Neutral Citation Number: [2005] EWHC 2991 (Ch)

Case Nos: 5798 (and others) of 2001 and 2344/2005

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21/12/2005

Before:

MR JUSTICE DAVID RICHARDS

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In the Matter of T&N Limited and Others
- and -
In the Matter of the Insolvency Act 1986
AND
Between :

CURZON INSURANCE LIMITED	**Claimant**
- and -	
(1) CENTRE REINSURANCE INTERNATIONAL COMPANY **(2) MUENCHENER RUECKVERSICHERUNGS-GESELLSCHAFT** **(3) T&N LIMITED**	**Defendants**

- -

Michael Crane QC and Paul Stanley (instructed by **CMS Cameron McKenna**) for the **Claimant**
Peter Arden (instructed by **Denton Wilde Sapte**) for the **Administrators and T&N Limited**
Christopher Butcher QC and David Lord (instructed by **Kendall Freeman**) for the **1st and 2nd Defendants**

Hearing dates: 14 and 15 July 2005

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Judgment

Mr Justice David Richards:

1. There are two applications before the court. Both seek the same substantive relief. The first is an application for directions dated 7 February 2005 under section 14(3) of the Insolvency Act 1986 issued by the administrators of T&N Limited (T&N). The second is a claim under CPR Part 8 issued on 8 April 2005 by Curzon Insurance Limited (Curzon). At the hearing, the Part 8 claim was treated as the principal proceedings before the court and I will address the issues on that basis.

2. T&N and a large number of subsidiaries have been in administration under the Insolvency Act 1986 since October 2001. Since the same time, those companies have been the subject of proceedings in the United States under Chapter 11 of the US Bankruptcy Code, as have also been their ultimate holding company, Federal-Mogul Corporation Inc (FMC), and 22 of its affiliates.

3. The administration and Chapter 11 proceedings resulted from the mounting volume of asbestos-related claims, particularly personal injury claims in the United States. There are also substantial personal injury claims in the United Kingdom. All or many of the companies are insolvent, but some have viable businesses, principally in the manufacture of automotive parts. It is intended, if possible, to avoid a liquidation of the companies. A plan of reorganisation is being promoted in the Chapter 11 proceedings. Pursuant to a Settlement Agreement dated 26 September 2005 between FMC and T&N (acting by their debtor in possession management), the administrators, and other interested parties including various creditors and committees of creditors, schemes of arrangement and/or company voluntary arrangements are to be promoted in England.

4. In December 1996 T&N put in place high level excess of loss insurance arrangements in respect of asbestos-related personal injury claims. The arrangements comprise an asbestos liability policy (ALP) between T&N and Curzon and a Reinsurance Agreement between Curzon and three reinsurers, Centre Reinsurance International Limited (Centre Re), Muenchener Rueckversicherungs-Gesellschaft (Munich Re) and European International Reinsurance Company Limited (EIRC).

5. The ALP provides cover on a claims-made basis from 1 July 1996 of £500 million excess of £690 million. Curzon is a captive insurer, incorporated in Guernsey, and wholly-owned by T&N. It is not in administration or other insolvency process. Its entire risk under the ALP was reinsured under the Reinsurance Agreement by the three reinsurers in equal shares. The premium under the ALP was £92,046,000, of which £46,000 was retained by Curzon and £92 million was paid by it as the total premium under the Reinsurance Agreement.

6. On 22 November 2001 EIRC issued proceedings in the Commercial Court claiming to be entitled to avoid its one-third participation in the Reinsurance Agreement. The principal alleged grounds for avoidance were non-disclosure and misrepresentation, as regards claims estimates and a legal report, by T&N and its brokers in the placing of the business. The brokers were companies within the Sedgwick group (collectively Sedgwick). Curzon joined the Sedgwick companies as Part 20 defendants. Trial of the action started before Colman J in the Commercial Court on 13 October 2003 and was expected to last until mid to late January 2004. The witnesses called by Curzon and EIRC were cross-examined, as were some of Sedgwick's witnesses. On 15 December

2003, before completion of Sedgwick's evidence, the judge was notified that an agreement in principle had been reached to compromise the proceedings. The action was stayed, to enable the compromise to be documented and finalised.

7. Neither Centre Re nor Munich Re has sought to avoid their participation in the Reinsurance Agreement and they remain fully liable in respect of their shares.

8. Under the agreements containing the settlement, which are described in greater detail below, EIRC will meet 65.5 per cent of its share instead of its full share. Sedgwick will meet 17.25 per cent of a one-third share. This leaves Curzon and T&N without cover for the balance of 17.25 per cent of a one-third share.

9. The settlement agreements are subject to a number of conditions. All conditions have now been satisfied, except that approval is required from the United States Bankruptcy Court for the District of Delaware (the US Court), in which the Chapter 11 proceedings are filed. Two of the agreements are conditional on such approval and the third agreement is conditional on the other two agreements becoming fully unconditional. The agreements have been executed and are held in escrow pending satisfaction of the outstanding condition. A motion was filed in the US Court on 1 March 2004 seeking the Court's approval. A hearing was set for 19 March 2004. In March 2004 English solicitors for Centre Re and Munich Re wrote to the solicitors for EIRC and Curzon, suggesting that the settlement agreements might breach one or more of the provisions of the Reinsurance Agreement and reserving their clients' rights.

10. In the light of this letter, the Official Committee of Asbestos Claimants (ACC) (appointed by the Office of the United States Trustee in the Chapter 11 proceedings) sought and obtained an adjournment of the motion in the US Court. The excess of loss insurance arrangements are a very significant asset of T&N and, since March 2004, the ACC has maintained the position that it will oppose the motion at any relisted hearing, unless either Centre Re and Munich Re withdraw their reservation of rights or there is a declaration by the English court that the settlement agreements do not give rise to any breach of the Reinsurance Agreement. It is a major concern to T&N, its creditors and the administrators that the excess of loss insurance agreements should remain fully effective as against Centre Re and Munich Re.

11. The Part 8 claim form issued by Curzon seeks a declaration that the entering into and performance of the settlement agreements in accordance with their terms will not infringe the rights, powers or interests of Centre Re and Munich Re with respect to the ALP and the Reinsurance Agreement. In the course of his submissions on behalf of Curzon, Mr Crane QC made clear that Curzon's principal concern was whether, by entering into the settlement agreements, it would breach the Reinsurance Agreement. It was accepted that declarations could not be made now as to whether future acts of Curzon might involve a breach of the Reinsurance Agreement. Although the precise terms of the declaration were not definitively reformulated, Mr Crane stated that it would be confined to the effect of entering into the agreements.

12. Curzon and the administrators of T&N consider that the settlement agreements do not breach the rights of Centre Re and Munich Re under the Reinsurance Agreement, but they are concerned that there should be no doubt, and in any case their view is not

sufficient to satisfy the ACC. Centre Re and Munich Re maintain their reservation of rights. Accordingly, Curzon seeks declaratory relief.

13. The settlement arrangements are, as mentioned above, contained in three separate but inter-conditional agreements. The first agreement (the Settlement Agreement) is between the parties to the EIRC litigation and sets out the terms on which the proceedings are to be compromised. T&N is not a party to the Settlement Agreement as it was not a party to the Reinsurance Agreement or the litigation. The Settlement Agreement contains the terms on which EIRC agrees to meet 65.5 per cent of its original obligations under the Reinsurance Agreement. Pursuant to the terms of the Settlement Agreement:

    a) The parties mutually release each other from any liability in connection with the EIRC litigation, the facts raised in those proceedings or the broking and placement of the Reinsurance Agreement. Specifically, EIRC abandons its claim to avoid the Reinsurance Agreement, and Curzon releases Sedgwick from any claim relating to the broking and placement of the Reinsurance Agreement. EIRC however retains the ability to avoid the Reinsurance Agreement on grounds that (i) were not known to EIRC at the time of execution of the Settlement Agreement, and (ii) are not reasonably capable of being ascertained from evidence or documents disclosed in the EIRC litigation.

    b) EIRC affirms the Reinsurance Agreement subject to the terms of the Settlement Agreement but will only be required to make payment of 65.5 per cent of its one-third share of the Ultimate Net Loss in excess of the Retained Limit (as those terms are defined in the Reinsurance Agreement). This means that EIRC's effective Limit of Cover (as defined in the Reinsurance Agreement) will be £109,166,666.66. In addition, EIRC will be liable to Curzon for only 65.5 per cent of the one-third share of Curzon's out of pocket costs as referred to in article 12.1 of the Reinsurance Agreement. EIRC continues otherwise to have the same rights and obligations under the Reinsurance Agreement as Centre Re and Munich Re.

14. The second agreement (the Collateral Settlement Agreement) is between Curzon, FMC, T&N and Sedgwick. This sets out additional terms on which the Part 20 proceedings between Curzon and Sedgwick are to be settled. Pursuant to the terms of the Collateral Settlement Agreement:

    a) Sedgwick will be liable to Curzon for a total of 17.25 per cent of the amount for which EIRC, but for the Settlement Agreement, would have been liable to Curzon under the Reinsurance Agreement. Sedgwick will pay these sums at the same time as Centre Re, Munich Re and EIRC are required to pay Curzon.

    b) Sedgwick is also liable to pay 17.25 per cent of any claims handling costs which EIRC, but for the Settlement Agreement, would have been required to pay to Curzon under the Reinsurance Agreement.

c) The maximum aggregate liability of Sedgwick under the Collateral Settlement Agreement is £28,750,000.

There are further terms of the Collateral Settlement Agreement central to the issues raised in these proceedings, to which I refer below.

15. The third agreement (the T&N/Curzon Settlement Agreement) is between Curzon, FMC and T&N. It sets out the terms agreed between Curzon and T&N. Under the T&N/Curzon Settlement Agreement:

a) Curzon retains the ability to avoid the ALP on grounds that (i) were not known to Curzon at the time of execution of the Curzon/T&N Settlement Agreement, and (ii) are not reasonably capable of being ascertained from the EIRC litigation. Curzon on the one hand and T&N and FMC on the other mutually release each other from any liability in respect of the issues arising in the EIRC litigation.

b) T&N will reimburse Curzon (by way of set-off at the election of either party) 5.75 per cent of all amounts for which Curzon is liable to T&N under the ALP in respect of the Ultimate Net Loss in excess of the Retained Limit. Curzon will repay to T&N 5.75 per cent of any amounts payable to Curzon by T&N under particular terms of the ALP.

c) The maximum aggregate of the sums repayable by T&N to Curzon is £28,750,000.

d) The parties recognised and agreed that there was no change to the terms of the underlying insurance.

16. In the course of correspondence, Centre Re and Munich Re have raised issues as to the compatibility of clauses 3.2, 4.5.1 and 4.7 of the Collateral Settlement Agreement (CSA) with their rights under the Reinsurance Agreement. Additionally, they have suggested that by entering and later performing the CSA, Sedgwick may be effecting and carrying out a contract of insurance without authorisation under the Financial Services and Markets Act 2000. There is now no significant dispute as to clause 3.2 and all parties are agreed that a declaration can usefully be made. The other issues are in dispute, and Centre Re and Munich Re have submitted that by entering into and performing the CSA, Curzon will be in breach of clauses 4.5.1 and 4.7 of the Reinsurance Agreement.

Objections to the form of relief

17. Mr Butcher QC on behalf of Centre Re and Munich Re raises objections to the grant of any declaratory relief and to the width of the declaratory relief sought, which it is appropriate to take first.

18. Mr Butcher accepts that the court has jurisdiction to make the declaration sought by Curzon but submits that as a matter of discretion, in the circumstances of this case, it should not do so. Curzon was in effect seeking an advisory opinion of the court. It was for Curzon, with the benefit of its own legal advice, to decide whether entry into the settlement agreements would involve a breach of the Reinsurance Agreement, an

entirely separate agreement with different parties. Borrowing Neuberger J's phrase from *Re T&D Industries plc* [2000] 1 WLR 646, Mr Butcher submitted that the court does not act as a bomb shelter for parties entering into commercial contracts. There are good reasons of principle and practice for this. First, the primary function of the courts in this field is to resolve disputes, not to give advice. Secondly, the court should generally avoid reaching decisions on the basis of hypothetical facts. Disputes arise on real, not hypothetical, facts and should be resolved on the basis of real facts. Thirdly, the court risks finding itself involved in considering how best to re-draft agreements to avoid particular effects or, in effect, advising parties how to conduct themselves so as to avoid a breach.

19. There is, of course, force in a general sense in these submissions, but they are not apposite to the facts of this case. There is an existing dispute between Curzon and the Reinsurers. The latter have asserted in correspondence and in these proceedings that entry into the settlement agreements, specifically the CSA, does involve breaches of the Reinsurance Agreement and they have identified particular clauses of the agreements for this purpose. The dispute is not academic or hypothetical. Curzon is not seeking advice but is seeking to resolve the issue. The circumstances of this case are well within those described by Lord Diplock in *Gouriet v Union of Post Office Workers* [1978] AC 435 at 501 as appropriate for declaratory relief:

> "So for the court to have jurisdiction to declare any legal right it must be one which is claimed by one of the parties as enforceable against an adverse party to the litigation, either as a subsisting right or as one which may come into existence in the future conditionally on the happening of an event.
>
> …
>
> Relief in the form of a declaration of right is generally superfluous for a plaintiff who has a subsisting cause of action. It is when an infringement of the plaintiff's rights in the future is threatened or when, unaccompanied by threats, there is a dispute between parties as to what their respective rights will be if something happens in the future, that the jurisdiction to make declarations of right can be most usefully invoked. But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."

20. In similar circumstances last year, I made declarations as to whether implementation of a proposed plan of reorganisation in the Chapter 11 proceedings would involve breaches of the Reinsurance Agreement, in circumstances where Centre Re and Munich Re were asserting that breaches would be involved: *Freakley v Centre Reinsurance International Co* [2005] 2 BCLC 530, [2005] Lloyd's Rep IR 264. Indeed, in that case, it was Centre Re and Munich Re who originally sought declaratory relief. The circumstances of the current application present a stronger case for a declaration, because it is the making of an actual agreement, rather than a proposed plan of reorganisation which was subject to future amendment, which is said to involve breaches of the Reinsurance Agreement.

21. A further ground on which Mr Butcher submitted that the discretion to make a declaration should not be exercised was that in fact it was not Curzon, but the ACC, which required the declaration. I do not accept this submission. Curzon wishes to settle the litigation with EIRC on the terms of the settlement agreements. Because T&N is the subject of Chapter 11 proceedings the approval of the US Court is required. That approval is opposed by the ACC unless the issue is resolved by the withdrawal by Centre Re and Munich Re of their reservation of rights or by a declaration of this court. Centre Re and Munich Re refuse to withdraw their reservation of rights. If Curzon is to be able to compromise the litigation, Curzon needs declaratory relief from this court.

22. I am satisfied that this is an appropriate case in which to consider making the declaration sought by Curzon. Mr Butcher's further objection was to the breadth of the declaration. Assuming that I decided that it could be appropriate to make some form of declaration, he submitted that it should be restricted to the specific matters which his clients have raised. They had raised with Curzon all the issues which they had identified, but it was possible that there were other objections which had not as yet occurred to them but which subsequent events might throw into sharper relief.

23. In my judgment it is appropriate, if Curzon succeeds on the issues raised, to make a declaration in the broad terms sought by it. Centre Re and Munich Re first raised objection to the settlement agreements, in unspecific terms, in March 2004. In July 2004 they raised specific concerns. Their position, as stated in their skeleton argument is that the mere entering into the CSA is inconsistent with their rights under the Reinsurance Agreement and Curzon is not entitled to grant Sedgwick the rights which they have purported to grant under the CSA. They have had ample time to raise any allegations of breach, and I see no reason why a declaration in general terms should not now be made.

24. I therefore turn to deal with the specific issues which have been raised and argued.

Clause 3.2 of Collateral Settlement Agreement

25. Clause 3.2 of the CSA provides:

> "Each party covenants (in the case of Federal-Mogul, on behalf of itself and all Federal-Mogul Debtors) not to bring, and to procure that all other members of its Group shall not bring, any Claims or commence any Proceedings whatsoever in any jurisdiction against any other Party arising out of or in any way connected with the Part 20 Action and/or the Settled Claims, save for the purpose of enforcing their rights pursuant to the terms of this Agreement."

"Settled Claims" are defined in the CSA as meaning:

> "(i) all Claims made in the Part 20 Action, and (ii) all claims arising or capable of arising out of or in connection with the Letter of Engagement, the Policy [the ALP] and/or the Reinsurance Agreement."

T&N is liable to reimburse claims handling expenses to Curzon, as is clear from the judgment of the Court of Appeal in *Freakley v Centre Reinsurance International Co* [2005] EWCA Civ 115, [2005] 2 All ER (Com) 65. In practice those claims handling expenses are likely to be incurred by the Reinsurers and they are likely to be in the region of £60 million. Centre Re and Munich Re are therefore concerned to ensure that Curzon does not lose its right to reimbursement.

26. Their view was that, on a proper construction of clause 3.2, Curzon's claim to reimbursement fell within the category of claims that Curzon had agreed not pursue. Curzon's view was that this was clearly not the intention of the parties and that it did not have this effect on a proper construction of clause 3.2.

27. To put the matter beyond doubt, the administrators of T&N and Curzon have prepared a side letter in terms which have been provided to the Reinsurers. The parties agreed that a declaration should be made to the effect that upon a proper construction of the CSA and/or by reason of the proposed side-letter, assuming that it is signed and exchanged, Curzon is not precluded from claiming against T&N for reimbursement of claim handling expenses. I am content to make this declaration.

Clause 4.5 of the Collateral Settlement Agreement

28. Clauses 4.5.1 and 4.5.2 of the CSA provide:

> "4.5.1 Subject to sub-clause 4.5.3 and 4.5.4 below, MUSA (on behalf of itself, SL and SRSL) will be entitled to assert against Curzon any right arising out of, in connection with or in relation to the terms of the Reinsurance Agreement raised at any time by any of the Reinsurers (including, without limitation, rights raised under Articles 4.3 and 10.2 of the Reinsurance Agreement) (a "Relevant Right") as if MUSA, SL and SRSL were party to the Reinsurance Agreement. Curzon agrees to notify MUSA as soon as reasonably practical of the raising by a Reinsurer of a Relevant Right.
>
> 4.5.2 In the event that Curzon is in dispute with one or more of the Reinsurers in respect of a Relevant Right and MUSA asserts such Relevant Right against Curzon pursuant to sub-clause 4.5.1 above, the determination of the Relevant Right as between Curzon and the Reinsurer or Reinsurers (whether such determination is made by way of agreement or by an order of a Court of competent jurisdiction) shall be binding on MUSA, SL and SRSL."

29. References to MUSA, SL and SRSL are to companies in the Sedgwick group. Sub-clause 4.5.3 is not relevant for present purposes. Sub-clause 4.5.4 provides that if the Reinsurers or any of them avoids, rescinds or terminates the Reinsurance Agreement, or seeks to do so, MUSA (on behalf of itself, SL and SRSL) (collectively Sedgwick) will be entitled to assert against Curzon any rights arising out of, in connection with

or in relation to the Reinsurance Agreement which could have been asserted by any of the relevant Reinsurer(s). In other words, in those circumstances, Sedgwick can assert rights against Curzon even though none of the Reinsurers has done so.

30. Centre Re and Munich Re submit that clause 4.5.1 conflicts with article 4.1 of the Reinsurance Agreement, which is in the following terms:

> "4.1 Subject as expressly provided herein and as a condition of this agreement, the Cedant hereby, in accordance with SECTION III – CONDITIONS, CLAUSE 12 – NON-TRANSFERABILITY of the Policy, irrevocably transfers to the Reinsurers all of its rights and powers pursuant to the Policy including (without limitation) those in SECTION III – CONDITIONS, CLAUSE 4, POLICYHOLDERS' CLAIMS HANDLING – PARAGRAPH f, of the Policy."

Articles 4.2 and 4.3 provide as follows:

> "4.2 The rights and powers transferred to the Reinsurers hereunder shall be exercised by a majority of the Reinsurers except where the terms and conditions of this Agreement require a right or power to be exercised unanimously or permit each Reinsurer to exercise the same severally. The rights and powers transferred to the Reinsurers shall be exercised by the Reinsurers who severally undertake to do so and to do so at their own expense only in accordance with the terms and conditions of the Policy, and in a business like manner in the spirit of good faith and fair dealing having regard to the legitimate interests of the parties to this Agreement.
>
> 4.3 Pursuant to the transfer in paragraph 4.1 of this Article, each Reinsurer may exercise the full, exclusive and absolute authority, discretion and control with regard to accepting or disputing, for the purposes of SECTION III – CONDITIONS, CLAUSE 5 – PAYMENT OF LOSS of the Policy, each and every element (but only for up to one third of the amount claimed for each such element) of each and every claim by the Policyholder under the Policy which authority, discretion and control such Reinsurer shall exercise only in accordance with the requirements of SECTION III – CONDITIONS, CLAUSE 5 – PAYMENT OF LOSS."

31. The rights transferred to the Reinsurers by article 4.1 include, for example, the claims handling rights under the ALP. The exclusive right to handle all relevant claims was transferred to Curzon, at the latest, on 1 October 2001 when T&N went into administration. Claims handling rights are defined in the ALP (section III clause 4f)

as the "full, exclusive and absolute authority, discretion and control… of the administration, defence and disposition (including but not limited to settlement) of all Asbestos Claims."

32. Mr Butcher for Centre Re and Munich Re submitted that, having irrevocably transferred to the Reinsurers all its rights under the ALP, including claims handling rights, Curzon cannot now grant such rights to Sedgwick. These rights are vested in the Reinsurers and it is not open to Curzon to give them to anyone else. Further, in relation to claims handling rights, it is the *exclusive* right to handle claims which has been transferred to the Reinsurers.

33. The terms of clause 4.5.1 of the CSA extend to all rights under or in relation to the Reinsurance Agreement, and is not limited to those which have been transferred to the Reinsurers under article 4.1. However, the concern raised by Centre Re and Munich Re has been focussed on the transferred rights, in particular the claims handling rights. Mr Butcher said that this was where the practical significance will lie. Although this is reflected in a witness statement by Mr Hopley on behalf of Centre Re and Munich Re, he goes on to say that they do not recognise Sedgwick as being entitled to assert any right and will proceed on the basis that Sedgwick's purported rights under clause 4.5.1 do not exist.

34. Curzon submitted that it was not intended to give "full, exclusive and absolute" claims handling rights to Sedgwick as well as the Reinsurers and that it would have been absurd to do so, given the terms of the Reinsurance Agreement which were very well known to all parties. What was intended was that to the extent that the Reinsurers took decisions which produced obligations on Curzon, such as the handling of a claim, Sedgwick should also have the benefit of those obligations under the CSA. It gave Sedgwick tag-along rights, entitling it to benefit from the exercise of rights by the Reinsurers. To remove any possible doubt on this, a side-letter was proposed between the solicitors for Curzon and Sedgwick which would state:

> "The Sedgwick Parties recognise the mutual rights and obligations of Curzon and the Reinsurers under the Reinsurance Agreement and accept that nothing in the CSA affects, limits or qualifies those rights and obligations. Accordingly, for the purposes of clause 4.5.1, the Sedgwick parties agree to abide by any decision of Reinsurers as to whether or how any right of Reinsurers under the Reinsurance Agreement should be exercised. Further, in the event of any disagreement as to whether or how any right of Reinsurers under the Reinsurance Agreement should be exercised, the Sedgwick Parties agree to abide by the decision of the majority of Reinsurers."

35. Mr Butcher's response to these points was, first, that if the effect of clause 4.5.1 was simply that Sedgwick was to have the benefit of the exercise of any rights by the Reinsurers, without any right itself to assert such rights, Centre Re and Munich Re would have no objection, but that was not what clause 4.5.1 said. Secondly, the side-letter was not an appropriate mechanism for qualifying the terms of the CSA, but in any event its wording did not provide clarity. In the course of argument, there was detailed discussion of the rights to which clause 4.5.1 may be said to apply. This was

illuminating because it enabled both sides to refine, in the case of Mr Butcher's clients, their objections and, in the case of Curzon, their claims for what it achieved.

36. I will take first the principal concern, claims handling rights. Mr Crane at first suggested that although the Reinsurers had exclusive claims handling rights under the Reinsurance Agreement, Sedgwick would have equivalent rights under the CSA, albeit controlled by the way in which those rights were exercised by the Reinsurers. It was not clear what this meant in practice, but the difficulty in any event is that by the combined effect of the ALP and the Reinsurance Agreement the Reinsurers have exclusive claims handling rights. Curzon cannot confer such rights on Sedgwick or any other party without being in breach of the Reinsurance Agreement. In his reply, Mr Crane made clear that Curzon was not submitting that Sedgwick could itself exercise claim handling rights. Only the Reinsurers were entitled to handle claims against T&N. The effect of clause 4.5.1 in this context was that Sedgwick could enjoy whatever advantages flowed from the Reinsurers' exercise of their claims handling rights. For example, if T&N failed to take a step required by the Reinsurers, the Reinsurers would as a result have certain legal rights, for example a right to damages, against Curzon or T&N. Sedgwick would then have the same rights, but they would have no right to interfere or participate in the claims handling process.

37. Curzon's position on claims handling is therefore that Sedgwick can enjoy the benefit of the exercise by the Reinsurers of their exclusive claims handling rights. Is that outcome consistent with the terms of the CSA? Read literally, clause 4.5.1 is not consistent with those terms, because it entitles Sedgwick "to assert against Curzon any right" under or in relation to the Reinsurance Agreement raised at any time by any of the Reinsurers. However, the explicit context is a settlement under which, subject only to a reduction in its share of the liabilities, the Reinsurance Agreement has been re-affirmed by EIRC and continues in full force and effect. That was in part the effect of the Settlement Agreement between EIRC and Curzon referred to in recital (E) to the CSA and annexed to it. Clause 4.8 of the CSA includes provision that:

> "the Parties acknowledge and agree that nothing in this Collateral Agreement affects the rights and obligations of T&N and Curzon under the Policy or the rights and obligations of Curzon, Munich Re and Centre Re and EIRC under the Reinsurance Agreement except to the extent EIRC's rights and obligations are affected by the Settlement Agreement."

38. In my judgment, on its proper construction, clause 4.5.1 does not confer on Sedgwick rights against Curzon which by their terms or by their nature have been conferred or transferred to the Reinsurers exclusively. Claims handling rights are an example. This does not prevent Sedgwick asserting against Curzon any other rights which may result from the exercise by the Reinsurers of their exclusive rights. For example, there is no difficulty in Sedgwick asserting against Curzon the rights which the Reinsurers have against Curzon flowing from a failure by T&N or Curzon to comply with their instructions as to claims handling.

39. Other rights which the Reinsurers enjoy against Curzon were discussed in argument, in particular those under articles 4.3 and 10.2 of the Reinsurance Agreement, which are specifically mentioned in clause 4.5.1. Article 4.3, which I have already quoted,

refers back to section III clause 5 of the ALP, which governs Curzon's rights and obligations as regards paying losses and disputing claims under the ALP. Under article 4.3 "*each Reinsurer* may exercise the full, exclusive and absolute authority, discretion and control with regard to accepting or disputing, for the purposes of [section III clauses], each and every element (*but only for up to one third of the amount claimed for each such element*) of each and every claim by the Policyholder." (emphasis added)

40. Consistently with article 1.1 of the Reinsurance Agreement, under which each Reinsurer agrees severally but not jointly to reinsure one third of the amount payable under the ALP, article 4.3 confers on the Reinsurers severally rights to dispute a claim as regards their share. Exercise of the right is not therefore subject to a majority decision of the Reinsurers under article 4.2. The right to dispute a claim is coextensive with the Reinsurers' several liabilities resulting from the claim.

41. This was accepted by Mr Butcher, who said that obviously a Reinsurer only has an interest and a right in disputing its share of a claim. It would make no commercial sense in these circumstances to confer on a Reinsurer a right to raise a dispute extending beyond its share. The effect of the Curzon/EIRC Settlement Agreement is to reduce the percentage of each claim severally reinsured by EIRC. The Settlement Agreement does not in terms alter as regards EIRC the words "up to one third of the amount claimed" in article 4.3 but there could be no expectation that EIRC could continue to dispute a claim beyond its own share. In my judgment this is implicit in the Settlement Agreement. The grant of a right to Sedgwick to dispute a claim does not derogate from the several rights of Centre Re or Munich Re, each of which can continue to dispute any claim up to one third of the amount of each element of the claim. Sedgwick's right to dispute a claim will also be coextensive with its own several liability for each claim. This is not in terms spelt out in clause 4.5.1 but it is an obvious and necessary implication.

42. In my judgment, therefore, clause 4.5.1 involves no interference with the rights of Centre Re and Munich Re under article 4.3. Mr Butcher submitted that those Reinsurers went into these arrangements specifically with EIRC and they have an interest in seeing that claims are disputed only by these three Reinsurers. This, he submitted, was underlined by article 16 which provides that:

> "neither this Agreement not any rights or obligations under this Agreement may be assigned or transferred by any party without the prior written consent of all other parties."

There has, however, been no assignment or transfer of rights or obligations under the Reinsurance Agreement. EIRC's share of the reinsured risk has been reduced. The uncovered share of the risk has, under a new agreement to which EIRC is not a party, been taken in part by Sedgwick. The position would be no different if EIRC had successfully avoided its participation in full and Curzon had purchased replacement cover. Any replacement reinsurer would expect to have the same rights as Centre Re and Munich Re to dispute claims under the ALP to the extent of its share, and I see no substantial basis for the contention that Centre Re and Munich Re have a sufficient interest in the identity of other reinsurers to insist that such a right could be conferred only with their consent.

43. The other provision mentioned in clause 4.5.1 is article 10.2 of the Reinsurance Agreement. Commercially this is a provision of great importance to the Reinsurers. It prevents a liquidation or other insolvency process from having the effect of accelerating or increasing any liability of the Reinsurers under the Agreement. It directly affected their assessment of risk. Extending the benefit of article 10.2 to Sedgwick does not in any way contradict or interfere with the Reinsurers' rights. The same result could have been achieved by setting out an equivalent provision in the CSA. The only difference is a qualification that Sedgwick's entitlement to assert this right is dependent on the Reinsurers doing so first. Mr Butcher accepted that the extension of this right to Sedgwick raised no issue.

44. My conclusion on clause 4.5.1 is that, on its proper construction, it does not involve a breach of the Reinsurance Agreement. It does not have the effect of conferring on Sedgwick a right to exercise any rights which, by reason of the express terms of the Reinsurance Agreement or necessary implication, cannot be exercised by any person other than the Reinsurers. Claims handling rights are an example of such rights. The proposed side-letter provides some additional clarity. It will in my view be binding on Sedgwick either by way of estoppel or as a collateral contract.

Clause 4.7 of the Collateral Settlement Agreement

45. The relevant parts of clause 4.7 provide as follows:

> "4.7 MUSA, on its own behalf and on behalf of SL and SRSL, shall be entitled:
>
> (i) …
>
> (ii) on the same terms as a Reinsurer would be entitled under Articles 5.1 and 13.1 of the Reinsurance Agreement, to receive claims reports and other material information and to have access to Curzon's books, records, documents, control systems and procedures (including the right to copy);
>
> (iii) to receive copies of any material provided to the Reinsurers or any of them under Articles 5.1 and 13.1 of the Reinsurance Agreement…"

46. In order to deal with the concern expressed by Centre Re and Munich Re that privileged or confidential documents, where the privilege or confidence belongs to them, may be disclosed to Sedgwick, the parties to the CSA have agreed to amend it by adding the following proviso to clause 4.7(iii):

> "provided that any confidential or privileged report or other document procured by or on behalf of one or more of the reinsurers shall not be passed to MUSA without the consent of the reinsurer or reinsurers by whom or on whose behalf the report or document was procured."

This was notified to Centre Re and Munich Re in November 2004.

47. Articles 5.1 and 13.1 of the Reinsurance Agreement, to which clause 4.7 (ii) and (iii) of the CSA refers, are as follows:

> "5.1 [Curzon] undertakes to supply, or cause to be supplied, to the Reinsurers promptly on receipt thereof by [Curzon] all claims reports it may receive in relation to the Policy together with any other material information in, or coming into, its possession regarding the Policy and to request from [T&N] and promptly supply, or cause to be supplied, to the Reinsurers when received such information or other materials as any Reinsurer may require [Curzon] to request pursuant to SECTION III – CONDITIONS, CLAUSE 3 – POLICYHOLDER'S REPORTING DUTIES of the Policy."
>
> "13.1 During the term of this Agreement and for so long after termination hereof as there remains any dispute outstanding between the parties to this Agreement, each of the Reinsurers and its representatives has the right to reasonable audit and inspection (if appropriate) and to take copies at its own expense of [Curzon's] books, records, documents, control systems and procedures which relate to the business covered under this Agreement. During the said period [Curzon] and its representatives have the right to reasonable audit and inspection and to take copies at [Curzon's] expense of the records and documents created pursuant to the exercise by the Reinsurers of the rights and powers transferred to them under Article 4."

48. Under the ALP, Curzon is entitled to have access to information obtained or created by T&N as regards the business covered by the ALP. The effect of article 5.1 of the Reinsurance Agreement is that Curzon is obliged to supply such information to the Reinsurers. In addition, article 13.1 entitles the Reinsurers to inspect and take copies of Curzon's records and documents relating to the business covered by the Agreement. This would include any records or documents created in the exercise of Curzon's claims handling rights under the ALP. Curzon is given a reciprocal right as regards the Reinsurers' records and documents.

49. Under clause 4.7 of the CSA, Sedgwick will have the same rights as the Reinsurers to receive information and to have access to Curzon's records and documents. To the extent that Curzon has exercised its rights to inspect and copy the Reinsurers' records, Sedgwick will have a right to gain access to those copies, as they will then form part of Curzon's records for the purposes of clause 4.7(ii). This is subject to restrictions to which I refer below.

50. Centre Re and Munich Re submit, first, that the rights to receive and copy documents breaches their claims handling rights under the Reinsurance Agreement. By article 4.1

of the Reinsurance Agreement, quoted above, Curzon irrevocably transferred its claims handling rights under the ALP to the Reinsurers. Under Section III clause 4f of the ALP, the claims handling rights are

> "the full, exclusive and absolute authority, discretion and control, which shall be exercised in a businesslike manner in the spirit of good faith and fair dealing, having regard to the legitimate interests of the parties to the Policy and of the reinsurers thereof, of the administration, defence and disposition (including but not limited to settlement) of all Asbestos Claims, including but not limited to the appointment of one or more Claims Handling Designees."

51. Centre Re and Munich Re submit that one of the rights comprised within the claims handling rights as set out in Section III clause 4f is the right to determine who should see documents relevant to the claims, insofar as they are in the possession of T&N, Curzon or their agents. The reason is that disclosure of information can be relevant to the strategy for claims handling. Mr Butcher points to the breadth of paragraph 4f, with its reference to the administration, as well as defence and disposition, of claims and "the full, exclusive and absolute authority, discretion and control" given in respect of claims handling. Mr Butcher accepted that paragraph 4f cannot qualify T&N or Curzon's duty of disclosure arising under the general law, such as a statutory duty of disclosure to auditors, but, subject to that, the Reinsurers had the right to determine whether any disclosure should be made. So, for example, if T&N wished to raise finance and for that purpose to disclose claims information on a confidential basis to potential investors or lenders, Mr Butcher submitted that it would not be entitled to do so without the consent of the Reinsurers. The same would be the case if T&N wished to purchase a higher layer of cover for asbestos claims or to purchase cover to replace Reinsurers who had successfully avoided the policy or become insolvent. As to whether the Reinsurers would have to act reasonably in withholding consent, Mr Butcher submitted, first, that the well-established duty of good faith owed by insurers to insureds in relation to claims handling, and the express duty to exercise their authority in a businesslike manner and having regard to the legitimate interests of T&N, Curzon and the Reinsurers, would not extend to their rights as regards disclosure of information. Alternatively, if it did, it would certainly not require the Reinsurers to permit disclosure for the purpose of plugging a gap in the reinsurance cover caused by non-disclosure or misrepresentation.

52. I do not accept the submission that the claims handling rights conferred by Section III clause 4f include a right to control the disclosure by T&N of information relating to claims and that the transfer of the rights creates a similar right as regards disclosure by Curzon. First, the documents in question are the property of T&N or, as the case may be, Curzon. This is the premise for the provisions of the ALP and the Reinsurance Agreement giving Curzon and the Reinsurers respectively the right to be supplied with or to inspect documents. Subject to any limitations, T&N and Curzon are entitled to deal with their own documents as they see fit. If that right is to be taken away, or made subject to the consent of the Reinsurers, one would expect to see a clear provision to that effect. Secondly, contrary to that expectation, Section III clause 4f of the ALP and the transfer provision of article 4.1 do not clearly or expressly deal at all with the disclosure of information. Thirdly, as Mr Crane submitted, the

administration, defence and disposition of claims involves naturally the right to be notified of claims, the right to adjust them following investigation, the right to process and administer them, the right to decide whether to pay them, and the right to decide whether to defend them and whether to settle litigation. The right for which the Reinsurers contend does not fall obviously within the scope of the relevant claims handling provisions. Neither Mr Butcher nor Mr Crane was aware of any authority that such a right fell within the scope of a claims handling clause or of any discussion of the issue. The basic provisions of Section III clause 4f are familiar, although some of the language ("full, exclusive and absolute authority, discretion and control") was more emphatic, or repetitive, and some of it ("administration, defence and disposition") was wider, than is usually found, in the experience of both counsel.

53. The second argument of Centre Re and Munich Re, in support of their case that clause 4.7 of the CSA involves a breach of the Reinsurance Agreement, is based on article 8.1(f) of the Reinsurance Agreement which provides that it is a condition of the Agreement that in respect of claims handling Curzon

> "shall provide all such assistance as the Reinsurers or a majority of them may reasonably require (subject only to the requiring Reinsurers meeting [Curzon's] reasonable and proper out of pocket costs)."

54. Centre Re and Munich Re submit that this provision entitles them to require Curzon not to disclose any documents relating to claims without their permission.

55. Curzon accepts that this provision would entitle the Reinsurers to require that documents be not disclosed, provided that the requirement is reasonable. Although it is drafted in a way which most obviously suggests positive assistance, Mr Crane accepts that it includes assistance in the form of not taking particular action. He accepts also that the Reinsurers have legitimate concerns as regards the disclosure of any of their documents which are privileged and confidential. It is in order to protect their position that the parties to the CSA have agreed to add the proviso to clause 4.7(iii) of the CSA.

56. The issue between the parties turns on what is involved in a *reasonable* requirement under article 8.1(f). Mr Crane submits that in judging whether a requirement is reasonable, it is necessary to have regard to the legitimate interests of both the Reinsurers and Curzon. If necessary, a balance has to be struck to determine whether the requirement is reasonable. If, for example, the assistance required by the Reinsurers would provide only a marginal advantage to the Reinsurers but a disproportionately large detriment to Curzon, the conclusion could properly be that the requirement was not reasonable, although in the absence of the detriment to Curzon it might have been reasonable.

57. As a matter of principle, Mr Butcher did not take issue with this approach to determining whether a requirement was reasonable. However, he argued strongly, as he had on the first limb of the case under clause 4.7, that the Reinsurers need not take into account Curzon's interest in securing the benefits of the compromise with Sedgwick, in view of the fact that such compromise arose as a result of alleged non-disclosure or misrepresentation when placing the business with EIRC. I am unable to see the logic of this position. First, non-disclosure or misrepresentation has been

alleged, not proved. It cannot be assumed that it took place, particularly as EIRC is confirming 65.5% of its liability under the Reinsurance Agreement. Secondly, and more importantly, it is a legitimate interest of Curzon to replace the missing cover and the Reinsurers have no right under article 8.1(f) to treat some of Curzon's legitimate interests as relevant to be taken into account and to disregard others.

58. Mr Butcher ran a similar argument, based on the suggestion that the CSA may be a contract of insurance which Sedgwick is not authorised to make under the Financial Services and Markets Act 2000. I refer to this issue later, but even if the suggestion were well-founded, it provides no basis for disregarding Curzon's legitimate interests in relation to the CSA. If there is a contravention of the regulatory regime, Sedgwick may commit an offence, but the CSA is enforceable at the suit of Curzon. Provided the CSA is capable of enforcement, Curzon retains a legitimate interest in its performance.

59. What the court cannot do at this stage is to say that any requirement not to disclose particular documents or categories of documents would be reasonable or unreasonable, as both counsel acknowledged. For example, Mr Crane accepted that the Reinsurers might have legitimate concerns about the disclosure of documents which were privileged to Curzon, if it led to a real risk that they could be disclosable in the hands of Sedgwick or other third party recipients under English or US rules to asbestos claimants.

60. What is, in my judgment, clear is that entering into the CSA will not breach article 4.7 of the Reinsurance Agreement.

61. The third submission of Centre Re and Munich Re made in support of their case in relation to clause 4.7 is that it is an implied term of the Reinsurance Agreement that Curzon will not take steps which prejudice their handling of claims, or alternatively this negative obligation arises under Curzon's continuing bilateral duty of good faith. Mr Crane accepted that such steps could, depending on the circumstances, be a breach of the duty of utmost good faith, but resisted the suggestion of an implied term. In view of my decision that the claims handling rights do not themselves contain the right to control the disclosure of documents, and given that article 8.1(f) applies only once the Reinsurers have notified their requirement for assistance, there is a gap if Curzon disclosed documents in a way which was detrimental to the exercise of the claims handling rights before the Reinsurers had imposed a requirement under article 8.1(f). There was not a great deal of exploration in argument of the extent of the duties of utmost good faith in this context, and it may be that they are sufficient to meet this problem. If, however, they are not, I would hold that a term to that effect should be implied. It is inherent in the grant of rights, that the grantor shall not act to defeat those rights. Disclosure which is materially detrimental to the exercise of the claims handling rights would to that extent tend to defeat the rights granted by Curzon. However, the implied term should not go further than relevant express terms, in this case article 8.1(f). Accordingly, disclosure of a document would breach the implied term only if the Reinsurers could reasonably have required that it not be disclosed.

62. The agreed list of issues in relation to clause 4.7 is as follows:

Upon a true construction of (a) the ALP (and in particular Sections III.3(a), III.3(b), III.4(d) and III.4(f) thereof), (b) the Reinsurance Agreement (and in particular Articles 4, 5 and 13 thereof), and (c) the CSA (and in particular clause 4.7.1 thereof):

5.1 Will T&N commit a breach of the ALP or Curzon commit a breach of the Reinsurance Agreement by agreeing to provide and providing to Sedgwick/Marsh information (including documents) which is neither confidential nor privileged?

5.2 Will T&N commit a breach of the ALP or Curzon commit a breach of the Reinsurance Agreement by agreeing to provide and providing to Sedgwick/Marsh information (including documents) which is confidential but not privileged?

5.3 Will T&N commit a breach of the ALP or Curzon commit a breach of the Reinsurance Agreement by agreeing to provide and providing to Sedgwick/Marsh information (including documents) which is privileged?

5.4 May the answer to 5.1, 5.2 and 5.3 above depend on (a) the precise nature of the information (including documents) and (b) what may happen to the information thereafter?

5.5 If Side Letter B is provided, would Sedgwick/Marsh be bound to abide by the decision of a majority of the Reinsurers, inter alia, to decide what information (including documents) may be provided to Sedgwick/Marsh?

5.6 Are Reinsurers entitled to require under clauses 8.1(d) and/or 8.1(f) of the Reinsurance Agreement that Curzon should not provide information (including documents) to Sedgwick/Marsh?

63. As a general point, following from what I have already said, it would be the provision of documents to Sedgwick, rather than entering into the CSA, which might in particular circumstances constitute a breach of the Reinsurance Agreement. A second general point is that it is impossible to be certain now as regards any category of documents that the provision of a particular document could not breach the Reinsurance Agreement. Equally, it is not possible to say that the disclosure of particular categories of documents would breach the Reinsurance Agreement. It follows that a blanket requirement that Curzon do not disclose any documents to Sedgwick is not a reasonable requirement under article 8.1(f). With those caveats, I would think it in the highest degree unlikely that the disclosure of a document within issue 5.1 could constitute a breach. The same is probably also true of documents

within issue 5.2. Although confidential, the documents are not privileged and so could be the subject of a disclosure order in favour of asbestos claimants, in the hands of T&N, Curzon or the Reinsurers. Issue 5.3 relates to documents which are privileged to T&N and/or Curzon. If disclosure to Sedgwick raises a risk that documents which would not otherwise be disclosable to claimants may become subject to such disclosure, there is an issue which would have to be addressed on the facts of the case. The answer to issue 5.4 is therefore "yes".

64. Issue 5.5 refers to the proposed side-letter between the solicitors for Sedgwick and for Curzon. The effect of that side-letter is that Sedgwick acknowledges that Curzon cannot be required under the CSA to act in breach of its obligations under the Reinsurance Agreement. Sedgwick also agrees to accept the decision of the majority of Reinsurers in the event of any disagreement (between the Reinsurers) as to the exercise of any rights by them under the Reinsurance Agreement. Accordingly, if the Reinsurers reasonably require Curzon under article 8.1(f) not to disclose particular documents or categories of documents to Sedgwick, Sedgwick will accept that Curzon is not in breach of the CSA in complying with the requirement. Mr Butcher questioned why this was being dealt with in a side-letter, rather than by an amendment to the CSA. As I have said in relation to the case under 4.5.1, the side-letter will in my view bind Sedgwick by way of estoppel or collateral contract. Therefore, the answer to issue 5.5 is that Sedgwick would be bound by the decision of a majority of the Reinsurers as to any exercise by them of any right under article 8.1(f).

65. I have dealt above with issue 5.6. Any requirement that Curzon should not provide documents to Sedgwick must in the circumstances be reasonable.

Regulatory Issue

66. By virtue of section 19 of the Financial Services and Markets Act 2000, and the Financial Services and Markets Act 2000 (Regulated Activities) Order 2001 (SI 2001/544), any person effecting or carrying out in the United Kingdom contracts of insurance as principal and by way of business must be authorised for that purpose. Any person carrying out such activities without authorisation is guilty of an offence (section 23 of the Act). Any contract made by an unauthorised person is unenforceable against the other party (section 26(1)), unless the court is satisfied that it is just and equitable in the circumstances to allow it to be enforced against that party (section 28(3)). There is no prohibition on the insured enforcing the contract against the unauthorised insurer and the agreement is not illegal or invalid to any greater extent than provided by section 26 (section 28(9)).

67. Centre Re and Munich Re have raised concerns that, in effecting and carrying out the CSA, Sedgwick may be carrying on a regulated activity without authorisation. They do not assert that Sedgwick would be doing so. In his witness statement on their behalf, their solicitor Richard Hopley stated that:

> "It is not for Centre Re and Munich Re to investigate any regulatory issues raised by the CSA. It is for T&N, Curzon and [Sedgwick] to satisfy themselves, if not the court, that there are no regulatory concerns."

68. In his oral submissions, Mr Butcher repeated that the Reinsurers did not intend to seek to prove that there has been, or will be, a regulatory breach. They had no concern except that the uncertainty be removed. There is before the court a letter from Slaughter and May, Sedgwick's solicitors, setting out their reasoned opinion that entering into and performing the CSA will not involve a breach of section 19. A copy of this letter was supplied to the solicitors for Centre Re and Munich Re three days before the hearing. The evidence filed by Curzon already stated that Sedgwick had satisfied itself that the making and performance of the CSA did not constitute the carrying on of an insurance business.

69. If the concerns of Centre Re and Munich Re were only as stated above, they should have been allayed by the steps taken by Sedgwick to satisfy itself of the issue. However, Mr Hopley added in his witness statement:

> "[I]f there were any such regulatory breaches, that would be a breach by Curzon of its express and/or implied obligations under the Reinsurance Agreement."

70. This bald assertion was expanded by Mr Butcher in his written and oral submissions. It involved (a) the proposition that, if the CSA was made by Sedgwick in breach of section 19, it was a factor which the Reinsurers could take into account in determining whether it was reasonable to require Curzon not to disclose documents to Sedgwick, and (b) an implied term that Curzon would not enter into an agreement which piggy-backs on the Reinsurers' rights, if the agreement is made in contravention of a provision such as section 19. He developed arguments to show that Sedgwick was acting in breach of section 19 in entering into the CSA.

71. There are a number of reasons why the stance taken by Centre Re and Munich Re in this regard is unsatisfactory. First, either they should allege and prove a breach of the legislation or they should not raise it. To "raise concerns" with a view to removing uncertainty is not in these circumstances an appropriate approach. Secondly, if their concern was to be sure that Sedgwick had satisfied itself on the point, they should have been content with the evidence and the advice taken from Slaughter and May. Thirdly, given that Centre Re and Munich Re did go on to make submissions on the section 19 issue, with a view to demonstrating a breach of the Reinsurance Agreement and strengthening its position under article 8.1(f), it was not just "raising concerns".

72. I do not propose to give a ruling on the section 19 issue in the absence of Sedgwick. During the hearing, Mr Butcher accepted that I would not give a ruling adverse to Sedgwick in its absence, but I was contemplating that it might be appropriate to give a ruling if it was favourable to Sedgwick. On further reflection, I do not consider this to be an appropriate course. Even if the result is favourable to Sedgwick, it has an interest in the grounds for that decision and it should therefore be heard. In case it is thought that this indicates concern on the issue on my part, I will however say that the arguments that there was no contravention of section 19 appeared to me to have very much more weight than the arguments going the other way.

73. It is however appropriate to rule on the points raised by Centre Re and Munich Re as against Curzon under the Reinsurance Agreement. In my judgment, neither point has substance. I can see no sensible ground on which it can be a concern of Centre Re and Munich Re as reinsurers under the Reinsurance Agreement that Curzon might enter

into a contract, enforceable by it, with a party which lacked the authorisation necessary for that contract. The suggestion that they might run a risk "of being associated with the commission of any criminal offence" (para. 66 of Mr Hopley's witness statement) is fanciful. As I have already stated, any authorisation on the part of Sedgwick would be irrelevant to the exercise of rights under article 8.1(f). The suggested implied term meets none of the tests of necessity or obviousness.

Conclusion

74. I will therefore make a declaration to the effect that by entering into the settlement agreements Curzon will not be in breach of the Reinsurance Agreement. I will invite to counsel to provide and, if possible, agree a draft of the declaration.