Case No: 2010 FOLIO 1313

Neutral Citation Number: [2013] EWHC 677 (Comm)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/03/2013

Before:

MR JUSTICE EDER

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Between:

(1) BEAZLEY UNDERWRITING LIMITED
(for and on behalf of itself and all other members of Lloyd's Syndicate AFB 2623 as constituted for the 2005 underwriting year of account)

(2) NEIL PATRICK MAIDMENT
(Suing on behalf of himself and on behalf of members of Lloyd's Syndicate AFB 623 as constituted for the 2005 underwriting year of account)

(3) SWISS REINSURANCE EUROPE S.A.

(4) TRANSATLANTIC REINSURANCE COMPANY

(5) RICHARD PAXTON BARDWELL
(Suing on behalf of himself and on behalf of members of Lloyd's Syndicate 1221 and 4472 (together, the Millennium Consortium 9128) as constituted for the 2005 underwriting year of account)

(6) LIBERTY MUTUAL INSURANCE EUROPE LIMITED

(7) XL INSURANCE COMPANY LIMITED

Claimants

- and -

(1) AL AHLEIA INSURANCE COMPANY

(2) WARBA INSURANCE COMPANY

(3) BAHRAIN KUWAIT INSURANCE COMPANY

(4) GULF INSURANCE COMPANY

(5) FIRST TAKAFUL INSURANCE COMPANY

(6) WETHAQ TAKAFUL INSURANCE COMPANY

Defendants

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Mr N Calver QC (instructed by **Morgan Lewis & Bockius**) for the **claimants**
Ms P Melwani QC and **Mr B Coffer** (instructed by **Ince & Co**) for the **defendants**

Hearing dates: 14 -17 January 2013

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Judgment

Mr Justice Eder:

Introduction

1. These proceedings concern a claim under a reinsurance contract between the claimants as reinsurers and the defendants as reinsureds/cedants. The claimants say that they are not liable under the reinsurance.

2. In summary, the underlying facts are as follows. On 3 October 2005 the Kuwait Oil Company ("KOC") entered into a contract with M/S Hyundai Heavy Industries Co Ltd ("HHI") to build 15 new crude oil storage tanks in Kuwait. After construction, one of these tanks i.e. Tank 84 was found to be defective due to unacceptable settlement of the tank base allegedly because it was constructed on made or filled ground which contained refuse under the sand. Estimates of the cost of repair have varied, some estimates indicating a total cost of approximately US$28m. As appears in more detail below, the claim in respect of such damage/loss (the "Tank 84 claim") was made against the original insurers i.e. the defendants who then notified their reinsurers i.e. the claimants and AIG UK Limited ("AIG") (Somewhat confusingly, AIG subsequently changed its name to "Chartis" and is sometimes referred to as such in the documents and evidence; but they are one and the same entity.) That reinsurance claim is the subject-matter of these proceedings.

3. The central issue in this part of these proceedings is the scope and effect of the Claims Control Clause ("CCC") incorporated into the Reinsurance Contract/Declaration between, on the one hand, the claimants as reinsurers and, on the other hand, the defendants as reinsureds and which provided as follows:

> "*Notwithstanding anything contained in the Reinsurance Agreement and/or the Original Policy Wording to the contrary, it is a condition precedent to any liability under this Reinsurance that:*
>
> a) *the Reinsured shall upon knowledge of any loss or losses which may give rise to a claim under this Policy, advise the Reinsurers thereof as soon as reasonably practicable;*
>
> b) *The Reinsured shall furnish the Reinsurers with all information available respecting such loss or losses and the Reinsurers shall have the right to appoint adjusters, assessors, surveyors or other experts and to control all negotiations, adjustments, and settlements in connection with such loss or losses.*
>
> c) *No settlement and/or compromise shall be made and no liability admitted without the prior approval of Reinsurers.*
>
> *In the event of a claim under the Original Policy Wording Reinsurers hereon agree that settlement shall take place at the*

same time as settlement or advance of funds under the said Original Policy Wording."

In essence, the claimants say that the defendants (in particular the first defendant, "AIC", which handled the underlying claim on behalf of the other defendants and at all material times acted on their behalf) committed various breaches of this clause; and that the claimants are therefore under no liability for the Tank 84 loss.

4. It is common ground that if the claimants are successful on this trial, the proceedings come to an end. However, if the court were to find that there has been no breach of the CCC, the remaining issues will go on to be tried at a hearing which has been fixed for five days from 11 November 2013. Of these, the main issue concerns the scope and effect of what is referred to as the "LEG2 exclusion". (The letters "LEG" refer to the London Engineering Group which apparently devised the wording of the exclusion.) In particular, it is the claimants' case that any liability which might otherwise exist under the Reinsurance Contract/ Declaration is in effect excluded in whole or in part by this exclusion on the basis of a defect in design of the tank.

The evidence

5. On behalf of the claimants, there were served statements from the following individuals all of whom gave oral evidence:

   i) Tobin Ryan. He was from 2003 until 2012 the Claims Manager at Beazley Underwriting Limited ("Beazley"), i.e. the first claimant.

   ii) Dean Rebello. At the time, he was employed by the third claimant. He is currently the Swiss Re Corporate Solutions Engineering Claims Manager and Vice President at Swiss Re Services Ltd ("Swiss Re"). He has worked at Swiss Re since 1993.

   iii) Tony Peters. He is and has been since 2002 the Claims Examiner at Transatlantic Reinsurance Company ("Trans Re"), i.e. the fourth claimant.

   iv) Andrew Norris. He is and has been since 2011 an Engineering Underwriter at Swiss Re. Prior to this role, he was a claims adjuster at Navigators Underwriting Limited, responsible for the conduct of the Tank 84 claim on behalf of the fifth claimant.

6. On behalf of AIC, there was served a statement from Mr Ayaz Bukhari who also gave oral evidence. At all material times he was a Director (and from January 2008, Senior Director) of AIC with overall responsibility for the handling of the present claim under the supervision of the Deputy General Manager, Mr Ibrahim Al-Duhaim. A statement signed by Mr Al-Duhaim was put in evidence. The day to day administration of the claim was conducted by Mr Sobhi Gharaibeh who was the Claims Manager.

7. Additional written statements were also put in evidence on behalf of the defendants from Mr Varghese Abraham (the Manager of the second defendant), Mr Abdulla Rabia Mohammed (the General Manager of the third defendant), Mr Kolluru Koteswara Rao (the Senior Manager of the Reinsurance Department of the fourth

defendant), Mr Quitaiba Al-Nusif (the Deputy General Manager of the fifth defendant), and Mr Saddiq Al Tawali (the Assistant General Manager of the sixth defendant). None of these individuals gave oral evidence. In broad terms, they had no direct involvement in relevant events and left the handling of all claims to AIC.

8. I should mention that there was one important individual who, as appears below, played an important part in the story but who did not give evidence i.e. Mr Richard Hodkinson of Aon who acted as the brokers of KOC/KPC in relation to the underlying insurance and also the brokers of the defendants in relation to the Reinsurance Contract/Declaration.

9. The parties expressly agreed that all documents included in the trial bundles were to be regarded as admitted in evidence as to the truth of their contents although, of course, the weight to be given to such evidence was a matter for the court.

The Reinsurance Contract

10. By a contract made in January 2005 between the claimants and AIG as reinsurers and the defendants as reinsureds (the "Reinsurance Contract") the claimants plus AIG subscribed for their respective subscriptions to an "as original" reinsurance of an open cover insurance of KOC (and also known as the Kuwait Petroleum Corporation or "KPC") as original insured, in respect of the reinsured's liability for construction all risks and third party liability risks. In total the claimants subscribed as to 69.5% of the Reinsurance Contract. AIG subscribed to a 20% share. The remainder i.e. 10.5% of the risk was retained by the first to third defendants as reinsured-cedants (in particular, AIC retained 7.5%, with the other two defendants each retaining 1.5%).

11. The Reinsurance Contract, which was a Lloyds' slip policy and stated to be subject to English law, covered projects attaching (by way of declaration under the Reinsurance Contract) during the period 1 February 2005 to 31 January 2007. One of the anticipated projects was the KPC project for a crude export facility (onshore). As stated above, the Reinsurance Contract contained a condition precedent to the liability of reinsurers for any particular claim, namely compliance with the terms of a standard CCC; and at all material times, Aon acted as brokers on behalf of <u>both</u> the original insured and the defendants although given the disputes which subsequently arose (in particular with regard to the scope and effect of the LEG2 exclusion) it seems to me that Aon were placed in a difficult if not impossible position. It is common ground that Aon drew the defendants' attention to the LEG2 exclusion at the time when the defendants were about to enter into the Reinsurance Contract.

12. The Reinsurance Contract also contained what was described as a "subscription agreement" which made AIG and Beazley jointly the Slip Leader (AIG for the companies market and Beazley for the Lloyd's market). Both AIG and Beazley jointly, as Slip Leader, were expressly stated to be "Claims Agreement Parties", together with MLM 9128 ("Millennium") and all named Direct Companies, being a reference to the fourth defendant ("Transatlantic"). It was further expressly provided that all claims (except for ex gratia payments) were (i) to be agreed only by the Claims Agreement Parties; and (ii) to be managed in accordance with the Lloyd's 1999 Claims Scheme and IUA claims agreement practices which, in particular, provides for the broker promptly to prepare a claims file on first advice of a potential claim which must be submitted to the Slip Leader(s) for his/their response and

agreement with LCO. Ex gratia payments/settlements were required to be referred to all underwriters (and not just the slip leader).

13. It is common ground that the (limiting) effect of the above was that the agreement of each of AIG, Beazley, Trans Re and Millennium, would be deemed to amount to the agreement of all reinsurers for the purposes of controlling and agreeing claims; and that it was not sufficient that *only AIG's* prior approval to any settlement between AIC and KOC (the original insured) was obtained by AIC, nor was only AIG given the right to control the negotiations which led up to the attempted settlement.

The Declaration

14. On or about 18 January 2005 a reinsurance declaration (the "Declaration") was made for the period 1 February 2005 to 1 February 2007, by which the defendants were named as the reinsureds, with the original insured being KOC. As stated above, AIC retained 7.5% of the risk with each of the second and third defendants retaining 1.5%. The Declaration was expressly stated to be subject to English law. The Declaration also contained a CCC which was similar but not identical to the CCC in the Reinsurance Contract. It was common ground between the parties that it was this wording in the Declaration which constituted the relevant wording. This is what I have already quoted in paragraph 3 above.

The underlying Insurance Policy

15. At around the same time, an open cover construction all risks and third party liability insurance policy was effected with the defendants as insurers for their respective proportions, KPC/KOC as original insured and HHI as an additional insured (contractor), for the same declaration period of 1 February 2005 to 1 February 2007 (the "Insurance Policy"). In particular, AIC took a 35% share in the risk. The Insurance Policy is governed by Kuwaiti law.

16. Cunningham Lindsey (Middle East) Limited ("CL ME") were the appointed loss adjusters under both the Reinsurance Contract/Declaration and the Insurance Policy.

17. The contract for the construction of onshore crude export facilities was signed by KPC and HHI on 3 October 2005. On 13 November 2005, KPC declared the crude export facility (onshore) project under the Insurance Policy. This was then noted and agreed under the Reinsurance Contract by the reinsurers.

Factual background

18. In about March 2007, following the discovery of the damage to Tank 84, KOC/KPC sought an indemnity from the defendants for the costs of repairing the defective tank 84 (i.e. the Tank 84 claim). Thereafter, the claim was duly notified by Aon on behalf of the defendants to the reinsurers i.e. the claimants and AIG.

19. Initially, at least, all reinsurers denied liability on the basis of the LEG2 exclusion. In particular as appears in a series of interim reports produced by CL ME, the view taken was that if the LEG 2 exclusion applied the Tank 84 claim would be massively reduced in quantum and might be a negligible sum.

20. In about June 2007, AIG instructed a third party, Mouchel, to undertake an engineering review of the deformation of Tank 84 and to produce a report into the geotechnical and structural engineering aspects of the tank's construction, alongside CL ME. Mouchel reported in November 2007 and concluded that the design of the tank was indeed defective.

21. In the light of the Mouchel report, CL ME produced its 4th Interim Report on 13 February 2008 in which it concluded that the claim might therefore be excluded by LEG2. AIC were made aware of this on 13 February 2008. Reinsurers agreed with CL ME's analysis. AIG in particular agreed with it on 13 March 2008. From this time onwards a protracted dispute arose between, on the one hand, KOC/KPC and, on the other hand, reinsurers as to whether or not the LEG2 exclusion applied to the Tank 84 claim.

22. On 13 May 2008, AIG sent an email to Aon confirming its conclusion that the original "design, plan or specification" was defective and stating the reinsurers' position as follows:

> "*The scope of the LEG 2 defects exclusion is quite clear. It excludes the costs that "would have been incurred if replacement or rectification of the Insured Property had been put in place immediately prior to the said damage". This means the cost that would have been incurred to carry out the necessary remedial works to have put in place adequate foundations if they had been carried out after the construction of Tank 84 but before the hydrotest. Additional repair costs arising out of the damage are covered by the policy, subject to the application of the $150,000 deductible.*"

23. On 17 June 2008 CL ME met the KOC project team (HHI). HHI said that their recommendation was a complete rebuild of the tank and that "*they are awaiting insurer's comments regarding liability and amounts payable in order to make recommendations to management regarding repair and time of replacement*". AIC were informed of this on the same day. Thereafter KPC/KOC and HHI put considerable pressure upon AIC to admit the claim and to obtain payment of the claim via reinsurers and the defendants' 10.5% retention. This appears from various correspondence including HHI's letter to KPC of 24 September 2008, HHI's letter to CL ME dated 4 December 2008, and CL ME's response dated 24 February 2009. In general terms, reinsurers were however refusing to cover the defendants' claim against them, saying it was up to KOC to decide whether to repair or to rebuild the tank.

24. The defendants and in particular AIC were caught up in the middle of this dispute: as submitted by Mr Calver QC, the contemporaneous documents show that AIC saw its job as being to unite with KOC/KPC in pressing reinsurers to pay the claim, rather than itself relying upon any defences to the claim arising out of the terms of the Insurance Policy. As stated by Mr Bukhari in his statement, the view taken by AIC was that the Insurance Policy and the Reinsurance Contract/Declaration were effectively back to back. On behalf of the claimants, Mr Calver QC submitted that it was this misapprehension which directly led to AIC's breaches of the CCC; and that this misapprehension was compounded by Aon's erroneous advice to AIC throughout,

although to be fair to Aon, it did advise AIC to engage English lawyers as from 20 June 2008. However, AIC rejected the suggestion and continued to rely upon its own and Aon's advice.

25. On 4 January 2009 HHI made a formal claim under the Insurance Policy, and on 1 April 2009 KPC and HHI produced an Insurance Case Dossier in respect of the claim. They recommended total demolition and rebuild of the tank. However, they stated that the remediation works would only commence upon settlement of the claim and the receipt of the insurance proceeds. The cost was said to be KD 8m. AIC received this dossier under cover of KOC's letter of 14 April 2009. Aon then took this up with AIG, but not with Beazley, sending AIG a copy of the dossier. Aon asked AIG to agree that demolition and rebuild was the most suitable option. Aon also asked them to reconsider the application of LEG2.

26. It was around this time, May 2009, that the position altered. In particular, two things happened. First, the broking account for KPC's work came under tender and Aon were anxious to retain it. Second, Aon came under considerable pressure from KOC for not being proactive enough in pushing the Tank 84 claim forward. In about June 2009, it seems that Aon therefore formed the plan to try and split AIG off from the rest of the reinsurers. This was because AIG wished to maintain its commercial relationship with KPC/KOC and was keen to write the renewal of their reinsurance programme for the 2010 year. Whilst AIG continued to assert that the LEG2 exclusion applied to the Tank 84 claim, it agreed with Aon in early July 2009 that Aon should obtain theoretical estimates for the pre-loss costs of 5 different schemes in an attempt to find a commercial solution.

27. On 16 July 2009 the Chairman of Aon sent a letter to Robert Kuchinski, the President of AIU Holdings (AIG) suggesting that there could be no common ground if AIG maintained its position that the cause of the loss was faulty design. On 24 July 2009 AIG emailed Aon and again reiterated that it disagreed with the interpretation of LEG2 and its applicability to the loss but that it remained willing to seek a solution outside of the legal process. This was forwarded to Tobin Ryan of Beazley on 27 July 2009 by Aon. Aon told Beazley that the Kuwaiti insured had now provided AIG with their cost analysis (which they did on the same date). Mr Ryan replied to Aon by email dated 28 July in which he (a) asked to be kept informed; (b) restated that Beazley's position was unchanged on the LEG2 exclusion; and (c) asked Aon to remember that Beazley were joint lead with AIG on the KOC risk in question. In other words, Mr Ryan was reminding Aon that that Beazley had to be consulted on any claims settlement proposal.

28. By August 2009, the pressure upon AIC and in turn AIG to pay this claim for commercial reasons had become intense. Aon continued to negotiate with AIG alone. On 2 September 2009 Stacey Mead of AIG called Liberty's underwriter to discuss the claim. This appears to have been an attempt to get him on board with AIG's position. Mr Mead referred to the considerable commercial pressure which he was coming under from AIG's head office in New York because of AIG's lead position on overall KPC programmes. He agreed that LEG 2 applied although he did not recommend litigating in Kuwait. AIG was looking at getting out of this on the best terms possible. Liberty told Mr Mead that it was not under any commercial pressure and would let matters play out for a while. On 3 September 2009 Mr Hodkinson of Aon met AIG to discuss the claim. He informed AIC of this and told AIC that "*... at present AIG are*

willing to settle for US$7,334,323, after the application of LEG2". He told AIC that if a compromise was reached with AIG, "*... it may take some time / be difficult to have the balance of the market go along with any agreement reached with AIG.*"

29. There was then a turning point. On 2 October 2009 Mr Hodkinson wrote to KPC and AIG (but not Beazley) stating that as they had agreed, AIG had contacted Eric Capewell of Robertson & Co with a view to that firm performing an independent assessment of the claim. This was said to be "*… a stand alone initiative and is not supported by the rest of the market*".

30. There was then a series of meetings between Robertson, KPC and AIG in October 2009, which resulted in an email from Mr Capewell of Robertson (appointed by AIG) to KPC on 26 October 2009 in which he stated that "*AIG have agreed to the loss amount of USD 19,163,173 i.e. (USD 19,213,173 less policy deductible USD 50,000). They will pay their proportion of 20% as explained*". AIC was notified of this by Aon on 29 October 2009. Aon stated that the agreement was between AIG and KPC only and that Robertson were producing a status report for AIG which would detail the basis of this settlement, at which point Aon would approach the balance of the market and seek their agreement too. This report was produced a few days later on 6 November 2009. The report set out the repair proposals and costings leading to the settlement sum. Stacey Mead of AIG forwarded the report on to Aon on 6 November and stated that the report "*confirms that AIG agreed to settle this claim at our share of USD 19,163,173*."

31. When Mr Barber of CL ME became aware of the above, he set out his concerns in an internal email:

> "*... This is most strange. How come AIG were allowed to take over Mouchel who initially were instructed for the whole market?*
>
> *The Robertson letter does not consider any exclusions whatsoever.*
>
> *Why did KOC not allow HHI to attend the meetings?*
>
> *I wonder whether KOC really understood who Capewell was representing. (i.e. only one of may* [sic] *Insurers)*
>
> *I bet the final cost of this solution is rather more than the budget.*
>
> *Does this mean we cannot show this letter to Beazley? If not, will AIG send teh* [sic] *letter to Beazley at any point?*"

32. On 17 November 2009 at 10.52 hours AIG sent an email to Aon in which they stated "*Please find attached a form of discharge for AIG's US$3,832,634.60 settlement. Please can you kindly forward to our client. Money will take around 2/3 days to get to you (Aon) and 3-5 days to an overseas account*." It is important to note that at this stage Beazley and the other reinsurers were not even aware of these developments. It was only later that day i.e. at 16.58 hours on 17 November 2009 that Aon sent an

email to Beazley passing on news of these developments. The email attached a copy of the Robertson report and stated in material part: "*As you will see, this has resulted in agreement being reached between KPC and AIG to settle this claim in the amount of USD19,163,173, without prejudice ... AIG also commissioned reports from Mouchel ... Obviously it is not in anyone's interest for some of the market to reach settlement with KPC and not others*." Although this agreement is there stated to be "without prejudice", Mr Calver QC submitted that this was not true; that the agreement was not "without prejudice" at all; that none of the documents recording this agreement are stated to be without prejudice; and that KOC/KPC did not consider it to be "without prejudice" as is demonstrated by the fact that they are now suing on the settlement in Kuwait. At this stage, it is sufficient to note that this was disputed by Ms Melwani QC. I revert to this further below.

33. Dean Rebello of Swiss Re was sent a similar summary by Aon on 17 November 2009 at 17.00 hours. Aon (Hodkinson) sent AIC a copy of the Robertson report on 17 November 2009 at 17.34 hours and again at 20.35 hours – in the latter case copied to Mr Bukhari. Four minutes later on 17 November at 20.39 hours Mr Hodkinson sent the AIG discharge/release to AIC stating "*obviously if you sign we will need instruction from [AIC] as to where to pay funds ... NB please note we are initiating discussions with the balance of market for their approval/comment*." Beazley and the other reinsurers were not informed of this development by Aon or AIC.

34. On 18 November 2009 at 13.40, three of the other reinsurers i.e. Trans Re, Liberty, and XL were also sent a copy of the Robertson report by Aon and told that AIG had settled its part of the claim.

35. On 26 November 2009, Trans Re (Tony Peters) then sent an email to Aon in which it expressed concern that the claim had gone up from $6m to $19m stating "*... what is the reasoning behind the huge increase on this claim?*" Aon (Hodkinson) did not respond to this until 8 December 2009 and, even then, the response is less than satisfactory. In particular, Mr Hodkinson made no mention of the non-involvement of Beazley in these developments.

36. On 2 December 2009 Mr Esmail of KPC telephoned Mr Bukhari (AIC). As appears below, this was a very important call and later that day, Mr Esmail sent to Mr Bukhari an email copied to Aon (Mr Hodkinson) which stated in material part as follows:

> "*Reference our telephone conversation today on the above captioned claim.*
>
> *As discussed, KOC have agreed to the final claim settlement (US$19,213,173 net of the applicable deductible) as proposed by Mr. Eric Capewell of Robertson and Co SA International Loss Adjusters for 20% AIG share and Al Ahleia to proceed on the following basis:*
>
> - *AIC issue their Discharge receipt to cater for partial/on account payment settlement for the subject claim representing AIG share 20% and Kuwaiti Co-Insurers shares bearing mind AIC shall still be responsible for the*

remaining balance of claim settlement. This can be processed immediately since AIG confirmed their action to transfer their share US$3,832,634.60 million upon receipt of KOC signature on DR.

- *AIC to transfer the fund collected to KOC Account as soon as possible.*

- *AIC to follow up with its Broker of Record AON Ltd. to obtain approval of the remaining balance of Reinsures.*

- *AIC to issue final Discharge Receipt of the remaining balance of the settlement.*

- *AIC to follow up collection of the funds from the concerned Reinsurers.*

Kindly treat this on a "TOP URGENT" basis and keep us posted on the progress of claim approval and fund transfer to KOC account.

Needless to say KPC/KOC are looking forward to a swift conclusion to the settlement of this long outstanding claim."

37. Attached to the email was a draft "Form of Discharge" for signature by KPC/KOC which provided in material part as follows:

"*WE/THE INSURED ACKNOWLEDGE AND AGREE*

1 That this Form of Discharge relates solely to AIG's Reinsurance Share of Our claim against the Insurers under the CAR Policy for any and all losses that We have suffered either directly or indirectly arising out of the Loss Incident..

2 To accept payment of the sum of US$3,832,634.60 (the "Settlement Sum") in full and final settlement of that proportion of any and all claims that We may have arising either directly or indirectly out of the Loss Incident against the Insurers under the CAR Policy that are reinsured by AIG's Reinsurance Share.

3 That the Settlement Sum has been calculated as representing AIG's Reinsurance Share of an adjusted loss on a 100% (one hundred per cent) basis of US$19,213,173 net of the applicable deductible under the CAR Policy of US$50,000.

4 That this Settlement and Discharge is otherwise entirely without prejudice to Our rights against the Insurers and/or the Other Reinsurers for the remaining 80% (eighty per cent) of Our claim relating to the Loss Incident.

5 *That payment by AIG of the Settlement Sum to AON (who shall be responsible for arranging the collection of such payment) as Our agent AND as the agent of the Insurers by 4pm GMT on [insert date] shall be in full and final settlement of any and all liability which the Insurers and AIG may have arising either directly or indirectly out of the Loss Incident under the terms of the CAR Policy and/or the Reinsurance Policy respectively in relation to AIG's Reinsurance Share AND in full and final discharge of any claim which We or any other interested party may have against the Insurers and/or AIG arising either directly or indirectly out of the Loss Incident under the CAR Policy and/or the Reinsurance Policy respectively relating to AIG's reinsurance Share.*

6 *That upon payment by AIG of the Settlement Sum to AON (as provided for under paragraph 4 above) We shall hold harmless and indemnify AIG in respect of any and all claims that may be pursued against them by any entity including without prejudice to the generality of this indemnity the Insurers or the Other reinsurers or their respective assignees or any other interested party from time to time who has an interest directly or indirectly arising out of the Loss Incident.*

7 *The terms of this Form of discharge shall be governed by and construed in accordance with English Law and any disputes arising hereunder shall be subject to the exclusive jurisdiction of the High Court of Justice of England and Wales."*

38. With regard to this telephone call and email, Mr Bukhari's evidence was set out in paragraphs 70-71 of his statement viz.

> "*70. On 2 December 2009, Mr Esmail of KPC called me concerning the arrangements for implementing the agreement reached direct between AIG and KPC for partial settlement of the claim. Later in the day Mr Esmail sent me an email referring to that conversation.*
>
> *71. In the course of my conversation with Mr Esmail, it was noted that KOC and Chartis had agreed between them, on the settlement of the Chartis proportion. Further Mr Esmail said that he wanted the other reinsurers to agree to this figure and for AIC to arrange for payment of the Chartis proportion and the local insurers retained proportion. However, I did not agree or suggest that the other reinsurers would agree the figure, nor did I agree on behalf of Chartis that it would pay its proportions, or that the Cedants would make payment in respect of their retentions. The steps summarised by Mr Esmail in his email were in effect demands by KPC as to how it wanted the claim to be*

processed. I have not experienced a situation before when Reinsurers had not agreed on the same course of action, and it was my expectation that the agreement of the Reinsurers, other than Chartis, that would be forthcoming once they had had an opportunity to consider the basis on which Robertson & Co. had assessed the value of the claim set out in its report. However, plainly I had to wait for them so to do."

39. Thus, it is important to note that it was Mr Bukhari's evidence that he did not agree or suggest during the call that the other reinsurers would agree the figure, nor did he agree on behalf of Chartis (i.e. AIG) that it would pay its proportions, or that the cedants would make payment in respect of their retentions. Further, it was Mr Bukhari's oral evidence that he was not in a position to agree or not agree anything because as he said: "... *My authority was just to, you know, refer the matter to the senior management. I was not in authority to agree or not to agree.*" I revert to this important part of the evidence below.

40. In summary, it was Mr Bukhari's evidence (which I accept) that Mr Al-Duhaim was fully aware of the claim filed; that all emails were copied to him; that both he i.e. Mr Bukhari and Mr Sobhe Gharaibeh (the claims manager) discussed the email dated 2 December with him and also what Mr Esmail had told Mr Bukhari during his call on that day; and that Mr Al-Duhaim then in effect instructed Mr Gharaibeh to draw up a memo summarising the position which was then done. The memo, prepared by Mr Gharaibeh, is a most important document. Unfortunately, apparently due to some oversight, it was not disclosed until very shortly before the commencement of the trial. The circumstances in which it came to light and was then disclosed are set out in the second witness statement of Mr Bukhari. In its original form it is undated but it must have been prepared shortly after 2 December. It is headed "Partial Payment". Brief details are then given of the policy and claim. It then continues as follows:

"*KOC/KPC has agreed on the final settlement @ US$19,213,173/- . Less deductible US$50,000/- = US$19,163,173/- (100%)*

AIG will transfer their 20% share of US$3,832,634/60 upon receipt KOC signature on discharge receipt.

Now KPC is requesting to pay the AIG share plus Kuwait Co Insurers retained shares which shown as below:

Claim amount	*: $19,213,173/-*
Less Policy Deductible	*:$ 50,000/-*
Total claim amount (100%)	*:$19,163,173/-*
20% AIG Share	*:$3,832,634.60*
Balance AON 69.5% FAC. Share	*:$13,318,405.24*
Local Share (3%)	*:$ 574,895.19*
AIC Share (7.5%)	*:$1,437,237.98*

Total part payment to be made from AIC now:

20% *:$3,832,634.60*

Local *:$ 574,895.19*

AIC *:$1,437,237.98*

Total *:$5,844,767.77*

The above is submitted for your approval to issue Discharge Receipt to above mentioned part payment."

At the bottom right of the memo, there is also to be found manuscript writing in Arabic which, it is common ground, is in Mr Al-Duhaim's hand and, in translation, reads: "*No objection according to agreement with Suleiman Esmail of KPC*" followed by the date 6 December 2009.

41. On 7 December 2009, Mr Bukhari forwarded Mr Esmail's email to Mr Hodkinson of Aon (even though he already had it) stating: "*Kindly advise urgently what documents you need to transfer 20% share of AIG to AIC account to meet KPC request for swift part payment. Also kindly keep us informed on the settlement of shares of remaining reinsurers*". On the same day i.e. 7 December 2009 Mr Esmail sent a further email to Mr Bukhari asking him to "... *kindly peruse* [sic pursue?] *the claim with Kuwaiti co-insurers*". Mr Bukhari responded early the following day "*Please note that we will do the needful*". Also early on 8 December 2009 Mr Hodkinson replied to Mr Bukhari's email of 7 December stating that he required a standard debit note from AIC and the AIG release form signed by KOC and that: "*As regards collection from the balance of reinsurers, we are still in discussion with the same and will revert with comments soonest*".

42. On 8 December 2009 at 08.16 hours Mr Hodkinson emailed Mr Ryan of Beazley and forwarded to him Mr Esmail's email to Mr Bukhari of 2 December 2009. He stated: "*As you will see,* [AIC] *are to issue a final discharge receipt of the remaining balance of the settlement at US$19,163.173 (net for 100%)*" - although, it is important to note that, much later, on 5 May 2010, Mr Hodkinson acknowledged in an email that this statement was a mistake on his part. The email continued with Mr Hodkinson saying that he was "... *happy to discuss this claim further with you should you wish, alternatively we would appreciate your agreement to settle your proportion of this claim on the same terms as agreed by AIG.*" Aon sent a similar email to Trans Re, Liberty Mutual and XL, but not to Millennium.

43. Mr Ryan of Beazley responded to this immediately and stated that the timing of the email was perfect as a letter was being prepared and would be with Aon that morning. That letter was sent shortly thereafter attached to an email dated 8 December 2009 at 10.48. The letter was sent on behalf of all participating reinsurers other than AIG and stated in material part as follows:

> "*As far as Reinsurers can tell, no account has been taken of the applicability of LEG2 in the Settlement Agreement between*

KPC and AIG, and Reinsurers can see no basis on which the value levels agreed correctly reflect these coverage issues.

It would certainly assist any further consideration of the situation if you could respond confirming either that no account of LEG2 was taken in agreeing the settlement or, if it was, then what value was attributed to the applicability of LEG2 in arriving at the settlement amount and how?

It would also assist Reinsurers to understand how it is intended that the settlement would be implemented. In this regard Reinsurers obviously have in mind the claims control provisions in the relevant reinsurance and for good orders sake have to make it clear that they have not provided their consent or approval to this settlement. I would appreciate your comments and clarification in that respect, so that Reinsurers can understand the position more completely ..."

44. On 10 December 2009, Mr Hodkinson replied to Mr Ryan's email. However, he did not answer Mr Ryan's questions and said nothing about the alleged breaches of the CCC. He stated "*As you know we have a fundamental disagreement over the application of LEG2 to this claim ... following these negotiations* [with AIG and KOC] *a global settlement figure was arrived at at USD 19,163,173 taking all factors into account.*" He sent this reply on to Trans Re, XL, Liberty but again not to Millennium. Swiss Re also appear to have been informed.

45. On the same day i.e, 10 December 2009 Mr Hodkinson sent Mr Ryan's letter on to Mr Bukhari stating: "*This is as expected*"; and then continued as follows:

"*We would not expect them to move from their position on LEG2 until such time as they agree to settle or else this would compromise any future legal position they may need to take. We take the fact that they have asked for details of the Mouchel fees as a positive sign that they are prepared to consider the AIG offer once they have full information available.*

We have responded to them with details of those fees and also this letter by advising that the global settlement reached between KPC and AIG took all aspects into account. I had sent reinsurers a copy of Mr. Esmail's Email dated 2 December and advised them that AIC were going to settle the claim in full to keep the pressure on, which is why they have made comment on this and mentioned the claim control clause. I deliberately remained silent on this in my reply to Beazley.

I am scheduling a further meeting with Swiss Re in an attempt to move this forward as quickly as possible."

46. On 16 December 2009 AIC sent a letter to KOC which stated in material part as follows:

> "*We refer to the above claim and are pleased to advise that 'AIG' have agreed to settle their 20% share of the total claim net amount of US$19,163,173/-. Accordingly AIG have requested to sign the attached "Form of Discharge" for AIG's 20% share which kindly return to us after signing with name, title, date on Page 2 of the attached form. On receipt of the above, we will be able to collect AIG share.*
>
> *We also attach herewith discharge receipt for US$2,012,133.16 being the retained share of local coinsurers which also return to us after signing the same*."

Neither the covering letter nor the AIC discharge receipt was stated to be without prejudice. However, importantly, the AIC discharge receipt stated in material part as follows:

> "*I/We, the undersigned [KOC] do hereby acknowledge the receipt from [AIC] the sum of USD2,012,133.16… in full compensation for the loss/damage under the* [Insurance Policy] *arising directly or indirectly from the subsidence at Tank No 84 which occurred at my/our AHMADI on or about Mar 15 2007.*
>
> *In consideration of the above, I/We fully and finally discharge all liability and liquidate all claims against* [AIC] *arising under the* [Insurance Policy] *and admit that I/We am/are fully indemnified for all claims and have no further rights and claims against them in respect of the above mentioned loss/damage*
>
> *This is a partial Payment*
>
> *The remaining amount of the claim will be paid on receipt of remaining Reinsurers shares*
>
> *Amount: USD2012133.16*"

47. On 22 December 2009, there was a phone call between Mr Esmail and Mr Bukhari. This was followed up by an email from Mr Esmail to Mr Bukhari setting out KOC's comments with regard to both the AIG Form of Discharge and the AIC Discharge Receipt. The details are not crucial but importantly KOC were seeking changes to both and requested AIC to let KOC/KPC have the amended documents as soon as possible.

48. On 23 December 2009, AIC emailed Mr Hodkinson and asked him to issue fresh discharge receipts taking account of their comments. The email continued in material part as follows:

> "*Since we are settling this claim as a partial payment (AIG share 20% plus Kuwaiti coinsurers shares i.e. US$3,832,634 + US$2,012,133.17 = US$5,844,767.77) therefore please confirm that the remaining balance of the Reinsurers will be paid in due*

> *course so that same is stipulated in AIC Discharge Receipt as required by KPC/KOC.*
>
> *Also advise if any other reinsurers have agreed to settle this claim?*
>
> *We await your quick response.*"

49. Mr Hodkinson replied to AIC by email dated 24 December 2009 stating that he would request AIG to amend the discharge receipt and: "*As regards the remaining balance of reinsurers, all are still outstanding*".

50. On 8 January 2010 Aon sent AIC an amended AIG form of discharge as requested by AIC. AIC replied by email dated 11 January 2010 with two minor points on the AIG Form of Discharge and stating:

> "*As mentioned in our email dated 23.12.2009, please confirm that the remaining balance of the Reinsurers will be paid in due course so that same is stipulated in AIC Discharge Receipt as required by KPC/KOC. Also please advise if any other Reinsurers have agreed to settle this claim?*"

51. Mr Hodkinson replied to this email on 13 January 2010, but he ignored the second part of it. As a result, AIC asked him again to confirm that the other reinsurers will pay the balance in due course so that this can be added to the AIC discharge receipt. Mr Hodkinson replied on the same date, 13 January 2010, identifying the reinsurers' signed lines and referring to the various discussions which were taking place.

52. On 14 January 2010 Mr Bukhari emailed Mr Esmail of KPC attaching an amended AIG Form of Discharge and AIC Discharge Receipt stating that these are "… *relating to only partial payment of the claim up to amount of US$5,844,767.77*." i.e. for 30.5% of the risk. The email continued by stating that as to the remaining amount, Aon was working on the agreement of remaining insurers and that any amount received from them would be paid over.

53. AIC then emailed one of its co-insurers, Bahrain Kuwait Insurance Co on 14 January 2010 in which it advised that "……*as per the loss adjusters last findings the leader Reinsurer has agreed on settlement of KD 5.6*[m] *... we are processing with the settlement and all relative documents shall be forwarded to you in due course.*"

54. On 18 January 2010 AIC wrote again to KOC attaching a revised Form of Discharge from AIG as well as a discharge receipt for AIC. Neither the covering letter nor the AIC discharge receipt was stated to be without prejudice.

55. It is important to note that none of these exchanges was disclosed to Beazley or the other reinsurers by AIC or Aon. Indeed, AIC had sent them nothing (other than the Mouchel reports) since receiving Mr Ryan's letter of 8 December 2009. It was only some 3 months later, on 11 March 2010, that Mr Hodkinson emailed Mr Ryan of Beazley and Mr Rebello of Swiss Re, copying in Trans Re, Liberty and XL (but again, not Millennium) referring to the Mouchel reports previously sent in December 2009 and asking "*whether or not, in light of this additional information* [i.e. Mouchel

reports], *you will follow the settlement agreed between [AIG] and the assured in order to conclude this claim*." He also asked reinsurers "*by midday tomorrow*" to agree to a standstill of the Tank 84 claim for limitation reasons, stating that if they did not hear from him, "*our client will have no option but to file suit as a protective measure*".

56. On 12 March 2010 Dewey & LeBoeuf LLP ("DL"), solicitors for the claimants, sent a letter to Holman Fenwick Willan LLP ("HFW") (who drafted the standstill agreement for Aon and acted for KPC/KOC), in connection with the request for a standstill. In summary, they complained about the claimants only being given one working day to respond, referred to the fact that Aon had asked Beazley to follow the settlement agreed between AIG/Chartis and the Insured and stated that they were instructed to make a formal request on behalf of the Reinsurers to the Insurers to explain this settlement, its status, and an explanation as to how Insurers' participation in the settlement is consistent with their claims control obligations within the relevant reinsurance, and that pending this explanation, reinsurers would not enter into the standstill.

57. Despite the terms of this letter, and despite it being sent on to AIC by Aon on 12 March 2010, on 14 March 2010 AIC emailed Aon and stated: "... *Regarding status of claim settlement, as per the agreed settlement of KOC to the final claim settlement US$19,213,173/- (net of the applicable) we have released Discharge receipt for US$5,844,767.77 (AIG share of 20% ...) to the client and we still await signed discharge from KOC*." DL responded on the same day stating that the reply from AIC appeared to confirm that they had gone ahead and implemented a settlement of the loss: that reinsurers had not agreed that settlement, and that "*this would appear to be a clear breach of the claims control clause*" which is a condition precedent to liability. DL noted that AIC entirely ignored the question posed as to how what they have done is consistent with the claims control clause; and that the agreed settlement paid no regard to the applicability of LEG2. DL suggested that AIC should take independent legal advice.

58. Aon sent on this response of DL to AIC on the following day, 15 March 2010. Mr Calver QC submitted that it was only at this point that Aon finally woke up to the serious problem which it and AIC faced, namely that all of these negotiations had been conducted in breach of the claims control clause - the appointment of Robertson as loss adjuster, the failure to afford Beazley the right to control the adjustment and the negotiations with KPC/KOC and the admission of liability and settlement with KPC/KOC. In consequence, submitted Mr Calver QC, Aon then sought to backtrack and to seek to extricate AIC from these difficulties but it was simply too late. In particular, Mr Calver QC submitted that Aon sought to construct a case that the offer had not been accepted; and that "*it ought to be confirmed [by AIC] to KOC that the offer that is made is for part of the claim and it is not an admission of liability for the balance of the claim*".

59. On 17 March 2010, AIC sent a letter to Reinsurers which had been drafted by Aon and which stated in material part:

> "- *the domestic insurers* [the defendants], *in respect only of their retained liability and the part of the risk reinsured with Chartis, have proposed payment on terms acceptable to the*

insurers and Chartis. That settlement is neither an admission of liability, a settlement or a compromise of that part of the claim that will remain unpaid following any agreed payment; ..."

In our view, therefore, we are seeking to effect settlement of our retained liability and that part reinsured by Chartis. That settlement will be without prejudice to the respective rights and liabilities of the insured and the insurer (as reinsured by parties other than Chartis) in respect of the balance of the claim."

60. Mr Calver QC submitted that the attempt to unravel the admissions of liability to KPC/KOC on this basis was hopeless; that Aon and AIC were driven to suggest that it was consistent with the CCC to settle part of the claim with KOC, admit liability for AIC's retained share and AIG's share, and yet not be in breach of the CCC; that, in the fourth paragraph of this letter, AIC suggested that "the unpaid balance" could be defended by applying the LEG 2 exclusion, despite the fact that AIC had abandoned reliance upon that exclusion in agreeing to the US$19m settlement; and that there was no suggestion that the settlement referred to in the third paragraph of this letter was made without prejudice.

61. Aon then emailed AIC on 17 March 2010 when, Mr Calver QC submitted, for the first time it explained to AIC that KOC was entitled to come after AIC for the full sum of US$19m for which AIC had agreed to settle; and that this was no doubt because the claimants continued to rely upon LEG2 to exclude the claim, as they had done all along. At about this time, it appears that Aon also contacted KOC and told them not to sign the discharge releases and advised KOC not to sign the discharge releases "*is the correct thing to have done and you should not alter from this or else you will definitely be in breach of the claims control conditions under your reinsurance*."

62. It was only on the following day i.e. 18 March 2010 that KOC eventually responded to AIC's letter dated 18 January 2010 stating in material part: "*Please find attached your original discharge receipt returned herewith as the wording doesn't reflect agreed claim amount by Underwriters hence not acceptable to KOC. Accordingly, we attached herewith our proposed wording for the discharge receipt reflecting the total agreed claim amount of USD 19,163,173/- and the partial payment amount of USD 5,844,767.77.*"

The Kuwaiti proceedings

63. On 14 March 2010, KOC issued proceedings against AIC in Kuwait in relation to the Tank 84 claim. The precise nature of these proceedings remains somewhat unclear. In particular, it is potentially relevant to consider whether the claim by KOC in Kuwait is one made under the Insurance Policy or pursuant to a settlement agreement. According to Mr Hodkinson's email dated 17 March 2010, he had apparently been told by Mr Esmail of KOC that "*proceedings had been issued locally to recover the 100% of the claim amount as agreed by AIG and KOC at USD19,163,173 and that he was looking for a statement from [AIC] committing to this amount.*". However, following a meeting in May 2010 between the solicitors acting for KOC (HFW) and DL i.e. the reinsurers' solicitors, HFW wrote to DL by letter dated 4 June 2010 stating in material part as follows:

> "*With regard to the claims control clause issue, whilst this is of course a matter for the cedant and the reinsurers, as promised, we write to confirm that our clients have not concluded any settlement with the cedant, whether as regards the cedant's line or Chartis' line. In their letter of 29 April 2010, the cedant states that it will follow the reinsurers in all respects, and this is the current position ...*"

64. Mr Calver QC submitted that this was demonstrably untrue. In particular, Mr Calver QC submitted that it can be seen from the face of the proceedings that KOC is specifically relying upon AIC's admission of liability in order to recover from it the entire settlement sum of US$19m, such admission being contained in their various letters and discharge receipts. This was disputed by Ms Melwani QC. I confess that I have found the debate in relation to this issue confusing partly because I am not sure whether the documents I have been shown in relation to the Kuwaiti proceedings are complete and partly because I am not sure that the translations are accurate. However, doing the best I can, it seems to me that the document which I would describe as the original claim form would appear to be a straightforward claim under the Insurance Policy: there is nothing there about any claim pursuant to any settlement agreement nor any attempt to rely upon any admission of liability. Rather, the main document which Mr Calver QC relied upon is one which was apparently served in anticipation of a hearing scheduled on 30 November 2011 setting out the arguments submitted on behalf of KOC. This is a very confusing document but Mr Calver QC relied in particular on what is stated at the bottom of p2 to the top of p3 viz "*... the matter finally reached the point where* [AIC] *in its letter dated 18.1.2010 agreed to pay the amount of US$5,844,767... immediately and to pay the remainder as soon as* [AIC] *received it from the other reinsurers ... This confirms that* [AIC] *acting for and on behalf of the remaining defendants acknowledged that* [KOC] *had a priority right to that amount in the claim which came to US$19,163,173 ... The defendants must therefore meet their obligations resulting from the insurance policy...*" In the light of this document, it seems to me that Mr Calver QC is right at least to this extent viz. that contrary to the letter from HFW, KOC is indeed seeking to rely upon an "agreement" to pay US$5,844,767 and a further agreement to pay the balance of US$19,163,173 as soon as it is received from the reinsurers. However, the fact that KOC are alleging an agreement does not necessarily mean that there was any such "agreement" in fact. That is a matter I deal with further below when considering the parties' submissions. For present purposes, it is sufficient to note that as stated by KOC in this document the basis of such alleged agreement is the letter from AIC dated 18 January 2010.

The issues: discussion

65. Against that background, I turn to consider the case advanced by the claimants and the issues which arise for determination in relation to the CCC.

66. In summary, the claimants' case was (at least originally) that the defendants acted in breach of the terms of the CCC (compliance with which is a condition precedent to the claimants' liability for the claim) in one or more of the following ways:

    i) In appointing Robertson as loss adjuster (who adjusted the claim up from US$6m to US$19m, without regard for LEG 2) without reference to Beazley

or any of the claimants and in failing to allow Beazley or the other claimants to control adjustments and settlements in connection with the Tank 84 loss;

ii) In failing to allow Beazley or any of the Claimants to control the negotiations with KPC/KOC and instead in conducting those negotiations behind the backs of reinsurers other than AIG, despite Beazley being joint lead on the risk (of which fact for this very purpose it specifically reminded Aon on 27 July 2009) and despite the claims agreement parties under the Reinsurance Contract being Beazley, Transatlantic Re and Millennium;

iii) In admitting liability (on numerous occasions) for KPC/KOC's Tank 84 Claim without the prior approval of Beazley, Transatlantic Re and Millennium;

iv) In settling and/or compromising the claim without the prior approval of Beazley, Transatlantic Re and Millennium.

67. In the event, Mr Calver QC abandoned his case as summarised in (i) above i.e. the claimants abandoned its allegation of breach of the CCC based upon the employment of Robertson as the loss adjuster. The remainder of the allegations fall into two main groups. The allegation in sub-paragraph (ii) concerns alleged breaches of subparagraph (b) of the CCC. The last two i.e. sub-paragraphs (iii) and (iv) concern alleged breaches of sub-paragraph (c) of the CCC. I deal with these two groups below but before doing so, it is convenient at the outset (a) to identify what was common ground and (b) to consider the proper approach to the construction of the CCC.

68. As to the common ground, it was agreed that compliance with the CCC is a condition precedent to Reinsurers' liability for this claim. Second, it is agreed that the word "Reinsurers" in sub-paragraphs (b) and (c) of the CCC is a reference to the Claims Agreement Parties, who are AIG, Beazley, Millennium and Trans Re. Third, it is agreed that it is therefore these Reinsurers (i.e. the Claims Agreement Parties) acting together who are able to exercise the rights conferred by sub-paragraph (b), and those rights cannot be exercised by individual reinsurers acting unilaterally, or by all the Non-AIG Reinsurers without the consent of AIG.

69. As to the proper approach to the construction of the CCC, Ms Melwani QC submitted that it is to be treated as an "exception clause" and therefore construed against the claimants being the parties seeking to rely upon it. Mr Calver QC submitted that this dispute would only be relevant if the CCC were "ambiguous" and here there was no ambiguity; but that, in any event, the CCC was not in the nature of an exception clause. In particular, he submitted that the CCC was saying simply that if the reinsureds wanted to recover under the policy they had to come to the reinsurers before settling any claim against them. In support of that submission, Mr Calver QC relied, in particular, upon the judgment of Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (Nos 2 and 3)* [2001] Lloyd's IRLR 667 at p686 [21]:

> "*I do not think that this is a case where it is necessary to resort to any principle of last resort in cases of real ambiguity, such as construction against the person putting forward the sub-clause for incorporation into the contract. In my judgment, only one of the two possible interpretations makes any commerial sense, and this should be adopted. I would add that there is anyway some*

room for doubt what, if any weight, could, even as a point of last resort, attach to the fact that Gan, as reinsurers, put forward this particular Claims Co-operation Clause. This Clause appears to have been required by Gan in lieu of a "Claims Control Clause" referred to in the broker's slip. It might be of interest to compare the two, to see if the Claims Co-operation Clause was, in a material respect, more stringent than a claims control clause – though I appreciate that that observation assumes that the characteristics of the latter type of clause can be identified with some specificity. A second point that might have some materiality is that clauses such as the Claims Co-operation Clause are standard clauses, used in a range of reinsurances, where one might expect them to receive a uniform construction, whoever proposed them: cf Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. (The "Nema") [1982] A.C. 724, 737F-H, per Lord Diplock; and Miramar Maritime Corp. v. Holborn Oil Trading Ltd. [1984] A.C. 676, 682C-F, per Lord Diplock. However that may be, I consider, as I have said, that there is no need or basis to invoke the principle of construction against the profferor in this case."

70. In my view, this passage does not provide much, if any, support to Mr Calver QC. In particular, it is important to note that Mance LJ was there concerned with a claims cooperation clause which is less stringent than a claims control clause. Moreover, as I read this passage, Mance LJ was focussing on the argument as to whether it was necessary to resort to any principle of last resort such as construction against the person putting forward the sub-clause for incorporation into the contract and, in the event, concluded that there was no need or basis to invoke such principle. Rather, it seems to me that of much greater assistance is the passage cited by Ms Melwani QC from the judgment of Longmore LJ in *Royal & Sun Alliance v Dornoch* [2005] Lloyd's Rep IR 544 at p550 [19]:

> "*A reinsurer of a reinsured's liability to a third party is prima facie liable to the extent of his subscription once it is ascertained that the reinsured is liable to that third party. A condition precedent to the liability of the reinsurer operates as an exemption to that prima facie liability. It is a well-established and salutary principle that a party who relies on a clause exempting him from liability can only do so if the words of the clause are clear on a fair construction of the clause, see Elderslie Steamship Co Ltd v Borthwick [1905] AC 93, Gordon Alison & Co v Wallsend Slipway and Engineering Co Ltd (1927) 27 Lloyds Rep 285, Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, 850D–851A per Lord Diplock and other cases cited in Chitty, Contracts, 29th ed para. 14-005. In my view the terms of the Claims Control Clause on which the Syndicates rely do not sufficiently clearly exempt them from liability.*"

Consistent with this passage, it is my conclusion that the CCC does operate as an exemption clause and that the claimants can only rely upon it if the words are clear on a fair construction of the clause.

CCC – breach of sub-paragraph (b)?

71. I turn then to consider the alleged breaches in relation to sub-paragraph (b) of the CCC. As to the wording of that sub-paragraph, it seems to me important to recognise, at the outset, that the phrase *"such loss or losses"* which appears twice in this sub-paragraph of the CCC must relate back to sub-paragraph (a) of the CCC i.e. it concerns – and concerns only – any loss or losses "*... which may give rise to a claim under this* [i.e. the Reinsurance] *Policy ...*". This was, as I understood, common ground and, as considered further below, gave rise to certain difficult points in relation to what Ms Melwani QC described as "pizza slices".

72. The main foundation stone of this part of the claimants' case is the decision of the Court of Appeal in *Eagle Star Insurance Co Ltd v Cresswell* [2004] Lloyd's Rep 537 which concerned the proper construction of wording in a claims cooperation clause which provided in relevant part: *".....(b) The Underwriters hereon shall control the negotiations and settlements of any claims under this Policy. In this event the Underwriters hereon will not be liable to pay any claim not controlled as set out above ...*" In particular, Mr Calver QC relied on the passage from the judgment of Longmore LJ at p543 [15]-[17]:

> "*15 Sub-Paragraph (b) – First sentence: Option or allocation of role?*
>
> *Mr Flaux accepted that the words "any claims under this Policy" must mean claims for which Eagle Star were potentially liable to their insured but submitted that the first sentence of sub-paragraph (b) with its use of the word "shall" must either constitute an obligation on reinsurers to take control of negotiations or settlements or an option entitling them to do so if they chose. In the court below he had argued that it was an obligation but, before us, he recognised that that was an impossible construction. He relied on what he called the only possible alternative, that it gave a choice to reinsurers to take control if they wished to do so. The only time when this option arose was on the happening of the event in sub-paragraph (a) viz the notification to reinsurers of a claim or occurrence likely to involve them. If the option was not exercised at that time, it could not be exercised at a later date. There would be a reasonable time within which reinsurers could inform Eagle Star that the option was to be exercised but that had never happened in this case and they were therefore bound to follow Eagle Star's settlement. It would be too uncertain to construe the clause as meaning that reinsurers could take control at any time they liked; there was moreover no implied obligation on Eagle Star to give notice that they were about to negotiate or about to settle a claim. Any such implication would itself be uncertain since it would be difficult to*

decide whether any particular step taken whether by Eagle Star or by Varian was a negotiation. The clause would be unworkable, if reinsurers' construction were accepted.

16. Attractively as the argument was presented, I cannot accept it. The clear intent of the clause is that the reinsurers are to be entitled (not themselves to negotiate or settle but) to control any negotiation or settlement that takes place between Eagle Star and Varian. All that this requires is for Eagle Star to inform reinsurers when negotiations begin so that reinsurers can say (if they choose) what form the negotiations should take and what offers should be made. Likewise if Eagle Star propose to settle the case, reinsurers have to be informed and have to consent. Of course many reinsurers may be content to leave their reinsured to do the negotiation and settlement of claims but the reinsurers on this particular policy have stipulated for a decisive role. There is no true uncertainty, since it is not difficult to know when a negotiation of a claim begins; it is even easier to know when a settlement can be made. To construe the sub-paragraph as conferring an option would lead to at least equal uncertainty as that complained of by Eagle Star, because there may not be enough information for a decision to be made about controlling negotiations or settlements at the time when notice of claim is given. Sometimes notices of claim are informal and do not disclose very much often because the reinsured does not himself at that stage know a great deal. The examples of notification given in paragraph 7 of the Agreed Statement of Facts are typical and would not be informative for the purpose of making a once and for all decision as to controlling negotiations or settlement at those particular times.

17. For these reasons I prefer Mr Edelman's submission viz. that the function of sub-paragraph (b) is to allocate a controlling role to reinsurers. It will be for the reinsured to say if and when negotiations are about to take place to enable the reinsurers to decide whether to exercise control at that stage. The position will be similar if it becomes apparent that a settlement can be made. This does not mean that there is any obligation on the reinsured to inform reinsurers of any negotiations or settlement; it just means that if reinsurers do not control negotiations or settlement, then (subject to waiver or estoppel) reinsurers will not be liable."

73. Relying on that passage, Mr Calver QC submitted that in breach of sub-paragraph (b) of the CCC in the present case, Mr Bukhari acting on behalf of the defendants began their negotiations with KPC on 2 December; that by 6 December, the deal was done; that the claimants were not notified of this until 8 December; and that in other words, by the time the claimants were told that AIC had negotiated the claim with KPC, the "horse had bolted". It is very important to emphasise that Mr Calver QC's argument on this part of the case was limited as just summarised. In particular, Mr Calver QC expressly disavowed reliance on any negotiations which were undertaken between AIG and KOC/KPC. That is hardly surprising because, as Mr Ryan made plain in

evidence and as Mr Calver QC acknowledged the claimants accepted that although they did not particularly like AIG pursuing its own course, they realised that they could not stop AIG and were content or at least resigned to let those negotiations take place. Moreover, Mr Calver QC does not rely on any negotiations before 2 December 2009 or after 6 December 2009. Thus, in summary, in considering the claimants' case under sub-paragraph (b) of the CCC the relevant negotiations are those which Mr Calver QC says took place between AIC and KPC/KOC between 2 December 2009 and 6 December 2009.

74. As to these submissions, Ms Melwani QC had a number of points by way of response. First, she submitted that the wording of the clause in *Eagle Star* is different from the wording of the CCC in the present case. That is certainly right but it does not seem to me that such difference in wording necessarily assists Ms Melwani QC. Second, she submitted that although the wording may give the reinsurers certain rights, it does not take away any of the defendants' rights. In a sense that is no doubt correct. But it seems to me (and this is the point which emerges from the passage in the judgment of Longmore LJ's judgment) that the question is not really whether or not the defendants' rights are taken away or not. Rather, what is, in my view, important is that the clause is, in effect, saying that (i) the defendants are under an obligation to furnish information respecting such *"loss or losses"* and (ii) the reinsurers have certain rights i.e. to appoint certain parties and to "control" all negotiations, adjustments and settlements "*in connection with such loss or losses*". It follows, in my view, that the reinsurers "must" be given a proper opportunity to exercise that right, the word "must" being used not in the sense of "obligation" as such but as shorthand in the sense that if such opportunity is not properly afforded to reinsurers, the consequence will be that the terms of the condition precedent will not be satisfied with the result that the reinsurers will not be liable.

75. In light of the above, it seems to me that the issue in relation to sub-paragraph (b) of the CCC is quite narrow bearing in mind, as stated above, that the case advanced by Mr Calver QC fell within a confined timescale i.e. between 2 December 2009 (i.e. when the phone call took place between Mr Esmail and Mr Bukhari) and, at latest, 6 December 2009.

76. In my view, there are two main difficulties with Mr Calver QC's case under this head. First, it was, in effect, Mr Bukhari's evidence that there were no "negotiations" as such during this period. Rather, his evidence was that Mr Esmail telephoned him on 2 December and made certain demands. As he stated in paragraph 71 of his statement, the steps summarised by Mr Esmail in his email were in effect demands by KPC as to how it wanted the claim to be processed. Mr Bukhari was, of course, cross-examined on this topic when he gave evidence. It is right to say that during such cross-examination it seemed to me that Mr Bukhari had real difficulty in both understanding the questions being put and in expressing himself; and that Mr Bukhari's evidence was, in important respects, confused and lacking in clarity. In that context, I have in mind in particular, parts of the cross-examination at Day 2 pp165-175. For example, I am sure that he sometimes gave answers like "right" or "yes" which were simply intended to acknowledge the question put without necessarily agreeing with its substance.

77. Despite these difficulties, I accept the broad thrust of Mr Bukhari's evidence as stated in paragraph 71 of his statement and at Day 2 p167 line 20-p168 line 5 i.e. that there

were no negotiations still less any agreement as such during the call on 2 December 2009 and that Mr Esmail was in effect simply bringing him up to date with regard to the position with AIG and putting forward what were in effect the demands of KOC/KPC relating to the outstanding balance of the claim. In my judgment that conclusion is supported by three main points.

i) First, quite apart from Mr Bukhari's evidence with regard to his limited authority, it seems to me inherently unlikely that Mr Bukhari would himself have engaged in any negotiations in the course of this telephone call seemingly out of the blue from Mr Esmail. The amounts concerned were very substantial and it seems to me highly likely that anything which Mr Esmail said in that context would have to have been passed up the line to Mr Al-Duhaim.

ii) Second, although I accept that the email dated 2 December 2009 is somewhat jumbled and not absolutely clear in part, it is, in my view, consistent (or at least more consistent) with Mr Bukhari's evidence. In particular:

    a) At the beginning, it refers to what KOC has agreed with Mr Capewell of Robertson – but Mr Calver QC (now) accepts that the latter was acting for AIG only and I do not read anything in the email to suggest that Mr Bukhari engaged in any negotiations with regard to that element of the claim.

    b) With regard to the balance of the claim, although the opening words say that "*as discussed*", AIC "*... to proceed on the following basis ...*" , it seems to me that Mr Esmail was simply setting out what were, in effect, his demands or expectations as to what should happen both with regard to the issuance of the discharge receipt in respect of AIG's share and the Kuwaiti co-insurers' shares. Despite Mr Calver QC's strong submissions to the contrary, I do not read the first bullet of the email (which was the highpoint of Mr Calver QC's case) as evidencing any "negotiations" relating to these matters still less that Mr Bukhari agreed to the course indicated.

    c) The third bullet point makes plain that AIC was to follow up with Aon "*... to obtain approval of the remaining balance of Reinsurers (sic ...)*".

    d) The penultimate sentence also would seem important in that is requests Mr Bukhari to "*... keep us posted on the progress of the claim approval ...*".

iii) Third, the memo prepared by Mr Gharaibeh also confirms the above: the opening words "*KOC/KPC has agreed on the final claim ...*" can only be a reference to what KOC/KPC considered had been agreed through Robertson with AIG (which is no longer relied upon by Mr Calver QC); the third sentence uses the present tense i.e. "*Now KPC is requesting ...*"; and the last sentence makes plain that the memo is being submitted for the purpose of obtaining Mr Al-Duhaim's approval.

78. Even if whatever was said on the phone on 2 December might be described as "negotiations", I do not think it was commercially realistic for Mr Bukhari to refuse to

speak to Mr Esmail when he phoned on 2 December and put the phone down. Nor do I consider that this was legally required by the terms of sub-paragraph (b) of the CCC. At most, it seems to me that the call on 2 December is to be regarded as the first step in any negotiations and that, fairly construed, AIC was in effect under an obligation to give notice of such negotiations promptly or at least within a reasonable time thereafter.

79. If that analysis is right, the focus must be on what happened immediately after 2 December. But, in truth nothing legally significant did happen after 2 December during the relevant period identified by Mr Calver QC. As I have stated above, following the call on 2 December the evidence of Mr Bukhari (which I accept) is that there were internal discussions with Mr Gharaibeh and Mr Al-Duhaim which resulted in the memo prepared by Mr Gharaibeh and the (internal) "approval" on 6 December by Mr Al-Duhaim. However, it seems to me that such internal "approval" did not have any legal effect as between the parties. In particular, Mr Bukhari did not go back to KOC/KPC and convey such "approval". It is unnecessary to consider what happened thereafter and, in particular, what the claimants did or did not do because in this context Mr Calver QC does not rely on anything done or not done after 6 December. However, it is noteworthy that there is nothing in the email on 7 December to Mr Hodkinson referring to such "approval" or otherwise taking any negotiations further; that although there was the "chaser" from Mr Esmail on 7 December with regard to the Kuwaiti coinsurers, the only response from Mr Bukhari early on 8 December was that "... *we will do the needful* ..." followed by two other emails of no significance; and that, importantly, as stated above, Mr Hodkinson forwarded Mr Esmail's email dated 2 December to Mr Ryan shortly thereafter at 0816 on 8 December – so from that time onwards the reinsurers were aware of what was going on and had full opportunity, if they so wished, of participating in and taking over control of any negotiations.

80. For these reasons, I reject the claimants' case that there was any breach of sub-paragraph (b) of the CCC. In summary, I do not regard what happened during the call on 2 December or at any time up to 6 December as constituting a breach of sub-paragraph (b).

81. I should mention that in relation to sub-paragraph (b), Ms Melwani QC relied upon a further point viz. that if (which she denied) there were any "negotiations" during this narrow window i.e. 2-6 December, they were not, on any view, negotiations "... *respecting such loss or losses* ..." within the meaning of sub-paragraph (b) i.e. loss or losses which might give rise to a claim under the Reinsurance Contract/Declaration; and for that reason there was no breach. This is the "pizza slice" argument i.e. there were certainly no negotiations respecting any loss or losses that might ultimately fall on these claimants and any negotiations concerning the defendants' own retention or AIG's share were not in respect of losses which might give rise to any claim against the present claimants and therefore were not "caught" by sub-paragraph (b). In light of my earlier conclusions, it is unnecessary to reach a conclusion on this point. However, I would note that although Ms Melwani QC may be right with regard to the positive duty to furnish information in the first limb of sub-paragraph (b), the wording of the last part of sub-paragraph (b) i.e. "... *in connection with such loss or losses*" is arguably much broader. Thus, for example, if negotiations had taken place in the context of the defendants' retention as to the appropriate 100% figure to be

used to calculate the defendant's share, then it seems to be that it would at least be strongly arguable that such negotiations would be "*in connection with*" a loss or losses which might give rise to a claim under the Reinsurance Contract/Declaration even if they would not be "*respecting*" such loss or losses. However, in the event, it is unnecessary to determine this potential issue.

CCC – breach of sub-paragraph (c)?

82. Under this head, the claimants' case was, in summary, as follows:

i) The claimants' primary case was that there was here a settlement by AIC on behalf of all the defendants of the entirety of KOC's claim of US$19,163,173; or at least AIC admitted liability on behalf of all the defendants for that full claim of KOC.

ii) KOC and AIG agreed a settlement of the claim in the sum of circa $19m. AIC then approved that settlement in full by adopting it and admitting liability to KOC for such sum in December 2009, in particular by agreeing to issue a discharge receipt for the balance of the sum after it had made "part payment" of this sum. It was a "part payment" precisely because AIC had admitted liability for the full sum, albeit that it anticipated getting the money in from the reinsurers. This agreement was reached and/or admission was made in the course of the telephone call between Mr Bukhari and Mr Esmail on 2 December and was further contained in or evidenced by the email from Mr Esmail of that date and various further documents which Mr Calver QC relied upon.

iii) In particular, AIC repeatedly admitted liability for the claim to KPC on and after 2 December 2009. It did so (a) by agreeing to pay to KPC under its insurance policy a sum which reflected AIG's 20% share of the reinsurance; (b) by agreeing to pay to KPC under its insurance policy its 10.5% retained share. It also did so by agreeing to issue a discharge receipt for the balance of the $19m settlement sum; and (c) by agreeing to pay that sum over to KPC without more upon recovery from its reinsurers.

iv) Alternatively, there was on any view a settlement or compromise by AIC of at least part of KOC's claim i.e. AIG's share (20%) and/or the defendants' share (10.5%). There was also an admission by AIC that KPC had a valid claim under the Reinsurance, whereas Reinsurers were maintaining that LEG2 eliminated the claim. That was an admission of liability.

v) On any view, in December 2009 AIC had bound itself to dispose of this part of KOC's claim. Mr Bukhari agreed with that. There does not have to be a formal settlement agreement drawn up. Nor is it correct to assert (as the defendants do) that the discharge receipt would only have brought about a settlement once payment of the cedants' retained share had been made and that payment was never made. Payment was simply a consequence of the settlement agreement which Mr Bukhari accepted had already been reached. The discharge receipts were merely the mechanics of payment under the settlement, which had already been reached.

vi) The foregoing conduct was a breach of clause (c) of the CCC because AIC did not seek the prior approval of Beazley, Trans Re or Millennium to this settlement or before admitting liability – it did not even tell Millennium what was happening.

vii) Nothing that AIC agreed with KOC was expressed to be agreed without prejudice. Mr Bukhari did not suggest that that was so. In any event without prejudice settlements certainly do fall within the scope of clause (c). Clause (c) is widely worded: it prohibits any form of settlement and/or compromise. That can cover all types of settlements and compromises.

83. As to these submissions, there was a number of legal issues as to the proper scope and effect of sub-paragraph (c) which gave rise to some debate. I deal with these below although the resolution of at least some of these issues is not strictly necessary because of my conclusions on the facts which I deal with later in this judgment.

"What" settlement/compromise or admission of liability?

84. It was common ground that sub-paragraph (c) is concerned with a settlement or admission of liability in relation to the underlying Insurance Policy. So much is clear. However, there was an important issue between the parties as to whether the wording was unlimited i.e. whether it prohibited, in effect, <u>any</u> settlement/compromise or admission of liability by AIC under the underlying Insurance Policy without the reinsurers' approval; or whether the prohibition was limited to any settlement or admission of liability either (i) "*respecting any loss or losses which may give rise to a claim under* [the Reinsurance Contract/Declaration] ..." (the limiting words in sub-paragraph (a)); or (ii) "*... in connection with such loss or losses ...*" (the limiting words in sub-paragraph (b)). Thus, it was common ground that if there was a settlement/compromise or admission of liability of say the full amount of US$19,163,173 (as Mr Calver QC submitted had been the case) without the reinsurers' prior approval, that would constitute breach of the condition precedent and, in effect, preclude any claim by the defendants under the Reinsurance Contract/Declaration. However, although Ms Melwani QC's primary case was that there had been no settlement/compromise or admission of liability, she submitted in the alternative that if contrary to that primary submission, I were to conclude that there had been a settlement/compromise or admission of liability of (i) that part of the claim covered by AIG's share and/or (ii) the defendants' retention, that would <u>not</u> constitute any breach of sub-paragraph (c).

85. The highpoint of Mr Calver QC's case is, of course, that the wording of sub-paragraph (c) is on its face unlimited. Further, Mr Calver QC submitted that his construction had an important commercial purpose and was consistent with business common sense. In particular, he submitted that in order for the defendants to settle any part of the underlying claim (whether in respect of their own retention or that covered by AIG's share) it would be necessary for the defendants to agree what the overall 100% claim was worth; that from reinsurers' point of view that overall 100% figure then fixes what Mr Calver QC described as the "negotiating bar" with regard to any future negotiations between the original insured and the defendants because, at the very least, their expectation would then be that they should be entitled to the full 100% figure; and that therefore it makes settlement much more difficult for the

reinsurers in particular, in the present context, with regard to persuading the original insured that LEG2 should apply.

86. Mr Calver QC advanced these submissions most persuasively. However, I am unable to accept them for the following reasons. First, although I accept that the purely literal construction of sub-paragraph (c) viewed in isolation is as suggested by Mr Calver QC, I am not persuaded that that is necessarily the correct approach as, for example, the House of Lords concluded (albeit in an entirely different context) in *The Antaios* [1985] A.C. 191 ("any breach" in a withdrawal clause did not mean "any breach" but only, in effect "any repudiatory breach"). Second, it seems to me important to construe sub-paragraph (c) in the context of the CCC as a whole. Thus, although the last sentence of the CCC refers to "settlement" twice it is relatively plain that when it is used the second time, it is referring to a settlement in respect of which there is a "matching" liability under the Reinsurance Contract/Declaration: it cannot be referring to a settlement of, for example, the reinsured's own retention. Third, I am not persuaded that Mr Calver QC's construction is in accordance with business common sense. On the contrary, it seems to me that there is a very strong contrary argument to the contrary, viz. in the absence of very clear words to the contrary, the defendants should, if they so wish, be entitled to settle, compromise or admit liability under the Insurance Policy at least if such settlement, compromise or admission is not in respect of or in connection with any loss or losses that might give rise to a claim under the Reinsurance Contract/Declaration. Fourth, it seems to me that these arguments derive further support when sub-paragraph (c) is viewed alongside sub-paragraphs (a) and (b). In particular, it seems to me odd, if not bizarre, that those sub-paragraphs should apply only when a claim is made respecting or in connection with a loss or losses that might give rise to a claim under the Reinsurance Contract/Declaration, but sub-paragraph (c) should apply generally to any settlement/compromise or admission under the underlying Insurance Policy regardless of whether such settlement/compromise or admission is in respect of or in connection with a loss or losses that might give rise to a claim under the Reinsurance Contract/Declaration.

87. For these reasons, it is my conclusion that in the context of the present case, sub-paragraph (c) has no application to any settlement, compromise or admission of liability in respect of AIG's share or the defendants' own retention.

88. As to a settlement, compromise or admission of liability by the defendants of, in effect, AIG's share, there is a further reason why, in my judgment, sub-paragraph (c) does not apply viz. the claimants were fully aware that AIG were seeking to settle their share and were content or at least resigned that this should happen.

"Settlement"?

89. The second main issue concerned the meaning of the word "settlement" and, in particular, whether that term covered a "without prejudice" settlement. As to this, Mr Calver QC's primary submission was that this question did not arise because nothing that AIC agreed with KOC was expressed to be without prejudice; but, if relevant, he submitted in summary as follows:

i) Without prejudice settlements certainly do fall within the scope of clause (c). Clause (c) is widely worded: it prohibits any form of settlement and/or compromise. That can cover all types of settlements and compromises.

ii) The settlement may be an oral settlement; or it may be a settlement recorded in writing but not contained in a formal settlement agreement. It may include without prejudice settlements or ex gratia settlements (an ex gratia settlement being one that is made where there is a payment of money by the insurer to the assured where there was no liability under the policy to indemnify the assured). It does not exclude such settlements from its scope.

iii) If what is meant by a without prejudice settlement in this context is a settlement agreement where the liability of the insurers is not admitted, then it also makes sense that such settlements should be caught by the first part of sub-paragraph (c) because it gives meaning to the rest of the clause concerning the separate requirement to obtain approval for admissions of liability.

iv) A without prejudice settlement (in the sense of not admitting liability for the claim under the policy) without reinsurers' approval is caught by the clause; additionally, an admission of liability without reinsurers' approval is caught by the next part of the clause.

v) The intention of the clause is that there should be no steps taken to dispose of the claim without reinsurers' prior approval. This was particularly important where the underlying policy was governed by a different legal system – Kuwait – and so the effect of a without prejudice settlement as a matter of Kuwaiti law would be far from certain.

90. As to these submissions, it seems to me that the difficulties which arise are due, at least, in part, to the ambiguity in the words "without prejudice". So far as necessary, I agree with Mr Calver QC that a legally binding settlement will be caught by sub-paragraph (c) even though it might be expressed to be, for example, "without prejudice to liability". In that context, such words are often intended simply to make plain that the parties are agreeing to a settlement without admitting any underlying liability. However, in my view, the word "settlement" imports, at the very least, either a legally binding agreement (whether oral or otherwise) or the actual transfer of consideration of some kind (whether money or otherwise) including what are sometimes described as "ex gratia payments" (although the latter does not arise here and it is therefore not necessary to determine for present purposes).

"or" – disjunctive?

91. The third main issue concerned the meaning of the word "or" in sub-paragraph (c). In particular, the question was whether, in order for sub-paragraph (c) to be triggered, it was necessary for there to be both a settlement/compromise and an admission of liability; or whether it was sufficient to have a settlement/compromise or an admission of liability. With regard to this debate, I was referred to the various judgments of Longmore J, Andrew Smith J and, in the Court of Appeal, Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] Lloyd's Rep IR 667. In my view, consistent with paragraph [20] of Mance LJ's judgment and as a matter of construction of the wording of the CCC, it is my conclusion that Mr Calver QC is

right that the wording is disjunctive i.e. sub-paragraph (c) is triggered if there is either a settlement/compromise or an admission of liability.

"Admission of liability"

92. As to this wording, there was, at least initially, an issue as to the meaning of the words "*admission of liability*" in particular, whether, as Ms Melwani QC originally submitted any admission had to be legally binding to be caught by these words. However, in the event, Ms Melwani QC accepted that there was no requirement that an admission of liability had to be legally binding in the sense that one could start an action based on an admission. However, she maintained, and I accept, that, to fall within the wording, the admission of liability had to be clear and unequivocal for the draconian consequences to apply; in particular, to trigger the clause, it is my view that any "admission of liability" must at the very least be one communicated in clear and unequivocal terms by one party to the other. Furthermore, I also accept Mr Calver QC's submission that admission of the whole claim is not necessary: an admission of liability for part of the claim is sufficient: see per Andrew Smith J in *Gan* at [31]. In other words, it is sufficient if the cedant admits the original insured has a valid claim; he does not have to admit liability in respect of the entirety of the claim provided such admission is one which is, as I have said, respecting or in connection with any loss or losses which might give rise to a claim under the Reinsurance Contract/Declaration.

93. In relation to this wording, there was one further important dispute viz. Ms Melwani QC submitted that there is only an "admission of liability" if there is an express admission that a sum is due i.e. an offer to pay money by way of settlement or compromise or an actual agreement to pay money or even the payment of money is not, of itself, an "admission of liability" within the meaning of those words in sub-paragraph (c). In support of that submission, Ms Melwani QC relied in particular on the judgment of Andrew Smith J at [27]-[33]. In particular, she relied upon what Andrew Smith J said at [33]: "*The word "admitted" imports the acceptance of the validity of a previous liability*". I respectfully agree. In particular, I agree that an offer to settle or to pay certain money is not, of itself, an "admission of liability". Still less do I consider that an offer to pay money over in the event, for example, such money is received at some stage in the future is an "admission of liability".

94. Against that background, I turn to deal with the case advanced by Mr Calver QC on the facts. I have already summarised his case in outline. More specifically, he submitted that there was a settlement, compromise or admission of liability in one or more of the following circumstances and dates viz. (i) on 2 December 2009 in the phone call between Mr Bukhari and Mr Esmail; (ii) on 6 December when Mr Al-Duhaim placed his manuscript note and signature on the internal memo prepared by Mr Gharaibeh; (iii) 16 December 2009 when Mr Al-Duhaim sent the letter and attached discharge receipts to KOC; (iv) on 14/18 January 2010 when the email and letter with attachments were sent to KOC.

95. I deal with each of these in turn.

Settlement/Compromise/Admission on 2 December 2009

96. Given the earlier part of my judgment dealing with the claimants' case based on sub-paragraph (b) of the CCC, I can deal with this quite shortly. In summary, in light of

the evidence of Mr Bukhari (which I accept), it is my conclusion that there was no "settlement", nor "compromise" nor "admission of liability" during the phone call on 2 December 2009 whether with regard to the full amount i.e. US$19,163,173, AIG's share (20%) or the defendants' share (10.5%). As I have said, what happened during that call was that Mr Esmail made his demands; and such demands were then set out in the email from Mr Esmail later that day. This is also consistent with the internal memo which Mr Al-Duhaim signed on 6 December and, at least so far as the defendants' share is concerned, also consistent with the email which Mr Esmail sent on 7 December requesting Mr Bukhari to "... [pursue] *the same with Kuwaiti reinsurers* ..." In addition, although Mr Calver QC relied upon what KOC alleged in the Kuwaiti proceedings in certain respects, it is clear that, at the very least, there is no suggestion there of any settlement, compromise or admission of liability having been made on 2 December.

6 December 2009

97. Again, I can deal with this part of Mr Calver QC's case quite shortly. As stated above, I accept that on 6 December, Mr Al-Duhaim placed his manuscript note - "*no objection according to the agreement with Mr Esmail.*" - and signature on the internal memo. However, this was an internal act never communicated to KOC/KPC and, as such, I do not consider that it can of itself and without more constitute a settlement/compromise or admission of liability.

16 December 2009

98. In essence, it was Mr Calver QC's submission that there was a binding agreement or perhaps an admission of liability when Mr Al-Duhaim sent the letter and attachments on 16 December. I have already set out the relevant part of that letter. As appears above, it dealt with two points. First, it dealt with the fact that AIG had agreed their own 20% share and confirmed that on receipt of the attached discharge receipt for that share, AIC would be able to collect the AIG share. Second, it requested KOC to sign the attached discharge receipt for the local coinsurers' share i.e. US$2,012,133.16. I do not consider that the sending of this letter gave rise to any relevant settlement, compromise or admission of liability. In my view, that is so because, for the reasons stated above, the letter does not concern any loss or losses respecting or in connection with a claim under the Reinsurance Contract/Declaration. However, even if that is wrong, my conclusion is still the same albeit for different reasons. Thus, as to the AIG share, it was simply saying that on receipt of the discharge receipt for that share, AIC would be able to collect the AIG share. As to the local coinsurers' share, it is important to note the terms of the discharge receipt attached to the letter which KOC was being asked to sign and which I have already quoted in material part above. Somewhat oddly, although the discharge receipt is, in the first part, an acknowledgement of receipt of US$2,012,133.16, AIC was seeking KOC's agreement and signature of that document <u>in advance of payment of any monies</u>. Quite apart from the fact that this would seem back-to-front, the more important and, to my mind, crucial point, is that, by the terms of the discharge receipt, in consideration of receiving this amount, KOC would be giving up its rights to claim the balance under the Insurance Policy and, in accordance with the last sentence, AIC's only further obligation with regard to the remaining amount would be to pay it over on receipt of the remaining reinsurers' shares. In my judgment, this is not a "settlement" or "compromise". Nor is it an "admission of liability" under the Insurance Policy. On the

contrary, in my judgment, it is in truth nothing more than an offer to vary the terms of the Insurance Policy. Even if it is construed as an offer to pay the amount stated on the terms set out, it is still not an "admission of liability" because it is, at best, simply an offer to pay money which, for the reasons stated above, does not constitute an admission of liability.

14/18 January 2010

99. In similar vein, it was, in essence, Mr Calver QC's submission that the email dated 14 January 2010 attaching a revised AIG Form of Discharge and AIC discharge receipt constituted a settlement/compromise or admission of liability. The wording of these attached documents was substantially different from the earlier versions attached to the letter dated 16 December. However, they still did not, in my view constitute a (relevant) settlement/compromise or admission of liability because they did not concern any loss or losses respecting or in connection with a claim under the Reinsurance Contract/Declaration. However, again, even if that is wrong, this email was, in my judgment, at best a new offer to settle/compromise on new terms; and it was not an "admission of liability" because it was at best simply an offer to pay money. This is confirmed by subsequent events viz. the AIG Form of Discharge and AIC discharge receipt were <u>never</u> signed by KOC. Rather, further copies were sent by AIC to KOC under cover of a letter dated 18 January; this remained unanswered until 18 March 2010 when KOC responded as I have quoted in material part above viz. "*Please find attached your original discharge receipt returned herewith as the wording doesn't reflect agreed claim amount by Underwriters hence not acceptable to KOC. Accordingly, we attached herewith our proposed wording for the discharge receipt reflecting the total agreed claim amount of USD 19,163,173/- and the partial payment amount of USD 5,844,767.77.*" However, there was never any total agreed amount of USD19,163,173/-.

Conclusion

100. For these reasons, it is my conclusion that there was no breach by the defendants of the CCC. It follows that the defendants are not barred from pursuing their claim against the claimants under the Reinsurance Contract/Declaration. Counsel are requested to seek to agree a draft order for my approval failing which I will deal with any outstanding issues.