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Case No: 2011 Folio 1066

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/10/2013

Before :

THE HONOURABLE MR JUSTICE MALES

- -

Between :

(1) EQUITAS LIMITED **(2) ADDITIONAL UNDERWRITING AGENCIES (No. 9) LIMITED**	**Claimants**
- and -	
WALSHAM BROTHERS & COMPANY LIMITED	**Defendant**

- -
- -

Mr Christopher Butcher QC and Mr Benjamin Parker (instructed by **Slaughter and May**) for the **Claimants**
Mr John Lockey QC, Mr David Quest QC and Mr Peter Ratcliffe (instructed by **Berwin Leighton Paisner**) for the **Defendant**

Hearing dates: 2, 3, 8 and 9 October 2013

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Judgment

Mr Justice Males :

Introduction

1. This action is about the duties of Lloyd's brokers to pass on to their reinsured principals money received from reinsurers in settlement of claims and by way of return of premium, and to pass on to reinsurers payments of premium received from the reinsured, and about the impact on those duties of the Lloyd's Reconstruction and Renewal following the catastrophic losses incurred in the Lloyd's market in the early 1990s.

2. The claimant, Equitas, is the successor to Lloyd's syndicates writing non-life insurance business for the 1992 and all prior years of account. It claims that the defendant broker, Walsham, received substantial sums which it ought to have remitted, either to the syndicates themselves before September 1996 or to Equitas thereafter, and that as a result of its failure to do so Equitas has lost substantial investment income. Walsham acknowledges a duty to remit such sums, but contends (in outline) that any claim is now time barred and that it is entitled to set off amounts which it overpaid to the syndicates in error.

3. The present trial is to deal with various issues of principle pursuant to an order made by Eder J on 3 September 2013. In the course of the trial the parties re-formulated the issues to be determined. I will address the issues as re-formulated. All other issues (save for those where one or other party has indicated that it no longer pursues a pleaded point) are left over for determination at a later stage in the light of my decisions on these issues of principle.

4. Because I am dealing with issues of principle much of the evidence adduced by the parties at a time when it was expected that this trial would deal with the whole case did not need to be considered in any detail, or in some cases at all.

Background

5. In outline, the circumstances in which these issues arise are as follows. It will be necessary to return to examine many of the agreements referred to in this summary in greater detail when considering the various issues. At this stage, however, it is convenient to summarise in chronological order the events which led up to the commencement of this action.

6. During the 1980s and early 1990s, Walsham was one of the largest Lloyd’s reinsurance brokers. It had over 100 employees, and the annual turnover of claims and premium payments through its books reflected its size. For example, in 1989 it transacted over US $1.1 billion in claims and over US $600 million in premium. In 1991 it transacted over US $2.2 billion in claims and over US $650 million in premium. Its operations have been in decline for many years, however, and in 2010 it went into run-off, moving to premises out of London in 2011.

7. As is well known, during the late 1980s and early 1990s there was extraordinary turmoil in the Lloyd's market, primarily as a result of syndicates' exposure not only to crushing long-tail liabilities including in relation to asbestos and pollution claims from the United States, but also a series of catastrophes which, coming together as they did, shook the market to its foundations. It is unnecessary to recount the detail here. The story has been told in many previous judgments of this court.

8. It is Equitas’s case that during this period Walsham failed to remit to syndicates substantial funds which it had received. These fall broadly into two categories. First, it is said that in its capacity as broker for syndicates on whose behalf it had placed contracts of reinsurance or retrocession (referred to in this action as "Outwards Protections"), Walsham failed to remit to its clients funds which it had received from reinsurers or retrocessionaires in payment of claims or by way of returns of premium. Second, it is said that in cases where Walsham received reinstatement premium for

passing on to reinsurers or retrocessionaires (referred to as "Inwards Protections") Walsham again failed to remit such funds.

9. Cases where it is said that Walsham did eventually pay over the funds received, but only after substantial delay, have been referred to in this action as the "Settled Claims". In those cases Equitas's claim is for loss of investment income during the period of delay. In round figures, the total amount said to have been paid late is about £5.2 million (or its equivalent in other currencies) and the loss on investment income said to have been suffered as a result of the late payment is about £9.8 million.

10. Cases where it is said that Walsham still has not paid over the funds received have been referred to as the "Outstanding Claims". Here Equitas claims both the principal sum (about £3.1 million) and the lost investment income (about £2 million).

11. Equitas's total claim in this action is therefore about £14.9 million or its equivalent in other currencies. Of this, about £11.8 million represents a claim for investment income said to have been lost as a result of delay in making payments (including lost investment income in a cases where the payments still have not been made), while about £3.1 million represents principal amounts which are said to be still outstanding.

12. Walsham does not accept that it has failed to make the payments claimed by Equitas and it would not be appropriate for me to attempt to make any findings about this at this stage. Walsham's evidence seeks to explain that processing of transactions was complicated by a number of factors, namely (i) the fact that, until 1995, Walsham continued to use an old-fashioned, manual accounting system based on handwritten ledgers and vouchers, (ii) the turmoil in the market in the late 1980s and 1990s, and (iii) the considerable pressure which Walsham was put under from the syndicates to process claims as rapidly as possible in order to assist them with cash flow which led to backlogs in record keeping and to a practice of combining multiple remittances into a single payment or splitting a single remittance into multiple payments. It says also that it was common for Walsham to fund syndicates by advancing moneys against anticipated collections and to allow the paperwork to catch up later. In these circumstances Walsham says that it would not be surprising if some accounting or processing errors were made, with syndicates being either overpaid or underpaid. Whether or to what extent this actually happened, however, is not for decision at this stage. Walsham says that it may be that in some cases payments were indeed made reasonably promptly as they ought to have been, but that it all happened so long ago that in the meanwhile the evidence of payment has been lost.

13. All this is for another day. I proceed on the basis, as it was common ground that I should for the purpose of the present trial, that Equitas will be able in due course to make good its claim that at least some payments were not made reasonably promptly upon receipt and that other payments have not been made at all.

Reconstruction and Renewal

14. In 1996 a Settlement Agreement was concluded, dated 1 August 1996, but apparently not executed until a little later, which was intended to bring an end to the extensive litigation to which the market turmoil referred to above had given rise and to give the market a badly needed fresh start. It was concluded between (among others) Lloyd's itself, Equitas, "Accepting Names" and "Brokers". The settlement was the

culmination of a long process, which came to be referred to as "Reconstruction and Renewal".

15. In May 1995 Lloyd's published a lengthy document entitled "Lloyd's: Reconstruction and Renewal", setting out how it proposed to "reconstruct our finances, maintain our solvency and deal with the problems of the past", including a settlement of the litigation which was then under way.

16. Three features of that proposal are relevant for present purposes. One was the concept of "finality" for Names who were facing continuing losses, potentially continuing for many years into the future. That finality was intended to consist of "a final reckoning of all their 1992 and prior liabilities, and the chance to resign from the Society, subject to regulatory consent" and was to be achieved by the incorporation of Equitas, which was created as an integral component of this proposal. There was to be compulsory reinsurance by Equitas of 100% of syndicates' liabilities in respect of non-life business for the 1992 and all prior years of account, in return for which Equitas would take an assignment of all the rights, title and interest of those syndicates in relation to that business, including any claims which the syndicates had against brokers. That would enable Equitas effectively to step into the shoes of the Names to manage the run off of the 1992 and prior years business, while enabling Names who wished to do so to resign secure in the knowledge that, subject to one qualification, they need have nothing further to do with Lloyd's, and could put what for many of them were their disastrous experiences as Names behind them. The qualification was that it was impossible to grant Names an absolute release from their liabilities because of the residual risk of future failure by Equitas but it was hoped (in the event correctly) that this was a fairly remote risk.

17. The second feature of the Reconstruction and Renewal proposal was that Lloyd's intended to assemble a settlement fund of £2.8 billion (in the event it was £3.2 billion) to which market participants would contribute in order to achieve a comprehensive settlement of all litigation.

18. The third feature of the Reconstruction and Renewal proposal (explained in greater detail in a document entitled "Reconstruction and Renewal Settlement Information" dated June 1996) was the ability of Equitas to take a much longer term view of its investments than had been possible for individual syndicates, together with significant economies of scale from which it was envisaged that Equitas would be able to benefit. This arose because of the contrast between the annual venture structure of an individual syndicate operating a three-year accounting period, which had necessitated short term investment strategies, and the long term nature of Equitas, which would not be subject to the same investment constraints and would also benefit from investing funds previously distributed among a large number of individual syndicates. Thus it was anticipated that on taking over the syndicates' liabilities Equitas would receive reinsurance premium in excess of £7 billion which it would invest in order to meet future claims likely to be made over the next 40 years while running off the policies taken out during the 1992 and prior years of account. As a result, it was hoped, as explained in a further document entitled "Reconstruction and Renewal Settlement Offer" dated July 1996, that Equitas would be able to achieve a significantly better return on its investments than had previously been achievable by individual syndicates.

19. These three features were widely known and understood in the market in the period leading up to the Settlement Agreement.

The Settlement Agreement

20. It will be necessary in due course to examine in detail some of the provisions of the Settlement Agreement, which was part of a package of agreements giving effect to the Reconstruction and Renewal proposals and settling the litigation which threatened to engulf Lloyd's. It contained extensive and widely drafted waivers of defined claims, whether known or unknown. It is Equitas's case that there was carved out from these waivers an exception (described as "an Equitas claim") which included claims such as those which it makes in this action, but that the waiver of claims did extend to the cross claims which Walsham seeks to set off against Equitas's claims.

21. At the same time Equitas entered into the "Reinsurance Contract", a contract whereby Names' "1992 and Prior Business" was reinsured into Equitas, and it took an assignment in wide terms of Names' rights, title and interest in respect of existing reinsurances, premiums and return premiums, and any other syndicate income. There was also a specific assignment of Names' rights "to recover any losses or damages from any broker or any member of a broker group, howsoever arising …". Walsham accepts that this assignment was effective to assign to Equitas whatever claims, if any, the syndicates had which are the subject of this action.

The Brokers' Agreement

22. Another agreement forming part of the Reconstruction and Renewal package was the Brokers' Agreement dated 15 August 1996. Although dated after the Settlement Agreement, it appears to have come into effect before the Settlement Agreement. It was an agreement between Lloyd's, Equitas and Lloyd's brokers (including Walsham) as to the terms on which the brokers would become party to the Settlement Agreement. Like the Settlement Agreement, it contained waivers of various claims and its relationship with the Settlement Agreement will need to be considered. Walsham relies on the Brokers' Agreement as keeping alive its right to set off its cross claims, while Equitas contends that the agreement recognises for the future a duty to account for funds received which was owed by brokers to Equitas directly and not merely as assignee of the Names.

23. It is Walsham's evidence that brokers who wished to continue to participate in the Lloyd's market were required to become parties to the Brokers' Agreement and thus to the Settlement Agreement. Walsham did so.

The DAC letter

24. Following Reconstruction and Renewal Equitas took over the running of the syndicates' business in relation to the 1992 and prior years of account and for that purpose dealt directly with Walsham. Reviewing syndicates' records and the state of accounts between syndicates and their brokers was a very substantial task. Part of that review included seeking assurances from brokers, including Walsham, that the brokers had accounted to syndicates for all funds received on syndicates' behalf. There was also correspondence about whether Equitas was prepared to refund payments to brokers which the brokers had made to syndicates in error or by way of

funding claims which reinsurers had not yet paid. It was not suggested at the trial, however, that this correspondence altered whatever was the existing legal position with respect to such overpayments.

25. As time passed Equitas began to seek formal assurances from Walsham that all funds received either had been or would be paid over to syndicates or to Equitas. This process culminated in a letter to Walsham from Davies Arnold Cooper, Equitas's then solicitors, dated 18 July 2002 ("the DAC letter"). This stated:

> "COLLECTED BALANCES PAYABLE TO EQUITAS
>
> We are instructed on behalf of Equitas and/or all relevant Lloyd's syndicates in respect of 1992 and prior year business.
>
> Equitas has previously written to you enquiring as to the position regarding any balances collected on behalf of Lloyd's syndicates for 1992 and prior years of account which you may hold.
>
> You have responded to the following broad effect:
>
> 1 That all identifiable balances have been paid.
>
> 2 All appropriate efforts have been made, are being made and will continue to be made to identify unpaid items.
>
> 3 Future balances discovered will be paid without delay under arrangements which already exist or will be put in place.
>
> If we have misrepresented your position or you do not accept that this does represent your position, we would be grateful if you would inform us immediately.
>
> However, as you may be aware, our clients have reason to be concerned as they continue to find on a regular basis that broker balances, whether premiums or reinsurance recoveries, have been held without remission on to the syndicates or Equitas for long periods.
>
> We consider that you are under a continuing duty to our clients:-
>
> 1 To inform them of all amounts you have received and still hold or hereafter receive on behalf of Lloyd's syndicates for 1992 and prior years of account and/or Equitas.
>
> 2 To make all appropriate efforts to identify any and all amounts you have received and still hold on behalf of Lloyd's syndicates for 1992 and prior years of account

> and/or Equitas and to pay to them without delay all such amounts subsequently identified.
>
> 3 To pay to them without delay all amounts you have received and still hold on behalf of Lloyd's syndicates for 1992 and prior years of account and/or Equitas.
>
> 4 To pay to them without delay any and all amounts you may subsequently receive or identify as having received on behalf of Lloyd's syndicates for 1992 and prior years and/or Equitas.
>
> We believe our clients would be entitled to obtain a court order for an account from you at this stage but are prepared to forbear from doing so if you will return a signed copy of this letter as confirmation of your acceptance of the above duties and that you will comply with them now and at all times in the future."

26. As requested, Walsham returned a signed copy of the letter confirming its agreement to these terms.

27. The effect of this letter is central to several of the issues for decision at this trial including the nature of the duties owed by Walsham and Walsham's limitation defences. It is Equitas's case that by confirming its acceptance of what was said in this letter, Walsham recognised and agreed that its duties to account for funds received were continuing duties and agreed also not to take any limitation point.

The Broker Transfer Agreement

28. On 17 September 2003, Walsham's role as broker to the Syndicates was effectively ended by the execution of a Broker Transfer Agreement, the purpose of which was (per recital 4) for "Equitas, acting on behalf of the Syndicates, … to assume control of the ongoing functions performed by Walsham's in relation to the Reinsurance Agreements". The agreement required Walsham to transfer documentation and information to Equitas on request, whereupon Equitas would become the Lloyd's broker of record in relation to the files transferred. The agreement provided that, from 17 September 2003, Walsham would no longer conduct any processing, accounting or claims collections in respect of reinsurances which it had placed on behalf of syndicates.

Reinstatement Premium Brokerage

29. One of the issues which arose during the negotiation of the Broker Transfer Agreement concerned Walsham's entitlement to brokerage on reinstatement premium. That issue arose because the terms of many of the contracts of reinsurance placed by Walsham provided for the automatic reinstatement of the limit of cover following the settlement of a valid claim. Additional premium, "reinstatement premium", would become payable by the reinsured upon this automatic reinstatement of cover. At the same time as the cover reinstated and the reinstatement premium became due to the subscribing reinsurer, Walsham as the placing broker would become entitled to

brokerage on the reinstatement premium, which was paid in the ordinary way by deduction from the reinstatement premium credited to the reinsurer.

30. However, if Walsham was no longer going to be the broker of record as a result of the Broker Transfer Agreement, it was concerned that it would lose its entitlement to brokerage on reinstatement premium. As a result, the parties negotiated an agreement, the terms of which were set out in a letter from Equitas dated 28 August 2003, whereby Equitas agreed to pay Walsham £225,000 in full and final settlement of Walsham's claims for reinstatement brokerage. There is an issue whether this "buy out", as the parties termed it, operated to extinguish all of Walsham's entitlement to such brokerage or was limited to a buy out of future brokerage, leaving any accrued rights unaffected.

The Broker Cash Flushing Project

31. In about 2005, Equitas commenced a programme known as the "Broker Cash Flushing Project" to investigate whether various Lloyd's brokers, including Walsham, were holding historical unremitted receipts. In the course of that programme, there were extensive discussions between Equitas and Walsham, and Equitas identified a number of receipts which it claimed had not been remitted. Walsham investigated the claims and, as a result, made payments to Equitas between 2005 and 2011 totalling about £5.2 million. These are what are referred to as the "Settled Claims". It is Walsham's case that, at least in some cases, it made these payments taking a pragmatic (and perhaps over generous) approach that, where it was unable to trace whether any particular amount had been received by Walsham in the first place and, if so, whether it had already been remitted, it would give Equitas the benefit of the doubt.

32. However, Equitas continued to make claims. It also refused to give Walsham any credit for what Walsham contended was the large balance in its favour created by historical overpayments to the syndicates. This led eventually to Equitas commencing the present proceedings on 9 September 2011.

Summary of the parties' positions

33. In summary it is Equitas's case that it is entitled to recover funds held by Walsham pursuant to duties owed by Walsham to remit such funds reasonably promptly upon receipt, such duties arising as a matter of contract, tort and restitution. The duties were owed to the syndicates, so that Equitas is entitled to bring a claim in its capacity as assignee, but were also owed to Equitas directly following and as a result of Reconstruction and Renewal. It says that Walsham was first in breach of those duties when it failed to make the remittance within a reasonable time after receipt of the funds in question. That failure first occurred for the most part (and perhaps in every case) more than six years before the commencement of this litigation on 9 September 2011 and it may be (Walsham says so, at any rate) that most of these funds were received by Walsham in the period before Reconstruction and Renewal. However, Equitas seeks to avoid any limitation defence in reliance on a variety of arguments: thus it contends that the duties owed by Walsham were continuing duties so that a fresh cause of action arose on each day when Walsham failed to make a remittance which it ought to have made; that (to the extent that it has a claim in tort for negligence) it can rely on the extended time limit in sections 14A and 14B of the

Limitation Act 1980; that there was "deliberate concealment" by Walsham so that pursuant to section 32(1)(b) of the Limitation Act 1980 the running of time was postponed; and that Walsham is precluded by the terms of the DAC letter from taking any limitation point. (Equitas has abandoned an argument that no limitation period applies pursuant to section 21(b) of the Limitation Act 1980 dealing with recovery of trust property).

34. Walsham accepts that it was obliged to remit moneys received for the account of a syndicate and to do so reasonably promptly. It does not accept that it failed to do so and puts Equitas to proof of its claims as a matter of fact. However, it contends that its obligation was an absolute obligation in contract and restitution (but not tort) which accrued once and for all when it failed to remit any funds received with reasonable promptness, so that all of Equitas's claims are barred by limitation.

35. Walsham contends that it is entitled to set off cross-claims for the recovery of moneys overpaid by Walsham to the syndicates. These were either mistaken payments (ie duplicated or excessive payments) or "funded" payments (where Walsham paid a reinsured syndicate in respect of a reinsurance claim before and in anticipation of the receipt of funds from the reinsurer but never collected the funds). Equitas responds that any right to set off has been waived as a result of one or more of the agreements described above.

36. This is by no means a complete account of the issues between the parties, and not all of these issues arise for decision at this stage, but it is sufficient to set the scene. I turn now to those issues that do arise.

Issue A: The nature of the brokers' duties

37. The first group of issues concerns the nature of the duties owed by Walsham as broker (a) to the syndicates, (b) to Equitas following Reconstruction and Renewal, (c) as a result of the DAC letter, and (d) as a result of the Broker Transfer Agreement.

Issue A(1): What duties were owed to the syndicates in relation to the remittance of receipts?

38. Equitas contends that Walsham owed continuing duties to the syndicates (i) to notify them reasonably promptly that it held funds on its account, and (ii) to exercise due diligence to remit those funds reasonably promptly, those duties being owed (i) in contract (in the case of the Outwards Protections, pursuant to Walsham's contract of retainer, and in the case of the Inwards Protections pursuant to collateral contracts), (ii) in the tort of negligence, and (iii) pursuant to a fiduciary duty to account. (Equitas's pleaded case that premium due on Inwards Protections is also recoverable under section 53 of the Marine Insurance Act 1906 was abandoned at the trial).

39. Walsham contends that it owed an absolute duty to remit funds reasonably promptly following receipt, but that duty was not a continuing duty and was breached once only whenever funds were not remitted reasonably promptly. It contends that in the case of the Outwards Protections, the duty was owed pursuant to contractual and restitutionary duties, while in the case of the Inwards Protections it was owed in restitution, but that in neither case was any duty owed in tort.

40. Accordingly the sub-issues which arise in relation to the duty owed to the syndicates to remit funds are (i) whether the duty in contract and restitution is an absolute duty or a duty to exercise due diligence; (ii) whether there is a concurrent duty in tort; and (iii) whether these are continuing duties or duties which arise once and for all on the date when funds should be remitted. Before addressing these issues further, I must say something about the role of Lloyd's brokers which forms the background against which they fall to be decided.

The role of Lloyd's brokers

41. The Lloyd's Code of Practice for Lloyd's Brokers, which deals with the duties of brokers to account for funds received, forms part of the relevant background. The relevant version was that in force from 1 November 1988, which provided (emphasis added):

> "7. Accounting
>
> 7.1 At an early stage in the business relationship, a Lloyd's broker should advise a client of his obligations to the Lloyd's broker and insurers concerning the timely payment of premiums.
>
> 7.2 Any insurance monies handled by a Lloyd's broker have to be kept in Insurance Broking Accounts. The operation of these accounts is the responsibility of the Lloyd's broker and *he receives and retains any interest or investment income earned on them*. A Lloyd's broker should apply *due diligence* to the collection and payment of all insurance monies.
>
> 7.3 A Lloyd's broker should have proper regard for the settlement due date agree with the insurers for any contract of insurance.
>
> 7.4 *A Lloyd's broker should remit money received and due to clients promptly*. Where a risk is placed with a number of insurers, and claims monies are remitted to the Lloyd's broker at different times, the Lloyd's broker will need to consider whether, having regard to the amount received and the time when the balance will be received, and any other relevant factors such as amounts owed by the client to the Lloyd's broker, he should pass on to the client such proceeds as he has received as soon as possible, rather than await the balance and make payment in full."

42. At this stage I note four points. First, this was a code of practice, which stated expressly that Lloyd's brokers are the agents of their clients and as such are subject to the general law as applied to agents. The provisions of the code of practice were expressly not intended to derogate from that general law. Second, it was at one time contended on behalf of Walsham that the words in paragraph 7.2 which I have italicised permitting retention by the broker of any interest or investment income provided a complete answer to Equitas's claim for lost investment income, but this

point was rightly abandoned. What the broker is entitled to retain is interest or investment income earned during the relatively short period until it is obliged to remit the money to its client. Third, Equitas relies on the reference to "due diligence" in paragraph 7.2 in support of its submission that the broker's duty with regard to the remittance of money received is a duty of due diligence rather than an absolute duty. Finally, the words in paragraph 7.4 which I have italicised require the remittance of money promptly, although in the event Equitas contends for (and Walsham acknowledges) a duty to remit money "reasonably promptly". It is common ground that the duty is to remit money reasonably promptly and that nothing turns on the omission of the word "reasonably" from the code of practice. For the purpose of this action, the parties were able to agree what is meant by "reasonably promptly", as explained below.

43. In addition to the provisions of the code of practice each party called evidence from a broking expert, although as there was little or no relevant dispute between them it was unnecessary for these experts to give oral evidence. Equitas's expert was Richard Lee, who was employed in the insurance industry for 43 years, including ten years dealing with claims at a Lloyd's syndicate and over 30 years as claims manager and subsequently director of a Lloyd's broker. Walsham's expert was Philip Cornick, who had also spent his career in Lloyd's working as claims manager and in other senior roles on the claims side on behalf of various syndicates.

44. Mr Lee explained the role of Lloyd's brokers in relation to the flow of funds in terms with which Mr Cornick agreed as follows:

> "At a very basic level, the flow of funds in [reinsurance] transactions consists of two types of transactions: (i) claims; and (ii) premiums. … the funds in relation to these transactions were typically first paid to the relevant broker, and that broker then paid those sums to the party to whom they were due. In the case of a claim payment, the money would flow from the reinsurer to the broker, and the broker would pay the relevant amount to the reinsured. In the case of a premium payment, this would be paid by the reinsured, via the broker, to the reinsurer. The upshot of this is that the broker was central to the flow of funds in the reinsurance market. … the broker not only handled the relevant sums, but took the role of effecting the processes necessary to ensure that the funds flowed at all. … the broker was responsible for obtaining the relevant agreements to the amounts to be paid so that the payments would be processed. The broker was involved in each step of the process, producing the relevant endorsements and debit and credit notes, and the other participants relied on the broker to keep them informed and to effect the relevant payments."

45. Mr Lee added that:

> "unless the broker in fact took steps to arrange the onward payment of the premium or claim amount (and as part of this sent to the syndicate the credit note), the relevant syndicate to which the funds should have been transferred would not

> ordinarily have any means of knowing that the funds had been received by the broker."

46. I doubt whether this evidence is intended to be read as saying that the syndicate would literally have no means of knowing whether the funds had been received. After all, a syndicate ought in general at least to know what claims it has made on its reinsurers and what business it has written on which premium is due, and it can always ask the broker for information. Indeed, the experts agreed that during the relevant period brokers were put under very considerable pressure by syndicates to speed up payments and also to fund payments which were expected to be made in the near future. However, I accept the evidence set out above as an accurate account of the way the market worked, including the fact that in practice syndicates did rely heavily on their brokers to ensure the prompt remittance of funds and that the broker played a central role in administering the policies taken out, ensuring that premiums were paid and presenting and collecting claims. I accept also, as Mr Lee explained, that if a broker made a late payment the syndicate would have no way of knowing that the broker had received the money some time ago and had failed to pay promptly, at any rate unless the broker said so.

47. In the light of this background it was the agreed evidence of the broking experts that the duties owed by Lloyd's brokers were as follows:

    i. to collect reasonably promptly from the Reinsured and pay reasonably promptly to the Reinsurers all premiums, net of any applicable brokerage (and claim refunds);

    ii. to notify the Reinsurers reasonably promptly of any potential claims advised by the Reinsured and to notify the Reinsured reasonably promptly of any questions raised by the Reinsurers;

    iii. to collect reasonably promptly from the Reinsurers all valid claims (and returns of premium) and pay them reasonably promptly to the Reinsured; and

    iv. to administer the reinsurance contract in a professional and business-like manner including the maintenance and preservation of proper and adequate records and providing the relevant records, or copies thereof, to the Reinsured and/or to the Reinsurers if requested.

48. While the question of what duties are owed is a question of law, I accept that this is compelling evidence of the market understanding of the professional responsibilities undertaken by a Lloyd's broker.

Absolute duty or due diligence?

49. I consider that the broker's contractual and restitutionary duty to remit funds reasonably promptly is probably best regarded as an absolute duty and not merely a duty to exercise due diligence. It is a general principle of the law of agency that an agent who holds or receives money for his principal is bound to pay it over or account for it: see *Bowstead & Reynolds on Agency*, (19th Edition, 2010), Article 52. This is

not a duty which in general is limited to the exercise of due diligence or reasonable care.

50. I doubt, however, whether it makes any difference in the present case whether the broker's duty is described as absolute duty or a duty of due diligence (or both concurrently), and I heard no argument by reference to facts which might test either proposition. For example, it is possible to imagine facts whereby the broker had exercised reasonable care to make the payment but was prevented from doing so or failed to do so for reasons beyond its control or because it was deceived into paying the wrong person. I do not intend to lay down in the abstract any general rule which may affect such cases or to determine whether, if and to the extent that such matters would provide a defence, that is because of the nature of the duty or for some other reason. It is somewhat paradoxical that in the present case it is Equitas which is arguing for a lower standard of duty, while Walsham contends for the higher absolute duty. As the only reason why this appears to matter is that Walsham contends that an absolute duty would be inconsistent with the existence of a duty of care in tort, I will proceed on the assumption that the contractual and restitutionary duties are indeed absolute.

51. That said, I would accept that the broker is performing a "contract for the supply of a service", the service in question being the collection and remittance of funds of behalf of its client syndicates, so that there is also a statutory implied term that the broker will carry out that service with reasonable care and skill pursuant to section 13 of the Supply of Goods and Services Act 1982. (Walsham submits that the payment over of receipts was not part of the service provided by the broker but on the evidence that is clearly wrong). Such an implied term is not inconsistent with an absolute duty and there is no reason why an implied term requiring the exercise of reasonable care should not co-exist with a stricter duty imposed by contract or by the law concerned with the duties of agents: see section 16 of the Act.

52. Other closely related and complementary duties are also owed by Lloyd’s brokers and have been described as duties of reasonable care. For example, it was held by Andrew Smith J in *Equitas Ltd v Horace Holman & Co Ltd* [2007] EWHC 903 (Comm), [2007] Lloyd’s Rep IR 567 that such a broker owes “a duty to take reasonable care to maintain proper and adequate records which would allow the syndicates at any stage to ascertain the true state of the account with them and to ascertain what sums were owed to the syndicates … by their reinsurers”, as well as to preserve and when called upon to do so to provide copies of their records in so far as those records relate to transactions carried out as agents of the syndicates.

Negligence

53. The question whether there is a duty in tort to exercise reasonable skill and care to remit funds promptly also seems unlikely to be of great practical significance in the circumstances of this case. Equitas’s principal reason for contending for such a duty is to assist it in relation to limitation issues, in that it will be able to invoke sections 14A and 14B of the Limitation Act 1980 (although it is contended by Walsham that this will not avail it -- whether that is so is not for decision at this stage). However, other aspects of the limitation issues do not appear to depend on whether the relevant duty arises in the tort of negligence. Moreover, and subject to the issue about continuing duties which also does not appear to depend on whether the relevant duty arises in

tort, any cause of action in tort would be complete upon failure to make the relevant payment on the date when it ought to have been made since damage would be suffered at that point. Thus any cause of action in negligence would accrue and (unless suspended, for example by section 32(1)(b) of the Limitation Act 1980) would begin to run on the same date as the cause of action in contract. It may be that questions of remoteness of damage would apply differently according to whether the cause of action is in contract or in tort, although that difference too seems likely to be more theoretical than practical. Nevertheless, the parties have devoted considerable effort to arguing about whether a duty of care in tort exists and it may be that this will prove to have a significance not currently apparent.

54. Equitas contends that the evidence summarised above about the role of a Lloyd's broker demonstrates an assumption of responsibility not only as to the prompt remittance of funds but as to the administration of reinsurance contracts in a professional and businesslike manner generally such that a duty of care arises in accordance with the principles discussed in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145. In that case, which was also concerned with the operation of the Lloyd's market, the House of Lords held that a professional person who undertakes or assumes responsibility towards another who relies upon him will be subject to a duty of care in tort, notwithstanding the existence of a contract between them. The correct approach is to consider first the relationship between the parties in order to determine whether there is such an assumption of responsibility and then to consider whether liability in tort is excluded by the contract because it is inconsistent with it. Inevitably, the existence of a contract will be one aspect, and no doubt an important aspect, of the parties' relationship, but what matters is the nature of the relationship however arising (including the responsibilities undertaken by one party and the reliance on that party by the other), and not the mere fact that the parties have a contract. As Lord Goff of Chieveley put it at 193C-D:

> "Approached as a matter of principle, therefore, it is right to attribute to that assumption of responsibility, together with its concomitant reliance, a tortious liability, and then to inquire whether or not that liability is excluded by contract because the latter is inconsistent with it. … I am of the opinion that this House, should now, if necessary, develop the principle of assumption of responsibility as stated in *Hedley Byrne* [1964] AC 465 to its logical conclusion so as to make it clear that a tortious duty of care may arise not only in cases where the relevant services are rendered gratuitously, but also where they are rendered under a contract."

55. It followed that a claimant who was owed concurrent duties in both contract and tort is "entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded".

56. Walsham disputes the existence of any duty of care in tort on two main grounds. First, it says that such a duty would be artificial and unnecessary because of the absolute duty owed in contract. Second, it is said that, unlike some other broking functions (such as a decision where to place reinsurance), the prompt remittance of money does

not involve or require any exercise of judgment or professional skill so that the "assumption of responsibility" analysis does not apply.

57. In my judgment the evidence demonstrates that syndicates do rely on brokers to administer their reinsurance policies, which includes but is not limited to the collection and prompt remittance of funds and that this is a responsibility which is assumed and undertaken by the brokers as a feature of the relationship with those syndicates. This applies both to Outwards and Inwards Protections. The argument that a duty of care is unnecessary carries no weight in such circumstances. As shown by *Henderson v Merrett*, that is not the relevant question. The question is not whether such a duty arising from the general law in the circumstances of the relationship between the parties is necessary, but whether it is inconsistent with or excluded by any contract between them. Nor is it a valid objection that the prompt remittance of money does not require the exercise of skill. Even assuming that to be so (an assumption which I would not necessarily make as a degree of care and skill is required in order to ensure the efficient conduct of a broking office), the relationship with the broker is not fairly characterised as being limited to the making of prompt remittances but extends more generally to the efficient administration of the reinsurance policies. I conclude, therefore, that unless it can be said that the duty is inconsistent with or excluded by contract, a duty of care was owed to the syndicates.

58. As to any inconsistency with the contractual relationship between brokers and syndicates, in agreement with *Jackson & Powell on Professional Liability*, (7th Edition, 2012), para 2-117, I can see no reason why an absolute contractual duty (assuming that is what it is) should not co-exist comfortably with a duty in tort to exercise reasonable care. Indeed, I have already concluded that there is no inconsistency between an absolute contractual duty and the statutory implied term requiring the exercise of reasonable care and skill pursuant to section 13 of the Supply of Goods and Services Act 1982.

Continuing duties

59. I consider next whether the duty owed by Walsham was a continuing duty (ie as Equitas contends, a duty to remit funds which was breached on the first day when those funds ought to have been remitted and breached afresh on every day thereafter when no remittance was made) or a single duty (as Walsham contends, so that a breach was committed once and for all on the first day when funds ought to have been remitted and were not). For this purpose there is no need to distinguish between duties in contract, tort and restitution.

60. In support of its submission that the duty is a continuing duty Equitas points to several features of the parties' relationship. First, there will be a continuing relationship, extending potentially over many years. Second, the broker's duty is not limited to the collection and remittance of specific amounts, but involves the administration of the syndicates' reinsurance policies generally. Third, there is as already noted heavy reliance by the syndicates on the broker’s ongoing performance of its duties, not only in relation to the collection and remittance of funds but generally. Fourth, the broker is an accounting party under a continuing obligation to maintain accounts and other records, and to produce them to the syndicates if required to do so, a duty which Clarke J described as a continuing obligation in *Johnston v Leslie & Godwin Financial Services Ltd* [1995] LRLR 472, 482 (“a continuing contractual duty to

maintain records so as to enable them to make a claim on behalf of the plaintiffs when called upon to do so"). Fifth, the continuing nature of the broker's responsibilities is implicit in the Code of Practice, in particular the duty recognised by paragraph 7.2 to operate insurance broking accounts.

61. Walsham relies on authorities which have held that a failure to remit funds on the due date gives rise to a single cause of action accruing on that date, and that there is no breach thereafter of any continuing obligation. Thus a continued failure to remit the receipt after the due date constitutes a failure to remedy the existing breach and not a series of further breaches giving rise to further causes of action. The first authority relied on is *Farimani v Gates* [1984] 2 EGLR 66, which was concerned with a tenant's duty to use insurance proceeds received as the result of a fire to rebuild or repair the premises. The tenant failed to do so, but the landlord nevertheless accepted payment of rent. The issue was whether, by that acceptance, the landlord had waived the breach so as to preclude forfeiture of the lease. The county court judge held that there was a continuing breach (or breach of a continuing obligation), which persisted after the acceptance of the rent and that the landlord's acceptance of rent therefore did not prevent forfeiture, but his decision was reversed on appeal. Griffiths LJ disapproved a passage in *Emmet on Title* (17th Edition) suggesting that the test for whether a breach was a continuing breach was whether the tenant had it in his power to remedy the breach. He continued:

> "If an obligation is to perform an act by a given time, once that time has elapsed and the act has not been performed, there is a breach of a single obligation and not of a continuing one. The fact that it still lies within the power of the lessee to perform the act cannot affect the nature of his obligation. In this field of law a reference to a continuing breach is a way of referring to breaches of a continuing obligation and does not refer to the ability to remedy a single breach."

62. Griffiths LJ analysed the tenant's obligation as being to use the insurance proceeds to repair within a reasonable time, which was "a once-and-for-all breach of a single obligation and which, once waived, could not thereafter be relied upon as a ground for forfeiture". Slade LJ gave judgment to the same effect. He drew a distinction between an obligation to do something by a given date which by its very nature could only be broken once, and an obligation to keep premises in repair, which was clearly a continuing obligation.

63. This case was followed and applied in *Channel Hotels & Properties (UK) Ltd v First Penthouse Ltd* [2004] EWCA Civ 1072, where the issue was very similar, namely whether a breach of a tenant's covenant in a lease to develop the roof space as expeditiously as possible was a once-and-for-all breach or a breach of a continuing obligation. Again the point was relevant because, if it was a single breach, it had been waived by the landlord. Peter Gibson LJ held that the obligation in question was closer to that considered in *Farimani* than a continuing obligation to repair.

64. The relationship of landlord and tenant, like that of a Lloyd's broker and the syndicates for which it acts, is an ongoing relationship. Clearly this is not enough by itself, and was not enough in these cases, to turn the tenant's obligations at issue into continuing obligations. I do not find it surprising that the landlord's attempt to

characterise the tenant's obligations as continuing obligations failed. It was essentially a somewhat artificial device to get around a clear waiver of the landlord's right to forfeit the lease. I do not question the proposition stated by Griffiths LJ in *Farimani* or its application in *Channel Hotels & Properties*. It can be taken as a general principle. But it remains for consideration in every case whether the relationship of the parties and the particular obligation in question is such as to give rise to a continuing obligation.

65. Walsham relies also on the decision of the Court of Appeal in *Bell v Peter Browne & Co* [1990] 2 QB 495, a solicitors' negligence case where the defendant solicitors failed to comply with the claimant's instruction to ensure that his interest in the matrimonial home was properly protected on the house being transferred into his wife's name. It was held that the limitation period both in contract and in tort began to run when the transfer was executed, and thus that the claimant's claims were time barred, notwithstanding that the breach would have been remediable by the solicitors at any time before the wife sold the house, which had occurred less than six years before the commencement of the action. However, the breach had occurred when the solicitor failed to lodge a caution to protect the claimant's interest at the time of the original transfer and his failure thereafter to make good the omission did not constitute a further breach. The position was simply that the existing breach remained unremedied. Nicholls LJ contrasted this "normal case where a contract provides for something to be done, and the defaulting party fails to fulfil his contractual obligation in that regard at the time when performance is due" with "the exceptional cases where, on the true construction of the contract, the defaulting party's obligation is a continuing contractual obligation … which arises anew for performance day after day, so that on each successive day there is a fresh breach", giving as an example of the latter a tenant's repairing covenant. Mustill LJ pointed out that although a solicitor may have a continuing retainer, requiring him to be constantly on watch for sources of potential danger, that was not so on the facts of the case before him, where the solicitor had simply been retained to put into legal effect the arrangement between the claimant and his wife.

66. *Nouri v Marvi* [2009] EWCA Civ 1107, [2011] PNLR 7, another solicitors' negligence case, is to similar effect. At [38] Patten LJ commented that there were "no special facts to suggest that the solicitors assumed a continuing duty to [their client] which survived the completion of the transaction" for which they had been retained.

67. Walsham emphasises Nicholls LJ's use of the word "exceptional" when referring to continuing obligations in *Bell v Peter Browne & Co*, but I do not understand this to be imposing an independent requirement that there should be something exceptional about such a case. In my view Nicholls LJ was merely recognising that in general obligations fall to be performed once and for all on the date for performance and a failure to perform does not give rise to a series of repeated breaches. Nevertheless the concept of continuing obligations is well recognised and in some very ordinary cases, such as a landlord's obligation to keep premises in repair, is standard.

68. In the light of these authorities, it is clear that the concept of a continuing obligation, whereby a fresh breach is committed on each successive day is a concept well known to the law. This will be important when I come to consider the terms of the DAC letter. Whether an obligation has the character of a continuing obligation must depend on the relationship between the parties and the nature of the obligation in question. I

would accept that the starting point, certainly in the case of an obligation to remit funds, is that such an obligation is likely to require performance once and for all on the due date and therefore will not be a continuing obligation, but this will always depend on the particular features of the relationship in question. As Patten LJ recognised in *Nouri v Marvi*, there may be special facts which point to a different conclusion.

69. The question, therefore is whether on the facts of the present case there are features of the parties' relationship and of a Lloyd's broker's obligation to collect and remit funds which point to a conclusion that the obligation is after all a continuing obligation. I accept that this case has the features identified by Equitas to which I have referred. The parties' relationship was a long-term continuing relationship in which the broker's role in collecting and remitting funds was central, in which reinsurance claims would be expected to come in and need to be dealt with over a period of years, with the broker under a continuing obligation to maintain accounts and administer the syndicates' reinsurance policies generally, and with heavy reliance known to be placed on the broker by the syndicates. The broker's obligation in essence was to administer the syndicates' accounts in a manner which ensured that the syndicates would not be kept out of funds to which they were entitled. In some respects this relationship was more akin to the example given by Mustill LJ in *Bell v Peter Browne & Co* of a solicitor with a continuing retainer to protect the interests of his client generally, which was contrasted with the facts of *Bell v Peter Browne & Co* itself, where the solicitor was retained for a one off transaction. I consider that the combination of features in the present case does suggest not only a continuing relationship, but also a continuing obligation.

70. The position can usefully be tested by considering what the reaction would be of an honest and conscientious Lloyd's broker who discovered, let us say six years and one day after he ought to have remitted funds to his principal, that as a result of an oversight he had failed to do so. In my judgment such a broker would rightly conclude that even now he was still under a duty to remit those funds and perhaps that it would even be reprehensible or dishonest not to do so. It is easy to imagine the reaction of the parties in such a case if the broker were to approach his principal to explain that he had just discovered that he had been sitting unknowingly on the principal's money for more than six years, but did not propose to pay it over because he was under no duty to do so. That seems to me to be a powerful indicator of how the parties would regard the obligation in question and I see no reason to conclude that they would be mistaken to do so.

71. On balance, therefore, I conclude that Walsham's obligation to remit the funds to the syndicates was a continuing obligation.

Impact of Reconstruction and Renewal

72. I have so far been considering the duties owed to syndicates in the period before Reconstruction and Renewal. Those duties continued to be owed to Equitas in its capacity as assignee of the syndicates' rights in the period following Reconstruction and Renewal (a separate question, considered below, is whether duties were undertaken towards Equitas directly). However, Walsham insists, correctly in my view, that the duty owed to Equitas in its capacity as an assignee of the syndicates' rights can be no greater than the duty originally owed to the syndicates themselves. Of

course, after Reconstruction and Renewal the syndicates themselves had no further interest in the collection of funds from reinsurers or in its prompt remittance by the brokers and any loss of investment income as a result of delayed remittance would be suffered by Equitas and not by the syndicates. Nevertheless, Walsham accepts, by analogy with the reasoning in *Offer-Hoar v Larkstore Ltd* [2006] EWCA Civ 1079, [2006] 1 WLR 2926, that this situation did not create what is sometimes referred to as a "legal black hole" whereby a party with title to sue has suffered no loss while the party who has suffered the loss has no title to sue. Indeed, it relies on that reasoning in support of its argument that no duty was undertaken towards Equitas directly. Thus Walsham accepts that in relation to receipts which ought to have been remitted before Reconstruction and Renewal, Equitas succeeded to whatever causes of action the syndicates had and is entitled to claim damages on the same basis as the syndicates would have been able to if the assignment had not taken place, while in relation to receipts which ought to have been remitted after Reconstruction and Renewal, any cause of action is vested in Equitas.

Continuing duties and the DAC letter

73. As I have concluded that the duties owed by Walsham were continuing duties, it is unnecessary to consider at any length what the position would have been if I had reached a different conclusion and, in particular, how that would have been affected by the terms of the DAC letter. It is, however, significant that the DAC letter, the terms of which are set out above and which was obviously a legal letter, refers unequivocally to Walsham being “under a continuing duty” with regard to remittance of funds, whether received in the past or in the future, a proposition which Walsham accepted by a formal signature which was requested and given expressly on the basis that it would avoid the need for litigation.

74. If necessary, therefore, I would have concluded that even if Walsham’s duties were not correctly characterised as continuing duties up to that point, the parties agreed to treat them as continuing duties as a result of this letter. As it is, the letter confirms what I have held to be the position, and therefore provides some reassurance that the parties would not have regarded my conclusion as unreasonable, uncommercial or contrary to the general understanding at Lloyd’s.

Continuing duties and the Broker Transfer Agreement

75. A similar point arises by reference to the provisions of the Broker Transfer Agreement dated 17 September 2003. Clause 1.1(iii) refers to the cessation of Walsham’s obligation to provide certain accounting information:

> “It is further agreed that there will be no further obligation upon Walsham’s to provide accounting information after 12 months from the date the accounting information has been provided to and acknowledged by Equitas save as may be reasonably required by Equitas in relation to Walsham’s continuing obligations pursuant to paragraph 1.2 herein;”

76. The “continuing obligations” in clause 1.2 are expressed as follows:

> "Walsham's shall remain liable to account to Equitas on its own behalf and on behalf of the Syndicates for all funds received in respect of the Reinsurance Agreements, without deduction or set off, whether received prior to or after the transfer date, whether by way of claims, receipts, return premiums, salvages or otherwise to which, but for the Equitas Reinsurance (or any previous reinsurance to close at Lloyd's), the Syndicates would have been entitled. Walsham's shall pay to Equitas forthwith, any such finds which it currently holds."

Consequences of continuing duties

77. It is worth recording the consequences of my conclusion that the duties owed by Walsham were continuing duties, although for the most part I do not think that these consequences are controversial once the conclusion is reached that the duties were continuing. The existence of continuing duties does not enable Equitas to escape altogether from the effect of limitation, although it has other distinct arguments which, it says, enable it to do so. What my conclusion does mean is that Equitas is in principle entitled to recover (at least) damages in respect of the breaches of continuing duties committed by Walsham in the six years preceding the commencement of this action. Thus any funds held by Walsham which have still not been paid over will in principle be recoverable, as will any investment income lost as a result of failure to remit funds during the six years preceding the commencement of this action. But investment income lost as a result of failure to remit funds at some earlier stage (which I am told makes up most of the claim for lost investment income) cannot be recovered as a result of this conclusion. If it is to recover such losses, Equitas will need to succeed on one or more of its arguments about limitation.

78. One such argument, which is not for decision at this stage, concerns the effect of sections 14A and 14B of the Limitation Act 1980. My earlier conclusion that Walsham owed a duty of care in tort means that Equitas is in principle entitled to invoke the extended time limit in sections 14A and 14B of the Limitation Act 1980. Walsham, however, points out that even if this extended time limit applies, it is subject to an overall "long-stop" of 15 years from the date when the cause of action accrued, so that any cause of action accruing before 9 September 1996 would *prima facie* be time barred. If necessary, this will have to be determined at a later stage of this action. My decision on continuing duties, however, means that in respect of funds held by Walsham, there was in principle, a fresh cause of action accruing each day when those funds were not paid over.

Issue A(2): What duties were owed to Equitas in relation to the remittance of receipts?

79. Equitas contends that, following Reconstruction and Renewal, the same duties which were owed previously to the syndicates (and which Equitas was able to enforce in its capacity as assignee of the syndicates), were now owed to Equitas directly. It says that everyone in the market knew that it was succeeding to the position of the syndicates in respect of the 1992 and prior years of account in order to conduct the run off of the syndicates' business, so that henceforth payments started to be made by Walsham to Equitas instead of to the syndicates. In those circumstances Equitas contends that, just as Walsham had assumed responsibility towards the syndicates in the period prior to

Reconstruction and Renewal so as to give rise to a duty of care in tort, so now it assumed the same responsibility towards Equitas.

80. Equitas contends that a recognition of this assumption of direct responsibility is implicit in the Brokers' Agreement dated 15 August 1996 by which the brokers including Walsham agreed to become parties to the Settlement Agreement. Clause 6.1 of the Brokers' Agreement contained a waiver by Equitas of what were described as "Relevant Claims" against the brokers:

> "Extent of waiver
>
> Subject to the following provisions of this clause, Equitas (on behalf of itself and each other member of the Equitas Group) hereby agrees with each Broker (on behalf of itself and each other member of that Broker's Group) to waive and release all Relevant Claims against each member of the Broker's Group in respect of any act or omission (or alleged act or omission) which occurred prior to the Effective Date."

81. "Relevant Claims" were defined as follows:

> "*Relevant Claim* means a Claim howsoever arising out of, or in any way related to or connected with, whether directly or indirectly the underwriting business of any Syndicate for the 1992 underwriting year of account or any earlier year of account, including any such claim the benefit of which has been assigned or transferred to Equitas pursuant to the RITC Contract or Settlement Agreement or in respect of which Equitas is otherwise entitled pursuant to the RITC Contract or Settlement Agreement to the conduct of such claim on behalf of any such Syndicate or on behalf of the Names, or any of them, thereon or any managing or members agents thereof;"

82. This definition would include a claim for payment of sums collected by a broker for the account of a syndicate. So far, therefore, these provisions would appear to mean that Equitas was waiving claims of the kind which it makes in this action. However, the waiver in clause 6.1 was expressly subject to the terms of clause 6.4, which provided that:

> "Exclusions from waiver
>
> 6.4 The waiver and release in clause 6.1 shall not apply to any Claim against any member of a Broker's Group:
>
> (a) to account to Equitas for funds received whether prior to, or after the Effective Date, whether by way of claims, receipts, premiums, return premiums, salvages, profit commissions, or otherwise, to which, but for the RITC Contract (or any previous reinsurance to close at Lloyd's), a Syndicate would have been entitled;

(b) for failure to remit as instructed funds received from any Syndicate or Equitas, whether prior to, or after the Effective Date whether by way of claims payments, outwards premiums, outward return premiums subrogated recoveries or salvages, reinsurance premiums or which are otherwise due to third parties, any Syndicate or Equitas; …"

83. Thus the claims which Equitas makes were expressly excluded from the scope of the waiver in clause 6.1. Equitas, however, contends that clause 6.4 goes further, in that it expressly acknowledges a duty "to account to Equitas for funds received", that is to say, a duty owed to Equitas directly.

84. Walsham, on the other hand, contends that until the DAC letter of 18 July 2002 (which it accepts did change the position in this regard, with the consequence that Walsham owed thenceforth the duties referred to in that letter) it owed no duties directly to Equitas, its only duties being owed to the syndicates, although it accepts the validity of the assignment of the syndicates' rights to Equitas.

85. In my judgment Equitas has the better of these arguments. There is no doubt that its role as the successor to the syndicates after Reconstruction and Renewal was fully understood in the market and that, in substance, Walsham was acting and understood itself to be acting as broker to Equitas in relation to the run off of the 1992 and prior years of account, while Equitas relied on Walsham to do so. It therefore owed to Equitas the same duties in contract, tort and restitution as it had previously owed to the syndicates. The same reasoning which leads me to conclude that Walsham assumed responsibility to the syndicates and therefore undertook a duty of care to them in the period before 1996 applies equally here, and leads to the conclusion that after Reconstruction and Renewal Walsham undertook the same duty to Equitas. As before, and applying *Henderson v Merrett*, the question is not whether it is necessary to impose such a duty in circumstances where Equitas was already in a position to enforce the syndicates' rights as an assignee. Rather, it is whether in circumstances where an assumption of responsibility and concomitant reliance exist, there is anything in the parties' relationship which is inconsistent with a duty of care. In my judgment there is not. I accept Equitas's submission that this conclusion derives some support from clause 6.4 of the Brokers' Agreement.

86. Equitas relied also on clause 1.2 of the Broker Transfer Agreement set out above, with its reference to Walsham remaining "liable to account to Equitas on its own behalf and on behalf of the Syndicates for funds received in respect of the Reinsurance Agreements". However, this agreement came after the DAC letter, which Walsham accepts gave rise to duties owed directly to Equitas, and therefore provides only limited assistance in considering what the position was before the date of that letter.

87. I conclude, therefore, that following Reconstruction and Renewal Walsham owed to Equitas the same duties as it had previously owed to the syndicates.

Issue A(3): What was the effect of Walsham's signing the DAC letter?

88. Equitas contends that the effect of the DAC letter was that Walsham owed to Equitas the various duties, which were continuing duties, set out in paragraphs 1 to 4 of the letter. For convenience, I set these out again:

> "We consider that you are under a continuing duty to our clients:-
>
> 1. To inform them of all amounts you have received and still hold or hereafter receive on behalf of Lloyd's syndicates for 1992 and prior years of account and/or Equitas.
>
> 2. To make all appropriate efforts to identify any and all amounts you have received and still hold on behalf of Lloyd's syndicates for 1992 and prior years of account and/or Equitas and to pay to them without delay all such amounts subsequently identified.
>
> 3. To pay to them without delay all amounts you have received and still hold on behalf of Lloyd's syndicates for 1992 and prior years of account and/or Equitas.
>
> 4. To pay to them without delay any and all amounts you may subsequently receive or identify as having received on behalf of Lloyd's syndicates for 1992 and prior years and/or Equitas."

89. On Equitas's case the letter did not materially change the existing position since, as I have already accepted, Walsham already owed continuing duties and, moreover, owed them directly to Equitas.

90. Walsham accepts that the effect of the letter was that it undertook duties directly to Equitas, but draws a distinction between receipts which it was already holding and future receipts. In the former case, it says that it undertook a duty to make all appropriate efforts to identify past unremitted receipts and to remit them when identified, but that a cause of action against it for breach of this duty would only arise if either (a) having identified such a receipt, it failed to remit it or (b) a past unremitted receipt ought to have been identified with the use of all appropriate efforts, but was not identified and therefore was not remitted, and that in either case the cause of action would accrue on the date when the payment ought to have been remitted. In the latter case, Walsham accepts that it undertook a duty to remit future receipts with reasonable promptness.

91. Thus the issue arising here (there is a separate issue as to the effect of this letter on limitation issues which I consider below) is whether in relation to past receipts Walsham's duty was limited to the making of "all appropriate efforts" to identify such

receipts. In my judgment it was not so limited, but was a duty actually to pay such receipts without delay.

92. This was the clear and unequivocal effect of paragraph 3 of the letter, which refers to payment without delay of "all amounts you have received and still hold". While paragraph 2 speaks of making appropriate efforts, and may be said therefore to impose an additional duty, it is inconceivable that Equitas intended, or would be understood as having intended, to water down the obligation in paragraph 3 in the manner for which Walsham contends. Rather, paragraph 2 was intended to ensure that Walsham would put itself in a position to comply with its paragraph 3 duty.

93. There is a dispute as to whether, if Walsham's only duty in relation to past receipts as a result of this letter was a duty to make appropriate efforts to identify such receipts, Equitas has pleaded a case of breach of such a duty. I was not taken to the parties' pleadings on this point, and in view of my decision that Walsham's duty was not so limited, I need not attempt to resolve that pleading dispute.

94. I record that in the course of the hearing Walsham abandoned a pleaded argument that there was no duty as a result of this letter to pay to Equitas any receipts for which a claim was already time barred.

95. As already noted, the duties referred to in this letter were continuing duties.

Issue A(4): What was the effect of the Broker Transfer Agreement?

96. The final issue as to the duties owed by Walsham concerns the Broker Transfer Agreement of 17 September 2003. Equitas contends that Walsham owed the continuing duties set out in clause 1.2 in relation to both past and future receipts, but that the agreement applied only to Outwards Protections (ie where Walsham was acting as a broker for reinsured syndicates) and that it did not supersede or extinguish any other duties which Walsham owed.

97. Walsham contends that the Broker Transfer Agreement had a more fundamental impact. Again, Walsham draws a distinction between past and future receipts. In relation to the former, it contends that clause 1.2 imposed a duty to pay over outstanding balances forthwith (regardless of when they had been received and whether any claim was already time barred), while in relation to the latter it imposed an obligation to remit them reasonably promptly following receipt, but that in both cases these were once-and-for-all (and not continuing) duties. It says, moreover, that the agreement applied to both Outwards and Inwards Protections, and that it superseded and extinguished all other duties previously owed by Walsham, at any rate once the files in question were transferred.

98. In my judgment Walsham’s submissions ascribe to the Broker Transfer Agreement a purpose and significance which it was never intended to have. The purpose of the agreement, as its recitals make plain, was simply to provide a mechanism for the transfer of broking functions for the future from Walsham to Equitas:

> “(1) Walsham’s acted as broker on behalf of the Syndicates in the placing of reinsurance agreements protecting the

> Syndicates writings, identified on Schedule 1 attached hereto (hereinafter "the Reinsurance Agreements") and/or subsequent processing, accounting and claims collection relating thereto. …
>
> (4) Equitas, acting on behalf of the Syndicates, wishes to assume control of the ongoing functions performed by Walsham's in relation to the Reinsurance Agreements.
>
> (5) The parties have negotiated a settlement to permit this transfer of functions, in accordance with the terms set out herein. …"

99. The agreement was therefore concerned with cases where Walsham had acted as broker placing reinsurance on behalf of the syndicates, that is to say, with Outwards Protections. It was not concerned at all with Inwards Protections, where Walsham was collecting premiums on behalf of reinsurer or retrocessionaire syndicates.

100. Further, there is nothing in the agreement to suggest that it was intended to supersede Walsham's obligations regarding the remittance of claims, let alone premiums. Indeed, in circumstances where these matters had been the subject of a careful restatement in the DAC letter just over a year before, it would be surprising if the agreement were intended to have the effect (without actually saying so) of superseding all existing obligations in that regard. The clause which is said to have had this effect is clause 1.2:

> "Walsham's shall remain liable to account to Equitas on its own behalf and on behalf of the Syndicates for all funds received in respect of the Reinsurance Agreements, without deduction or set off, whether received prior to or after the transfer date, whether by way of claims, receipts, return premiums, salvages or otherwise to which, but for the Equitas Reinsurance (or any previous reinsurance to close at Lloyd's), the Syndicates would have been entitled. Walsham's shall pay to Equitas forthwith, any such finds which it currently holds."

101. Clearly this was not intended to change the nature of Walsham's obligations, as it speaks of Walsham remaining liable to account, a term which implies a degree of continuity rather than change. Much clearer language would be required to demonstrate that an agreement apparently concerned with the mechanics of transferring broking functions from Walsham to Equitas was intended as a definitive restatement of Walsham's payment obligations, superseding all that had gone before. The agreement speaks of this continuing liability, moreover, by reference to the kind of payments which would be due in respect of Outwards Protections only, and it draws no distinction between past and future receipts, although obviously future receipts could not be paid over to Equitas until they were received. Further, as I have already noted, the obligations in clause 1.2 were expressly described as "continuing obligations" in clause 1.1(iii). Those obligations relate not only to future receipts, but also to past receipts, which disposes of the submission that these were not intended to be continuing obligations. Walsham suggests that the reference to "continuing obligations" is to be explained because it would have an obligation, continuing into

the future, to remit future receipts. But the obligations described as "continuing obligations" apply equally to receipts already received.

Issue B: Within what period of time should Walsham have remitted funds received?

102. The methodology adopted by Equitas for the purpose of calculating its claim (which it maintains is if anything too generous to Walsham) is to proceed on the basis that payment ought to have been remitted on the first day of the month two months after the month in which funds were actually received by Walsham. Thus, for example, if Walsham received payment of a claim from reinsurers on 15 January in any year, Equitas's claim is advanced on the basis that payment to the reinsured syndicate should have been made on 1 March of the same year. This means that, for the purpose of its claim, Equitas's accepts that Walsham would not have been in breach until it had failed to remit a payment for at least one month and that all payments should have been remitted at most two months after receipt. The average period after which Walsham would be in breach would therefore be six weeks. This methodology is agreed by Walsham.

103. Of course, if Equitas is right to say that Walsham's duties were continuing duties, Walsham's duty to remit the funds in the example given, would have first arisen on 1 March, but a further breach of duty would have occurred on each subsequent day when the funds were not remitted.

Issue C: Remoteness

104. The next issue is whether the loss and damage claimed by Equitas in respect of the return on its investment funds after 1996 is too remote or is otherwise irrecoverable. It seems to me, however, that it is sensible to deal with this issue (which is concerned with investment income lost in respect of the period after Reconstruction and Renewal) after considering the calculation of lost investment income in the period before Reconstruction and Renewal.

Issue D: Calculation of lost investment income

What lost investment income, if any, is recoverable in respect of the period before 1 September 1996?

105. While the calculation of actual recoverable losses, if any, is to be deferred to a later stage, the principle by which such losses should be assessed is for decision now.

106. In relation to remittances which ought to have been made by Walsham before the formation of Equitas in September 1996, any loss of income between the date when the remittance ought to have been made and the date when the assignment to Equitas took place were losses suffered by the syndicates, which Equitas seeks to recover in its capacity as assignee of the syndicates' claims. It claims in respect of such period at the rate of LIBOR plus 1% compounded at monthly rests. This claim is put forward on the basis that it is said to represent the Commercial Court's usual and typical approach when calculating the time value of money, whether viewed in terms of lost interest or additional borrowing costs for the period in which a claimant is kept out of its money. In fact, however, the usual approach of the court in awarding statutory

interest is necessarily to award simple interest as there is no power under what is now called the Senior Courts Act 1981 to award compound interest.

107. The only issue here is said to be one of proof, although it does involve a point of principle. Walsham accepts that in principle damages for loss of investment income during this period are recoverable in accordance with the principle established in *Sempra Metals Ltd v Inland Revenue Commissioners* [2007] UKHL 34, [2008] 1 AC 561, but contends that such losses must be proved as a matter of fact and that there is no evidence to show that the syndicates did in fact suffer losses on this scale, or indeed at all. It is correct that there is no evidence of the investment returns achieved by the syndicates before September 1996, or of the rates at which they were able to borrow money, nor was there any evidence positively to suggest that they did in fact borrow money in order to replace the payments which Walsham failed to remit to them. It was, however, part of Walsham's own evidence that as a broker it came under considerable pressure from syndicates to ensure the prompt collection of claims and to fund claims where payment had not yet been made by reinsurers, all because of the supreme importance of cash flow to those syndicates. This is not surprising, particularly in the market conditions which existed at the time.

108. It is therefore necessary to examine what *Sempra Metals* has to say about the circumstances in which a conventional interest rate can be used, when compound interest can be awarded, and what is meant by the need for proof of loss in such circumstances.

109. The remedy sought by the taxpayer claimant in *Sempra Metals* was compensation for having been required to make payments to the Revenue prematurely, in a way which had been held to be contrary to European Union law. Because the Revenue's demand for payment was unlawful under EU law, it was necessary to consider whether domestic English law provided an appropriate remedy in order to comply with the EU principle of effectiveness. Two possibilities were canvassed, a claim in tort in the nature of a claim for breach of statutory duty (see eg Lord Nicholls at [90]) and a claim in restitution, whereby the Revenue was required to disgorge the benefit which it had obtained as a result of its unjust enrichment at the expense of the taxpayer (see eg Lord Nicholls at [101]). These two claims raised different considerations because the claim in damages was concerned with the loss suffered by the taxpayer, while the claim in restitution focused on the benefit obtained by the Revenue.

110. Dealing with the claim for damages, the House of Lords held unanimously that in principle it is open to a claimant to plead and prove its actual losses caused by late payment of a debt and that such claims are subject to normal principles governing damages claims, such as remoteness and mitigation.

111. Lord Nicholls began his judgment by observing that:

> "52. We live in a world where interest payments for the use of money are calculated on a compound basis. Money is not available commercially on simple interest terms. This is the daily experience of everyone, whether borrowing money on overdraft or credit cards or mortgages or shopping around for the best rates when depositing savings with banks or building societies. If the law is to achieve a fair and just outcome when

> assessing financial loss it must recognise and give effect to this reality."

112. After reviewing the authorities concerning the award of interest as damages dating from *Page v Newman* (1829) 9 B & C 378 and even earlier, and concluding that it was time to discard "the unprincipled remnant of an unprincipled rule", Lord Nicholls stated the position as follows:

> "94. … in principle, it is always open to a claimant to plead and prove his actual interest losses caused by late payment of a debt. These losses will be recoverable, subject to the principles governing all claims for damages for breach of contract, such as remoteness, failure to mitigate and so forth.
>
> 95. In the nature of things, the proof required to establish a claimed interest loss will depend on the nature of the loss and the circumstances of the case. The loss may be the cost of borrowing money. That cost may include an element of compound interest. Or the loss may be loss of an opportunity to invest the promised money. Here again, where the circumstances require, the investment loss may need to include a compound element if it is to be a fair measure of what the plaintiff lost by the late payment. Or the loss flowing from the late payment may take some other form. Whatever form the loss takes the court will, here as elsewhere, draw from the approved or admitted facts such inferences as are appropriate. That is a matter for the trial judge. There are no special rules for the proof of facts in this area of the law.
>
> 96. But an unparticularised and unproved claim simply for 'damages' will not suffice. General damages are not recoverable. The common law does not *assume* that delay in payment of a debt would of itself cause damage. Loss must be proved."

113. Dealing with the loss suffered by the taxpayer, Lord Hope of Craighead said:

> "16. … The reality is that every creditor who is deprived of funds to which he is entitled and which he needs to run his business will have to incur an interest-bearing loan or employ other funds which could themselves have earned interest. It is a short step to say that such interest losses will arise 'in the ordinary course of things' in such circumstances.
>
> 17. I also agree with Lord Nicholls that the loss of the late payment of a debt may include an element of compound interest. But the claimant must plead and prove his actual interest losses if he wishes to recover compound interest, as is the case where the claim is for a sum which includes interest charges. The claimant would have to show, if his claim is for ancillary interest, that his actual losses were more than he

> would receive by way of interest under the statute. In practice, especially where the period over which interest is sought is short or where the claimant does not have to borrow money to replace the debt, simple interest under section 35A of the [Senior Courts] Act 1981 is likely to be the more convenient remedy."

114. Lord Hope added at [42] that the virtue of simple interest is its simplicity, a virtue not shared by compound interest, which can be calculated in different ways, leading to different results.

115. Lord Scott of Foscote also agreed that damages could be awarded. He said:

> "140. … Where a wrong committed by A has caused B to be wrongfully deprived for a period of time of a sum of money, the extent of the loss should be measured by the value to B of that sum for that period. There may be actual evidence of what B would have done with the money. The actual evidence may show that B has lost nothing. On the other hand, it may show that he has lost a great deal, but of course some of that loss may be too remote to enable a claim for its recovery to succeed. At the least it can usually be said that by being deprived of the money B has lost the opportunity of leaving it on deposit at the bank for the period in question. On that sensible footing B can claim compensation measured by the interest the sum would have produced if simply left with the bank for that period. Interest would have accrued at the bank's usual rate of interest on deposits and the usual rests allowed by the bank's terms. An award of interest compounded in the manner referred to would result, in my opinion, from an ordinary application of legal principles applicable to the assessment of compensatory damages for tort or breach of statute."

116. Lord Walker of Gestingthorpe and Lord Mance gave judgments agreeing that damages could be awarded which would take the form of interest, including compound interest. The result was that the trial judge's order that the Revenue should pay damages consisting of interest calculated on a compound basis at a "conventional" rate was upheld. Lord Nicholls explained:

> "127. This order should stand so far as it relates to the claim for damages. The reference to a 'conventional' rate was intended to dispense with the need for protracted investigation of the financial affairs of the parties and of other claimants. On the claims for damages a conventional rate should be taken to refer to the rate at which a substantial commercial company could borrow the amounts in question in the market at the relevant time."

117. Lord Mance added:

> "226. The judge had before him extensive evidence about Sempra's financial position at the relevant times, which showed that it was in a net borrowing position. He was evidently satisfied that Sempra had incurred properly recoverable loss of interest on a compound basis. On one view he should or might have sought to assess Sempra's actual loss by detailed calculation. He decided instead that 'full compensation' would be achieved by taking a conventional rate and by compounding that. As the Court of Appeal noted, a conventional rate will only give rise to full compensation in conjunction with compounding at the periodic intervals used in arriving at the rate."

118. Thus *Sempra Metals* was a case where, despite what was said about the need to plead and prove a loss, the damages actually awarded were determined by taking a conventional rate and awarding compound interest. This did not depend on any evidence as to the taxpayer's actual loss, but was simply the interest which a substantial commercial company would have to pay to borrow the amount in question in the market at the relevant time, regardless of what the taxpayer had actually done. Although it may be that this approach was not the subject of specific argument in the House of Lords, it was clearly an approach which the House endorsed.

119. Although there was agreement so far as the damages claim was concerned, disagreements arose in relation to the claim in restitution, in particular as to the extent to which it was appropriate to award restitution by reference to a conventional borrowing rate in the absence of specific evidence that the defendant had benefited from the unjust enrichment by avoiding the need to borrow. Lord Scott and Lord Mance considered that such evidence was necessary, whereas the majority was prepared to take as a starting point the proposition that the value of having the use of money is *prima facie* the reasonable cost of borrowing the money in question, measured by reference to commercial rates of interest calculated on a compound basis. As Lord Nicholls (one of the majority) put it:

> "103. In the ordinary course the value of having the use of money, sometimes called the 'use value' or 'time value' of money, is best measured in this restitutionary context by the reasonable cost the defendant would have incurred in borrowing the amount in question for the relevant period. That is the market value of the benefit the defendant acquired by having the use of the money. This means the relevant measure in the present case is the cost the United Kingdom Government would have incurred in borrowing the ACT for the period of prematurity. Like all borrowings in the money market, interest charges calculated in this way would inevitably be calculated on a compound basis."

120. That *prima facie* proposition, however, was subject to proof to the contrary -- for example, if the beneficiary had not in fact made use of the money or if it was able (as the government was) to borrow money more cheaply than commercial companies could (see [118], [119] and [128]).

121. Accordingly, while the judge's order on both claims had been that the Revenue should pay interest on a compound basis at a "conventional" rate, with no distinction drawn between the damages claim and the restitutionary claim, that order was modified in the House of Lords to clarify that the reference to a conventional rate in the context of the restitutionary claim should be taken to refer to the government's borrowing rate.

122. Lord Hope said:

> "48. … It was not that there was no actual benefit, but that the benefit was extremely difficult to quantify. It seems to me that, on this evidence, the assumption that the revenue derived some benefit from the receipt of money prematurely has not been displaced, and that this justifies resort to a conventional rate of interest as a measure of that benefit.
>
> 49. The proposition that a conventional rate should be used leaves open for further discussion questions of detail such as how that rate is to be arrived at and what rests should be adopted. The enrichment principal indicates that these questions should be resolved by looking at the circumstances of the enrichee. The use of ordinary commercial rates of interest, at ordinary rests, would be appropriate if those rates were relevant to the enrichee's circumstances. But I would hold that it is open to the enrichee to show that it would have been able to borrow money at rates or on terms more favourable to it than those available in the ordinary commercial market. If it can do that, then ordinary rates and other terms must give way to those that are relevant to the circumstances of the enrichee. …"

123. Where does all this leave the present case? I am not concerned with a claim in restitution at this stage (but see Issue E below), but with a damages claim. In the light of the judgments in *Sempra Metals* I would summarise the position as follows.

i) First, it is clear that damages are in principle recoverable, subject to ordinary principles of remoteness and mitigation, for breach of an obligation to remit money, where the failure to remit has caused a loss.

ii) Second, unless there is some positive reason to do otherwise, the law will proceed on the basis, at any rate in the commercial context, that a claimant kept out of its money has suffered loss as a result. That represents commercial reality and everyday experience. Specific evidence to that effect is not required and, even if adduced, may well be somewhat hypothetical and thus of little assistance. For example, a business man may well be unable to say precisely what he would have done differently if a particular payment had been made to him when it ought to have been, especially if (as apparently in this case) he was unaware that the money was being withheld. Extensive disclosure, which would no doubt be demanded by the defendant, is unlikely to assist. But that does not mean that no loss has been suffered. In the present case the general evidence of the importance attached in the market to prompt remittance of funds is more than sufficient to justify the conclusion that the syndicates did suffer a loss by being kept out of their money. Accordingly the question in

such a case is not whether a loss has been suffered, but how best that loss should be measured.

iii) A solvent claimant who seeks to recover damages which exceed the cost of borrowing to replace the money of which it has been deprived is likely to be met with the defence that the claim is too remote or that it has failed to mitigate by borrowing in order to replace the money lost, in which case its recovery may be limited to that borrowing cost, which will include the need to pay compound interest, that being the only basis on which money can be borrowed commercially. The position may, however, be different if there is a good reason why the claimant should not have gone into the market to borrow the missing money, for example if it did not know and should not reasonably have known that the money was missing. (Whether this is so in the present case is considered below by reference to Equitas's claims in respect of the period after 1 September 1996).

iv) In other cases I consider that it is not necessary for the claimant to produce specific evidence of what it would have done with the money or what steps if any it took to borrow or otherwise to replace the money of which it was deprived. As noted above, it may often be impossible or at any rate extremely difficult to produce such evidence, especially if that would mean attempting to disentangle a claimant's overall business operations in an artificial attempt to attribute specific activity such as borrowing to the non-remittance of specific funds. Instead, at any rate in commercial cases and unless there is some positive reason to do otherwise, the law will proceed on the basis that the measure of the claimant's loss is the cost of borrowing to replace the money of which the claimant has been deprived regardless of whether that is what the claimant actually did. A conventional rate will be used which represents the cost to commercial entities such as the claimant and is not necessarily the rate at which the claimant itself could have borrowed or did in fact borrow. This avoids the need for protracted investigation of the particular claimant's financial affairs. As with other conventional measures (for example, the assessment of damages by reference to a market price in sale of goods cases) this approach has the advantage of certainty and predictability which is always important in the commercial context, as well as being broadly fair in the great majority of cases and avoiding expensive and often ultimately unproductive litigation.

v) If a conventional borrowing cost is to be adopted in this way, the question whether interest should be simple or compound answers itself. While simple interest has the virtue of simplicity as Lord Hope observed, it also has the certainty of error and injustice. As their Lordships noted, it is impossible to borrow commercially on simple interest terms. I respectfully agree with Lord Nicholls that the law must recognise and give effect to this reality if it is to achieve a fair and just outcome when assessing financial loss. To conclude that, at least in a typical commercial case, the normal and conventional measure of damages for breach of an obligation to remit funds consists of compound interest at a conventional rate is therefore both principled and predictable, as well as being in accordance with what was actually awarded in *Sempra Metals*.

124. I referred above to the possibility that in some cases there may be a positive reason not to approach the assessment of damages in the manner suggested. I would not wish to exclude that possibility and in any event the assessment of damages should not be fettered by unduly rigid rules. But there is no reason in this case (and none was suggested) to think that this approach would result in an unfair result so far as losses in the period before 1 September 1996 are concerned.

125. Accordingly I conclude that losses suffered by the syndicates in the period before September 1996 are to be measured by reference to the cost of borrowing in the market, and that Equitas is in principle entitled (subject to the limitation issues yet to be considered in this judgment and those to be determined at the next stage of this action) to recover damages in respect of losses in this period at the rate of LIBOR plus a margin of 1%, compounded with appropriate rests.

126. The question of what rests are appropriate is for decision at a later stage if the parties cannot agree. It will depend on evidence as to what borrowing terms were available in the market at the relevant time. As already noted, Equitas's calculation of its claim has used monthly rests and, if necessary, that may need to be revised. I would add, however, that at least in my experience the usual practice of London arbitrators (who have had power to award compound interest under section 49 of the Arbitration Act 1996 since 31 January 1997) is to award compound interest with three monthly rests. I add also that the parties will need to agree which of the various LIBOR rates is appropriate to be used.

Issue C revisited: Remoteness

Is the loss and damage claimed by Equitas in respect of return on its investment funds too remote or otherwise irrecoverable?

127. Equitas's claim for lost investment income during the period from September 1996 to March 2007 is advanced by reference to the actual investment returns achieved by Equitas during that period which, as foreseen at the time of Reconstruction and Renewal, were significantly better than previously achieved by individual syndicates and were considerably higher than the conventional interest rate of LIBOR plus 1% claimed in respect of the earlier period.

128. The issue here is very limited. In view of my conclusions set out above as to the adoption of a conventional measure of damages by reference to the normal cost of borrowing, it is important to spell out the limited nature of that issue. First, initially the only reason advanced as to why Equitas should not in principle recover its lost investment income as claimed was that the damages are too remote. There is no case advanced of failure to mitigate, for example, by borrowing in the market in order to make good the payments which Walsham failed to remit, which would then have enabled Equitas to use the borrowed funds to achieve its investment return. Since no such case is advanced, it is unnecessary to consider whether Equitas would have had a good answer to such a case, as it might have done in circumstances where (it says) it did not know that the funds in question had not been remitted to it and could reasonably say, therefore, that failure to borrow funds to replace what it did not know was missing could hardly be regarded as a failure to mitigate.

129. Second, Walsham does not contend that the damages are too remote if and to the extent that Equitas is able to advance a claim for breach of an obligation owed to it directly, as distinct from a claim as assignee of the syndicates. It accepts in effect that the improved investment return which Equitas was expected to achieve was within the parties' reasonable contemplation (or if different, was reasonably foreseeable) after Reconstruction and Renewal.

130. Third, Walsham accepts that Equitas is able to advance such a claim for breach of the DAC letter, which it acknowledges to have created a direct obligation owed to Equitas. Accordingly, the impact of what was referred to as the remoteness issue is limited on any view to the position between September 1996 and July 2002. I have held, however, that a direct obligation was owed from 1 September 1996 onwards. That being so, no issue of remoteness arises to limit Equitas's claim.

131. It is therefore unnecessary to consider at any length what the position would be in the event that between September 1996 and July 2002 Equitas were confined to a claim advanced as assignee of the syndicates' rights. Equitas contends that the lost income which it would have achieved is not too remote for two reasons. The first is that the relevant type or kind of loss for the purpose of the remoteness issue is investment income. It was foreseeable that in the event of failure to remit funds the syndicates would suffer a loss of investment income, and it makes no difference that the loss actually suffered was more extensive: it was still a loss of investment income. In this regard Equitas relies on cases where a loss of revenue or investment income has been recovered notwithstanding that the precise way in which the loss arose or the scale of the loss was not foreseeable (*Network Rail Infrastructure Ltd v Conarken Group Ltd* [2011] EWCA Civ 644, [2012] 1 All ER 692; and *Brown v KMR Services Ltd* [1995] 2 Lloyd's Rep 513). Equitas's second reason for saying that the loss was not too remote is that (as the evidence demonstrates) throughout the period before Reconstruction and Renewal it was known that US dollar recoveries would be paid into Lloyd's American Trust Fund and, in this respect, the position was no different after Reconstruction and Renewal.

132. In my judgment, however, these arguments founder on the well-established principle (which as Walsham acknowledges is not in fact a principle of the law of remoteness at all) that an assignee cannot recover greater damages than would be recoverable by the assignor (see *Dawson v Great Northern & City Railway Co* [1905] 1 KB 260 and subsequent cases discussed in *Offer-Hoar v Larkstone Ltd* [2006] EWCA Civ 1079, [2006] 1 WLR 2926) at [37] to [42], [48] to [54], [74], and [86] and [87]). The syndicates could never have achieved the returns achieved by Equitas because of the necessarily short term nature of their investment policies and their inability to benefit from the same economies of scale as were available to Equitas. These were some of the principal benefits of Reconstruction and Renewal which were trumpeted in the documents published by Lloyd's in the lead up to the Reconstruction and Renewal settlement. The losses which Equitas is entitled to recover in its capacity as assignee are the syndicates' losses and those losses are to be assessed by reference to the investment returns which the syndicates would have achieved if there had been no assignment. The question whether losses at Equitas's rate of return would have been too remote (because they were a different kind of loss from that which was foreseeable) if they had been suffered by the syndicates therefore cannot arise. In the nature of things such losses would not have been suffered by the syndicates.

133. Accordingly, if Equitas had been confined to a claim as assignee in the period from September 1996 to July 2002, it would have been entitled to recover in accordance with the same principles which I have held to apply before September 1996, that is to say damages assessed by reference to a conventional interest rate of LIBOR plus 1%, compounded with appropriate rests. As it is, Equitas is not so confined and is entitled in principle (and again, subject to limitation) to recover at the rate of return achieved on its investment funds during the whole of the relevant period.

Issue E: The claim in restitution

In principle, does Equitas have a claim in restitution?

134. Equitas contends that it has a claim in restitution in respect of any outstanding principal sums, and in respect of interest on unremitted or late remitted receipts, at the rate of LIBOR plus 1% (compound) in respect of the period during which the sums were retained by Walsham. This is accepted by Walsham, subject to limitation issues. Thus Walsham accepts that the benefit which it has obtained from the use of money is to be measured by reference to a conventional interest rate in the same way (leaving on one side the wrinkle that the government was able to borrow money more cheaply) as the benefit to the Revenue was measured in *Sempra Metals*.

Issue F: Was Walsham entitled to deduct reinstatement brokerage accruing due before 28 August 2003?

135. As noted above, a question arose during the negotiation of the Broker Transfer Agreement concerning Walsham's entitlement to brokerage on reinstatement premium, which was dealt with by an agreement, recorded in a letter from Equitas dated 28 August 2003, whereby Equitas agreed to pay Walsham £225,000 in full and final settlement of Walsham's claims for reinstatement brokerage. Although there was some limited evidence about the parties' oral negotiations, I see no reason to doubt that the letter correctly recorded what was agreed and, in any event, Walsham accepted the payment without suggesting that the letter was in any way mistaken in what it recorded.

136. The letter stated:

> "Reinstatement Brokerage Buy-Out
>
> I refer to our recent discussions and my conversation with Steve Berg last week regarding the above issue.
>
> As you are aware, we have now mutually agreed terms whereby Equitas has, on the basis set out herewith, agreed to pay Walsham Brothers & Co Ltd an amount of £225,000 on condition that it is agreed to be in full and final settlement of any and all claims by Walsham Brothers & Co Ltd, for brokerage arising out of or in any way connected with the administration (including, but not limited to claims collections) by Walsham Brothers & Co Ltd, or any predecessor thereof, of any 1992 or prior year Lloyd's syndicate business.

> This payment is made entirely without prejudice to the question of Walsham Brothers & Co Ltd legal entitlement to this sum and is not to be regarded as creating any precedent or acknowledgement of legal liability."

137. There is an issue whether this "buy out" operated to extinguish all of Walsham's entitlement to such brokerage or was limited to a buy out of future brokerage only, leaving any accrued rights unaffected, although that is to put the matter neutrally. Another way of stating the issue would be to say that there is an issue whether the words "full and final settlement of any and all claims …" should be understood as referring to all claims or only to some claims. I accept that although the figure of £225,000 was a negotiated compromise, it was arrived at by reference to the reinstatement brokerage which Walsham expected to earn in the future and that its calculations appear to have taken no account of brokerage which had already accrued but had not been credited. I accept also that clause 1.1(v) of the Broker Transfer Agreement comprised a waiver by Walsham "of any claims for brokerage/commissions which it may have against the Syndicates in respect of the Reinsurance Agreements and which accrue after the date of this Agreement", with no mention of any such claims which had already accrued.

138. Nevertheless, the terms of the buy out are comprehensive, emphatic and unambiguous. I conclude that by this agreement Walsham gave up whatever claim it had for reinstatement brokerage, whether accruing due before or after the date of the letter, in exchange for the immediate payment of £225,000. That represented an immediate benefit to Walsham, in circumstances where its right to such brokerage at all was not conceded.

139. Accordingly Walsham was not entitled to deduct reinstatement brokerage accruing due before 28 August 2003.

Issue G: Limitation

140. The next group of issues concern limitation. Here too there are some issues of principle to be decided, but these do not cover the whole range of issues concerning limitation which arise in this case and the consequences of my decisions on the issues to be decided will have to be determined at a later stage if they cannot be agreed.

Issue G(1): In principle when would the syndicates and/or Equitas's causes of action have accrued?

141. It is common ground that, subject to the effect (if any) of sections 14A, 14B and 32(1)(b) of the Limitation Act 1980, Equitas's causes of action (whether in contract, tort, restitution or fiduciary duty) first accrued in relation to each sum on the date when it should have been remitted to the relevant syndicate or to Equitas in accordance with the methodology described under Issue B above.

142. Walsham contends also that a claim under the Broker Transfer Agreement accrued on 17 September 2003, the date of the agreement, and not at any later time. I have dealt with this contention under Issue A(4) above.

Issue G(2): Were the duties owed by Walsham in relation to the remittance of funds already received continuing duties?

143. For the reasons already given under Issue A(1) above, Walsham's duties in relation to the remittance of funds were continuing duties.

Issue G(3): Do the terms of the DAC letter preclude Walsham from asserting that Equitas's claims are time barred?

144. Equitas contends that Walsham agreed by accepting the terms of the DAC letter not to take a limitation defence in response to Equitas's claims. Although pleaded also as an estoppel, Equitas advances no separate argument to explain why, if the letter did not amount to an agreement to this effect, it nevertheless gave rise to an estoppel, and as Walsham points out, it is hard to see how it could.

145. It is clear, and is not in dispute, that a defendant can agree not to take a limitation point, and that an agreement to pay sums which are due may, depending on all the circumstances, preclude the defendant from subsequently taking a limitation defence even if there is no mention made in the agreement of limitation periods or time bars. Examples can be found in *Wright v John Bagnall & Sons* Ltd [1900] 2 QB 240 and *Lubovsky v Snelling* [1944] 1 KB 44 and also, much more recently, *The MSC Pamela* [2013] EWHC 2792 (Admlty).

146. It is therefore a question of construction of the agreement in issue whether the parties have agreed that a limitation point will not be taken. If so, it is necessary to identify the limitation point which the defendant has agreed not to take. For example, in *The Pamela* the effect of the parties' agreement (in an agreement which did not mention limitation at all) was that proceedings for damages arising out of a collision need not be commenced within the two year time limit provided by section 190 of the Merchant Shipping Act 1995, but it did not necessarily follow (and Teare J did not need to decide) whether this left the claimant free to delay proceedings indefinitely or whether the six year limitation period applicable to claims in contract would apply (see [23] of the judgment). It seems to me that, while this will always be a question of construction of the agreement in issue, an agreement which leaves a claimant free to delay the commencement of proceedings indefinitely (for ten years? for a hundred?) is inherently improbable. There would need to be clear wording or other circumstances to justify a conclusion that this is what the parties intended. As Lord Evershed MR said in *The Sauria and the Trent* [1957] 1 Lloyd's Rep 396, another maritime collision case where the issue was whether the defendant had agreed not to rely on the two year time limit in the predecessor to section 190 of the 1995 Act, there is:

> "the greatest difficulty in seeing how you can formulate an agreement which will have the effect (in such a case as the present) of binding the defendant contractually not to raise the plea of section 8 of the Act of 1911 in any action the plaintiffs may choose to bring … however long after the cause of action they may elect to start those proceedings."

147. Thus it may be that the true construction of an agreement by which a party is precluded from taking a limitation defence is effectively to start the limitation clock running again, or it may be implicit in such an agreement that the claimant will not delay indefinitely, but will if necessary commence proceedings within a reasonable

time in the event that (for example) the parties' current negotiations break down. No doubt there are other possibilities. While everything will depend on the wording and the circumstances, such an agreement would appear to be more probable than an agreement that no limitation point at all would be taken, however long delayed the commencement of proceedings may be.

148. In the present case Equitas contends that the parties did agree by the terms of the DAC letter that no limitation point would be taken at all. I asked Mr Christopher Butcher QC for Equitas whether the letter meant that Equitas could wait for ever before commencing proceedings and, as I understood his answer, that is indeed Equitas's case. In support of this case, Equitas draws attention to four aspects of the letter. First, paragraph 3 of the letter stated an obligation to pay to Equitas without delay all amounts which Walsham had received in the past, including any amounts for which a claim would now be time barred. Second, the final paragraph of the letter referred to acceptance by Walsham that it would comply with its duties as stated in the letter "now and at all times in future". Third, the letter contains a promise by Equitas to forbear from seeking a court order if Walsham would confirm its acceptance of this position. Fourth, Equitas says that the timing of the letter was significant, coming as it did almost six years after the Reconstruction and Renewal Settlement Agreement, when questions of limitation could have been expected to be in the forefront of the parties' minds.

149. I would accept, as does Walsham, that the DAC letter does constitute an agreement not to take a limitation defence, but the limitation defence which Walsham agreed not to take was in relation to claims for payment of past receipts which were (or were arguably) already time barred. (Whether they were in fact time barred would depend upon whether, apart from the letter, Walsham's obligations were continuing obligations, a point which the letter resolved but which would otherwise have been a potential subject of dispute). So far as necessary, the effect was to re-start the limitation clock in respect of such claims. That follows necessarily from the acceptance of an obligation in paragraph 3 of the letter to pay over all amounts previously received. Thus Walsham was obliged to pay to Equitas (and if it failed to do so Equitas could bring an action to recover) a payment received by Walsham more than six years before the date of the letter. But I can see nothing in the terms of the letter which would have the effect that Equitas was not only entitled to recover the payment itself (together if appropriate with statutory interest in the discretion of the court), but was also entitled to recover damages in the form of lost investment income for the failure to make the payment more than six years beforehand.

150. Similarly the obligations in paragraphs 3 and 4 of the letter to pay to Equitas not only all past receipts but all future receipts were expressly described as "continuing obligations", as discussed above. In that sense, therefore, the time within which Equitas was required to commence proceedings to recover such receipts was postponed as a new cause of action would accrue on each day when a payment which ought to have been made was not made. I would accept also that Walsham agreed to comply with the duties set out in the letter "at all times in the future" -- that is to say, that its obligation to remit receipts (whether a payment already received of which it was not aware or a payment to be received at any time in the future) was unlimited in time. But I do not accept that the DAC letter had the effect of enabling Equitas to commence proceedings at any time in the future, however distant, to recover as

damages investment income allegedly lost as a result of a failure to make a remittance in the distant past. Indeed there is nothing in the letter to suggest that the parties had in contemplation a claim to recover loss of investment income as damages for late payment or non payment at all.

151. Accordingly, the effect of the DAC letter was that Walsham agreed not to take a limitation defence in response to a claim to recover principal sums received by Walsham and not paid over to Equitas, but the letter did not preclude Walsham from taking a limitation defence to any claim for damages incurred as a result of a breach committed more than six years before the commencement of proceedings. (Whether Walsham is precluded from taking such a point for other reasons is a separate matter).

Issue H: Walsham's cross claims

152. The next group of issues is concerned with whether Walsham is entitled to set off claims which it has or had against the syndicates to recover sums which were either overpaid in error or which represent sums advanced to the syndicates in expectation of receipt of funds which in the event were never received. For the purpose of these issues it is to be assumed that Walsham has or had such claims.

Issue H(1): Are Walsham's cross claims time barred?

153. It is common ground that all of Walsham's claims are now barred by limitation so that they cannot be advanced by way of claim. Walsham does not contend that any of its cross claims give rise to continuing duties on the part of the syndicates or Equitas. The only issue is whether these cross claims are available as set offs to claims advanced by Equitas. Walsham relies on the principles of equitable set off. Equitas accepts that in principle, and subject to the issues considered below, a cross claim which is time barred may give rise to a defence of equitable set off, but reserves the right if necessary to contend otherwise in the event that this case goes to appeal.

Issue H(2): Was it the effect of the Reconstruction and Renewal Settlement Agreement that the cross claims were waived?

154. It is Equitas's case that, to the extent that Walsham had claims to recover over payments made by it, those claims were waived by the Reconstruction and Renewal Settlement Agreement. This requires examination of the waivers contained in that agreement, together with various definitions which explain the terms used.

155. Clause 4.6 of the Settlement Agreement contains a waiver by the Names as follows:

> "Subject to clause 10, each Accepting Name unconditionally and irrevocably covenants with each Broker (for itself and as agent and/or trustee for each of its respective Broker Persons) that:
>
> (a) he hereby waives and releases all of his Broker Claims against each of the Brokers and the Broker Persons; …"

156. The definition of "Broker Claims" is contained in Schedule 1. It is:

> "*Broker Claim* means a Claim by an Accepting Name (whether directly, or by or through an Action Group for his benefit, on his behalf or otherwise) against a Broker or Broker Person howsoever arising out of, or in any way related to or connected with, whether directly or indirectly, an Accepting Name's recruitment to underwrite insurance business at Lloyd's through, or his membership at any time of, or the management of one or more Syndicates for the 1992 year of account or any earlier year of account (excluding for this purpose long term business, as defined in the Insurance Companies Act 1982, underwritten by such Syndicate) and/or his 1992 and Prior Business (including the management thereof), except that a Broker Claim for this purpose shall not include:
>
> (a) an Equitas Claim, the benefit of which has been validly assigned or transferred to Equitas, or in respect of which Equitas is otherwise validly entitled; …"

157. For present purposes what matters is that there is carved out from this waiver by Names of claims against brokers (including Walsham) any claim falling within the definition of an "Equitas Claim". "Equitas Claim" is defined as follows:

> "*Equitas Claim* means a Claim howsoever arising out of, or in any way related to or connected with, whether directly or indirectly, 1992 and Prior Business, the benefit of which is assigned or transferred to Equitas, or in respect of which Equitas is otherwise entitled, pursuant to the Reinsurance Contract, including, without limitation, Claims in respect of Syndicate reinsurances, premiums, premium returns, salvages or other assets receivable from any other person (or, in each case, any security therefor or other right relating thereto);"

158. Thus the claims which Equitas is making in this action fall within the definition of "Equitas Claim" and are therefore outside the scope of the waiver by Names. That is not disputed.

159. In contrast, clause 5.1 of the Settlement Agreement contains a waiver by "Contributors" and "Brokers". The latter term includes Walsham. This reads:

> "Subject to clauses 9 and 10, each Contributor and Broker unconditionally and irrevocably covenants with each Accepting Name that;
>
> (a) it hereby waives and released all of its Contributor's Claims against any of the Accepting Names; …"

160. The definition of "Contributor's Claim" is:

> "*Contributor's Claim* means a Claim by a Contributor or Broker (including a Claim by way of subrogation) howsoever

> arising out of, or in any way related to or connected with, whether directly or indirectly, an Accepting Name's recruitment to underwrite insurance business at Lloyd's through, or his membership at any time of, or the management of one of more Syndicates for the 1992 year of account or any earlier year of account (excluding for this purpose long term business, as defined in the Insurance Companies Act 1982, underwritten by such Syndicates) and/or his 1992 and Prior Business (including the management thereof), including, without limitation, a Claim under an agency agreement in respect of an Accepting Name's underwriting business on any such Syndicate …"

161. Stripping out the parts of this definition which are irrelevant for present purposes, the definition can be expressed as follows:

> "*Contributor's Claim* means a Claim by a … Broker … howsoever arising out of, or in any way related to or connected with, whether directly or indirectly, an Accepting Name's … 1992 and Prior Business (including the management thereof) …"

162. In order to make sense of this it is necessary to refer to a further definition, namely of the term "1992 and Prior Business".

> "*1992 and Prior Business* means all liabilities under contracts of insurance (whether direct or otherwise) or reinsurance underwritten at Lloyd's (other than long term business as defined in the Insurance Companies Act 1982) and originally allocated to the year 1992 year of account or any earlier year of account including, without limitation, any such liabilities reinsured to close into the 1993 or any later year of account but excluding any liabilities re-signed, or reallocated pursuant to a premium transfer, into the 1993 or later year of account;"

163. Thus the question whether there has been a waiver of Walsham's cross claims against syndicates depends on whether the claim arises out of, or is in any way related to or connected with, whether directly or indirectly, the syndicates' "1992 and Prior Business". These are extremely wide connecting words. In my judgment there is no doubt that such a connection exists. The cross claims fall into two categories. The first is sums which were mistakenly paid in the belief that they constituted payments due in respect of reinsurances allocated to the 1992 or prior years but which were not in fact due, for example because they duplicated payments already made. The second is sums advanced to syndicates to fund a claim in the expectation (in the event disappointed) that payment of that claim would shortly be made by reinsurers. While it can be said that these sums were not "liabilities under" the contracts of reinsurance in question, I see no escape from the conclusion that they were claims connected, directly or indirectly, with such liabilities.

164. The deliberately wide scope of these waivers was underlined by clause 12.17 of the Settlement Agreement, headed "Unknown and unsuspected claims", which appears to

have been included in order to ensure compliance with the principle (subsequently affirmed by the House of Lords in *Bank of Credit & Commerce International v Ali* [2001] UKHL 8, [2002] 1 AC 251) that an intention to release claims as yet unknown must be clearly expressed. This clause provided:

> "It is the intention of each of the Parties that, notwithstanding the possibility that any of the Parties subsequently obtains further information or understanding as to the facts, law or anything whatsoever which, if presently known or understood, would have affected that Party's assessment of the Claims settled, waived and released by it under this Settlement Agreement, this Settlement Agreement shall nevertheless be deemed to have fully and finally settled, waived and released any and all such Claims."

165. Finally on this issue, reference should be made to the definition of "Claim":

> "*Claim* means a claim, potential claim, counterclaim, claim by way of enforcement of judgment, award or order of any kind (including as to interest and costs), right of appeal, claim by way of contribution, right of set off, indemnity, cause of action, right or interest of any kind or nature whatsoever, whether known or unknown, suspected or unsuspected, whether arising in contract, tort, equity, fraud, as a consequence of wilful, reckless or negligent conduct, or of any fiduciary, statutory, regulatory or other duty, or otherwise, howsoever and whenever arising and in whatever capacity and jurisdiction;"

166. Again this is comprehensive language which expressly extends to the assertion of a claim by way of set off.

167. Although it may be said that the Settlement Agreement is somewhat one-sided in that claims by brokers against syndicates are comprehensively waived, while the mirror image claims by syndicates against brokers are preserved by the "carve out" from the syndicates' waiver of any claim falling within the definition of "Equitas claim", the language of the agreement is (at any rate, once the various definitions are understood) clear and unambiguous in this respect. Moreover, the imbalance makes some commercial sense, in view of the principle of finality for Names which underpins the Settlement Agreement. It was important to ensure that Names who wished to resign from Lloyd's should have a clean break so that they would not be faced in future with claims of any kind, but there was no corresponding imperative that brokers should be released from claims relating to "1992 and Prior Business" which had been assigned to Equitas.

168. Walsham contends that even if this was the effect of the Settlement Agreement, that effect was qualified by the provisions of clause 8.6 of the Brokers' Agreement. This provided that:

> "Proceedings against Brokers
>
> 8.6 Nothing in this Agreement shall: …

> (b) operate to restrict or prevent or in any way prejudice or waive any defence or set off or cross or counterclaim that a Broker or any member of a Broker's Group may have or may be able to raise in respect of any proceedings brought against such Broker or any member of a Broker's Group;"

169. Walsham argues, therefore, that its right to set off cross claims which was apparently waived by the Settlement Agreement is in fact preserved. I do not accept this. Clause 8.6 of the Brokers' Agreement begins with the words "Nothing in this Agreement" and is therefore providing for the effect of the Brokers' Agreement, but does not say anything about the effect of other agreements including the Settlement Agreement.

170. Accordingly I conclude that the effect of the Reconstruction and Renewal Settlement Agreement was that Walsham's cross claims were waived and cannot be asserted by way of set off in this action.

Issue H(3): Was it the effect of the Broker Transfer Agreement that the cross claims were waived?

171. Clause 1.2 of the Broker Transfer Agreement provided that (emphasis added):

> "Walsham's shall remain liable to account to Equitas on its own behalf and on behalf of the Syndicates for all funds received in respect of the Reinsurance Agreements, *without deduction or set off*, whether received prior to or after the transfer date, whether by way of claims, receipts, return premiums, salvages or otherwise to which, but for the Equitas Reinsurance (or any previous reinsurance to close at Lloyd's), the Syndicates would have been entitled. Walsham's shall pay to Equitas forthwith, any such finds which it currently holds."

172. Equitas contends that this was a further agreement by Walsham not to assert set offs against claims for funds received. I would accept this subject to two points. The first is that, as already discussed, the Broker Transfer Agreement is concerned only with Outwards Protections. Accordingly, any agreement in this clause not to assert a set off against claims by Equitas applied only to claims in respect of such Outwards and not Inwards Protections. The second is that, although Walsham agreed not to assert a set off, it did so only in relation to a claim "to account … for all funds received in respect of the Reinsurance Agreements". It is at least debatable whether this would extend to a claim for damages in the form of lost investment income. However, in view of my conclusion on Issue H(2), that question need not be pursued further.

Issue H(4): If any equitable set off arose, did it take place automatically at the time when the cross claim accrued?

173. Walsham contends that, to the extent that the claims which it seeks to set off against Equitas's claims in this action satisfy the test for equitable set off, the set off operated automatically to extinguish Equitas's claims without needing to be asserted by Walsham. This requires consideration of the way in which an equitable set off operates. Equitas contends that Walsham's argument is contrary to the House of

Lords authority of *The Aries* [1977] 1 WLR 185, as well as the recent first instance decision in *Fearns v Anglo-Dutch Paint & Chemical Co* Ltd [2010] EWHC 2366, [2011] 1 WLR 366, while Walsham relies on what is said to be the contrary decision of Lightman J in *Fuller v Happy Shopper Markets Ltd* [2001] 1 WLR 1681.

174. *The Aries* was a claim for freight due under a charterparty which was subject to the Hague Rules including the one year time bar for cargo claims in Article III rule 6. The charterers withheld a sum from freight because of a claim for short delivery of cargo and, a little over one year later, the owners claimed the freight which had been withheld. The first ground on which the claim succeeded was that no suit had been brought within one year as required by Article III rule 6, with the consequence that the cargo claim had ceased to exist and therefore could not operate as a defence to the claim for freight. Lord Wilberforce said at 188D-F:

> "[Article III rule 6] amounts to a time bar created by contract. But, and I do not think that sufficient recognition to this has been given in the courts below, it is a time bar of a special kind, viz., one which extinguishes the claim … not one which, as most English statutes of limitation … and some international conventions … do, bars the remedy, while leaving the claim itself in existence. Therefore, arguments to which much attention and refined discussion has been given, as to whether the charterer's claim is a defence, or in the nature of a cross-action, or a set-off of one kind or another, however relevant to cases to which the Limitation Act 1939 or similar Acts apply, appear to me, with all respect, to be misplaced. The charterers' claim, after May 1974, and before the date of the writ, had not merely become unenforceable by action, it had simply ceased to exist, and I fail to understand how a claim which has ceased to exist can be introduced for any purpose into legal proceedings, whether by defence or (if this is different) as a means of reducing the respondents' claim, or as a set-off, or in any way whatsoever."

175. It follows necessarily from this reasoning that if the charterers' cross claim were to operate as a defence by way of set off, it needed to be "introduced … into legal proceedings". It did not operate automatically at the time the cross claim arose to extinguish or reduce the charterers' liability on the claim for freight. It was not even enough that the cross claim had been asserted as giving rise to a right to set it off against freight, as on the facts it had (see 188H). Moreover, this part of Lord Wilberforce's reasoning proceeded on the assumption that in principle a cross claim for short delivery of cargo was or might be capable of satisfying the test for an equitable set off. Even if that were so, it would not avail the charterers precisely because such a set off did not operate automatically, but only when it was introduced by way of defence into legal proceedings. It was only at a later part of his judgment that Lord Wilberforce went on to consider whether, if he was wrong on this first ground of decision, the cargo claim could operate as a defence to a claim for freight. He held that it could not, first because of a long established rule in relation to deductions from freight in English law (see 189G to 191B), and second because it did not satisfy the test for an equitable set off (191B-F).

176. Walsham contends that in the passage quoted above Lord Wilberforce did not have in mind the possibility that the cross claim might constitute an equitable set off, a topic to which he only turned later in its judgment, and that his reference to "a set-off of one kind or another" should be read as referring exclusively to legal set off. That, however, is an untenable reading of his judgment.

177. *The Aries* and other authorities were considered by Mr George Leggatt QC (sitting as a Deputy High Court judge) in *Fearns*. The issue there was how to give effect to an equitable set off between claims arising in different currencies. Mr Leggatt described at [21] to [23] the way in which an equitable set off has come to be seen as affecting substantive rights, so that a set off can be asserted, even outside the context of legal proceedings, as "an immediate answer to a liability to pay money otherwise due and to the exercise of rights, such as a right to terminate a contract, which are contingent on such non-payment". In order to determine how the principle of equitable set off operated, Mr Leggatt considered three lines of authority, as well as the conflicting views of leading text book writers.

178. The first was the line of authority which established the correct test for an equitable set off, which is concerned with preventing each party from enforcing or relying on its claim when the connection between the claim and the cross claim would make it manifestly unjust to do so. The second comprised cases beginning with *The Nanfri* [1978] QB 927 in the Court of Appeal which held that the cross claim relied on as giving rise to an equitable set off need not necessarily be a valid claim, so long as it was asserted reasonably and in good faith. The third was *The Aries* itself, where it had been held that the exercise of a right of equitable set off by its assertion within the one year time limit did not have the effect of extinguishing or reducing the charterers' liability. Mr Leggatt concluded that:

> "33. … where A has a claim against B which A is entitled in equity to set off against a claim made by B against A, neither the existence or the exercise by A of his right of equitable set-off has the effect of extinguishing or reducing either claim."

179. At first blush there may appear to be a tension between Lord Wilberforce's decision that assertion of the cross claim as a set off did not assist the charterers in *The Aries* and Mr Leggatt's description of that assertion as the exercise of a right of set off which could affect substantive rights. Such tension, however, is more apparent than real. A right of set off may be exercised by being asserted. Upon the exercise of the right in this way, a claimant who seeks to enforce or rely on its own claim (for example, by terminating a contract, as in the typical case of withdrawal from a time charter for non payment of hire) without taking the cross claim into account acts at its peril. But if the set off is not even asserted, it can have no effect at all. A cross claim which has not even been asserted can hardly affect the claimant's conscience so as to make it manifestly unjust to enforce the claim without taking account of the cross claim. However, even the exercise of the right in this way does not operate to extinguish or reduce the claim. That can only be done by agreement or by judgment, as Mr Leggatt held at [50].

180. In *The Aries*, therefore, the charterers had purported to exercise a right of set off by asserting the right to deduct from freight. If, contrary to what the House of Lords went on to hold, the cargo claim had given rise to a right of equitable set off, that would

have prevented the owners from recovering the freight without giving credit for the cargo claim. But because the exercise of a right of set off does not extinguish the claim, the set off could be lost and was lost when it ceased to exist as a result of the one year Hague Rules time bar.

181. Applying these principles to the present case, to the extent that Walsham had valid cross claims which satisfied the test for equitable set off (a point considered below), it would first need to exercise a right of set off by asserting that set off. It appears that it did not do so. But even if it had, that assertion would not operate to extinguish the syndicates' claims, and Walsham's right of set off could be lost. It was lost, as I have held, by being waived by the Settlement Agreement.

182. Walsham disputes this analysis and contends that *Fearns* was wrongly decided. It contends that any cross claim which satisfies the test for an equitable set off operates automatically to extinguish or reduce the other party's claim, regardless of whether a right of set off is asserted, and relies on the decision of Lightman J in *Fuller v Happy Shopper Markets Ltd*.

183. In that case the issue was whether a tenant who had overpaid rent during a period when the premises were unfit for use was entitled to set off those overpayments against later arrears of rent. The context in which the issue arose is important. The tenant had asserted a right of set off, but the landlord had sent in the bailiffs to levy a distress for the arrears without taking account of the earlier overpayments. The action was a claim by the tenant for unlawful distress. Lightman J held that the two claims were sufficiently closely connected to give rise to a right of equitable set off. Some parts of his judgment may appear to speak of an equitable set off operating automatically to reduce the indebtedness of the tenant to the landlord (see eg [25]), but in my judgment the true analysis of this case is that it is a straightforward application of the principles discussed above. Thus the tenant had exercised his right of equitable set off by asserting a right to set off the earlier overpayments of rent against the landlord's claim for arrears. The landlord therefore acted at his peril in levying distress without taking those overpayments into account. That did not mean that the tenant's liability was extinguished, only that the landlord could not enforce or rely on his claim without taking account of the tenant's right of set off.

184. In my judgment there is no real conflict between the decision in *Fuller v Happy Shopper Markets Ltd* and the decision of Mr Leggatt in *Fearns*, a decision with which I respectfully agree. As it happens, *The Aries* appears not to have been cited in *Fuller v Happy Shopper Markets Ltd*, which in turn was not cited in *Fearns*. However, as I have explained, the cases are consistent with each other.

185. For these reasons I conclude that if and to the extent that any equitable set off in favour of Walsham arose, it did not operate automatically to extinguish or reduce the syndicates' claims at the time when the cross claims arose.

Issue H(5): Do Walsham's cross claims give rise to an equitable set off?

186. If, contrary to the conclusions reached above, Walsham is after all entitled in principle to invoke principles of equitable set off in defence of Equitas's claims, it is necessary to examine Walsham's cross claims more closely in order to determine the extent to which in principle they satisfy the legal test for giving rise to an equitable set

off. That test has been stated in various ways over the years but, at the risk of over simplifying a judgment which considered in some detail the elements which underpin this test, can be taken as stated by Rix LJ in *Geldof Metaalconstructie NV v Simon Carves Ltd* [2010] EWCA Civ 667, [2011] 1 Lloyd's Rep 517:

> "43. … For all these reasons, I would underline Lord Denning's test [in *The Nanfri*], freed of any reference to the concept of impeachment, as the best restatement of the test, and the one most frequently referred to and applied, namely: 'cross-claims … so closely connected with [the plaintiff's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim'. That emphasises the importance of the two elements identified in *Hanak v Green*; it defines the necessity of a close connection by reference to the rationality of justice and the avoidance of injustice; and its general formulation, 'without taking into account', avoids any traps of quasi-statutory language which otherwise might seem to require that the cross-claim must arise out of the same dealings as the claim, as distinct from vice versa."

187. At one stage it was Walsham's position that its cross claims could be set off generally against Equitas's claims, regardless of whether the claims made by Equitas related to the same syndicate on the same year of account, let alone the same reinsurance contract, as the cross claims which it was sought to set off. However, this position was modified in the course of the proceedings in the light of the nature of a Lloyd's syndicate. Such a syndicate is not a legal entity, but for present purposes is merely a collection of individual Names writing insurance and reinsurance together. Moreover the membership of syndicates can change from year to year and did so (sometimes dramatically) during the relevant period. While the members of a syndicate during any given year would all stand in the same position so far as equitable set off is concerned, that would not be so for the members of any given syndicate in successive years.

188. Walsham's final position is that a sufficient connection existed to satisfy the test for equitable set off between claims and cross claims relating to the business of any individual syndicate, but that it was not necessary for the claim and cross-claim to arise out of the same reinsurance contract. As to the changing membership of syndicates from year to year, Walsham recognises the difficulty involved in seeking to set off a cross claim arising in one year against Names who were not even members of the syndicate in that year, but submits that there can be an equitable set off as against Names who were members of the syndicate in both of the years in question. I accept this, which appears to derive some support from what Potter LJ said in *Peninsular & Oriental Steam Navigation Co v Youell* [1997] 2 Lloyd's Rep 16 at 144. So far as the common members of any given syndicate are concerned, I consider that, in the operation of the syndicate's account by the broker, a claim to recover those members' share of payments made to the broker for the account of the syndicate is so closely connected with a claim by the broker to recover those members' share of overpayments made to the syndicate that it would be manifestly unjust to enforce the claim without taking account of the cross claims.

189. This conclusion could in theory require some complex working out, but in view of my decision on earlier issues the point does not arise.

Issue I: In principle is Equitas entitled to simple interest pursuant to section 35A of the Senior Courts Act 1981?

190. This issue is concerned with the statutory interest to be awarded on any debt or damages which may be recovered by Equitas. In principle (and subject to any issue of limitation or double counting) it is common ground that Equitas is entitled to interest on any judgment for the Outstanding Claims and on any judgment for damages consisting of lost investment income, but that it is not entitled to interest on the Settled Claims as those claims were paid before the commencement of this action. It is also common ground that the appropriate rate of interest is LIBOR plus 1%.

191. I record this common ground but make no decision. Statutory interest is discretionary and it would not be right to fetter a future exercise of discretion, which may need to be made according to whatever circumstances exist when any monetary judgment is eventually given.

Conclusions

192. I would summarise my conclusions as follows:

i) Walsham owed a duty to the syndicates and (from 1 September 1996) to Equitas) to remit funds reasonably promptly after receipt.

ii) Those duties were owed in contract, tort and restitution and were continuing duties.

iii) Any cause of action for breach of such duties first accrued on the date when, acting with reasonable promptness, Walsham ought to have remitted the funds in question to the syndicates or to Equitas.

iv) For the purpose of this action that date is the first day of the second month after the month in which a payment was received.

v) A fresh cause of action accrued on each subsequent day when the payment was not made.

vi) In principle and subject to limitation issues in respect of losses suffered by the syndicates in the period before 1 September 1996, Equitas is entitled to recover damages at the rate of LIBOR plus 1% compounded with appropriate rests.

vii) In principle and subject to limitation issues in respect of losses suffered between September 1996 and March 2007 Equitas is entitled to recover at the rate of return achieved on its investment funds.

viii) Walsham was not entitled to deduct reinstatement brokerage.

ix) The effect of the DAC letter is that Walsham agreed not to take a limitation defence in response to a claim to recover payments which had not been made,

but the letter did not preclude Walsham from taking a limitation defence in relation to any claim for damages in the form of lost investment income incurred as a result of failure to make such payments.

x) Walsham is not entitled to rely on any cross claim by way of defence to Equitas's claims in this action.

193. Where does all this leave the parties? While the significance of some of these decisions for the future conduct of this action is obvious, the impact (if any) of others on Equitas's claims is not. That will need to be worked out at the next stage of this action. It is to be hoped that decisions on these issues of principle will enable the parties to achieve a just and amicable resolution of the dispute.

194. Nevertheless, any reader who has struggled this far with me may wish to form some impression of how things stand between the parties as a result of my decisions. Here is mine:

i) First, it appears that (subject of course to proof) Equitas will be entitled to recover any funds received by Walsham which have still not been remitted to it.

ii) Second, (and again subject to proof of late payment) Equitas should be able to recover damages for late remittances of funds which have been remitted to it, but those damages will not necessarily extend to lost investment income as a result of breaches committed before 9 September 2005 (ie more than six years before the commencement of this action) or possibly before 9 September 1996 (ie the "long stop" date in section 14B of the Limitation Act 1980), which earlier losses may represent the majority of the damages claimed for lost investment income.

iii) Third, in order to recover investment income lost as a result of such earlier breaches Equitas will need to succeed on one of its remaining limitation arguments, for example section 32(1)(b) ("deliberate concealment").

iv) Fourth, the basis on which damages should be assessed has been established broadly in accordance with the principles and methodology proposed by Equitas, although the rests used for compounding its damages claim may need reconsideration.

v) Finally, Equitas has succeeded in disposing of Walsham's set off defence and its claim to deduct reinstatement brokerage.