in the bordereau of construction risks as an outstanding claim (of £5,650). Although there had been a deterioration in the loss position, it was fairer to compare losses against estimated premium, on which basis there was a deterioration from 33% to 62%. Overall the claims development was predictable and unremarkable.

(2) The Syndicates had disclosed claims up to 31 January 1998. The account was relatively long tail and it was inevitable that there would have been further losses and incidents which had yet to be reported. The figures would move constantly. If Albingia wanted updated statistics, it should have asked for them and, having failed to do so, it must be treated as having waived further disclosure.

(3) As regards the incidents, these were unremarkable. It was obvious that the bordereaux confined disclosure to paid and outstanding claims and did not include unreserved incidents. That is normal market practice. Except in cases of dreadful catastrophe like *Piper Alpha*, it is entirely speculative whether a reported incident will develop into a claim, let alone a significant one. I was reminded of what Stephenson LJ said in the *Container Transport International Inc. v. Oceanus Mutual Underwriting Association (Bermuda) Ltd* (CA) [1984] 1 Lloyd's Rep. 476 at p.529:

> "The marine underwriter may of course indicate what particular matters he wants to know, and he may be put on enquiry by what he is told and through negligence or stupidity or inexperience or pigheadedness not pursue enquiries which a prudent underwriter would have pursued. He may lead an insured to believe that what is by the statute material is not material to him, and then he is estopped from relying on its non-disclosure to avoid his contract of insurance. He cannot expect to be told everything, every minute detail; he cannot shut his eyes to obvious incompleteness and then complain of his bargain made in ignorance of the full story. He can expect to be given a fair summary and can assume that placing files which he has an opportunity of examining contain nothing exceptional or unusual; for a summary which excludes such

> matters is not a fair summary. I appreciate the difficulties of giving a fair summary of a complicated insurance experience, as any Judge who has tried to sum up a complicated case fairly must appreciate."

(4) Albingia was not induced to write the Treaty by any non-disclosure.

98. In my judgment, the principle issue boils down to whether the claims and incidents reported after 31 January 1998 were sufficiently serious to alter the balance overall presentation. It would be obvious that losses on the 1996 Treaty (as extended) would continue to develop. There would be further claims and incidents, and existing claims would increase. The growth would not necessarily be in a straight line. There would be jumps and some months would be worse than others. A reinsurer in Albingia's position could be expected to know that. If it wanted to be told about ordinary claims development that had occurred since the statistics had been prepared, it should have asked. It could not expect that the information would be volunteered. By contrast, if a development became known to the Syndicates which showed a significant deterioration beyond the range of what might be naturally expected, that is material and should be disclosed by the assured

99. On which side of the line do the additional claims and new incidents lie? There was nothing remarkable about the six incidents reported. They were routine and it was impossible to draw any firm conclusion from them. They might or might not develop into anything. It was obvious that no disclosure had been made of incidents which had not led to the creation of reserves. This was in accordance with market practice and it was not material information which the Syndicates ought to have disclosed.

100. On the other hand, the development in the claims position was significant. Whether one compares claims against estimated or signed premium, the effect was roughly to double outstanding claims in the space of only a month. That goes beyond any ordinary or routine development. The total new losses were estimated at over £150,000. Two claims exceeded £50,000 and were in the

category of large or major claims, as to which Herr Holzapfel had made specific enquiry. Mr O'Farrell fairly said that, had he been aware of the two large Petro Canada losses before renewal, he "would have ensured that reinsurers were informed about it", because these were losses that reinsurers "would have been likely to want to know about". I agree with that approach. In my judgment, the rather sharp deterioration in the account following 31 January 1998 was material and should have been disclosed. Albingia did not waive disclosure of that kind of adverse development.

101. Did non-disclosure of this deterioration induce the writing of the 1998 Treaty? Herr Holzapfel was just persuaded to renew the Treaty. He said in evidence that he was so reluctant to renew the Treaty anyway that disclosure of the losses would definitely have made a difference; they put Albingia in the red and he would not have renewed. Again, that is inevitably speculative. I think it doubtful that he would have renewed the Treaty at all. It is unlikely that he would have done so on the terms offered. Albingia was induced by the non-disclosure.

102. I have so far considered issue of inducement separately for the misrepresentation/non-disclosure in relation to the deductibles policy and non-disclosure of the deterioration in the claims position. Combining them, and acknowledging that there remains a degree of speculation, I think it most unlikely that, if the overall position had been fairly disclosed, Albingia would have written the 1998 Treaty unless it had been offered radically different terms.

Conclusion on the 1998 Treaty

103. Albingia is therefore entitled to avoid the 1998 Treaty on the grounds of misrepresentation/non-disclosure of the change in deductibles policy and (assuming knowledge on the part of the Syndicates) non-disclosure of the deterioration in the claims position.

Subsidiary Issues

104. A number of subsidiary issues were argued. In the light of my findings so far, none are relevant because they all depend on the Treaties being valid. Nevertheless, because some of these issues may have an impact on other proceedings and because they were fully argued, I will express my conclusions on those issues briefly.

Cession Issues

(1) Cession of BP Amoco Risks 93, 94 and 99 to the 1998 Treaty.

105. The 1998 Treaty covered "losses occurring on risks attaching during the period twelve months effective 1st February 1998, or as original". Albingia argued that Risks 93 (BP Amoco Keith Field), 94 (BP Amoco Tambar Field) and 99 (BP Amoco South Everest) incepted, and so attached, on 1 March 2000, 11 April 2000 and 1 August 1999, after the expiry of the 1998 Treaty. In answer, Mr Lockey argued that the risks had attached under an open cover (valid for 24 months for offshore risks) which commenced on 1 November 1998. The Syndicates had scratched their line on the open cover on 29 January 1999. The open cover had been declared under the treaty, and it followed that the risks attached within the period of the 1998 Treaty.

106. The short answer to Mr Lockey's argument is that no risk attached when the open cover was written. It was a facility under which risks would be attached if and when declared. Until a risk was declared, the Syndicates were not on risk, no premium was due and there was nothing to reinsure. The date of attachment is the date of declaration of the individual risk to the Open Cover which occurred outside the 1998 Treaty period. Mr Allan stated to the contrary and contended that there was a market practice that declarations under an open cover would be treated as attaching at the date of the attachment of the open cover itself, because the open cover was obligatory, such that the Syndicates were bound to accept declarations. Mr Compton-

Rickett denied that there was any such market practice. In his view you could not declare a facility as a risk attaching.

107. I am not persuaded that there was any market practice of the kind described by Mr Allan. Such a practice would have the rather remarkable effect of enabling an insured to bind a risk long after the expiry of a treaty period. In my judgment, where a treaty is written on the basis that a risk must attach during a stated period, an open cover under which risks can be declared is not in itself a risk attaching. It follows that Risks 93, 94 and 99 were not validly declared to the 1998 Treaty. I should add that it is very far from clear that the Syndicates ever did declare the Open Cover as such.

(2) Was the cession of some risks notified outside the time limited by the terms of the Treaties?

108. Both Treaties provided for "Bordereaux: Quarterly detailed risk and premium bordereaux." Mr Hamblen submitted that a number of risks had been notified much too late – many had not been declared until "final" bordereaux were supplied on 4 June 2004, many years (between 5 and 7 years) after they were ceded to the Treaties. Even if loss reports could be treated as adequate notification, they were still well out of date, being between 2 and 3½ years after they were ceded to the Treaties. The failure to notify the risks on a quarterly basis as required was a breach of an innominate term. Albingia could decline an individual risk if the breach was sufficiently serious: c.f. *Alfred McAlpine plc v. BAI (Runoff)Ltd* (CA) [2000] 1 Lloyd's Rep 437 at §26 and *The "Beursgracht"* [2001] EWCA Civ 2051; [2002] Lloyd's Rep. IR 335 at §44.

109. Mr Lockey's response was that a risk was validly and effectively ceded to the Treaties upon the Syndicates deciding to make the cession and determining the amount of that cession. The Syndicates' method of doing this was to code a slip with a "Y", making an underwriting note and/or making an appropriate entry into the Sceptre system. That was entirely consistent with *Baker v.*

Black Sea and Baltic General Insurance Co Ltd [1995] Lloyd's Rep. IR 261, 271, where Potter J accepted expert evidence that:

> "The usual procedure was, and still is, that a Lloyd's underwriter identifies a specific reinsurance cession by use of a symbol incorporated within the underwriting reference written alongside his line on the stamp identifying the syndicate on the broker's slip. When the broker completes the placement, he sends the slip to the LPSO for signing. Such process includes the LPSO recording of each underwriter's reference, which reference appears against the underwriter's line and the syndicate number on the policy once issued by the LPSO. It also appears on each premium card and claims card issued by the LPSO to each underwriter recording any financial transaction on each policy. Once the LPSO has recorded the underwriter's reference, a system is then activated which provides for the payment of the premium due to the reinsurers and the collection of claims from reinsurers. It is customary for insurers to credit and debit reinsurers at agreed periods. In this case, as is common, the provision was for "Quarterly Accounts".

He held:

> "So far as notice is concerned, it does not seem to me that in the context of the working of the Lloyd's market, notice of cession is required before such cession can be valid and binding, absent some specific provision in the reinsurance contract which requires it."

110. It followed that Albingia was arguing that a cession, which was originally binding, had in some way ceased to be so if it was not subsequently notified in time. There was no such provision in the Treaties. Even if the requirement for quarterly bordereaux was a term requiring notification on a quarterly basis, it was not a condition subsequent. Nor was it an innominate term: the majority in *Friends Provident Life & Pensions Ltd v. Sirius International Insurance* (CA) [2005] EWCA Civ 601; [2005] 2 Lloyd's Rep 517 had rejected Waller LJ's approach in *McAlpine v. BAI* (*supra*).

111. I think Mr Lockey's arguments are plainly correct. The risks were ceded when the Syndicates coded the risk with a "Y". These was no provision in the Treaties to de-cede a risk for late notification. Whilst it is unfortunate that the Syndicates failed to comply with the requirement for the provision of risk

bordereaux, as they should have done (a general failure in the London market), that does not excuse Albingia from the risk to which it was already bound. It is right to add that, despite the absence of proper risk bordereaux, premiums were paid and accepted on the risks. No complaint was made about the absence of bordereaux. If there had been a right to decline late declared risks, Albingia waived it.

Premium Accounting issues

112. There are two comparatively small issues as to whether the Syndicates have accounted fully for all premium due under the Treaties. The issues were not fully developed in argument before me (due to shortness of time) and are academic on my findings, given that all premium paid is returnable to the Syndicates following avoidance. I have decided that it would be better not to deal with these accounting issues in this judgment. Should it ever become necessary, the points can be resolved shortly after proper argument in this Court.

Overall Conclusion

113. Albingia is entitled to a declaration that it was entitled to avoid the 1996 Treaty, including the 1997 Endorsement, and the 1998 Treaty. The Syndicates must refund any claims paid and Albingia must return all premiums paid. I expect the figures can be agreed. I will hear counsel on the terms of the order I should make.

114. I am most grateful to both teams of counsel and solicitors for the immense assistance they have provided to me in this complex case.