Neutral Citation Number: [2008] EWHC 843 (Comm)

Case No: 2007-1213

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/04/2008

Before :

THE HONOURABLE MR JUSTICE BEATSON

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Between :

TEMPLE LEGAL PROTECTION LIMITED	**Claimant**
- and -	
QBE INSURANCE (EUROPE) LIMITED	**Defendant**

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MR. CHRISTOPHER BUTCHER QC, MR. TIMOTHY SALOMAN QC and MR. JONATHAN HOUGH (instructed by **Stevens & Bolton LLP**) for the **Claimant**
MR. ANDREW POPPLEWELL QC and MR. HARRY MATOVU
(instructed by **Barlow, Lyde & Gilbert**) for the **Defendant**

Hearing dates: 13 & 14 February 2008

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Judgment

The Hon. Mr Justice Beatson:

Introduction

1. This is an appeal pursuant to section 69 of the Arbitration Act 1996 against the Award of Mr J H Leckie, made on 4 July 2007 ("Award No. 1"), determining a preliminary issue in an arbitration between Temple Legal Protection Ltd. (hereafter "Temple"), and QBE Insurance (Europe) Ltd. (hereafter "QBE"). Temple is a legal expenses insurance underwriting agency and QBE is the European wing of a large international insurance company. Permission to appeal was granted on 9 October 2007 by Teare J. The arbitration concerned an underwriting agency agreement, "the Binder", entered into between Temple and QBE which commenced on 1 January 2006 and, following a deterioration in relations between the parties, was terminated with effect from at the latest 2 December 2006. The arbitration hearing was solely concerned with the "run-off", the business of dealing with and resolving claims arising out of business written during the currency of the Binder but not notified or resolved until after its termination.

2. Legal expenses insurance can take a number of distinct forms. There is a distinction between "before the event" (BTE) insurance and "after the event" (ATE) insurance. The business written under the Binder between QBE and Temple was primarily ATE insurance. This type of insurance was discussed by the Court of Appeal in *Callery v Grey* [2001] 1 WLR 2112 at [15] – [23] and [65] – [79] and *Rogers v Merthyr Tydfil CBC* [2007] 1 WLR 808. The Court in both cases was primarily concerned with the recoverability of ATE premiums in costs proceedings but the earlier decision considered the different types of ATE insurance, and when it was appropriate for a party to take out an ATE policy. For present purposes it suffices to state that, under ATE insurance, the person who has suffered an injury and is litigating is insured. If the litigation is unsuccessful the insurer, in this case QBE, pays the successful party's costs. If it is successful, the insurer recovers the premium from the losing party. The time it can take litigation to be concluded means that policies can be on foot for a considerable time. In broad terms, the role of a legal expenses insurance underwriting agency such as Temple is to enter into contracts of insurance, primarily with firms of solicitors who require (or whose clients require) cover against potential liability for legal expenses in litigation, and to manage the insurance on behalf of the insurer who carries the risk. In *Rogers v Merthyr Tydfil CBC*, the Court stated (at [62]) that Temple had established itself as a market leader since 2000 and is "among the top five ATE providers for personal injury claims". The issue in this case concerns the Temple's role and entitlement after the termination of the Binder.

3. By his Award, the arbitrator held that QBE was free to terminate Temple's authority to conduct the run-off by unilateral notice and had, in a letter dated 4 January 2007, validly brought Temple's authority to an end "within the powers contained in the Binder". The arbitrator made three other Awards on 16 and 27 July and 21 August 2007. This appeal is not concerned with the matters dealt with in those awards.

4. With regard to Award No. 1, Mr Butcher QC, on behalf of Temple submitted that Mr Leckie erred in law in concluding that QBE was free to terminate Temple's authority to conduct the run-off and had done so. Broadly speaking, Temple's position is that, in the light of the complex inter-relationship of contracts between QBE, Temple, and a number of third party intermediaries and insured persons, on the true construction of the Binder, QBE was not entitled to take over Temple's contractual functions in respect of the run-off after the Binder had been terminated. This was *inter alia* because it would put Temple in breach of its obligations to the third parties, in particular to the intermediaries, largely firms of solicitors, who act for litigants and required cover against potential liability for legal expenses in conditional fee litigation cases. The intermediaries are known as "coverholders" although they are more accurately described as "sub-coverholders".

5. QBE's position, again broadly speaking, is that Temple is not, on the true construction of the Binder, entitled to insist on carrying out the run-off after it had been validly terminated because there is no clear provision in it so entitling Temple. A principal who loses trust and confidence in his agent is, absent specific provision in the contract, normally entitled to bring the agency relationship, a fiduciary relationship, to an end. Mr Popplewell QC on behalf of QBE, submitted that, on Temple's approach, QBE would not be able to end the relationship in respect of the run-off even where Temple acted fraudulently or had seriously breached its obligations under the Binder. I am very grateful to both counsel for their comprehensive and thoughtful submissions.

6. Teare J was satisfied that the requirement in section 69(3)(c)(ii) of the Arbitration Act 1996 was met. He granted permission to appeal "on the grounds that the question of law, in essence, whether the principal (QBE) is entitled to take over the functions of the agent (Temple) in run-off when the underwriting agency agreement between QBE and Temple has been terminated, is one of general public importance and the decision of the Tribunal is open to serious doubt".

7. The issue does not turn on the particular factual circumstances that led to the termination of the Binder or the reasons for which QBE did not wish Temple to manage the run-off. It suffices to say that the Arbitrator found (Award paragraphs 7 and 9-10) that the relationship between the parties began to deteriorate soon after the commencement of the contract. It became much worse in about June 2006 when Mr Rocco Pirozzolo, an underwriting director of Temple, resigned and took up a position at QBE. On 11 August Temple gave notice under section 9.2 of the Binder to terminate the agreement. That notice would have expired in April 2007. At that time Temple was negotiating with another underwriter, IGI. It stopped writing new business under the Binder with QBE on 1 October when the agreement with IGI came into effect. QBE was informed of this on 3 October. It claimed that the Binder was terminated forthwith (under section 9.5.2) by Temple's repudiatory breach in

entering into a Binder with another insurer or, alternatively, pursuant to the section 9.4, on 2 December, the expiry of 60 days.

8. Under section 69 of the 1996 Act the court looks exclusively at the award and does not go behind what is on its face, including, of course, the reasons given by the arbitrator: *The Agios Dimitrios* [2005] 1 Lloyd's Rep. 23 at [5] – [7].

The Arbitrator's findings of fact

9. The Arbitrator made the following findings of fact. References to paragraph numbers in this section are to those in the Award.

1. Temple came into existence in 1999 as a specialist legal expenses insurer, largely to take advantage of the vast increase in this market from the introduction of the Conditional Fee Arrangements authorised by the amendments to the Courts and Legal Services Act 1990 introduced by section 27(2) of the Access to Justice Act 1999: § 4.
2. Temple dealt in both "before the event" (BTE) insurance and "after the event" (ATE) insurance but ATE insurance in conditional fees cases represented almost 85% of its business: § 4.
3. As to Temple's method of operation (see §§4 and 14):
    a. Temple operated through a number of intermediaries, largely firms of solicitors, who required cover against potential liability for legal expenses in conditional fee litigation cases [who] were known as "coverholders" although they are more accurately described as "sub-coverholders".
    b. coverholders were authorised to issue individual policies to individual clients provided that appropriate underwriting criteria were met.
    c. Coverholder Agreements are "standard documents": §14.
    d. Temple also dealt directly with individuals requiring cover on a one-off basis.
    e. Temple itself did not carry the financial risk in any legal expenses insurance cover in which it was involved. It entered into an agency agreement with an underwriter who took the financial risk but permitted Temple to carry out the administration of the business for a percentage of the gross premium income.
    f. In the period since 1999 Temple entered into agency agreements with a number of different insurers. From 1999 to 2002 it had agency agreements with various Lloyd's syndicates. From 2003 to the end of 2005 it had an agency agreement with Europ Assistance Holdings Limited (EA). This agreement expired at the end of 2005 due to the decision of EA to withdraw from the legal expenses insurance market because it had sustained substantial losses in it.
4. From around late 2004, Temple was looking for another underwriter as a result of EA's decision to withdraw from the market at the end of 2005: §§ 4 and 6.
5. In January 2005 Temple made a major presentation to QBE. The presentation was in a substantial document of some 295 pages. The document set out in detail the way in which Temple did business and its expectations of the respective duties and obligations of the participants in that business. It contained a table showing the annual gross premium income generated by the business, which grew from approximately £1.25 million in 2000 to £5.69 million in 2004. As a result of that presentation there

were negotiations between Temple and QBE, which continued through 2005. At one stage (until July/August) there were also negotiations for a possible sale to QBE of the whole of Temple's business: §§ 6 and 7.

6. The drafting of the Binder developed during the late summer and autumn of 2005, during which time amendments came in from both sides. The main stumbling block concerned the percentage of premium income which would be taken by Temple. The agreement was eventually signed on or about 1 December 2005 and came into effect on 1 January 2006. Temple was not entirely satisfied by the outcome of negotiations about the share of premium income it was to take: § 7.
7. Temple's January 2005 presentation document contained a statement of confidentiality, and both sides regarded the whole process as being subject to requirements of confidentiality: § 6.
8. The agency agreement between Temple and QBE ran from 1 January 2006 until it was terminated not later than 2 December 2006 following the deterioration in relations between the parties in the circumstances I have described in paragraph 7 of this judgment.
9. On 4 January 2007 QBE wrote to Temple "stating that QBE would assume all claims handling functions relating to policies underwritten by QBE, including the run-off" and, at the same time, wrote to a number of Temple's coverholders asking them to deal directly with QBE in the future: § 11.
10. By a letter dated 9 January 2007 Temple wrote to the coverholders to whom QBE had written asking them to continue to deal with Temple. For the most part, these coverholders have complied with Temple's request: § 11.
11. QBE attempted to take over the operation of the bank account established in the name of, and operated by, Temple for the purpose of paying claims and collecting premiums. The bank refused to comply with this request pending the outcome of the arbitration: § 11.
12. There were two expert reports; the first, on behalf of Temple by Mr Parker, and the second, on behalf of QBE, from Sir Alan Traill, both experienced insurance practitioners. The following findings were made about their evidence (§15):
    a. The experts were not really able to help the arbitrator in relation to his task, which was construing the proper meaning of the agency agreement.
    b. Both experts agreed that in the majority of cases the normal procedure was for the agent to conduct the run-off, but Sir Alan Traill, in particular, stated that he could not "imagine that any responsible Coverholder in granting a Binder, would consider that he could not protect his interest to the full in the event of a breakdown in his relations with" the agent.
    c. There was no example in the evidence of any other Binder-type agreement where the agent was entitled as of right to conduct the run-off.

The terms of the underwriting agency agreement, the Coverholder Agreements, and the Certificates of insurance

10. There are three contractual documents; the underwriting agency agreement between Temple and QBE (the Binder); the Coverholder Agreements; and the Certificates of insurance. The Binder consists of 46 sections and 4 schedules, schedules 1 and 2 of which respectively contain model or pro forma Coverholder Agreements and the wording of Certificates of insurance for ATE and BTE insurances. Schedule 3 deals with claim management and settlement, and schedule 4 is a confidentiality

agreement. Subparagraph (4) of the Binder's interpretation clause provides that "the schedules form part of this agreement and shall be construed and shall have the same full force and effect as if expressly set out in the body of this agreement".

11. In this section I summarise the main provisions of the Binder and the other contractual documents. I only set out section 10, the crucial provision of the Binder for the purposes of this appeal, which deals with the effect of termination, and a few of the other contractual provisions in their entirety. The remaining provisions of the Binder, the Coverholder Agreements, and the Certificates of insurance to which I refer are set out or summarised in appendicies at the end of the judgment.

The terms of the Binder

12. Section 1 of the Binder states that Temple is QBE's agent and is authorised to bind ATE and BTE insurances; to authorise coverholders to issue policies; to receive and hold premium and claims moneys; to settle claims; and to market the specified insurances.

13. By section 2 Temple was obliged to operate a trust account in QBE's name for the purposes of receiving and holding money as an agent of QBE under the Binder.

14. Section 4 authorised Temple to delegate authority granted by the Binder to coverholders subject to the conditions set out. So, for example, section 4.1 obliged Temple to obtain Coverholder Agreements in substantially the same form as those in Schedule 1 and section 2.1.1 required all insurances bound to be substantially the same as the wordings specified by QBE in Schedule 2. Accordingly, pursuant to sub-paragraph (4) of the Binder's interpretation clause, the Coverholder Agreements and Certificates of insurance were incorporated into the Binder and formed part of it.

15. Section 8 sets out Temple's duties and obligations. These included; to use that level of care, skill and diligence as would reasonably be expected of QBE if QBE were itself performing the duties and exercising the powers (8.1.1), to use its reasonable endeavours to ensure that it continues to be permitted by the FSA to undertake such insurance mediation activities as may be necessary for it to fulfil its obligations (8.2), and to co-operate at all times with the FSA (8.4).

16. Section 9 is headed "Cancellation and Termination". Section 9.1 states which of the Binder's provisions are to survive its termination. These include; section 2 (holding premium and claims monies in a trust account in QBE's name); section 4.2 (agreement by Temple for delegated authority to a Coverholder to continue in force

until its natural expiry or 12 months from the termination or non-renewal of the Binder); section 10 (effect of termination); section 26 (bordereaux accounts and settlements); section 27 (commission and expenses); sections 33 and 34 (maintenance of records by Temple and inspection of them by QBE); and section 39 (confidentiality).

17. The circumstances in which the Binder may be terminated are set out in sections 9.2 – 9.5. By section 9.2, it may be terminated by either party giving to the other not less than 240 days notice. By section 9.3 the Binder terminates automatically with immediate effect if Temple is the subject of liquidation proceedings, an action in bankruptcy, has a receiver appointed or acknowledges its insolvency, or ceases to be authorised by the FSA. By section 9.4 QBE is entitled to cancel the Binder at any time with immediate effect if; Temple is in material breach and has not remedied such breach within 60 days of QBE giving Temple notice (9.4.1); any of Temple's directors, partners or employees are convicted of or charged with any criminal offence involving fraud or dishonesty or which may materially affect the operation of the Binder (9.4.2); there is a change of control in relation to Temple where such new control materially conflicts with QBE or where Temple's business plan is materially changed by any such new control (9.4.3); continued performance would be in breach of the Financial Services and Markets Act 2000, secondary legislation made under that Act, or any rule made by or condition imposed by the FSA upon QBE's or Temple's permission to carry on regulated activities (9.4.4); a change of law prevents this insurance being underwritten on the same basis (9.4.5); Temple enters into any line or Binder agreement with another insurer (9.5.2); or there is a significant change to the management of Temple (9.5.3).

18. I have said that section 10 of the Binder, which deals with the effect of termination, is the crucial provision for the purposes of this appeal. It provided as follows:

> "Upon and following the giving of any notice of termination pursuant to Section 9.2 or 9.4 or 9.5 Temple shall have authority to extend insurances already bound (or which may be bound during the period of such notice)."

> "10.1 Upon Termination

> 10.2.1 Temple shall immediately cease and shall have no further authority either to bind or offer to bind insurances or to renew any insurances but shall have authority to cancel, extend, amend or alter any insurances already bound;

> 10.2.2 unless otherwise agreed in writing by QBE, Temple shall remain liable to perform its obligations in accordance with the terms and conditions of this Agreement in respect of all insurances bound prior to Termination until every such

> insurance has expired or has otherwise been terminated PROVIDED that if Termination occurs pursuant to Section 9.3.6 [automatic termination due to withdrawal of FSA authorisation from Temple] Temple shall have no liability to perform such obligations to the extent that to do so would be in breach of the FSMA, any secondary legislation made thereunder or referred to therein or any rule made by or condition imposed by the FSA upon Temple's permission (if any) to carry on regulated activities and in such circumstances Temple shall co-operate in good faith with and comply with all reasonable instructions from QBE with a view to the appointment of such other person as QBE may choose to provide the services which Temple is unable to provide.
>
> 10.2.3 unless otherwise agreed in writing by QBE, Temple shall deliver promptly to QBE or its authorised representative all unused Certificates of insurance, other documents and other unused materials which it possesses in connection with the Agreement which might be used as evidence of insurance and which bear the name of, mark of or refer in any way to QBE."

19. Section 11 prohibited continuous contracts and section 11.2 required Temple to ensure that QBE was not committed to insurances which incept after termination of the Binder.

20. Section 16.4 provided that, in the event the Binder was terminated or cancelled, each insurance bound under it would run until its contractual expiry date, unless Temple cancelled it.

21. Section 21 provided that "all insurances bound" had to be in substantially the form specified by QBE in Schedule 2 to the Binder. Schedule 2 contained the Certificate of Insurance. Section 21.3 provided that: "Each Certificate shall show the name and address of Temple" and required each Certificate to state that "all claims and other enquiries shall be addressed to Temple" (section 21.3.1), and that "all complaints must be referred in the first instance to Temple" (section 21.3.2).

22. Section 24 of the Binder concerns the procedure for reporting and settling claims. Together with Schedule 3, it empowered Temple to settle claims below £25,000 without referring them to QBE. It required Temple to refer claims in excess of that sum to QBE who would deal with them, Temple liaising with and co-operating with QBE. Section 26 of the Binder governed "Bordereaux accounts and settlements". Section 26.4 provided: "During the period of this Agreement and any subsequent run-off period, if applicable, following termination or expiry QBE must ensure that

Temple is provided in advance with sufficient funds to settle claims in respect of which it has authority to adjust and settle" (emphasis added). Section 26.5 provided that: "Temple will retain" a claims fund of £100,000 until "expiry of all insurances bound under this Agreement" (emphasis added).

23. Sections 27 and 28 deal with commission and expenses. Section 27.1 provided that Temple was entitled to retain a maximum of 20% of the gross premiums paid. Section 27.5 provided that QBE would pay Temple a profit commission of 20% of the net ascertained profit calculated in the way the section specified. Section 28 required Temple to refund to QBE commissions on cancelled, terminated or abandoned insurances and to return premiums.

24. Section 30 made Temple responsible for the collection and payment of Insurance Premium Tax and other taxes, and for the maintenance of tax records. Section 33.1 required Temple to establish and maintain records of insurances bound, and to make those records available for inspection by QBE. Section 34 entitled QBE to audit the records of Temple on reasonable notice.

25. Section 39 dealt with confidentiality and the use of confidential information. Section 39.3 provided that neither party shall knowingly solicit or transact business in relation to the insurances bound with any of the other party's existing business producers nor cause or encourage such business producers to cease or restrict or reduce its custom, and prohibited QBE from taking advantage, to Temple's detriment, of its knowledge of Temple's business producers (i.e. its coverholders).

26. Section 46.3 imposes a duty on the parties to co-operate with each other to carry out and effect the intent and to fulfil the purpose of the agreement.

The Coverholder Agreements

27. At the hearing attention was focussed on the first of the two model Coverholder Agreements in Schedule 1 to the Binder. It is headed "Litigation Advantage Coverholder Agreement", and its sub-heading is "Temple Litigation Advantage Disbursements and Opponents Costs Insurance Scheme for Personal Injury Cases". The document carries what appears to be the date "9/2004" in its "footer", i.e. before QBE's involvement. Neither this document, nor the second Coverholder Agreement in Schedule 1, expressly named QBE. The summary below is of the terms of the Litigation Advantage Coverholder Agreement, which provided that it was to be signed respectively "on behalf of Temple Legal Protection Limited" and "on behalf of the Coverholder". The second model agreement was to be signed "for and on behalf of" Temple and the Coverholder.

28. The first paragraph of the Litigation Advantage Agreement provides that Temple allows the Coverholder to assess its client's cases for insurance and to issue a Certificate of Insurance in respect of eligible clients, that it is to be read in conjunction with the definitions, terms, conditions and exclusions of the Certificate wording "TEMPLE LIT ADV.092004" attached to it, and that words and phrases defined in the Certificate wording have the same meaning in it. The definition of "insurer" in the Certificate (see paragraph 42 below) thus applied to the Coverholder Agreements.

29. The second paragraph *inter alia* states that the Coverholder intends and understands that the information supplied by it to Temple is "to be and has been relied upon by insurers in deciding to enter into this agreement on the terms contained herein."

30. The **"Issuing Certificates"** and **"Term of Agreement"** provisions provided that no amendments may be made to the Certificate wording without Temple's prior agreement, and the agreement is to remain in force for a period of 24 months subject to specified rights of cancellation or renewal.

31. The **"Delegated Authority"** term authorised the Coverholder to give consent to issue, discontinue, withdraw, or settle proceedings or to decline any offer of settlement as insurers agent where the Certificate requires that insurers' consent is required. It required the Coverholder to keep a written record of all such consents given available for the insurer's inspection.

32. The **"Cancellation"** term provided that the Coverholder or Temple may cancel the agreement by giving 30 days' notice, and that the agreement may be cancelled with immediate effect upon breach of any of its terms and conditions or if Temple considered there to be a fundamental breakdown of trust or understanding with the Coverholder. It also provided that, if the agreement came to an end, the Coverholder must comply fully with the terms and conditions of the Certificate wording, and continue to fulfil its obligations under the agreement until all Certificates of insurance bound under it have been concluded.

33. The **"Eligible Risks"** term laid down a list of underwriting criteria. It provided that the Coverholder must issue and attach cover where the criteria are met and must refer cases falling outside those criteria to Temple. It also provided that the Coverholder should indemnify "Temple or its principal" against any payment and associated costs or interest if cover is not issued in accordance with the terms and conditions of the agreement.

34. The **"Procedures"** term required the Coverholder to notify Temple of any claim, any facts affecting the insured's prospects at trial and any challenge to the premium in costs assessment proceedings. It also provided that the Coverholder agreed to Temple's involvement in any Part 8 or detailed assessment proceedings

35. The **"Risk Bordereaux and Payment"** term required the Coverholder to e-mail bordereaux each month to Temple in a specified form. The "Premium Status" term stated that: "All premiums paid to the Coverholder shall be deemed to be held by the Coverholder as agent for Temple".

36. The **"Claims Administration"** term provided that Temple "will" administer all claims matters arising from policies issued under the agreement, and "shall" make any payments due to the insured, and that the Coverholder must not set off such claims payments against premiums due to underwriters. It also provided that the Coverholder must not agree the Insurer's liability under the Certificate of Insurance without Temple's written authority.

37. The **"Indemnity"** term provided that the Coverholder "… will indemnify Temple fully in respect of any payment that Temple or their principal makes under or in respect of the issue of the Certificate of Insurance together with any associated interest and costs and Temple and/or its principal will have no obligation to pay any disbursements or Opponent's costs" (emphasis added) if it *inter alia* issues Certificates of insurance in breach of the authority conferred, acts or fails to act negligently, or in breach of the conditions of the agreement or acts or fails to act in accordance with the delegated authority, or conducts the insured personal injury claim negligently.

38. The **"Arbitration"** term provided that in the event of any dispute "between the insured and the insurers", "both parties agree to seek to resolve the dispute by mediation or conciliation. …"

39. The **"Contracts (Rights of Third Parties) Act 1999"** term provided that:-

> "Any person, company, limited liability partnership or other body recognised by law who is not a party to this Agreement has no right under the Contract (Rights of Third Parties) Act 1999 to enforce any term of this contract (except as against the Coverholder by any principal of Temple who is obliged to provide an indemnity under an authority given to Temple

which has been further delegated by virtue of this agreement to the Coverholder)."

40. The **"Confidentiality"** term provided that:

> "Except where necessary to allow for the recovery of the Premium, neither the Insured nor the Coverholder nor the Appointed Legal Representative shall disclose the existence or terms of this Agreement to any third party without Temple's written agreement."

The Certificate of Insurance

41. Only the Certificate for ATE (after the event) insurance, set out in Schedule 2 to the Binder, was before me. It appears from the markings on the document before me that the document was originally prepared before QBE's involvement with Temple. This is because of the deletion indicated on page 2 of Europ Assistance Insurance Limited as the insurer.

42. The Certificate states that it "has been signed by the Coverholder on the authority of the insurer". Temple's name, address and corporate registration number appear immediately underneath this statement. Under the heading **"Insurer"** on page 2 of the Certificate it is stated "Temple Legal Protection Limited are specialist underwriters with authority to underwrite and manage this insurance on behalf of QBE Insurance (Europe) Ltd". Under the heading **"Complaints"** on page 6 of the Certificate QBE's name and address are given as the insurer's head office and registered address. On page 2 the **"Coverholder"** is stated to be:-

> "The solicitor or firm of solicitors or legal entity, if applicable, named in the Schedule who has authority under a Coverholder Agreement with insurers to arrange this insurance on behalf of the insured and who has conduct of the Legal Action".

43. Under **"Exclusions"**, paragraph 8 excludes "disbursements or opponent's costs where the Legal Action is abandoned, discontinued or settled without the insurer's prior written consent or where any conditional fee agreement has been amended without the prior written agreement of the insurer". Paragraph 12 excludes "disbursements that, in the insurer's opinion, have been incurred unreasonably or unnecessarily".

44. Under the heading **"Conditions"** there is a subheading **"Co-operation"** in which it is stated *inter alia* that:

> "The insured must not cause any unreasonable delay and must provide, obtain or execute all documents and attend meetings, examinations, conferences or hearings as requested by the appointed legal representative or by the insurer."

and

> "The insured hereby gives irrevocable instructions to the appointed legal representatives;
>
> to provide the insurer with such information, documentation or particulars whether privileged or not relating to the legal action as they require,
>
> to notify the insurer of any fact or matter adversely affecting the prospects of a successful outcome for the insured…"

45. Condition 4 is headed **"Conduct of the Legal Action"**. It provides:-

> "The Insured irrevocably authorises the Appointed Legal Representative to inform the insurer in writing of any offer to settle Legal Action, including an offer made prior to the commencement of proceedings which the insured is minded to refuse and prior to refusal being communicated to the Opponent. If the Insured rejects an offer of settlement or payment into court that the insurer considers to be reasonable, no indemnity will be provided under this Certificate of Insurance and the Premium will become immediately payable."

> "The Insured agrees that the Legal Action will not be settled or discontinued in circumstances which could give rise to a Claim under this Certificate without the insurer's prior written consent."

> "The Insured agrees that proceedings will not be commenced without the insurer's prior written consent and irrevocably authorises the appointed Legal Representative to obtain such consent from the insurer. If the insurer's prior written consent is not obtained, no indemnity will be provided under this Certificate of Insurance and the Premium will become immediately payable."

46. In the section of the Certificate headed **"Operation of the policy"** there are provisions for the payment of costs, appeals and subrogated claims, cancellation, insolvency of the insured, disputes and governing law, and a **Contracts (Rights of Third Parties) Act 1999 clause**. The last of these is in virtually identical terms to the clause in the Coverholder Agreement. The only differences are that the exception to the exclusion of any right under the 1999 Act applies to rights against "the insured" (instead of "the coverholder") by any principal of Temple who is obliged to provide an indemnity under an authority which has been further delegated and that the authority delegated is by virtue of "this Certificate of Insurance" (rather than by virtue of the Coverholder Agreement "to the Coverholder").

47. In the section headed **"Complaints"** it is stated that Temple aims to provide first class service at all times but sets out the procedure available to resolve any complaint regarding the standard of service received. It states that in the first instance the dissatisfied person should write to the Managing Director of Temple and that, if not satisfied with the response from Temple, to the Managing Director of QBE, and thereafter the Financial Ombudsmen Service.

48. The insurance documentation also contains a **"Key Facts"** policy summary. This states that the insurance provided is underwritten by QBE. The significant exclusions and limitations include no cover for opponent's costs and own disbursements "where a case is no longer pursued without Temple's written consent". The key facts state that the insured agrees to provide Temple with information, documentation or details relating to the case. It also states that "if there is any deterioration in the prospects of a successful outcome at trial Temple may cancel the policy immediately", and that any claim under the policy should be notified to Temple.

The Arbitrator's decision

49. Paragraph 18 of the Award states:

> "It was, I think, common ground between Mr Popplewell and Mr Butcher that the essence of what I have to decide is the true construction of section 10.2.2 of the Binder. Both of them started with the actual wording, and each put his own spin on how he submitted that that wording must be read. For me that is not the starting point. I must remember that these words, which differ from the wording used in the other examples of agreements of this kind which were put in evidence, were brought into existence in the context of the general law of agency, and that law is set out in the wording of paragraph 10-023 of Bowstead on Agency which I have quoted above. Looking again at that wording I am struck by the specific comment that authority granted under an agency agreement can

> be "terminated by the principal giving to the agent notice of revocation at any time before the authority has been completely exercised, or by the agent giving to the principal notice of renunciation accepted by the principal". Looking at that wording, it appears to me to be addressing two quite separate sequences of events. The first is where the principal wishes to terminate the authority, in which case unilateral notice is normally sufficient, and the second is where the agent wishes to renounce his authority, in which case there is a requirement for mutual agreement in that the principal must accept the renunciation. Applying those two separate principles to the wording of section 10.2.2 I am struck by the fact that the wording really only deals with the situation arising if Temple wished to renounce its liability to carry out the run-off, and expresses the requirement of the common law that it could only do so if the principal QBE agreed. I accept that, in those circumstances there is a requirement for mutuality, and to that extend Mr Butcher was right to say that the use of the word "agreed" envisages some sort of consensus. However, it seems to me that the wording of section 10.2.2 does not address at all the possibility of a termination notice in relation to the run-off being given by QBE, the principal, and, if that is right (and I can see no alternative) then the Binder simply incorporates the common law position, and under the terms of the Binder QBE is free to terminate Temple's authority to conduct the run-off by unilateral notice."

50. In paragraph 19 the Arbitrator stated that for the purposes of his award, that disposed of the claims made but he then dealt with the individual submissions made.

The Claimant's submissions

51. On behalf of Temple Mr Butcher submitted that the Arbitrator fell into error in starting from the common law position and thereafter concluding that QBE was entitled to revoke Temple's authority to conduct the run-off business. He submitted that the Arbitrator did not approach the construction of the words used by the parties in the Binder against the objectively ascertained commercial purpose of the contract but started from the fact that the words used were brought into existence in the context of the general law of agency. The Arbitrator began by assuming an intention apart from the language of the Binder itself and, having made that assumption, "forced" or "worked" the contractual language in favour of the assumption so made, contrary to the principles set out in, for example, *Leader v Duffy* (1888) 13 App. Cas. 294 at 301 and *Pagnan SpA v Tradax Ocean Transportation* [1987] 1 All ER 81 at 88. Mr Butcher also submitted that the Arbitrator confused the question whether the Binder entitled QBE as principal unilaterally to revoke the authority of Temple, the agent, and the separate question, whether on the relevant facts, there was a common law power to revoke. A distinction is made between the two in the

section of *Bowstead and Reynolds on Agency* (Article 120 and the notes to it) on which the Arbitrator relied. Mr Butcher's third submission under this heading was that the Arbitrator erred in concluding that; (a) there is an unqualified and overriding common law right in a principal to revoke an agent's authority; (b) this common law right to revoke applied in the circumstances of this case; and (c) the common law position was incorporated into the Binder.

52. Mr Butcher submitted that the correct starting point is the language of the Binder construed in its commercial context and in accordance with its commercial purpose. In this case the commercial context was that the Binder was part of a multi-contractual scheme, one of a series of interlocking contracts scheduled to, and part of or incorporated into the Binder. Those contracts reflected long-term contractual relationships involving a form of insurance with a long term run-off between Temple and other parties, in particular its network of Coverholders. If QBE is permitted to revoke Temple's authority to conduct the run-off business, Temple would be prevented from performing the obligations under the linked contracts which it owed to third parties and would thus interfere with the rights of those third parties. It would also interfere with important interests of Temple with regard to, in particular, information about its entitlement to commission, and involvement in any discussions or proceedings about the amount of premium.

53. He placed significant weight on the decision of Langley J in *Europ Assistance Insurance Ltd v Temple Legal Protection Ltd* [2007] EWHC 1785 (Comm), given shortly after the Arbitrator's Award in this case. Europ Assistance was QBE's predecessor as the underwriter of business bound by Temple. The Arbitrator did not know that case was pending when the delivered his Award in the present case. In that case Langley J rejected an application by Europ Assistance for interlocutory injunctions entitling it to take over business bound by Temple in run-off. He stated that the commercial and goodwill relationships with the coverholders were Temple's business, that Europ Assistance had no continuing interest in the business, and that, if Temple was unable to continue the scheme, or participating coverholders were compelled to work with EA, there was a real risk of damage to Temple's business.

54. Mr Butcher submitted that the Arbitrator erred in refusing to take into account the evidence before him as to the commercial and factual background to the Binder. His first reason, that it is a "truism that extrinsic evidence is rarely, if ever, admissible in the construction of a written agreement" (Award paragraph 17) was wrong in law in the light of the principles established in decisions such as *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 778, *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912-913, and *BCCI v Ali (No. 1)* [2002] 1 AC 251. Secondly, while the parties' agreement that the evidence should go before the Arbitrator in writing only meant that disputed matters were not tested by cross-examination, much of the relevant evidence was not in dispute. This included the evidence as to Temple's business and

relations with coverholders, its functions under the Coverholder Agreements and the relative experience of Temple and QBE in legal expenses insurance business.

55. As to the terms of the Binder, Mr Butcher submitted that on its true construction and in its context (notably the terms and provenance of the Coverholder Agreement) it, and in particular clause 10, precluded QBE from taking over the run-off from Temple. He submitted that paragraph 10.2.2 deals expressly with the question whether or not QBE is entitled, without Temple's agreement, to take over such rights and obligations of Temple which were expressed to survive termination of the Binder, and provides that QBE was not so entitled. He submitted that the other provisions of the Binder are all predicated on Temple performing the run-off. Taken as a whole the provisions show that a scenario in which Temple was not performing the run-off was not envisaged as a serious possibility. I deal with his detailed submissions in the next section.

Discussion

56. The Arbitrator found *inter alia* that the normal procedure in the insurance market is for the agent to conduct the run-off. The issue before me is whether, in the particular circumstances of this case and the terms of the Binder entered into by Temple and QBE, this is not a matter of practice but an entitlement. Neither the terms of the Binder, nor those of the Coverholder agreement, or the Certificates of insurance provide a clear answer to the question. The Binder is not, as Mr Butcher accepted in the context of section 10.2.2 (see paragraph 72 below), drafted with care as to every word. The Coverholder Agreements and Certificate of Insurance appear to be based (perhaps substantially based) upon contractual documents prepared by Temple before QBE became involved. Both Mr Butcher and Mr Popplewell were able to mine the provisions of the various contracts in support of their cases. Neither sought to justify the Arbitrator's reasoning or approach in particular as to the common law of agency although Mr Popplewell submitted that the result he reached was correct.

57. The words of the Binder must be construed and understood in their objective commercial context without, as Steyn J stated in *Pagnan SpA v Tradax Ocean Transportation* [1987] 1 All ER 81 at 88, "any preconception as to what the parties intended". "The court's task is simply to determine the meaning of the provision, against its contractual and contextual scene", also referred to as the "matrix of fact". In *ICS Ltd. v West Bromwich BS* [1998] 1 WLR 896 at 912-913 Lord Hoffmann stated that this phrase includes anything which would have affected the way the language of the document under consideration would have been understood by a reasonable man, and enables not only a choice to be made between the possible meaning of words which are ambiguous, but "even … to conclude that the parties must, for whatever reason, have used the wrong words or syntax". In this case the Binder is one of a series of linked contracts, the others being the Coverholder Agreement and the Certificate of Insurance the terms of which were part of the Binder. While the provisions of the other contracts are important and must be considered together with the commercial context, the starting point of the analysis

must be the provisions of the Binder. It is necessary to deal with the detailed and complex submissions concerning the Binder, the Coverholder Agreements, the Certificate of Insurance, and those based on the general law of agency. Before I do so, however, I explain my approach to the decision of Langley J in *Europ Assistance v Temple* [2007] EWHC 1785 (Comm.) and give a summary of my conclusions.

Europ Assistance v Temple:

58. I have taken into account the judgment of Langley J and in particular what his Lordship stated (paragraphs 16 & 17) about the respective interests of Temple and its then underwriter in the relationship with Coverholders, and about (paragraph 19) the effect of granting relief enabling Europ Assistance to take over the run-off. However, Langley J was not concerned with the substantive issue in those proceedings or that before me. He was concerned with an interlocutory application in which the balance of convenience was determinative. Moreover, it was accepted (paragraph 4) that for the purposes of that interlocutory application, Europ Assistance was not a party to the Coverholder Agreements and that Temple entered them as principal. The terms of the Coverholder Agreements and the Binder in that case are not before me and may well be different. Here the issue is as to the contract in the Binder. There the causes of action (see paragraphs 13-14) were alleged unlawful interference with contract, causing loss by unlawful means, and breach of trust in failing to pay over moneys in the bank account used by Temple to hold premiums and pay claims. Langley J considered that the unlawful means relied upon were "inventive but thin", and little more that an assertion by Europ Assistance that it was entitled to step into Temple's shoes. He stated that historically Temple had discharged its duty to account for money and that there was no evidence of any loss since April 2005 (paragraph 16).

59. These differences mean that, while I gain assistance from Langley J's judgment as to Temple's factual involvement with the Coverholders, it is ultimately of limited assistance in the resolution of the matters before me. Langley J was concerned with the classic *American Cyanamid* factors. He concluded that, there was a real risk of damage to Temple's business which would be difficult both to prove and to quantify, whereas Europ Assistance's concerns could be preserved pending a trial. For this reason and because of the concerns and rights of third parties, the status quo had more than its usual significance. As in many interlocutory applications, the case has not proceeded to trial. The matter has been settled.

Summary of my conclusions:

60. My overall conclusion is that neither the contractual matrix, nor the commercial context, nor the indications from the general law of agency suffice to establish an entitlement in Temple to conduct the run-off. The Binder does not confer such entitlement. The language of section 10.2.2 of the Binder (discussed in detail in paragraphs 71-74 below) is in terms of an obligation or duty on Temple, not a right.

61. Although there are clauses in the Binder which survive its termination as a result of section 9.1 and those clauses are applicable if Temple manages the run-off, the terms of those clauses are not such as to show an entitlement in Temple to conduct the run-off. Those clauses are entirely consistent with Temple being under a liability to manage the run-off unless QBE agrees otherwise. Moreover, a number of clauses, which are an important part of the contractual structure while authority to write new business exists, and which would also be important if Temple had an entitlement to manage the run-off, do not survive the termination of the Binder. I refer in particular to sections 8 and 24. Section 8 contains Temple's duties and obligations including duties of care, skill and diligence. If it was contemplated that Temple was to be entitled to conduct the run-off business after termination, why is it only Temple's obligation under section 8.4 to co-operate with the FSA that survives termination? Why, in particular, does Temple's obligation to act with care, skill and diligence, not survive? Section 24, setting out the procedure Temple is to follow for reporting and settling claims, does not survive the termination of the Binder. Why, if Temple is entitled to conduct the run-off business after termination, does the procedure for reporting and settling claims not survive its termination?

62. Importantly, on Temple's submissions it would be entitled to manage the run-off in all circumstances after the Binder is terminated save where termination is under section 9.3.6. Section 9.3.6 entitles QBE to terminate the Binder where the FSA has removed Temple's authority to act in whole or in part. On Temple's argument, it would thus be entitled to manage the run-off even if the Binder was terminated because of its fraud, because one or more of the named directors and partners who were authorised to write business and manage claims had been convicted of a criminal offence, or as a result of a change of control. Temple invites the court to construe the Binder as providing an entitlement in it to conduct the run-off even in such situations. One would expect a more nuanced approach such as there is in relation to entitlement by Temple to commission after termination. Whereas Temple's entitlement to commission generally survives termination, section 27.2 of the Binder provides that Temple is not entitled to have profit commission paid where it terminated the Binder or where the termination is under section 9.4.2. Section 9.4.2 entitles QBE to terminate where one of Temple's partners or employees has been charged or convicted with fraud of dishonesty affecting the operation of the Binder.

63. Do these considerations and the more detailed analysis of the words in the Binder, the Coverholder Agreements and the Certificates of insurance in the rest of this judgment lead to a conclusion that (in Lord Diplock's words in *The Antaios* [1985] AC 191, 201) "flouts business commonsense"? I have concluded that that they do not. Undoubtedly, the relationship between Temple and the Coverholders is important and significant. As is seen from the statements in *Callery v Grey* and *Rogers v Merthyr Tydfil CBC*, Temple has been an important player in this market for a number of years. By 2004 it was generating a gross premium income from legal expenses insurance of some £5.6 million. QBE was a newcomer to this

market. Temple's expertise and the long-term nature of the run-off of legal expenses insurance policies tend to support the submissions made on its behalf. These factors must, however, be set against the unattractiveness of construing a commercial contract so as to require a principal who has terminated a Binder because of serious misconduct or incompetence by his agent being obliged to allow that agent to continue to manage the principal's risks and his money over many years until the end of the litigation which is the subject of the insurance. The long-term nature of the run-off in this type of insurance is thus a factor that cuts both ways.

64. For these reasons and those set out below, I have concluded that, whether or not QBE is a party to the Coverholder Agreements (and it will be seen that I do consider it to be a party to those agreements), the rights and obligations of Temple and the Coverholders to each other must be construed as subsisting only for so long as Temple has authority to manage the run-off. Finally, I do not consider that the common law principles of agency preclude any right of QBE to revoke Temple's authority to manage the run-off or indicate that the Binder should be construed as entitling Temple to do so.

65. I now turn to the detailed submissions and my detailed conclusions on each of the contracts and the general principles of agency.

The terms of the Binder:

66. It is common ground that section 1 of the Binder, the clause conferring authority on Temple to act as agent for QBE, is not one of the clauses identified in section 9.1 as surviving the termination of the Binder. Mr Popplewell's submission is that this means that, *prima facie*, all Temple's authority to act on behalf of QBE ceases on termination unless such authority is conferred elsewhere in the Binder. Mr Butcher submissions did not rely on section 1 but on section 10. He submitted that on its true construction, and in context, the Binder, and in particular section 10, precluded QBE from taking over the run-off from Temple. There were three parts to his submissions on section 10.

67. *Section 10.2.1:* Mr Butcher argued that the entitlement expressly conferred on Temple in section 10.2.1 to "cancel, extend, amend and alter insurances already bound" after termination shows that Temple's entitlement and authority continued after termination in respect of insurances already bound. If QBE is entitled unilaterally to remove Temple it could deprive or at least make it impossible for Temple to exercise that right. Mr Butcher submitted that section 10.2.1 shows that with regard to existing insurances, Temple's authority continues after termination, that is during the run-off period.

68. QBE's position on section 10.2.1 changed after it filed its skeleton argument. At the hearing Mr Popplewell submitted that section 10.2.1 does not provide authority in relation to post-termination administration of the run-off of business already written. He submitted that the last part of section 10.2.1, which gives "authority to cancel, extend, amend or alter any insurances already bound", is a proviso to be construed as ancillary and supportive of the principal function of the provision. The principal function of section 10.2.1 is to remove Temple's authority to bind. Mr Popplewell submitted that the words "authority to cancel, extend, amend or alter any insurances already bound" are necessary to give effect to the requirement in section 11.2 that "Temple's responsibility is to ensure that no risks incept after termination" in respect of ATE business. This is because the Coverholder Agreements in the form contained in Schedule 1 envisaged authority being given to coverholders to write business for 24 months, that is a period which could extend beyond the termination of the Binder. He submitted that the purpose of this part of section 10.2.1 is to allow Temple (pursuant to the 30 day cancellation provision in the Coverholder Agreements) to change the Coverholder Agreements for this purpose once the Binder is terminated. The form of the modified agreement would have to be in accordance with the requirements of section 4.2. Accordingly, he submitted that this part of section 10.2.1 is aimed at preventing new risks attaching and not with the administration of business already written.

69. Mr Butcher responded that this argument is misconceived, is inconsistent with QBE's primary argument that all of Temple's run-off functions can be removed by QBE unilaterally, and is "untenable", "impossibly strained" and has obvious flaws: see Temple's written note dated 20 February 2008 submitted after the hearing in response to QBE's written submissions filed on 18 February.

70. I reject Mr Popplewell's submission that the provision in the last part of section 10.2.1 is only to enable Temple to ensure that no risks incept after termination. It does not, however, follow that, as Mr Butcher submitted, this part of 10.2.1 shows that Temple's authority in respect of existing insurances applies to the administration of the run-off and in particular the premium and claims handling activities described in sections 1.1.3 to 1.1.6. This is because the "authority to cancel, extend, amend or alter any insurances already bound" conferred in the last part of section 10.2.1 does not grant Temple authority to perform the classic run-off functions of handling claims, claims monies, or accepting, processing and accounting for premium. The fact that section 24 of the Binder setting out the procedure Temple is to follow for reporting and settling claims does not survive the termination of the Binder (see paragraph 61 above) is also a pointer. There is no anomaly in the word "insurances" in section 10.2.1 referring to Coverholder Agreements rather than individual contracts of insurance written thereunder because that is the sense in which the term "insurances" is used in sections 1.1.1 and 3.1 of the Binder. For these reasons I have concluded that section 10.2.1 does not of itself assist the argument that there is an entitlement in Temple after termination to administer the run-off.

71. *Section 10.2.2:* Mr Butcher argued that section 10.2.2 deals expressly with the question whether or not QBE was entitled, without Temple's agreement, to take over such rights and obligations of Temple which were expressed to survive termination of the Binder. While section 10.2.1 makes it clear that, upon termination of the Binder, Temple has no further authority to bind or offer to bind insurances or to renew any insurances, authority to cancel, extend, amend or alter any insurances already bound remains. Section 10.2.2 provides that Temple "shall remain liable" to perform its obligations in accordance with the Binder in respect of all insurances "bound prior to termination" unless otherwise agreed in writing or the proviso to it applies. Apart from those matters for which Temple's authority ceases pursuant to 10.2.1, he submits those obligations include the management and settling of claims in respect of insurances bound prior to termination, the collection of premiums and the other obligations Temple undertakes under the Coverholder Agreements.

72. Mr Butcher submitted that QBE's submission (skeleton argument paragraphs 18-20) as to the use of the word "agreed" in the phrase "unless otherwise agreed in writing by QBE" in 10.2.2 is not a helpful way of looking at a commercial agreement not drafted with care to every word. He submitted the phrase does not mean that QBE can make a unilateral decision to remove Temple from the business. The verb "agree" involves a mutual accord or consensus. The reference to Temple remaining "liable to perform its obligations" is simply a reference to Temple being liable to perform the tasks which will have to be performed in carrying out the run-off in accordance with the terms of the Binder. He also relied on the fact that in this part of section 10.2.2 the language of "agreement" is used whereas, in the proviso to 10.2.2, where Temple does not remain "liable to perform its obligations", the language of "instruction" is used.

73. As the Arbitrator found, section 10.2.2 contemplates a scenario in which Temple does not wish to act and provides that Temple is under an obligation to do so unless QBE agrees otherwise. Its language is not the natural language that would be used to indicate the creation of an entitlement in Temple. It does, as Mr Popplewell submitted, appear to be a provision for the benefit of QBE imposing an obligation on Temple to continue to perform functions as an agent following termination unless QBE agrees otherwise. It does not concern Temple's authority or entitlement, but Temple's obligations. The natural meaning of the words used is that Temple's obligation as QBE's agent after termination continues in relation to business written and that QBE is entitled either to insist on Temple conducting the run-off or its release from its obligation to do so. The construction urged on the court on behalf of Temple would seek to replace the word "liable" by the word "entitled" and the word "obligations" by the word "authority". For this reason there is force in Mr Popplewell's submission that the interpretation which Mr Butcher urged on the court seeks to re-write the section and "to mangle the plain meaning of the language". Does the context of section 10 or the remaining provisions of the Binder indicate otherwise?

74. I reject Mr Butcher's submission that all the examples in the Binder of the use of the word "agree" envisage a mutual agreement although most (all save that in 10.2.3) envisage or assume that Temple wants the thing to which QBE *can* agree. Although the different contexts of the various references must be taken into account, all are examples of provisions for the benefit of QBE which bind Temple unless QBE releases or relaxes Temple's obligations. Thus, for example, the limits on net premium income are limits at QBE's option.

75. *The proviso to section 10.2.2:* The proviso to section 10.2.2 deals with the situation where Temple ceases to be permitted by the FSA to undertake the activities necessary for it to fulfil its obligations under the Binder. It provides that if termination occurs pursuant to section 9.3.6 because Temple has ceased to be authorised to undertake the business by the FSA, Temple shall have no liability to perform the obligations to the extent that to do so would be in breach of the Financial Services and Markets Act, any secondary legislation made under it, or any rule or condition imposed by the FSA.

76. Mr Butcher relied on the contrast between the first part of 10.2.2 and the proviso. The proviso states that if termination occurs pursuant to section 9.3.6, it should (see paragraph 55 of his skeleton argument) "cease to conduct business" but should co-operate with all reasonable instructions from QBE with a view to the appointment of a substitute to manage the business. There is, he argued, a need for such co-operation in all cases where Temple is required to cease to perform its obligations during the run-off. Accordingly, the absence of any such "co-operation" clause in the first part of section 10.2.2 shows that it was not contemplated that Temple could be compelled to divest itself of its management functions during the run-off. Moreover, the language of the proviso includes the term "instructions" in contrast to the language of the first part of section 10.2.2 which uses the term "agreed". There would, in Mr Butcher's submission, be no need for the proviso if QBE is entitled to decide in all circumstances to step in and remove Temple from conducting the run-off business. Mr Butcher also submitted that any other conclusion was inconsistent with the Coverholder Agreements and the Certificates of insurance. This is because, under the Coverholder Agreements, Temple has a series of obligations about the administration of claims concerning risks already bound and the coverholders have the right under those agreements to have those matters dealt with by Temple.

77. The difficulty with this argument is that it rests the entire protection of QBE and its funds held by Temple on the FSA stepping in and on the Binder being terminated pursuant to section 9.3.6. Mr Butcher submitted that this was as it should be because whether Temple had acted fraudulently, negligently or had seriously misbehaved might be in dispute. As far as holding QBE's monies is concerned, he submitted that Temple's obligation under section 2.1 to hold premium and claims monies in a trust account in QBE's name provided QBE with a sufficient safeguard. Section 9.3.6, however, is only one of the events which trigger termination. I have

summarised the other circumstances in which the Binder may be terminated in paragraph 17 above.

78. Section 9.2 enables either party to terminate by giving 240 days notice. If Temple terminates the Binder pursuant to this provision or otherwise, section 27.4 dealing with profit commission (the second clause 27.4 in the document) provides that commission "earned or outstanding" will cease to be paid. In these circumstances, while Mr Butcher's submissions about Temple's relationship with coverholders apply, those about its interest in collecting its commission directly by retaining a proportion of the premiums and in receiving information about premiums and thus its commission do not apply to this type of commission. The findings of the Arbitrator in this case (paragraph 9(11) above) shows the limit to the effectiveness of the protection afforded to QBE by the requirement that Temple hold monies in a trust account in QBE's name.

79. The other provisions in section 9 which trigger or authorise termination automatically or with immediate effect are also intended to protect QBE even without, or in advance of, the FSA stepping in. Each of the events entitling QBE to terminate are events giving rise to a situation in which QBE may have legitimate concerns about Temple's competence, honesty, or capacity to act on its behalf and with the undivided loyalty which is at the heart of a fiduciary relationship. Some of these events, for instance a failure to adhere to underwriting limits giving rise to an entitlement to terminate under section 9.4.1, are unrelated to FSA regulations and so cannot realistically be seen as in themselves producing circumstances in which the FSA might intervene and trigger section 9.3.6. Even if they did, if the Binder was terminated pursuant to one of them, say section 9.4.1, the proviso to section 10.2.2 would not apply. I accept Mr Popplewell's submission that it would be most surprising if Temple were entitled to insist on carrying out the run-off, handling and holding QBE's money, and potentially affecting QBE's goodwill and reputation in all the circumstances in which the Binder had been validly terminated except in those falling within the proviso to section 10.2.2, i.e. termination pursuant to section 9.3.6.

80. Temple's position is that it is entitled to carry out the run-off where it has repudiated or renounced the Binder by a material and serious breach, where the Binder has been terminated because of its serious mismanagement of the administration of the business, or under section 9.4.2 where one of its directors, partners or employees is convicted or charged with a serious criminal offence which might materially affect the operation of the Binder. This is so even though the provision on profit commission in the second section 27.4 provides that profit commissions, whether earned or outstanding, will cease to be paid if the Binder is terminated under section 9.4.2. On Temple's argument, if one of its directors or one or all of the individuals named in section 3 as able to write business or in Schedule 3 as authorised to conduct claims handling is charged with a criminal offence or is convicted of that offence, QBE would not be entitled to move to protect its funds and its position

until the FSA has acted. It appears to be Temple's position that it is also entitled to conduct the run-off where it or those controlling it have acted dishonestly in the management of the business.

81. A similar point can be made about sections 9.3.1-9.3.5 of the Binder. These sections provide that the Binder will terminate automatically with immediate effect if Temple is insolvent. On Temple's argument, QBE could not immediately ensure that premiums are paid directly to itself. Temple's liquidator could insist on conducting the run-off whether or not that liquidator was a person or corporate entity with relevant experience.

82. I have referred (paragraphs 61 and 73) to the fact that section 10.2.2 is worded in terms of Temple's obligations, not its authority or entitlement. Temple's submissions on the proviso to section 10.2.2 assume that where the proviso does not apply Temple is entitled to perform the run-off. What the proviso in fact states is that Temple "shall have no liability to perform such obligations to the extent that to do so would be in breach of statute or regulatory provision". The provision imposing a duty on Temple to co-operate with QBE with a view to the appointment of another person to provide the services which Temple is unable to provide must be seen in this context. On behalf of Temple it is submitted that, since the Binder imposes a duty on Temple to co-operate with QBE with a view to QBE's appointment of another person to provide the services where Temple is not liable and/or entitled to perform those services, the absence of a duty to so co-operate in other situations indicates an entitlement by Temple to conduct the run-off. This does, however, not follow. The proviso to section 10.2.2 is addressing the situation in which Temple is not permitted by its regulator to perform some of its obligations or its ability to do so is made subject to conditions. The duty to co-operate arises in respect of those obligations that Temple is not under a liability to perform. The provision envisages Temple providing such services as it is able to provide with an alternative person or entity providing those services which Temple's regulator does not permit it to provide. In such circumstances there is an obvious need for co-operation between the different entities providing the services and to know who is in control. Hence the references to "reasonable instructions" from QBE. Moreover, Temple is, in fact, under a duty to co-operate with QBE by virtue of section 46.3, a provision which (see section 9.1) survives the termination and thus applies in respect of events thereafter, including a decision by QBE to conduct the run-off itself.

83. *Other provisions:* What of the other provisions of the Binder? Section 9 provides that a number of the provisions of the Binder "shall survive" its termination. Do those provisions provide support for the argument that section 10 preserves Temple's authority in respect of insurances already bound and its entitlement to administer the run-off business regarding them after the termination of the Binder? Mr Butcher submitted that the following terms of the Binder provide strong support for this interpretation of section 10.

84. Mr Butcher submitted that, in the light of the agreement by the experts that the normal procedure is for the agent to conduct the run-off, the fact that there is no provision for Temple not to conduct the run-off shows that this was not envisaged as a serious possibility. He also relied on section 26.4's express inclusion of "any subsequent run-off period" in relation to the requirement that QBE provides Temple with sufficient funds to pay claims, the requirement in section 26.5 that Temple establish and retain a claims fund out of net premium income which is to be repaid to QBE "upon expiry of all insurances bound" under the Binder, and the provision in section 16.4 that "in the event that the agreement is… terminated each insurance bound… shall run to its contractual expiry date unless cancelled by Temple in accordance with its individual cancellation provisions". He submitted that the clear implication of section 16.4 is that nobody other than Temple is expected to perform such an act.

85. Mr Butcher also relied on sections 27.1, 11, and 39.3. Section 27.1 entitles Temple to retain 20% of gross premium by way of commission. Mr Butcher argued that, if QBE is entitled unilaterally to terminate Temple's management of the run-off, Temple would no longer be able to monitor its entitlement to commission directly, would be obliged to seek information from QBE about the amount of premium which is not fixed at the outset in ATE insurance, and would have to seek to recover it. Mr Butcher submitted that it would be striking to say that QBE could deprive Temple of the right to 'retain' the premium even though this is not spelled out anywhere in the Binder. Sections 11 and 21.3 provide that Temple should ensure that QBE is not committed to insurances which incept after termination of the Binder, and that each policy issued by Temple or its coverholders include a statement that all claims and other enquiries should be addressed to Temple. Mr Butcher submitted that these assume that Temple will retain effective control of dealings with coverholders during the run-off of the business.

86. As to the confidentiality provision in section 39, whereas section 39.3 precludes QBE from transacting business with Temple's coverholders and from causing them to restrict or reduce their custom with Temple, there is no equivalent provision binding Temple *vis-à-vis* QBE. QBE is also prohibited by section 39.1 from using knowledge of Temple's business affairs to gain a commercial advantage over it. Mr Butcher argued that the different way the provisions deal with QBE and Temple, show that they, in particular, section 39.3, recognise Temple's strong interest in maintaining direct and close interest with its coverholders.

87. Finally, Mr Butcher submitted (skeleton argument paragraph 64) that the absence of any mechanisms in the agreement (apart from the obligation to co-operate where the proviso to section 10.2.2 applies) to allow QBE to take over the functions of Temple without its agreement show that Temple was to manage the run-off of the business after termination. Had it been envisaged that QBE was to do this there would have

been provision for obligations in the Coverholder Agreements and policy Certificates which are expressly to be performed by or to Temple to be varied so as to provide for performance by or to QBE, for QBE to obtain bordereaux or premium payments from coverholders rather than from Temple, and for Temple to receive commission income from QBE in respect of sums due but paid after termination.

88. In my judgment it would be striking to say that QBE could not remove Temple as run-off agent even where Temple had acted dishonestly or with gross negligence in its conduct of the Binder. It is possible to say that fraud unravels everything and should be treated differently. There is, however, nothing in the Binder to indicate that there is a distinction between termination for fraud and termination on the other grounds authorised or made automatic by section 9 of the Binder. Moreover, as I have observed in paragraphs 61 and 70, if it was contemplated that Temple was to be entitled to conduct the run-off business after termination, there would have been provision for Temple to be obliged to do so with care, skill and diligence and for there to be a procedure for reporting and settling claims. The provisions of the Binder dealing with these matters (sections 8 and 24) do not, however, survive its termination.

89. As to the other provisions relied on by Mr Butcher, section 21.3, like section 24, does not survive termination of the Binder. Neither it nor section 11 assist in showing that Temple has an entitlement to conduct the run-off as opposed to making provision for the situation where, pursuant to its obligations under section 10.2.2, it is liable to conduct the run-off. Section 16.4 is another of the Binder's provisions which do not survive termination pursuant to section 9.1. Although it nonetheless envisages activity by Temple in the form of cancelling an insurance in accordance with the individual cancellation provisions, the fact that it does not survive termination suggests that it was not a provision seen as concerned with an entitlement in Temple to handle the run-off. Its wording and the fact that it does not survive termination suggests strongly that the parties did not envisage Temple having an irrevocable right to conduct the run-off. It certainly does not confer such a right.

90. Similarly, section 26.4, which explicitly refers to the run-off period, does not deal with authority to conduct the run-off or entitlement to do so. It deals with what happens if Temple is conducting the run-off pursuant to its obligation under section 10.2.2. The position is similar in respect to the claims fund dealt with in section 26.5.

91. I do not consider that section 27.1 is a pointer to Temple having an entitlement to conduct the run-off. Mr Butcher's argument relied on Temple needing to monitor its entitlement to commission directly. However, where the agreement is terminated under section 9.4.2, or by Temple, section 27.4 provides that profit commissions

will cease to be paid. In such circumstances Temple would not have an entitlement to profit commission. Moreover, the submission that it would be striking to say that QBE could "deprive" Temple of the right to retain the premium, even though this is not spelled out anywhere in the Binder, takes no account of the fact that the premium is to be held for and on behalf of QBE and in a separate trust account.

92. Finally, section 39.3 provides that QBE will not "directly or indirectly take advantage to Temple's detriment" of its knowledge "of Temple's prospective business producers" which will be disclosed to them from time to time. I do not consider that this provision can be used to insulate QBE from Coverholders in respect of past business. QBE bears the financial risk of such business and it is difficult to see how contact by it with Coverholders in itself affects Temple's relationships with Coverholders regarding new business. It is true that, if those Coverholders form a good impression of QBE in any such contact, they may decide to do business with QBE in the future. That does not, however, in my judgment, fall within the notion of "take advantage to Temple's detriment" of QBE's "knowledge" of Temple's prospective business producers. That phrase is primarily directed to the prevention of solicitation. Temple's interest in protecting its position in the market in the future is protected by section 39. But that provision does not support Temple's case that it has a right to manage the run-off of current business.

93. There are also other provisions in the Binder which indicate that it has a personal nature and that it should not be construed to produce a sharp difference between the position in relation to future business and in relation to the run-off business. Section 46.1 provides that the agreement is personal to Temple and QBE and that neither party may assign any rights under it or (save as authorised) sub-contract or delegate any obligations. Section 3 specifies that only the named individuals within Temple are authorised to bind insurances and amendments, and to agree Coverholder Agreements. Schedule 3 specifies four named individuals within Temple who are the only persons authorised to conduct claims handling. Whatever the formal position, the authority, and thus any entitlement, in reality and in substance vests not in Temple as such, but in the named individuals.

94. Sections 9.4.3 and 9.5.3 give QBE the right to terminate the Binder in the event of a relevant change in the control of Temple or a significant change in its management. I accept Mr Popplewell's submission that it makes no sense to provide that where there is a change of control (possibly by a competitor of QBE taking over Temple) QBE can terminate the relationship for the writing of future business but not the handling of business which has been written but not yet expired, the risk of which is borne by QBE. Mr Butcher placed much emphasis on the expertise of Temple in the legal expenses insurance market. If his submissions are correct, however, QBE would be unable to protect its interest on the transfer of control to individuals or an entity without such expertise. QBE is also given power to terminate by section 9.5.2 if Temple enters into a Binder agreement with another insurer (which is what happened in this case). The agency context and the fiduciary obligations imposed on

an agent to his principal mean that, when the principal loses trust and confidence in the agent, the foundation of the relationship is destroyed, and absent explicit provision or special circumstances, the principal is generally entitled to bring the agency relationship to an end and to assume control over his own affairs.

95. Temple's obligation to provide bordereaux in section 26, to collect insurance premium tax and to ensure that all other local taxes are collected and paid in section 30, and its obligations in other clauses relied on by Mr Butcher and to which I have referred are not expressed to be contingent on its continuing authority to handle the run-off. However, if there are any circumstances in which Temple can be removed as run-off agent, many of them (although, not the confidentiality provisions) must be construed as such.

96. It is clear that Temple can be removed as the run-off agent where the proviso to section 10.2.2 applies, that is where the Binder has been terminated pursuant to section 9.3.6. Accordingly, Temple's obligations and entitlements under the Binder in respect of the run-off of insurances already bound are contingent on that. I have, for the reasons given, concluded that, leaving aside the arguments based on the Coverholder Agreements, the Certificates of insurance, and general principles of agency, QBE may also remove Temple as run-off agent where the Binder has been terminated pursuant to fraud and the other grounds contained in section 9. Accordingly, subject to the arguments based on those contracts, the context and agency law, the provisions in the Binder regarding post-termination functions must also be contingent on Temple remaining authorised to act and liable to perform its run-off obligations pursuant to section 10.2.2.

97. For these reasons I have concluded that the provisions in the Binder itself do not support Mr Butcher's submissions. I now turn to the Coverholder Agreements and Certificates of Insurance which are incorporated into the Binder. The question is whether they provide a context which displaces the meaning of the language of section 10.2.2 when it is viewed in isolation.

The Coverholder Agreements:

98. Mr Butcher submitted that the provisions in the model Coverholder Agreement supported Temple's position that it was entitled to conduct the run-off of the business. He submitted that the Arbitrator's Award erred or was at least confused (cf. paragraphs 14 and 19) as to whether Temple was a party in its own right to the Coverholder Agreements or only entered them as agent for QBE.

99. Mr Butcher's case was that QBE was not a party to the Coverholder Agreements. The agreements were signed "on behalf of Temple Legal Protection Limited" and

the commercial relationship was between Temple and the Coverholders. This was reflected in the name of the first of the two model agreements, "Temple Litigation Advantage". He relied on many of the provisions of this agreement. It contains no express reference to QBE. Specific duties, rights, and powers are conferred on Temple, including entitling Temple to cancel the agreement by 30 days notice or with immediate effect if Temple considers there to be a fundamental breakdown of trust or understanding with the Coverholder, the Coverholder becoming insolvent or the subject of an intervention by the Law Society. He also relied on the provision that cases falling outside the underwriting criteria in the eligible risks term should be referred to Temple, the requirement in the "procedures" clause that Temple be notified of any claim, any fact adversely affecting the prospects of the litigation, and of any challenge to the premium in costs proceedings.

100. Other requirements also, he submitted, showed the relationship was between Temple and the coverholders. These included; that Coverholders email bordereaux each month to Temple, in the form attached to the agreement which was drafted by Temple, that premiums paid to the Coverholder "shall be deemed held by it as agent for Temple", and the provisions that Temple would administer "all claims matters arising from policies issued under this agreement" and that any payments due to the insured "shall be made by Temple and the Coverholder must not set off such claims payments against premiums due to underwriters". The confidentiality term, which provided that the existence and the terms of a Coverholder Agreement were not to be disclosed to any third party "without Temple's written agreement", also showed this.

101. Mr Butcher submitted (see his skeleton argument paragraphs 19-20) that these provisions imposed a series of obligations owed expressly and exclusively to Temple by name and conferred on Temple a series of rights, in respect of the receipt of bordereaux and other information and applications for authority to write business outside the authority. He submitted that in respect of the rights conferred on Temple, it was important that no term of the standard form Coverholder Agreements provided that a Coverholder could comply with the agreement by providing information or payments directly to the insuring underwriter.

102. Mr Butcher considered the Contracts (Rights of Third Parties) Act clause of particular importance because (see paragraph 43(g) of his skeleton argument) "the whole predicate of a third party's rights under the [1999 Act] is that it is <u>not</u> party to the contract". Finally, he relied on the general rule that there is no privity of contract between a principal and a sub-agent merely because the delegation was effected with the principal's authority and that such contractual nexus will only arise where the agent is expressly or impliedly authorised to constitute it or if his act is ratified: see *Bowstead and Reynolds on Agency* 17th ed., Article 37(2) and *Prentis Donegan and Partners Ltd v Leeds and Leeds Co Inc.* [1998] 2 Lloyd's Rep 326 at 329-334 and the cases discussed by Rix J therein.

103. Mr Popplewell primarily submitted that Temple was party to the Coverholder Agreements as agent but ultimately accepted that Temple was also party as principal to parts of the agreements. He, however, maintained that QBE was also a party. There is, he submitted, no difficulty in an agreement with coverholders containing rights and obligations of both QBE and Temple with the distinction depending on the context and content of each provision: see for example *British Energy Power and Trading Ltd v Credit Suisse* [2008] EWCA Civ 53.

104. As to QBE's position, Mr Popplewell relied on the fact that the model Coverholder Agreement incorporates the definitions in the prescribed form of the Certificate of Insurance in its opening paragraph. The term "insurer" in the Certificate and thus in the Coverholder Agreements states: "Temple Legal Protection Limited are specialist underwriters with authority to underwrite and manage this insurance on behalf of QBE Insurance (Europe) Ltd" (emphasis added). The insurer is thus Temple "on behalf of" QBE. The address of the insurer at the end of the Certificate of Insurance is QBE's address. It followed that the rights and obligations of "the insurer" in the Coverholder Agreement are those of the risk carrier, QBE and not Temple. Mr Popplewell also submitted that the number of provisions in the model Coverholder Agreements make it clear that QBE is a party to them and that Temple created privity of contract between QBE and the Coverholders pursuant to the authority conferred on Temple by section 4 of the Binder.

105. As to the provisions naming Temple in relation to rights and obligations, he argued that the proper construction of those is either that, although Temple is a party as principal to parts of the Coverholder Agreements, for those relating to the run-off the rights and obligations are conferred on Temple as agent for QBE. Alternatively he argued that, on their true construction, those rights and obligations were to subsist for as long as Temple was authorised to act as the run-off agent.

106. For the reasons I give below I have concluded that, while the primary relationship under the Coverholder Agreements was between the Coverholders and Temple, a contractual nexus did arise between QBE and the Coverholders through the agency of Temple. The Coverholder Agreement has to be considered together with the Certificate of Insurance and the Binder. In *British Energy v Credit Suisse* the court stated (paragraph 32) that "the description of the parties is… of considerable importance". Although the unqualified signature "on behalf of Temple Legal Protection Ltd" is a pointer against QBE being a party, the incorporation into the Coverholder Agreement of the definition of "insurer" from the Certificate of Insurance is also significant. While the Coverholder Agreement is signed on behalf of Temple with no qualification, the references in the agreement to the insurer suggest that Temple was not acting solely on its own behalf in entering the Coverholder Agreements.

107. Where "insurers' consent" is required, the Coverholder Agreement authorises the Coverholder to give such consent "as insurers' agent", that is on behalf of QBE and as QBE's agent. The provision in the delegated authority term that a written record of all consents must be kept "available for insurer's inspection" is also a pointer. So is the arbitration clause which makes provision for arbitration in the event of any dispute between "the insured" and "the insurer", the latter being QBE. It would be odd to make provision for the arbitration of a dispute between the insured and a non-party. There is a separate arbitration provision in the Certificate of Insurance and so it cannot be said that the provision in the Coverholder Agreement relates to disputes under that contract. The provision in the second paragraph of the model Coverholder Agreement that the Coverholder intends, understands and accepts that information it has supplied "was to be and has been relied upon by insurers" in "deciding to enter into this agreement" is clearly a pointer to the insurers being party to it for certain purposes.

108. The fact that the Coverholder Agreement is specific to QBE because it only confers authority on a Coverholder to issue Certificates of Insurance in the specified form binding QBE as insurer is also a pointer, but one of lesser weight. I do not, however, accept Mr Popplewell's submission that the indemnity clause also shows that the insurers, that is QBE, are a party to the Coverholder Agreement. While the clause deals with the liabilities of Temple's principal, it does not provide that "the insurer" or "Temple's principal" shall have a right of indemnity. It only provides that Coverholders indemnify Temple in respect of any payment that Temple or its principal makes in the circumstances in which the clause applies. There is no obligation to indemnify QBE directly.

109. I turn to the Contract (Rights of Third Parties) Act clause. Section 1(1) of the Contracts (Rights of Third Parties) Act 1999 provides that "… a person who is not a party to a contract… may in his own right enforce a term of the contract". If account is taken only of the terms of the Coverholder Agreements, a clause stating that in the circumstances specified a principal of Temple has rights under the Act would be a strong indication that the principal (i.e. QBE) is not a party. I have, however, concluded that, in the particular circumstances of this case, this clause does not assist Temple's submission that QBE is not a party to the Coverholder Agreements.

110. In looking at the assistance to be gained from this clause as to who are the parties to the Coverholder Agreement, one cannot look at the Coverholder Agreement in isolation. The Certificate of Insurance, as I have observed in paragraph 46 above, also contains a Contract (Rights of Third Parties) Act clause. That clause is substantially identical to the clause in the Coverholder Agreements. In particular the clause is identical in relation to the person who is, exceptionally, to have rights pursuant to the 1999 Act under the respective contracts. In both the Coverholder Agreements and in the Certificate of Insurance contracts that person is "any

principal of Temple who is obliged to provide an indemnity under an authority given to Temple which has been further delegated". It was not an issue and is indeed absolutely clear that QBE, which carries the risk and provides the indemnity, is a party to the Certificate of Insurance notwithstanding the Contracts (Rights of Third Parties) Act clause in the Certificate. The presence of an almost identically worded clause in the Coverholders Agreement cannot therefore be seen as having the significance which Mr Butcher attributes to it in deciding who are the parties to the Coverholder Agreement.

111. The model Coverholder Agreement refers to "coverholders", "insured", "insurers", "Temple", and Temple's "principal". References to "insurer" are, in the light of the definition incorporated from the Certificate, to QBE. It does not, however, follow that all references to "Temple" are to Temple as principal. For instance, it would be singular in an agreement to which QBE is party, for it to be unable to cancel, or withdraw coverholders' authority to give consents as its agent. I incline to the view that the cancellation clause applies to Temple in both capacities (see *British Energy v Credit Suisse* at [35]).

112. Whether or not QBE is a party to the Coverholder Agreement is, however, not conclusive as to whether Temple is entitled to conduct the run-off business. At the core of Temple's case is the submission that the provisions to which I have referred impose a series of personal and exclusive obligations on Temple and confer on Temple a series of personal rights in respect of the coverholders with whom it is in a long-term relationship. Do the Coverholder Agreements show that Temple's rights and obligations under the agreements are of a nature that means it is to have an entitlement under the Binder to conduct the run-off? The submission is that they are for two reasons. The first is that unless Temple conducts the run-off it would be in breach of obligations it owes to Coverholders. The second is that, since Temple's commission depends on the amount of the premium, it needs to protect its interests by monitoring its entitlement to commission by having premium monies paid to it to be held in a trust account for QBE and by being involved in any Part 8 or detailed assessment proceedings.

113. I have, however, concluded that the answer to the question is "no". My reasoning is similar to that in paragraphs 96 and 77-80 above about the construction of the Binder. The language of the model Coverholder Agreements is not expressed in a contingent way. It is nevertheless clear (and not in issue) that the position of Temple in relation to the run-off is subject to termination pursuant to section 9.3.6 of the Binder. The rights and obligations under the Coverholder Agreement must, to that extent, be contingent. Mr Butcher referred to a number of practical difficulties which have to be faced if Temple is removed as a reason for construing the agreements as entitling Temple to conduct the run-off. He referred to the Coverholder being put into a relationship with a person with whom it had never contracted and may not have known, to the relative inexperience of QBE in this line of business, and particularly that Temple would be put in breach of contract to its

Coverholders, and that QBE would have to seek new rights of reporting and variation to the policy terms. These practical difficulties will, however, have to be faced where the Binder is terminated pursuant to section 9.3.6. The provision in section 10.2.2 of the Binder imposing a duty on Temple to co-operate with QBE with a view to the appointment of another person, does not assist in meeting them because (see paragraph 82) it envisages Temple continuing to provide such services as its regulator permits it to provide and an alternative person or entity providing those services which the regulator no longer permits Temple to provide. If, as Mr Butcher submitted, a duty to co-operate does so assist, the obligation in section 46.3 of the Binder is available.

114. The following factors also point to these provisions of the Coverholder Agreements being construed as subsisting for so long as Temple is the run-off agent. The right to make a claim on the policy is that of the assured not the Coverholder. That claim lies against QBE not against Temple. The substantive rights and obligations under the contract of insurance are thus held by QBE and the insured. In those circumstances, an entitlement in either Temple or the Coverholder to have the claim handled by Temple in all circumstances except where termination is because the FSA has intervened, does not seem appropriate. To regard the Coverholder Agreements as pointing to such an entitlement or right would preclude QBE terminating Temple's authority to conduct the run-off, however grossly they were mismanaging the administration of the business, and even where they were doing so dishonestly.

115. The claims by those insured against QBE under the policy must, moreover, be distinguished from the underlying personal injury claims which are the subject of the policy. The Coverholder Agreements delegate the handling of the latter to the Coverholder firms of solicitors. The delegated authority clause provides that where insurer's consent is required the Coverholders are authorised to give such consent "as insurers' agent". The position is also dealt with in the Certificate of Insurance although in that contract the focus is on the position of the insured. Thus, it is concerned with the authority given by the insured to the solicitors with conduct of the case to inform the insurer of offers to settle, and the insured's agreement that proceedings will not be commenced or settled or discontinued without the insurers prior written consent. Under the terms of the Coverholder Agreement, authority is given by the Coverholder as the insurer's agent and consent is therefore given on this basis, i.e. on behalf of QBE. The Certificate also imposes a duty on the insured to cooperate with the appointed legal representative and the insurer by providing documents and attending meetings, examinations or hearings as requested by them.

116. Mr Butcher's submission that describing Temple's functions as administrative and mechanical is to understate them has some force in relation to the position while there is authority to write new business. Although changes to the Certificate wording must leave the Certificate (section 4.2 of the Binder) in substantially the same form as that in schedule 2 to the Binder, the Binder does authorise Temple to

make such changes. Similarly, at that stage Temple had discretion under section 4.2.1.3 to negotiate eligible risks and premium within the specified criteria.

117. Once the authority to write new business is terminated, I accept that, with two exceptions, Mr Popplewell's description of Temple's functions as primarily administrative and mechanical does not understate the position. Although these functions include holding money, the money is to be held for QBE and in a trust account in QBE's name. In the run-off period the functions in the Coverholder Agreement which can be said to go further than an administrative or mechanical role are Temple's right to be notified of any challenge to the premium being paid in full and to be involved in any Part 8 or detailed assessment proceedings and the authority to make amendments to the Certificate wording. The other exception is Schedule 3 of the Binder (set out in Appendix (A) and summarised in paragraph 22) which authorises Temple to settle claims below £25,000 without referring them to QBE. This does not, however, survive termination. The Certificate gives Temple the right to cancel the policy if there is any deterioration in the prospects of the claim. None of these, however, suffices to show an entitlement in Temple to conduct the run-off.

118. The Binder and the Coverholder Agreements are primarily concerned with the position where the contracts are fully subsisting. The agreements describe what functions Temple will perform in those circumstances. The model Coverholder Agreements provide that Temple shall conduct claims administration. The fact that there will be claims administration after the determination of the Binder does not mean that the provisions in the model Coverholder Agreements confer an entitlement to do so in all circumstances save where the Binder is terminated pursuant to section 9.3.6 to handle the run-off business.

119. Much of the argument on behalf of Temple was based on Temple being in breach of its obligations to Coverholders if it did not manage the run-off. Since the Coverholder Agreements contemplate Temple as having authority from QBE under the Binder and provide, for example, that Coverholders are authorised to give "insurer's consent" as insurer's agent it would be surprising if Temple would be in breach of the Coverholders Agreement for not acting (for example by providing claim forms or performing other administrative acts) in circumstances where its authority to conduct the run-off had been terminated by QBE. Equally, in such circumstances I do not consider that a Coverholder would be in breach of the Coverholder Agreement if it informed QBE and not Temple of a claim. I have referred to the fact that the claims reporting and settlement procedure clause in the Binder binding Temple to pass on to QBE any notification of claims and information relating to such a claim does not survive termination. If, notwithstanding this, a Coverholder remains obliged to inform Temple but Temple is not under any obligation to inform QBE there will be a lacuna in the administrative arrangements.

The Certificates of Insurance:

120. I have also concluded that the Certificates of Insurance do not assist the submissions made on behalf of Temple. Although the model ATE Certificate appears to have been substantially drafted by Temple before QBE's involvement, it is plain from its terms that Temple acts on behalf of QBE and as QBE's agent.

121. The description of "insurer" in the Certificate uses the words "with authority to underwrite and manage this insurance on behalf of" QBE. The word "underwrite" enhances Temple's role and may reflect its discretion under section 1.3 of the Binder to negotiate eligible risks and premiums. But Temple is not an "underwriter" who bears the insured risk. The word "manager" refers to businesses bound. I reject the submission that the words "manage" and "underwrite" show this provision is a warranty that Temple will continue to have authority to manage the run-off after a termination of the Binder. It is a description of Temple's role, and one that is premised on Temple having authority to manage the business. That question is primarily to be determined by the Binder.

122. The functions and roles of Temple under the Certificate are in the capacity of agent. Condition 2 in relation to changes in the appointed legal representative, and condition 4 in respect of notifications of offers to settle, or consent to settlement or discontinuance require "the insurer" to be informed or to consent. It is clear that such information is received and consent given by Temple as agent of QBE. Although the "Key Facts" summary of the policy refers to Temple being provided with information and documentation, notification of claim, and providing consent, it does not assist in determining in what capacity Temple acts. Nor does that summary assist in determining the scope or revocability of Temple's authority.

Common law principle of agency:

123. The Arbitration and this appeal are concerned with the question of a contractual construction and not with whether, on the relevant facts, QBE had a common law power to revoke Temple's authority to conduct the run-off. In these circumstances the relevance of common law principles is as an aid to the construction of the Binder. *Bowstead & Reynolds on Agency* 18th ed., p.605, states that "the dominant assumption in the cases is that a grant of authority is of its nature revocable".

124. Mr Butcher submitted that the relationship between Temple and QBE is one to which the dominant assumption does not apply. He submitted that the Binder between Temple and QBE created an agency "coupled with interests", including the specific interest in Temple receiving performance of contractual obligations from Coverholders and the general business interest in satisfying the requirements of the Coverholders who were its established business producers. He submitted that, as an

agency under which Temple was expressly authorised to undertake such personal obligations in relation to insurances bound, in the absence of clear terms to the contrary in the Binder excluding Temple's common law rights, the agency was irrevocable and not revocable at QBE's will.

125. He relied on two principles (see paragraphs 31-37 and 69 of his skeleton argument). The first, based on *Read v Anderson* (1882) 10 QBD 100, (1884) 13 QBD 799, is that if an agent, with the knowledge and consent of his principal, enters into contractual obligations with third parties for which he is personally responsible and would be in breach if the principal revoked his authority, the principal cannot revoke that authority.

126. The second, based on *Society of Lloyds v Leighs* [1997] CLC 759 at 773-4 and *Bowstead & Reynolds on Agency*, Article 118 and commentary, is that Temple's authority to manage the business written under the Binder was coupled with important commercial interests which made its authority to manage the business in run-off irrevocable. In *Society of Lloyds v Leighs*, Colman J made it clear, in the context of a Lloyds binding authority, that the principle stated in Article 118 of *Bowstead & Reynolds*, is not confined to security interests. His Lordship stated (at 773-74):

> "… there cannot be any conceptual basis for confining irrevocability of the authority of the agent in cases where the purpose of the authority is to secure his money interest. In the authorities under discussion the purpose of preventing the revocation of the agent's authority is that the perpetuation of the authority is necessary to provide the agent with a means which is under his control of insuring that some obligation of his principal for the benefit of the agent is performed. The inability of the principal to withdraw authority is what ensures that the principal will not be able to avoid satisfying his contractual obligations."

127. Mr Butcher submitted that Temple's important commercial interests included its interests; in continuing to manage the Temple insurance scheme, in maintaining Coverholder relationships, *inter alia* by ensuring that Coverholders who had selected Temple because of its expertise could have their expectations fulfilled; in discharging its obligations to Coverholders and policy holders; and a security type interest in collecting commission directly by retaining a proportion of collected premiums rather than awaiting payment from QBE.

128. *Society of Lloyds v Leighs* concerned names on a syndicate who did not wish to accept the Equitas reinsurance contract in respect of 1992 and prior years. The Equitas reinsurance contract formed part of the Lloyd's Reconstruction and Renewal Plan. Colman J held that as a matter of law the non-accepting names could

not withdraw the authority of their managing agents to enter into the contract. After the passage set out above, his Lordship explained that an underwriting member of a particular syndicate makes available part of his underwriting capacity to that syndicate as a co-participant with the other syndicate members for the year in question. Unless the managing agent irrevocably controls the underwriting business, the individual underwriting name could disrupt the working of the syndicate and the managing agent's business and responsibility to the other syndicate members. He stated (at 774) that "to protect this interest the irrevocability of the agent's authority is manifestly essential".

129. The context of Colman J's statements is of fundamental importance. Most significantly, clause 7.3 of the Managing Agents' Agreement provided that the underwriting name acknowledged that "he has delegated to the agent sole management and control of the underwriting and that the agent is not bound to comply with any instructions or requests of the name… and [the name] undertakes that he will not in any way interfere with the exercise of such management or control". Colman J held (771 F-G) that provision expressly prevented the revocation of the managing agent's authority to act in matters relating to the management and control of the underwriting. An attempt by the names to argue notwithstanding that provision that an individual name could revoke the managing agent's authority because of an overriding rule of agency or fiduciary law, unsurprisingly failed. In any event, the Lloyds context, the essence of which is participation in a specific syndicate on an annual basis, and the particular problems of syndicate fragmentation and disruption of the working of a syndicate should an individual withdraw (see pages 771, 772, 774) are far removed from the present facts.

130. In the light of the terms of the Binder, Temple's interest in premiums is neither a security interest nor a security-type interest. The Coverholder Agreements provide that premiums paid to Coverholders are to be held by them as agent for Temple. However, under the Binder Temple holds premiums, premium refunds, and claims money as the agent of QBE and is obliged to hold them in a trust account in QBE's name: see sections 1.2, 2.2 and 4.3 of the Binder. For this reason, the Coverholders Agreement cannot be construed as obliging Coverholders to hold premiums for Temple personally as opposed to in its agency capacity. That this is so is also shown by the obligation in section 1.2 of the Binder upon Temple to inform its clients that it will hold their money as agent of QBE. In any event (see paragraphs 80 and 91 above) Temple is not entitled to premium in all circumstances where the Binder has been terminated. In cases where it is not, it has no interest at all in the premium.

131. Where it remains entitled to commission after termination, it does have an interest in the premium payable. To this extent its right under the Coverholder Agreements to take part in Part 8 or detailed assessment proceedings may be a personal right tied to its interest in the amount of the premium which determines the amount of the commission as well as a right as agent (see *British Energy v Credit Suisse* at [35], paragraph 112 above). If this is so, it can, however, participate in such proceedings

whether or not it is managing the run-off, although no doubt it is likely to be in a less advantageous position to do so effectively.

132. As to *Read v Anderson* (1882) 10 QBD 100, (1884) 13 QBD 779, Hawkins J had held (10 QBD at 106) that on the facts of that case, the principal did not revoke the agent's authority to pay. The case concerned an unenforceable agreement with a member of Tattersall's acting as a turf commission agent. The evidence was that, if the member of Tattersall's did not pay his unenforceable betting debts he would be turned out of Tattersalls and could not work at all as a turf commission agent. *Halsbury's Laws*, 4th ed., vol. 1(2) paragraph 185, cites this case as authority for the proposition that where an agent is liable to personal loss though not amounting to legal liability, "the principal cannot revoke the authority after the liability has been incurred". However, paragraph 184, dealing with the position where an agent becomes personally liable, states "where, in pursuant of his authority, the agent has contracted a personal liability, the principal cannot revoke the authority so as to destroy the agent's right of indemnity in respect of such liability" (emphasis added).

133. The terms of Bowen LJ's judgment (see 13 QBD at 782-3) suggest *Read v Anderson* is primarily an authority on the right of an agent to an indemnity against his principal where termination of his authority means he is in breach of a contract with a third party. *Bowstead and Reynolds* state (p.560) that propositions expressed in a number of cases, including *Read v Anderson*, as relating to irrevocable authority relate to indemnity, and the common use of the term "authority" in this context "can be confusing". In these circumstances, it is doubtful if the case is an authority on the issue of irrevocability as opposed to the right of the agent to be indemnified against loss by his principal. In any event, to the extent that the rights and obligations of Temple and the coverholders are construed as subsisting for so long as Temple is authorised to manage the run-off, see paragraphs 113-119 above, there would be no such breach of contract in the present case.

134. Since the arbitration was concerned with Temple's entitlement to conduct the run-off under the Binder, Temple, while not accepting that at common law the agent's authority could not be or was not irrevocable, did not present its arguments on this issue. Having now considered them, I have concluded that the common law principles of agency do not, in the context of the terms of this Binder and the associated contracts incorporated into it, entitle Temple to conduct the run-off or lead to the conclusion that the Binder should be construed to create such an entitlement.

Conclusion

135. I have concluded that, while the approach of the Arbitrator was not justified, on the proper construction of the Binder, Temple is not entitled to conduct the run-off.

Accordingly, notwithstanding the reasoning, the Arbitrator's decision was correct. The question of law is thus determined in favour of QBE, and this appeal is dismissed.

Appendices to judgment: the Binder and the Model Litigation Advantage Agreement

(A) Underwriting agency agreement between QBE (Europe) Ltd and Temple Legal Protection Ltd. (the "Binder")

SECTION 1 – APPOINTMENT

1.1 QBE hereby appoints Temple as its agent, on the terms and subject to the conditions of this Agreement:

1.1.1 to rate, condition and bind, through the partners or employees (as the case may be) of Temple specified in SECTION 3.1 below, insurances and amendments thereto on behalf of QBE:
- 1.1.1.1 After the Event Insurance (ATE) for Personal Injury – Temple agreements with coverholder business producers
- 1.1.1.2 Before the Event Insurance (BTE) – Commercial & Employment Practices pre-approved by QBE
- 1.1.1.3 ATE for Personal Injury – one-off referrals in accordance with Temple Legal Protection ATE Underwriting Guide dated 1st September 2004 (as attached);
- 1.1.1.4 All other ATE or BTE insurance, quotes to be agreed by QBE.

1.1.2 to issue or authorise another party to issue and bind, in accordance with the terms and conditions contained herein or agreed from time to time in writing by QBE and endorsed hereon, certificates of insurance, endorsements and such other documents evidencing cover in respect of insurances bound under this Agreement;

1.1.3 to receive and hold premium from Temple's clients or their agents in respect of insurances are bound under this agreement;

1.1.4 to receive and hold premium refunds in respect of such insurances prior to transmission to the client entitled to the refund or his agent;

1.1.5 to receive and hold claims money in respect of such insurances prior to transmission to the client making the claim or his agent; and

1.1.6 to manage and settle claims in accordance with Schedule 3

1.1.7 to market the above insurances.

1.2 Temple shall inform all those of its clients who may be affected by the agency arrangements set out in SECTION 1.1 above that it will hold their money as agent of QBE and that the agency extends to premiums, premium refunds and claims money.

SECTION 2 – HOLDING PREMIUM AND CLAIMS MONIES

2.1 Notwithstanding the provisions of Sections 1.1.3 to 1.1.5 Temple agrees to operate and use a trust account in the QBE's name solely for the purposes of receiving and or holding money as an agent of QBE under this Agreement.

2.2 Further to the provisions of SECTION 4, Delegation of Binding Authority, QBE agrees that each authorised coverholder may treat money which it receives and holds as agent of QBE as client money and in accordance with provisions of rules 5.3 to 5.6 of CASS.

2.3 QBE consents to its interests under the trusts referred to in CASS 5.3.2R or CASS 5.4.7R (as the case may be) being subordinated to the interests of clients of any authorised coverholder.

SECTION 3 – PERSONS AUTHORISED TO BIND

[This section specifies five named partners and employees of Temple who are authorised to bind insurances and amendments as referred to in Section 1.1.1 and who are responsible for the operation of the agreement claims.]

SECTION 4 – DELEGATION OF BINDING AUTHORITY

4.1 Temple is authorised by QBE to delegate any authority granted hereunder to any other person, firm or company who is accepted by Temple provided that such other person, firm or company is FSA authorised or an exempt firm. Temple will obtain a Coverholder Agreement in writing, in substantially the same form as specified in Schedule 1, and retain copies of such details as are agreed between the parties of such delegation for inspection by QBE. Each month, Temple will remit a list tabling the name and address of all parties to whom authority is delegated.

4.2 Any agreement by Temple for delegated authority to a coverholder (business producer) shall continue in force until its natural expiry or 12 months from the termination or non renewal of this Agreement, whichever is less provided always that such agreements:

1 for ATE insurance are as per the standard agreement or in substantially the same form attached amended to include provision for

1.1 certificates, policies or copies thereof to be issued within 21 days

1.2 inspection of records to include QBE and any Financial Services Regulator

1.3 Temple has discretion to negotiate eligible risks and premiums as appropriate; provided that, eligible risks at a minimum apply to:

1.3.1 personal injury claims against no more than 2 opponents
1.3.2 coverholder has agreed to act on a conditional fee agreement
1.3.3. client has at least 60% prospects of success
1.3.4 liability has not been denied
1.3.5 policy issued before proceedings issued
1.3.6 freedom to accept client risks which for avoidance of doubt excludes risks where any business producer Coverholder is obliged to accept clients

2 do not apply to risks relating to the coverholder's own costs or fees

3 for BTE insurance as per the standard Temple policy wording or in substantially the same form

4 provide for standard bordereau to be maintained per QBE agreed format – failure to comply will result in 60 days notice of cancellation of the agreement.

All cases falling outside these eligibility criteria are to be referred to QBE.

4.3 QBE agrees that all monies held under the terms of a Coverholder Agreement by any of the business producers (and with QBE's prior arrangement, the agent of a business producer) are held as agent of QBE and that the agency extends to premiums, premium refunds and claims money.

4.4 Temple agrees to audit each coverholder to whom they delegate authority at least once per year and for coverholders new to Temple the first audit to be completed within the first six months. Copies of all audits are to be provided to the QBE within (30) days of any audit.

SECTION 8 DUTIES AND OBLIGATIONS OF TEMPLE

8.1 Temple undertakes to QBE that Temple will for the duration of this Agreement:

8.1.1 perform its duties and obligations and exercise its powers under this Agreement so as to ensure insofar as it is able to do so that QBE is not, in respect of matters within the scope of the Services and as a result of such performance, in breach of any provision of the FSA Handbook;

8.1.2 use that level of care, skill and diligence as would reasonably be expected of QBE if QBE were itself performing such duties and obligations and exercising such powers;

8.1.3 ensure that at all times during the term of this Agreement it has available to it such premises, staff of suitable calibre, qualification and experience and equipment as may be required for it properly to perform and fulfil its duties and obligations under this Agreement;

8.1.4 insofar as is relevant to Temple and its obligations under this Agreement, develop and maintain appropriate systems and controls in accordance with SYSC R3.1.1 of the Handbook and maintain written procedures manuals for such systems, conduct regular audit testing of such systems and consult with QBE on the test results;

8.1.5 ensure that all Records maintained for QBE are at all times available to QBE;

8.1.6 comply as reasonably as may be possible with such specified security and archiving policies as QBE may request;

8.1.7 continue to provide information relating to underwriting years prior to inception of this Agreement provided always that Temple is not restricted in the provision of such information due to breach of client confidentiality.

8.2 During the term of this Agreement, Temple shall use its reasonable endeavours to ensure that it continues to be permitted by the FSA to undertake such insurance mediation activities as may be necessary for Temple to fulfil its obligations under this Agreement.

8.4 Temple shall in connection with the performance of the Services:

8.4.1 promptly and fully co-operate at all times with the FSA and its appointees and representatives and in particular without limitation:

(a) make itself readily available for meetings with representatives or appointees of the FSA as requested;

(b) give representatives or appointees of the FSA reasonable access to any Records which are within its possession or control and provide any facilities for inspection of the same which the FSA or its representatives or appointees may request;

(c) produce to representatives or appointees of the FSA any documents, files, tapes, computer data or other material in its possession or control as reasonably requested;

(d) print any data or information in its possession or control which is electronically held or held on microfilm or otherwise convert it into a readily legible document or any other record which the FSA may request;

(e) permit representatives or appointees of the FSA to copy documents or other material on its premises and to remove copies and hold them elsewhere, or provide any copies, as requested;

(f) answer truthfully, fully and promptly all questions which are put to it by representatives or appointees of the FSA;

(g) permit representatives or appointees of the FSA to have access with or without notice during normal business hours to any of its premises in relation to the discharge of the FSA's functions under the FSMA; and

(h) procure insofar as it is able to do so that its officers, employees, agents and contractors comply with the obligations in paragraphs (a) to (g) above;

SECTION 9 – CANCELLATION AND TERMINATION

9.1 SECTIONS 2, 4.2, 8.4, 10, 11, 12, 14, 25, 26, 27, 28, 30, 33, 34, 35, 39, 40, 41, 42, 43, 45, and 46 of this Agreement shall survive its termination (and SECTIONS 9.3 and 9.4 shall be construed accordingly).

9.2 All other provisions of this Agreement, unless otherwise terminated in accordance with SECTIONS 9.3 or 9.4 shall continue in force unless and until terminated by either party giving to the other not less than 240 days notice in writing. In the event that such notice of cancellation is given, the Agreement will terminate upon the expiation of the period of such notice subject to section 4.2.

9.3 Unless QBE specifically agrees to the contrary in writing, this Agreement will terminated automatically with immediate effect if Temple:

9.3.1 shall become the subject of voluntary or involuntary rehabilitation or liquidation proceedings;

9.3.2 shall become the subject of an action in bankruptcy;

9.3.3 shall suspend payment of its debts, make or propose any composition or arrangement with or make any assignment for the benefit of its creditors or otherwise acknowledge its insolvency;

9.3.4 shall become the subject of a voluntary arrangement or have a receiver, manager, administrator or administrative receiver appointed over its undertaking, assets or income or any part thereof;

9.3.5 being a partnership, be dissolved by agreement between the partners or by operation of law;

9.3.6 shall cease to be permitted by the FSA to undertake such insurance mediation activities as may be necessary for Temple to be permitted to undertake in order for it to fulfil its obligations under this Agreement, or suffer the imposition of conditions to its permission to conduct insurance mediation activities such as that it is unable to fulfil all its obligations under this Agreement.

9.4 QBE shall be entitled to cancel this Agreement at any time with immediate effect by written notice to Temple if:

9.4.1 Temple is in material breach of any of the provisions of the Agreement and such breach is not remedied within 60 days' of QBE giving, in writing, reasonable particulars of the breach to Temple; provided that the administrative protocols including the collection and maintenance of policy bordereaux from Temple as agreed by QBE are remedied within six (6) months of the inception of this Agreement.

9.4.2 any director, partner or employee of Temple is convicted of or charged with any criminal offence involving fraud or dishonesty or any other criminal offence which may materially affect the operation of the Agreement;

9.4.3 there is a Change of Control in relation to Temple where such new control materially conflicts with QBE or where Temple's business plan is materially changed by any such new control;

9.4.4 continued performance would be in breach of the FSMA, any secondary legislation made thereunder or referred to therein or any rule made by or condition imposed by the FSA upon QBE's or Temple's permission to carry on regulated activities by the FSA;

9.4.5 a change of law that prevents this insurance being underwritten on the same basis;

9.5 QBE shall be entitled to cancel this Agreement at any time with 60 days notice by written notice to Temple if:

9.5.1 the net loss ratio, being Expenses as defined by Section 27.4(a) to (d) divided by the gross earned premium, exceeds 70%;

9.5.2 Temple enters into any other lineslip or binder agreement with another insurer;

9.5.3 there is a significant change to the management of Temple;

9.5.4 Temple fails to arrange for the employment contract to Rocco Pirozzolo that contains a 6 month non-solicitation/dealing with existing clients clause commencing from the date of any resignation.

9.6 Temple shall inform QBE in writing immediately upon becoming aware of the occurrence of any of the events set out in SECTION 9.3, 9.4 or 9.5 above. For the avoidance of doubt any failure by Temple so to advise shall not affect the automatic termination of the Agreement under section 9.3 or QBE's rights under SECTION 9.4 or 9.5 above.

9.7 Temple shall immediately acknowledge in writing receipt of any notice of cancellation given by QBE in accordance with SECTION 9.2, 9.4 or 9.5 above, but such acknowledgement shall not be necessary for such notice to be effective.

SECTION 10 – EFFECT OF TERMINATION

[See paragraph 17 of the judgment]

SECTION 11 – TACIT OR AUTOMATIC RENEWAL

11.1 No continuous contracts shall be allowed under this Agreement.

11.2 It is Temple's responsibility to ensure that QBE is not committed to insurances which incept after Termination. Should any insurance bound provide for or local legislation entitle an insured to tacit or automatic renewal, Temple shall immediately upon (and notwithstanding) termination:-

11.2.1 take appropriate action to cancel any renewals which would incept after the Termination Date; and

11.2.2 provide QBE with a full list of insureds where tacit or automatic renewal provisions cannot be withdrawn.

SECTION 13 DUTIES TO CLIENTS: NO CONFLICT

Temple confirms that:

13.1 it has and will continue to make all necessary and appropriate disclosures concerning [the binder] to its clients and/or principals; and
13.2 there is nothing within this Agreement which conflicts or may give rise to any conflict with any duty which the [sic] Temple owes to its clients or other principals ….

SECTION 16 PERIOD OF INSURANCES …

16.3 No insurance shall be bound which provides for automatic or tacit renewal unless otherwise agreed in writing by the QBE.

16.4 In the event that the Agreement is cancelled or terminated, each insurance bound [under it] shall run until its contractual expiry date, unless cancelled by Temple ….

SECTION 21 – WORDINGS, CONDITIONS, CLAUSES, ENDORSEMENTS, WARRANTIES AND EXCLUSIONS APPLICABLE TO INSURANCES BOUND

21.1 All insurances bound shall be subject to, or be substantially the same as, the wordings, conditions, clauses, endorsements, warranties and exclusions originally specified by QBE in Schedule 2.

21.2 Each certificate must contain the full text of each wording, condition, clause, endorsements, warranties, exclusions and other document(s) forming part of the individual contract of insurance. Futhermore all included wordings, conditions, clauses, endorsements, warranties, exclusions and other documents shall be identified and itemised in or upon the certificate.

21.3 Each certificate shall show the name and address of Temple and shall contain a statement that:

21.3.1 All claims and other enquiries shall be addressed to Temple;

21.3.2 All complaints must be referred in the first instance to Temple and, if no satisfaction is obtained, complaints can be referred to QBE;

21.3.3 Where Temple deals with the insured through a retail agent, in respect of any claims referred to by the insured to Temple, Temple acts as agent for QBE and not the insured.

21.4 Each certificate must identify the law and jurisdiction applicable to the contract of insurance, the period of insurance, the limits of liability or sums insured, the amount of premium and any other applicable provisions that may be required under relevant local laws and regulations.

SECTION 24 PROCEDURE FOR REPORTING AND SETTLEMENT OF CLAIMS

Except as provided for by Schedule 3, Temple will pass on to QBE any notification of an actual or potential claim in respect of any insurance bound under this Agreement, and any information relating to any such claim, immediately upon receipt thereof. QBE will then deal with such claim, irrespective of its size and Temple has no authority to pay, settle or refuse to pay or settle any claim on behalf of QBE.

SECTION 26 – BORDEREAUX ACCOUNTS AND SETTLEMENTS

26.1 Unless agreed to the contrary by QBE in writing Temple shall prepare the monthly bordereaux referred to in 26.2 and 26.3, (in a format agreed by the QBE), separately throughout the period of the Agreement and any subsequent periods.

26.2 A premium received bordereaux shall be transmitted to QBE within 60 days of the end of each bordereaux period. In the event of there being no activity during a particular bordereaux period, Temple shall provide a statement to that effect.

26.3 A paid and incurred claims bordereaux shall be sent by Temple to QBE within 60 days of the end of each Bordereaux period.

26.4 During the period of this Agreement and any subsequent run-off period, if applicable, following termination or expiry, QBE must ensure that Temple is provided in advance with sufficient funds to pay claims in respect of which it has authority to adjust and settle. QBE agrees to transfer funds to Temple within 7 working days of any written request by Temple if the claims fund held by Temple, on behalf of QBE, should not have sufficient funds to meet any known claims and to maintain a claims fund of £50,000 for ATE and £50,000 for BTE, £100,000 in all in accordance with 28.5.

26.5 Temple will retain the first £100,000 of net premiums due to QBE to enable Temple to establish the claims fund. This fund will be repaid to QBE upon expiry of all the insurances bound under this Agreement.

SECTION 27 – COMMISSION AND EXPENSES

27.1 Temple will be entitled to retain a maximum of 20% of the gross premiums paid. No commissions are payable on abandoned or terminated policies. Gross premiums to include all fees, charges or additional earnings.

27.2 The maximum deductions in respect of each original policy shall not exceed 30% in all of which Temple shall be entitled to a maximum of 20% in all as defined in 27.1 above.

27.3 Commissions for BTE to be jointly agreed with QBE. QBE agrees Temple may deduct a minimum of 20% of net premiums for such insurances.

27.4 Temple shall, unless otherwise agreed in writing by QBE, bear and pay all charges and expenses incurred by Temple in the operation of the Agreement.

27.4 [sic] Profit commission:

> QBE will pay Temple a profit commission of 20% of the Net Ascertained Profit calculated [by deducting specified items from gross earned premium less expenses]
>
> The profit commission will be calculated 6 months after the expiry of the last risk attaching in each calendar year hereunder and annually thereafter until all liabilities are extinguished. Any profit commission payable will be paid over three (3) years – one third each year. The

amounts paid will be recalculated at the end of each calendar year and any deficit in profits calculated will be carried forward and adjustments made against profits earned.

Profit commissions whether earned or outstanding will cease to be paid if the binder is terminated by QBE under SECTION 9.4.2 or terminated by Temple.

SECTION 28 – REFUND OF UNEARNED COMMISSIONS

Temple shall refund to QBE on insurances bound under the Agreement commissions on all cancelled, terminated or abandoned insurances and return premiums at the same rates at which such commissions were originally allowed to Temple.

SECTION 30 – TAXES

By section 30 of the binder Temple was responsible for the collection and payment of IPT and other taxes, and for the maintenance of tax records.

SECTION 33 – RECORDS

Section 33.1 required Temple to establish and maintain records of insurances bound, and to make those records available for inspection by QBE.

SECTION 34 – INSPECTION OF RECORDS

Section 34 entitled QBE to audit the records of Temple on reasonable notice.

SECTION 39 – CONFIDENTIALITY

Section 39 contained detailed provisions as to confidentiality and the use of confidential information, including the customer and supplier lists of each party.
Section 39.3 provided that:

"Neither party shall knowingly, during the term of the Agreement, directly or indirectly solicit or transact business in relation to the insurances bound under the Agreement with any of the other party's existing business producers nor cause or encourage such business producers to cease or restrict or reduce its custom unless agreed otherwise in writing. QBE agrees that they shall not directly or indirectly take advantage, to Temple's detriment, of their knowledge of Temple's prospective business producers, which will be disclosed to them from time to time".

[Temple's business producers are the coverholders.]

SECTION 40 – HOLD HARMLESS

Temple shall indemnify QBE from and against any reasonable expenses, damages, liability, actions, judgments, awards, reasonable costs or other claims, including but not limited to, attorney's fees and associated costs incurred by QBE that are proved to have been caused or contributed to as a direct result of Temple's negligence. The indemnities provided in this section shall be no more onerous to any liability which Temple otherwise might have to QBE.

SECTION 41 – INDEMNITY INSURANCE

This required Temple to maintain for the duration of the authorities conferred by Section 1 indemnity insurance providing coverage in connection with the operation of the Agreement.

SECTION 46 – GENERAL

46.1 Subject to Section 4 of this Agreement, this Agreement is personal to Temple and QBE and neither party may without the written consent of the other assign any of its rights hereunder, or (save as expressly provided elsewhere in this Agreement) sub-contract or otherwise delegate any of its obligations hereunder.

46.3 The parties each agree from time to time to do all such acts and to execute and deliver all such instruments as may be required or reasonably requested by the other to establish, maintain and protect the rights and remedies of the other party and to carry out and effect the intent and purpose of this Agreement. The parties each agree at all times to take all steps so as to ensure that the provisions that are to be performed by it are properly performed in good faith.

SCHEDULE 3 – SECTION 1.1.6 AND 24 – CLAIM MANAGEMENT AND SETTLEMENT

1 QBE provides authority to Temple to accept, adjust, settle or reject on the former's behalf, without referral, all claims submitted under any policy issued under the terms of the Agreement in respect of ATE and BTE insurances, subject to immediate advice to QBE of any claim for damages and costs in excess of £25,000. Once advised Temple will liaise and cooperate with QBE as to the strategy and manner of most economical resolution of the claim.

2 The only persons authorised to act on behalf of Temple in carrying out the activities specified in 1 above are [four named individuals].

(B) The "Litigation Advantage Coverholder Agreement (set out in Schedule 1 to the Binder)

This is the first of the Coverholder Agreements in Schedule 1. Its sub-heading is "Temple Litigation Advantage Disbursements and Opponents Costs Insurance Scheme for Personal Injury Cases". The document carries the date "9/2004" in its "footer". The first two paragraphs of the agreement state:

"By this Agreement Temple Legal Protection Limited (Temple) allows the Coverholder to assess its client's cases for insurance and to issue a certificate of insurance in respect of those clients of the Coverholder who are eligible for Temple Litigation Advantage Insurance. It should be read in conjunction with the definitions, terms, conditions and exclusions of the certificate wording TEMPLE LIT ADV.092004 attached to this agreement. Words and phrases defined in the certificate wording have the same meaning in this agreement."

"This agreement is entered into based upon the Information contained in the written Solicitor Application Form and such other documentation and Information supplied by the Coverholder to Temple in support of its application. The Coverholder represents and warrants that the Information contained in the Solicitor Application Form and any other documentation and Information supplied is correct. It is intended, understood and accepted by the Coverholder that this Information was to be and has been relied upon by insurers in deciding to enter into this agreement on the terms contained herein."

The remaining material provisions are:

"Issuing Certificates	Valid certificates issued must comply with the requirements of this agreement and will be confirmed by the Coverholder issuing a certificate of insurance in the form attached to this agreement and defined as the certificate wording… no amendments may be made to

	the certificate wording without the express prior agreement of Temple.
Term of Agreement & Period of Insurance	This agreement shall remain in force for a period of 24 months from [date] subject to specific rights of cancellation or renewal set out below and without prejudice to Temple's rights generally. Individual certificates of insurance may be issued under this agreement at any time within such term.
…	
Delegated Authority	Where a certificate wording requires that insurers' consent is required to issue proceedings or to discontinue, withdraw or settle any legal action or to decline any offer of settlement or payment into court or to incur any disbursements, the Coverholder is authorised to give consent as insurers' agent provided the Coverholder is satisfied the giving of such consent is reasonable in all the circumstances and will lead to the most economic resolution of the Legal Action. The Coverholder must keep a written record of all such consents given available for insurer's inspection.
Cancellation	The Coverholder or Temple may cancel this agreement by giving 30 days written notice of cancellation to the other. The agreement may be cancelled with immediate effect upon breach of any of the terms and conditions of this agreement or if Temple considers there to be a fundamental breakdown in trust or understanding with the Coverholder or if the Coverholder becomes insolvent or if any partner is struck off or if the Coverholder is the subject of an intervention by the Law Society. … Upon this agreement coming to an end, the full terms and conditions of the certificate wording come into effect and the Coverholder must comply fully with them. The Coverholder shall continue to fulfil their obligations under this agreement until all certificates of insurance bound under this agreement have been concluded.
Limit of Indemnity	Maximum of £100,000 for any one declaration attaching under this agreement. Any requests for higher limits of indemnity must be made in writing to Temple.
Eligible Risks	The Coverholder must issue and attach cover under this agreement as soon as the Coverholder is able to reasonably assess the merits of the Legal Action and where conditions 1-7, inclusive, apply to the Legal Action. [The seven conditions are set out] All cases outside of this authority must be referred to Temple by way of a one off proposal form and supporting documents.
Important	The Coverholder will be obliged to indemnify Temple or its principal against any payment and associated costs or interest if they are not issued in accordance with the terms and conditions of this agreement

	nor will the Coverholder be entitled to recover from Temple or its principal any disbursements or any opponents costs.
…	
Procedures	The Coverholder must notify us immediately in writing if: • A claim may be made under the certificate of insurance • Any fact or matter adversely affecting the prospects of a successful outcome at trial for the insured (including the prospects of any judgment in the insured's favour not being successfully enforceable) The Coverholder agrees to notify Temple in writing of any challenge to the premium being paid in full and further agrees to Temple's involvement in any part 8 or detailed assessment proceedings.
…	
Risk Bordereaux & Payment	The Coverholder shall email a bordereaux (in the form attached to this agreement) to Temple in respect of all incepted risks under this agreement during each calendar month no later than 30 days after the end of the month. … Failure to provide Temple with a bordereaux within 21 days of its due date or providing bordereaux consistently late will be grounds for immediate cancellation of this agreement. The Coverholder agrees to provide other information to Temple regarding the status of any risks that have attached to this scheme as Temple might reasonably require.
Premium Status	All premiums paid to the Coverholder shall be deemed to be held by the Coverholder as agent for Temple.
Claims Notification	The Coverholder or the insured must immediately notify any claims made under this scheme to Temple who will issue a claim form for completion and return as required.
Claims Administration	Temple will administer all claims matters arising from policies issued under this agreement. Any payments due to the insured shall be made by Temple and the Coverholder must not set off such claims payments against premiums due to underwriters. The Coverholder must not agree the insurer's liability under the certificate of insurance without Temple's written authority.
Indemnity	If the Coverholder issues certificates of insurance in breach of the authority provided to him under the agreement, negligently acts or fails to act or acts in breach of the conditions of this agreement or acts or fails to act in accordance with the delegated authority negligently… or conducts negligently by itself or with the appointed counsel the personal injury claim, which is the subject of the certificate of insurance issued under this agreement, and/or in breach of its retainer, the Coverholder will indemnify Temple fully in respect of any payment that Temple or their principal makes under or in respect of the issue of the certificate of insurance together with any associated interest and costs and Temple and/or its principal will have no obligation to pay any disbursements or opponents costs.
Arbitration	[See paragraph 37 of the judgment]
…	

Contracts (Rights of Third Parties) Act 1999 [see paragraph 38 of the judgment]

Confidentiality [see paragraph 39 of the judgment]

The agreement provides that it is signed respectively “on behalf of Temple Legal Protection Limited” and “on behalf of the Coverholder”.