Neutral Citation Number: [2006] EWHC 1705 (Comm)

Case No: 2003-413

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 10/07/2006

Before:

MR. JUSTICE TOMLINSON

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Between:

R+V Versicherung AG	**Claimant**
- and -	
(1) Risk Insurance and Reinsurance Solutions SA	**Defendants**
(2) Reass France Sarl	
(3) Reass Sarl	
(4) Risk Insurance and Reinsurance Solutions Limited	
(5) Reass Sarl (a Lebanese company)	
(6) Jean-Claude Chalhoub (An Individual)	

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Colin Edelman QC & Charles Dougherty (instructed by **Messrs LeBoeuf, Lamb, Greene and MacRae**) for the **Claimant**
Hugo Page QC (instructed by **Messrs Penningtons**) for the **Defendants**

Hearing dates: 21, 22, 23, 27, 28, 29 and 30 March 2006

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Judgment

Mr. Justice Tomlinson :

1. On 18 November 2004 Moore-Bick J gave his judgment on liability in this case in favour of the Claimant, and on 27 January 2006 Gloster J gave her judgment on certain issues of principle in relation to the quantum of the Claimant's claim. In the interest of economy and proportionality I do not propose to set out the factual background, which can be found fully set out in the first judgment and summarised in the second. The hearing before me has been concerned with a number of disparate issues and applications on some of which I ruled and gave my reasons during the course of the hearing which occupied seven days between 21 and 30 March 2006. On one issue I announced my decision reserving until now my reasons therefor. In this judgment I shall refer to the Claimant as "R+V" and to the first four corporate Defendants collectively as "Risk."

The claim for managerial, staff and external contractors' time

2. Gloster J held that R+V is entitled to recover as damages for conspiracy the expense of managerial and staff time spent in investigating and mitigating the conspiracy and in handling the run-off of claims after termination of the binders. It was left to be decided by, in the event, me, what amount is recoverable by R+V under this head. Gloster J held that in this exercise damages are at large and the court is not over-concerned to require a claimant to prove precise quantification of its losses. Such losses are recoverable notwithstanding that no loss by way of additional expenditure or loss of revenue or profit can be shown. This is however, held Gloster J, subject to the proviso that it has to be demonstrated with sufficient certainty that the wasted time was indeed spent on investigating and/or mitigating the relevant tort, i.e. that the expenditure was directly attributable to the tort. This Gloster J regarded as another way of putting what Potter LJ said in Standard Chartered Bank v Pakistan Shipping 2001 EWCA Civ 55, namely that to be able to recover the claimant has to show some significant disruption to the business, in other words, that staff have been significantly diverted from their usual activities.

3. These points having already been decided, it being left to me only to decide whether the claimant has proved its claim with sufficient particularity, I am not sure that it is open to me to revisit the question of the proper approach in law, even if I wished to do so. However I respectfully agree with Gloster J's analysis of what is demonstrated by the authorities to be the correct approach, which seems to me entirely in line with how the matter is put in the leading textbook, McGregor on Damages, 17th edition, at paragraph 40.008 and in Lonhro Plc v Fayed (No. 5) [1993] 1WLR1489 at 1494 per Dillon LJ. I note also the rationale for this approach as enunciated by Bowen LJ in Ratcliffe v Evans (1892) 2QB 524 at 532-3, in giving the judgment of the Court:

> "In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves, by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

4. It was common ground before Gloster J that R+V is entitled in principle, subject to quantification, to recover as damages for conspiracy external costs and expenses incurred as a result of the conspiracy. Gloster J recorded the precise terms of Risk's concession at paragraph 54 of her judgment as follows:

> "it is agreed that subject to issues of causation, remoteness and reasonableness of the expenditure and issues arising out of its being made in connection with the litigation, there is no reason in principle why R+V cannot recover as part of its loss arising out of the conspiracy losses which consist in the cost of hiring external consultants or experts."

5. It seems to me that the quantification of R+V's properly recoverable external contractors' costs must be subject to the same general principles as are applicable to the quantification of recoverable staff and management costs.

6. Under each head mentioned above R+V has sought to exclude from its claim costs attributable to work in connection with the London litigation, by which is meant work by way of preparation for and support of that litigation. There is an issue to what extent they have been successful in that endeavour.

7. In circumstances where it is not confident of its ability ultimately to recover amounts found due to it, R+V has naturally attempted to discharge the evidential burden that lies upon it without disproportionate expense and without therefore descending to a high degree of particularity. In any event, since R+V does not operate a system for recording the time spent by its employees on particular tasks or issues, its staff have been asked to estimate the amount of their time that has been spent in investigating the conspiracy and in mitigating its effects, including time spent in running off the business and handling claims, tasks which would otherwise have been performed by Risk.

8. The sums which are in consequence claimed are: -

   i) The direct cost of R+V personnel time between 2002 and 2005 - €1,482,476.

   ii) Internal overhead costs associated with this personnel time - €831,747.

   iii) The relevant proportion of the fees charged by an external contractor, the consultants Chiltington International GMBH - €1,214,133.

   The total claimed under this head is therefore €3,528,357.

9. In order to support this claim R+V relied upon a considerable body of evidence. Dr. Matthias Maneth-Desrochers is a department and project manager at R+V. Since January 2005 he has had the title of "project director" within the Risk run-off team. He has been responsible for co-ordinating the collection of data to support the claim and he was called to give evidence. Significantly, he spoke of how certain employees, Martina Schwarzel, Sabine Giegerich and Michael Eschke had been essentially released from their normal work in order to work on Risk matters and had formed the core of the "Risk team." The regular work of these employees was delegated to other employees, who completed the work on overtime. So far as concerned all of the work, not just that performed by these three employees, he described it as complex and time-consuming. He stressed that it had required the investment of a great deal of resources by R+V and had caused disruption to the normal functioning of the Reinsurance Department. This evidence was not challenged. Mr. Page took a different point, which is that because R+V had expressly not put forward a case to the effect that there was any disruption to or diminution in third party premium written, so therefore it was precluded from asserting that the necessity to deal with the conspiracy had caused the disruption to business which Gloster J had held was an essential prerequisite to recovery. This seems to me with respect misconceived. Gloster J held that it is unnecessary in order to establish a claim for the relevant costs to show any loss of business or loss of profit. Just because underwriting was not disrupted to the extent of business being lost does not mean that

there was not significant disruption to the business in the sense of staff being significantly diverted from their usual activities. The evidence of Mr. Maneth made good this proposition and, as I have already recorded, I did not understand it to be challenged. Dr. Maneth explained how the supporting schedules setting out the time claimed had been collated and prepared and how the overhead costs had been calculated.

10. In addition to the overarching evidence of Dr. Maneth R+V relied also upon evidence from Ms Karin Kleister, the departmental manager for payroll accounting. She had calculated the gross wage costs of each employee. Ms. Kleister was tendered for cross-examination but Risk did not require her attendance.

11. Further, R+V tendered in evidence twenty-two short statements from R+V's staff confirming the time spent on Risk matters, confirming that that time did not include work which was directly related to the conduct of the London litigation and confirming the accuracy of the description of the work as set out in a schedule with which I was supplied, Schedule 2c, which later became Schedule 3d. R+V called one witness from each of the relevant departments to speak to his or her "proforma" statement in this regard. From the Technical Accounting Department Mr. Michael Eschke was called, one of the core members of the Risk team as I have already recorded. His oral evidence occupied ten minutes, of which cross-examination was five minutes. The only question of any substance which he was asked was why it had taken so many people in his department to handle the run-off of the Risk business. In addition to pointing out that the ING binder, which I shall discuss later, comprised about one hundred contracts he said that "dealing with this run-off requires more effort than other business." In re-examination he explained that the data had to be verified in a more complex manner than is normal and that there was uncertainty what payments had already been made to Risk. Dr. Thomas Ullrich from the Legal Department gave oral evidence. His evidence occupied about twenty minutes. Nonetheless, Dr. Ullrich painted a summary picture of the difficulties with which the Legal Department had to deal in analysing contractual documentation generated by the Risk business. He described this as "a direct result of the situation with Risk which has been found to be a conspiracy and a direct result of the work we had to do to assess the scope of that and questions that developed out of that." Evidently there were numerous situations in which real and substantial questions arose as to whether R+V should or would have to consider itself bound to business to which it had apparently been committed by Risk. The oral evidence of Mrs Bianca Jung, an underwriter, took a little longer. Her evidence was effective to describe the scale of the task which had been faced by R+V in unravelling the Risk business. There had been one hundred and eighty lever arch files of underwriting, claims and accounting material for the SHTTL and UNL binders alone and some six hundred risks which were completely new to the R+V underwriting team. Approximately four hundred of these risks were still active when R+V took over, generating endorsements and the like with which R+V had to deal without initially knowing anything of the risks themselves. Of particular importance was Mrs Jung's evidence as to the scope of the work included in the time claimed. Her evidence was explicit that there had been excluded time spent in dealing with Risk business which was not routed through London. This corroborated the earlier evidence of Dr. Maneth to the effect that the time estimates which he had collated and presented were for time spent in working on business which had come through the London market operation. Finally R+V relied

also upon the oral evidence of Mr. Carsten Hoff, who although also an underwriter in the Reinsurance Department of R+V has management responsibilities. Because of his greater responsibilities his evidence was more wide-ranging than that of his colleagues. The main significance of his evidence was in dealing with a suggestion put to him by Mr. Page for Risk that most if not all of the work done represented the working out of a decision taken by Dr. Lamby in late 2002 to cancel all Risk contracts that could be cancelled and to rewrite those that could not be cancelled. It did not seem to me that this line of inquiry greatly assisted Risk. Firstly, a distinction has to be drawn between a preferred strategy to terminate binding authorities insofar as they could be terminated, a strategy to which I have no doubt Dr. Lamby adhered from his first involvement, and an actual decision to terminate contracts in advance of normal cancellation dates. Dr. Lamby apparently did not like binding authorities to whomsoever given, and neither did Mr. Hoff. However I do not myself think that adherence to a strategy to terminate such binding authorities, insofar as they could be terminated, is inconsistent with what Mr. Hoff described as the first object during the period November 2002 to March 2003 which was to understand to precisely what contracts, on what terms and in what circumstances R+V had apparently been bound. Until that was established, neither a strategy nor a decision to cancel, in whatever terms, could be successfully implemented. In any event, however the matter is looked at R+V was in my judgment at all times material to this inquiry investigating and working out the consequences of what proved to be the conspiracy. To my mind Mr. Hoff's evidence provided powerful confirmation that the exercise upon which R+V was engaged was precisely the kind of fact finding and unravelling exercise the cost of which the law regards as recoverable where it has been made necessary by a conspiracy.

12. Finally R+V relied upon the evidence of Dr. Hubertus Labes, managing director of Chiltington International Gmbh. In addition to producing a memorandum which explained in overview the work which Chiltington carried out to assist R+V with its understanding and management of the Risk Business he too gave oral evidence. He described Chiltington's task as being to bring transparency to the business relationship between R+V and Risk. He also confirmed that Dr. Lamby's first priority had simply been to understand the business written through Risk. In relation to the Chiltington costs the main area of contention was the extent to which R+V had been successful in excluding from what was sought to be recovered the cost of work done in support of the litigation. That work had mainly been done by Dr. Michael Baier although it was not his only work. However it was neither Dr. Maneth nor Dr. Labes who had been responsible for the elimination from the claim of the cost of this work. Although in part academic, since litigation costs are recoverable as such, subject to the principles pursuant to which such costs are assessed, it was accepted that it was appropriate to extract these costs from those claimed as damages under this broad head of the cost of external contractors investigating the conspiracy. At the very least it should avoid double counting. If that exercise is to be done, it must obviously be done in a reliable manner. In that regard there is no doubt that this exercise is unlikely to have been 100% reliable. Wherever the invoices and supporting documentation clearly identified "legal activity" that was excluded, but where the work was not so identified it was assumed not to be in support of the litigation. Whilst that is a valid criticism of the method so far as it goes, it is also right to record that there were certain periods in respect of which Dr. Maneth did know exactly what Dr. Baier was or had been doing. As with the management and

staff costs, so here the claim in relation to Chiltington's costs was confined to the investigation of Risk business routed through London.

13. For the most part Risk did not suggest that the R+V staff or the Chiltington personnel had not carried out the work claimed or that the amount of time spent was unreasonable – certainly no such challenge was made to any witness who was made available for cross-examination. Comparisons of the man hours spent with the time which Risk might have spent in running off the business in the strict sense of that expression missed the point, since like was not being compared with like. The real challenge boiled down to whether the work done reflected time spent in investigating the conspiracy. Most of Risk's criticisms of the calculation of management and staff time and the cost and time of the external contractors overlooked in my view the importance and relevance of the findings of Moore-Bick J as to the nature and width of the conspiracy. At Paragraph 251 of his judgment he found that in entering into, and subsequently implementing, the London binders Mr. Gebauer deliberately participated in a scheme that was designed to enable Risk to obtain as much as possible by way of commission during the first year of underwriting contrary to the interests of R+V. In doing so he acted dishonestly and in disregard of his duty to the company. At paragraph 24 of his judgment Moore-Bick J found that the conspiracy began in the Spring of 2001. I would also draw attention to Moore-Bick's findings as to the purpose of Mr. Gebauer in having the binders counter-signed by junior employees, paragraph 157 of his judgment, and as to the manner in which Mr. Gebauer caused relevant information to be entered into R+V's computer system – see paragraph 249. There are similarly significant findings in relation to the misleading nature of the March 2002 Risk presentation in London and as to the decision not to set up escrow accounts so as to avoid questions from the Board of R+V – see the judgment of Moore-Bick J at paragraphs 140, 141 and 169. R+V was faced with investigating a huge explosion of business surrounded by obfuscation which turned out in fact to be concealment. A feature of the investigation was that there was lacking in the files at R+V the documentation and information on the business which a portfolio of this nature would ordinarily be expected to generate. According to Dr. Labes what was lacking was both underwriting information and accounting information. In such circumstances where plainly the first priority was to discover precisely what had been done I regard as unsustainable the suggestion by Risk that it is only costs incurred in investigation after the 40% addenda were discovered in March 2003 which are recoverable. The costs incurred before that discovery are equally recoverable costs of investigating and mitigating the effects of the conspiracy. Equally unsustainable in my judgment is a suggestion that it is only costs directly related to investigating the SHTTL and UNL binders which can be recoverable. R+V had to investigate the relationship with Risk as a whole. Moore-Bick J examined nearly all of the treaties mentioned in Dr. Labes' memorandum. The investigation of all these contracts was crucial to an understanding of the nature of the whole relationship between R+V and Risk. Moore-Bick J found that the nature of Risk's conduct was such as to strike at the heart of the whole relationship between R+V and Risk, justifying R+V in terminating all the binding authorities granted to Risk, not just the SHTTL and UNL binders. I should also record that I found ultimately unhelpful the discussion of what had been meant by Dr. Maneth when in his second Witness Statement he used the expression "run-off." Whatever the technical or received meaning of that expression, the nature of the work to which the claim relates was clear on the evidence. R+V is entitled to recover both the cost of investigation of the

conspiracy prior to termination of the binders and the cost of running off cancelled or not renewed business, the latter necessarily including time spent in handling claims and other tasks which would otherwise have been performed by Risk. In that latter regard it is accepted that pursuant to the SHTTL and UNL binders Risk is entitled to a 1% claims fee. I am not asked to give judgment for R+V in any sum, simply to assess the amount to which R+V is in principle entitled under this head of claim, so that it may be taken into account by the jointly appointed expert accountant responsible for drawing up the account between the parties.

14. Subject to one point R+V has in my judgment satisfactorily discharged the burden of proving with the necessary particularity its claim in respect of management and staff time and external contractors' costs. There is a very strong case for saying that R+V's approach to this exercise has been conservative. R+V has excluded from its computation of staff time time spent in constructing the overall accounting of premiums, claims, commissions etc. as between itself and Risk. As Dr. Maneth noted in his evidence, R+V in fact needed to establish the correct accounting position properly to run off the business. It needed to establish, in Dr. Maneth's words "where is the flow of payment." Further, R+V has limited its claim to time spent in investigating and running off the London business alone in circumstances where the conspiracy both struck at and entitled R+V to terminate the entire relationship with Risk. Moreover a line has been drawn at the end of 2005, with no claim made for staff time spent in dealing with these matters thereafter, notwithstanding Mr. Hoff's evidence to the effect that considerable amounts of time continue to be spent on such basic matters as ascertaining the nature of ceded business. The one exception to which I referred above relates to Dr. Baier. Accepting as I do that his work in 2004 was not exclusively confined to litigation support, nonetheless I consider it appropriate to exclude from recovery all the costs of his work incurred between January and July 2004. As far as I can ascertain he was not involved before January 2004 and by the end of July 2004 the trial in London was over. This is a rough and ready approach but in the circumstances it is the best I can do properly to reflect the fact that the allocation of his time does not appear to have been conducted on a consistently reliable basis. As I understand it this involves a reduction in the claim in respect of Chiltington's fees of the order of €185,000. I would hope that the parties can agree the appropriate figure. If it is incapable of agreement I shall have to rule on it after having been directed to the relevant invoices. Subject to that point, R+V has in my judgment established its entitlement to the amounts claimed under this head as summarised at paragraph 8 above.

Set-off of profit?

15. The next issue raised by Mr. Page for Risk is whether Risk is entitled to set off against R+V's claim in respect of management and staff time and Chiltington's costs profits which R+V made or may have made as a result of being bound to the business to which the conspiracy related.

16. I believe that, for better or for worse, I have already ruled that this point is not available to Risk. On Day 3 of the hearing before me, Thursday 23 March 2006, Mr. Page for Risk sought permission to make an amendment to Risk's Quantum Defence by the addition of the following paragraph: –

> "Risk is entitled to be credited with the capital value of the insurance business written by Risk as at April 2003, on the basis that R+V did or could have renewed it and received profit for future of at least £10.2 million annually."

My ruling on this application is at pages 25-30 of the transcript for that day. Specifically, I said this: -

> "I would, therefore, refuse leave on the grounds alone that it would now at this stage be a grave injustice to R+V to allow Risk to raise this huge new area of enquiry at this stage in the proceedings given that the judgment of Mr Justice Moore-Bick was handed down as long ago as November 2004.
>
> In my judgment, however, Mr Edelman is also right to suggest that it is simply an abuse of process for Risk now to seek to raise this point before me having not raised it before Mrs Justice Gloster in circumstances where Mrs Justice Gloster has already ruled that it is not open to Risk to suggest that the 40 per cent commissions is it not itself recoverable without giving credit for profits which may have been made, or for other benefits which may have been bestowed.
>
> It seems to me that if this suggested defence is a good defence to the claim made by R+V for the costs of investigating and remedying the tort so also it would have been a good answer to the suggestion that the 40 per cent commission was recoverable. But Mrs Justice Gloster has ruled in her judgment that that point is no longer open to Risk because of the manner in which they conducted their defence at the trial before Mr Justice Moore-Bick; and it seems to me by parity of reasoning, that the argument which they seek to put forward by this proposed amendment is likewise something which is no longer open to them to run.
>
> If it were necessary, therefore, I would rely upon that ground also, but in my judgment it is simply out of the question that Risk should now be permitted to lead to the massive extension of the proceedings which this amendment would involve, and the further huge expenditure of costs which would be necessary on R+V's part in order to deal with the point both in terms of the factual enquiry, the disclosure that would be required, and the expert evidence that would be required to deal with, to my mind, not easy questions of the manner in which one values business which may or may not have been renewed."

17. I also made some tentative observations on the merits of this suggested set-off of profits against the costs of investigation. At the end of my ruling on this same occasion I said this: -

> "I should also indicate that, in any event, I am far from satisfied that the defence is even arguably good in law. It seems to me given that the victim of the tort is entitled to recover the costs of dealing with the investigation and remedying of the tort, it is not immediately obvious to me that against those costs the victim of the tort must give credit for supposed benefits which have been bestowed upon it by the commission of the tort, but I do not need to go into that in order to resolve this application which in the exercise of my discretion I refuse for the reasons I have given."

18. My ruling was of course made in the context of Mr. Page's quite separate application for permission to amend. It did not deter Mr. Page from arguing in his closing submissions that R+V should be entitled to maintain the suggested set-off, and Mr. Edelman addressed me on the point also, whilst contending that pursuit of the point by Risk was by now triply abusive. I will therefore just indicate that in my judgment the suggested set-off of profits accrued from the impugned business is not a good defence to the claim for the costs of the extensive enquiries to detect the extent of the conspiracy, which costs are properly characterised as expenses incurred in mitigation of damage – see McGregor on Damages, 17th Edition paragraphs 2-049 to 2-051. The cause of the incurring of costs on the scale on which they were incurred is the extent of the conspiracy and in particular the steps taken to conceal it – what Dr. Maneth described as the "cloud" which R+V was attempting to pierce. The profitability of the business in itself is quite unrelated to the necessity to investigate the wrongdoing which had occurred. Just as Gloster J held that it is not a necessary precondition to the recovery of expenditure under this head that a claimant prove that its profitability has been adversely impacted by the staff time spent on the investigation, so in my judgement it is simply an irrelevant averment to suggest that the impugned business has bestowed a benefit in the shape of profit. The claimant simply seeks to recover costs which, in the absence of commission of the tort, would simply not have been incurred. Those costs are not incurred in order to generate profit and their expenditure will have no impact upon the profitability or otherwise of the business, which will simply be a function of the size of claims and their incidence as compared with premiums and the incidence of their collection. Although therefore I have concluded that I cannot entertain Risk's argument that profits must be set off, it is in my judgment in any event a bad argument which affords Risk no defence to the claim for wasted management and staff time, associated overheads and external contractors' costs.

The commission payable under the ING binder

19. On 27 August 2002 R + V through Mr. Gebauer agreed to subscribe a 100% share on what has been called the ING binder. The background to this appears to be a decision in 2002 by ING Re to concentrate on US business to be written from its headquarters in Charlottesville. ING ceased underwriting new and renewal life, accident and health reinsurance business through its Copenhagen and London offices. It seems that the accident reinsurance business had been developed by Mr. Jonathan Bowers, the Managing Director of ING Re (UK) Ltd. Mr. Chalhoub appears to have had a close business relationship with Mr. Bowers. At all events he was in a position in August 2002 to offer to Mr. Gebauer what was effectively (although not actually confined to)

the renewal of ING's accident reinsurance business. This was presented as "an exciting opportunity to put your hands on a mature book of business with a proven track record." I have no reason to believe that it would not have been similarly so perceived by Mr. Gebauer. Mr. Chalhoub wrote to Mr. Gebauer offering this opportunity on 19 August 2002.

20. The binder slip to which Mr. Gebauer was invited to subscribe provided as follows: -

"ACCEPTANCES	Agreement of the Reinsurer to accept from Risk *insurance* and *reinsurance solutions* S.A. (hereinafter named *Risk*), reinsurance accounts previously written by ING and offered to the Reinsurer at their individual anniversary dates as declared by *Risk*.
TYPE	All business specifically allocated and falling broadly within the following classes of business: Reinsurance of Accidental Death and Dismemberment including but not limited to Personal Accident, W.C., Bodily Injury from occupation or 24/24 hours, Total and Partial Disablement from Accident or Sickness, War, Assistance, Repatriation, Kidnap & Ransom, Travel, Medical Expenses, Loss of License, Loss of Occupation, Credit Cards and/or in accordance with original conditions and/or as declared and ceded herein by *Risk*.
FORM	This Agreement serves as the entire contract between *Risk* and the Reinsurer as agreed and prepared by *Risk* and in accordance with the terms herein
PERIOD	Commencing at 24 hours on date September 1st 2002, for an indefinite period of time, except if cancelled 210 days prior to any anniversary date. First anniversary date to read January 2, 2004. each individual account to run to its natural expiry, irrespective of the date of termination of this Agreement – Tacit renewal as original.
INTEREST	Accounts previously underwritten by ING and accepted by *Risk* on behalf of the Reinsurer and/or as original
…..	
RISK FEES	The Reinsurer will in addition to original acquisition costs, pay fees to *Risk* based on the ING 2002 projected expense ratio as documented in the attachment and multiplied by a 1.12 factor to allow *Risk* a reasonable profit margin of 12% over costs [(premiums *ING 2002 projected expense ratio) *1.12 = fees to *Risk*].

BASIC CONDITIONS

All Clauses, conditions and warranties as attached,

1. This agreement is subject to UK Law, U.K. Jurisdiction and the competent Courts of England
2. *Risk* is authorized to bind reinsurance accounts and amendments on behalf of the Reinsurer on accounts previously underwritten by ING per the list attached, or similar accounts when Return on Insurance Operations based on a proven track record of minimum three years (from attached) exceed 10%.

……

ACCOUNTS	Quarterly electronically (Reporting of risks bound, shares, balances, premiums and claims)
SETTLEMENTS	*Risk* to collect premiums on behalf of Reinsurer and pay claims into and straight from, an escrow bank account to be established by *Risk* to the benefit of the Reinsurer – Bank Interest on the account are the property of the Reinsurer
CLAIMS	Claims to be paid directly by *Risk* out of said escrow bank account. Reinsurer to leave in said escrow bank account a minimum of Euro 500,000 or 15% of net net premiums written and collected during the past 12 months, whichever is greater, in order for *Risk* to pay claims. Claims assistance and advice from the Reinsurer on claims greater than Euros 250,000 for the line bound by *Risk*

Mr. Gebauer for R +V together with a second signatory accepted a 100% line on this slip on 27 August 2002.

21. The question is to what fees are Risk entitled under the binder. It is accepted by R + V that Risk is entitled to original acquisition costs, the question is over the fees payable additional thereto. As I understand it the asterisks in the "Risk Fees" clause are to be understood as multiplication signs. The problem lies in the identification of the "premiums" and the "projected expense ratio" to which the multiplication exercise must be applied.

22. On the basis of the evidence of Mr. Hoff, who had caused the relevant searches to be carried out, and on the basis of the disclosure given in the liability action, I find that the documents sent to Mr. Gebauer under cover of Mr. Chalhoub's letter of 19 August 2002 did not include "the attachment" to which reference is made in the "Risk Fees"

clause. I also find however that as at that date an ING 2002 Plan did exist in at any rate one version. It was sent by e-mail from Mr. Bowers to Mr. Chalhoub on 16 May 2002. There is another version of that document which is identical save for the addition of two features. Firstly, there is added in the top right hand corner of the single sheet document the ING Re corporate logo. Secondly, after the line reading "General Expenses 2,857,000" (which is a US dollar figure) there are two further lines reading "expenses as % NEP" and "expenses as % WP" respectively. On the version of the plan sent by Mr. Bowers to Mr. Chalhoub there are no actual percentage figures given. On the second version the percentages are written in as 7.23% and 5.83% respectively. From the figures in the Plan it is apparent that 7.23% is the ratio borne by General Expenses to Net Earned Premium, itself a figure derived from estimated figures. 5.83% is the ratio borne by General Expenses to Estimated Gross Written Premium, which further up the page is shown as US$49,036,500. For convenience I will call this second version of the ING 2002 Plan the ING version.

23. I cannot find with any confidence when the ING version came into existence. The copies of it which are in evidence before me also bear a manuscript note, agreed to be written by Mr. Chalhoub. On it he has written "Expense ratio – 2,857,000/39,532,390 = 7.22%. (The ratio is in fact 7.22698% - Mr. Chalhoub has not rounded, hence the small discrepancy between 7.23% as appears on the ING version and 7.22 as appears in Mr. Chalhoub's manuscript note.) Risk did not produce at the liability trial the e-mail from Mr. Bowers to Mr. Chalhoub with attachment to which I have already referred, but I have no reason to doubt its authenticity. The copy of Mr. Chalhoub's letter to Mr. Gebauer of 19 August 2002 produced at the liability trial did not include as an attachment any version of the ING Plan, although the copy produced by Risk through Mr. Cooper for the purposes of the hearing before me did. What is clear is that no copy of the ING binder showing that the ING Plan was attached thereto and initialled and agreed to by R + V has ever been produced. I was told that a copy of the ING 2002 Plan was produced at trial, although it came in very late as an item in a separate bundle in a different documentary context. It seems to me unlikely that anyone at R+V saw this document before it was produced in connection with the trial, and evidently its production then made little impact, since Mr. Hoff states as his belief that no-one at R+V had seen a copy of the ING 2002 Plan until it was exhibited to Mr. Cooper's (he says Mr. Chalhoub, but he must be mistaken) Witness Statement of 23 September 2005 served in these proceedings. Indeed Mr. Hoff also states at paragraph 7 of his Witness Statement of 9 February 2006 that he understands from Mr. Edison (of LeBoeuf Lamb) that a review conducted by LeBoeuf Lamb of the disclosure given by Risk in the liability proceedings had also failed to locate a copy of the ING 2002 Plan. Mr. Hoff was not cross-examined about this and it may be that there is a misunderstanding. Perhaps Mr. Hoff was referring to a copy of the ING 2002 Plan as an attachment either to the letter or to the slip. In view of my conclusions as set out hereafter I do not need to explore this point further.

24. The picture revealed by Risk's disclosure is bewildering and it is capable of being regarded as sinister. However it has to be remembered that there is no suggestion that any dishonesty whatsoever attended the negotiation and conclusion of this binder. If as Risk now contends the ING Plan would have indicated a fee to Risk of 6.53% of gross written premium, i.e. 5.83% x 1.12, this would have produced a substantial figure when applied to the estimate of gross written premium, that estimate being US$49,036,500. On the other hand Mr. Burbidge, R + V's expert witness on this

aspect, accepted that had this been an open market book of individual risk business with a full service then an overriding commission of up to 7% would be possible in the market. This was, said Mr. Burbidge, by contrast a book of mainly whole account accident business, with an accordingly much reduced workload. That may be so, but as I have already indicated, the business was put forward as being a particularly attractive proposition and I have no reason to believe that it was not also perceived as such by Mr. Gebauer. I cannot therefore conclude that Mr. Chalhoub would have had a motive to conceal the ING Plan from Mr. Gebauer, or indeed from R + V more generally. Moreover the binder slip in any event refers to the projected expense ratio as being documented in the attachment and it would have been natural therefore for Mr. Gebauer to ask for this attachment if it was not included in the documents sent to him on 19 August 2002, as I find it was not. It would therefore make little sense for Mr. Chalhoub deliberately to withhold a document to which the binder slip made express reference and for which he could reasonably expect to be asked. If he was not asked for it by Mr. Gebauer he could expect a request in due course from the R + V back office staff on scrutiny of the quarterly accounts or on settlement of balances generally.

25. Whilst therefore I am satisfied that R + V never at any material time saw still less initialled the attachment, it is plain that R + V agreed to a formula for the calculation of Risk fees which was intelligible only by reference to the attachment to which express reference was made in the formula itself. There is in my judgment no reason why R + V should not be regarded as bound by that formula provided that it is itself intelligible and provided also that there was in existence at the time a document which, had it been attached, would have contained the ING 2002 projected expense ratio, so that that could have been readily ascertained at the time had R + V asked for it to be so ascertained.

26. Although I cannot determine whether the ING version was in existence in August 2002, the version sent by Mr. Bowers to Mr. Chalhoub on 16 May 2002 by e-mail did then exist. It contained all the figures from which the projected expense ratio could be calculated, the only question being whether that ratio relates to estimated gross written premium or estimated net earned premium. In the light of the parties' obvious intention to contract by reference to a projected expense ratio, it is in my judgment appropriate to strive to give effect to their intention. When asked whether it is a problem that the document refers to two ratios, Mr. Burbidge's reaction was that it is not necessarily a problem provided that the same indices are used all the time. That in turn raises the question what is meant by "premiums" in the "Risk Fees" clause in the binder slip. In my judgment the most natural meaning to give to that word in that context is gross written premiums, the raw figure about which there can be no debate as to how it should be computed. Those too are the "premiums" to which reference is made in the settlements clause. Furthermore Mr. Burbidge and Mr. Pipe, Risk's underwriting expert, and also Mr. Cooper, were agreed that it would in fact be difficult and inappropriate to calculate commission by reference to net earned premium since that is a figure which is time sensitive and is more usually used on the underwriting side to determine profitability at a moment in time.

27. In my judgment therefore it is clear that the parties would naturally have understood "premiums" in the "Risk Fees" clause as applying to gross written premium. Of the two projected expense ratios thrown up by the ING 2002 Plan they would naturally

have understood that it was the ratio of expenses to estimated gross written premium which it was appropriate to use when calculating fees or commission by reference to gross written premium. In my judgment therefore Risk is entitled by reason of the express terms of the binder to a commission or fees calculated at 6.53% of gross written premium.

28. I am glad to have been able to reach this conclusion because I regard as unsatisfactory, as did both Mr. Burbidge and Mr. Pipe, the exercise which they conducted in order to form a view as to what would, in the circumstances, on the assumption that the contractual machinery had failed, have been a reasonable commission on which to have agreed. They were agreed that they had insufficient information available to them in order to reach a satisfactory conclusion. Given that lack of information it would have been very difficult for me to reach a reliable view on which was to be preferred, Mr. Burbidge's 3.5% or Mr. Pipe's figure of between 5 and 10%. This was an unusual contract and any attempt retrospectively to impose a supposedly reasonable commission is necessarily artificial and subjective. It is clear however that the parties did intend that a commission should be payable in addition to original acquisition costs and had the point arisen I should have been reluctant to accede to R + V's submission that the Court simply lacks the information to reach any conclusion. On the evidence I would if necessary have concluded that Risk had made out a case for a commission of at least 3.5% simply because that was a figure for which Mr. Burbidge was able to give a reasoned basis and which he was therefore prepared to accept as reasonable and which Mr. Pipe for his part did not regard as unreasonable. As it is however the claim for a reasonable commission does not arise, and I do not need to decide whether a figure any higher than 3.5% should be regarded as appropriate.

The ING Quota Share Treaty

29. In my judgment delivered on 22 March 2006 I described how, on 14 January 2003, Risk had purported to bind R+V to an 85% Quota Share of ING's 2002 book of business in what might broadly be called the personal accident class, the same class of business to which the ING binder made earlier on 27 August 2002 related. The Quota Share treaty was the subject of a slip signed by Risk on 14 January 2003 and a treaty signed on 6 March 2003. Moore-Bick J found, at paragraph 272 of his judgment, that Risk did not have authority to enter into this retrospective retrocession on R+V's behalf. What is more, Moore-Bick J also found that Risk was party to a dishonest arrangement to produce, prior to its purporting to bind R+V to the Quota Share treaty, a corrupt document, the 19 September fax, designed to give the misleading impression that R+V duly authorised the conclusion of the Quota Share treaty on its behalf. At paragraph 273 of his judgment Moore-Bick J said this: -

> "It is uncertain at present whether R+V will ultimately suffer any loss as a result of being bound to this retrocession. In those circumstances it is common ground that all remaining questions relating to this treaty should be left over for determination at a later date."

30. As I also recorded in my judgment of 22 March 2006, in separate and subsequent proceedings between ING and R+V, ING has alleged that R+V is nonetheless bound by the treaty, either because Risk had ostensible authority to conclude it on R+V's

behalf, or because R+V has subsequently ratified the treaty. That action was heard by Toulson J in February of this year and as at the hearing before me his judgment was awaited.

31. It was of course accepted that I could not in these proceedings determine and should not attempt to determine whether R+V is bound to the ING Quota Share. Nevertheless, on the footing that it is bound to the business, R+V seeks an indemnity in respect of all net sums, after taking into account any premiums that it has received in respect of the said business, that it is liable to pay the cedants, and/or any third party, including all costs and expenses. R+V seeks declaratory relief in this regard as to its entitlement to be indemnified in respect of the consequences of Risk purporting to bind it to the ING Quota Share treaty. R+V seeks declarations to the following effect: -

> "1. The Claimant is entitled to an indemnity in respect of all net sums it has to pay to the cedants and/or any third party under the ING Quota Share treaty dated 6 March 2003, including all costs and expenses, after taking into account any premiums that it (the Claimant) has received in respect of the said business.
>
> 2. The Claimant is entitled to an indemnity in respect of all sums received by the Defendants pursuant to the ING Quota Share treaty dated 6 March 2003 and not paid the Claimant insofar as the Claimant is liable to repay the same."

32. The production of the corrupt document, the 19 September fax, was of course all part and parcel of the conspiracy but the short point here is that Risk acted without authority in purporting to bind R+V. In those circumstances I am afraid that I did not follow the logic of Mr. Page's argument to the effect, as I understood it, that any indemnity to which R+V is entitled under this head is conditional upon it being required to bring into account profits earned as a result of the business produced pursuant to the conspiracy as a whole. Mr. Page sought to meet reliance upon the lack of authority simpliciter with the suggestion that no order had been made for recovery of damages for breach of contract in relation to the Quota Share agreement. I do not need to go into the circumstances in which the formal order of Moore-Bick J was drawn up. A claim for recovery of damages for breach of contract in relation to the Quota Share agreement was expressly made before Moore-Bick J. It was contained in Paragraph 20A of R+V's Re-Amended Particulars of Claim. It seems to me that it is precisely the question of recovery of damages as a result of being bound to this retrocession in breach of the actual authority given to Risk that Moore-Bick J left over for determination at a later date.

33. In relation to the second suggested declaration Mr. Page made the following written submission: -

> "The duty to repay premium to the cedants only arises because R+V has chosen to maintain that it is not bound. This is R+V's choice and Risk is not responsible for it."

I indicated to Mr. Page that I found this submission astonishing. Mr. Page indicated graciously that whilst he had no instructions to concede the entitlement of R+V to this relief he would say no more about it.

34. In my judgment R+V is plainly entitled to both of the declarations sought and I shall make such declarations accordingly. They may or may not be rendered academic by the decision of Toulson J or any appeal therefrom.

Monies in the London Accounts

35. I must next deal with R+V's claim for declaratory relief in relation to the monies held in certain accounts with HSBC in London. The declaratory relief sought is to the following effect: -

> "1. All monies held in the bank accounts referred to at paragraph 25 of the Re-Amended Particulars of Claim, including for the avoidance of doubt any related money market accounts in which the monies are or have been held from time to time, together with any interest, are held on trust by the Fourth Defendant for the benefit of the Claimant.
>
> 2. Insofar as any third party retains any beneficial interest in any of the monies in the accounts referred to at paragraph 1 above, such monies are held on trust by the Claimant on behalf of the respective third party."

36. The reference to the Re-Amended Particulars of Claim is to the Claimant's pleading as it stood before Moore-Bick J. Paragraphs 24 and 25 read as follows: -

> "~~23~~.24. As set out above, the premiums received by the Defendants pursuant to the UNL, SHTTL and ING agreements were to be paid into separate escrow accounts ("the escrow accounts") to be established by Risk France in the name of R+V. Further or alternatively, any premium which the Defendants received purportedly in respect of, or pursuant to, the UNL, SHTTL, and ING agreements were to be paid into the escrow accounts.
>
> ~~24~~.25. Pursuant to this requirement Risk UK and/or Risk France established the following escrow bank accounts with HSBC ("the escrow accounts"):
>
> i) Account number 91474731, sort code 40-01-04: GBP
>
> ii) Account number 57340976, sort code 40-05-15: USD

iii) Account number 57340968, sort code 40-05-15: EURO

iv) Account number 21481053, sort code 40-01-04: GBP

v) Account number 57786621 sort code 40-05-15: USD

vi) Account number 57786613, sort code 40-05-15: CAN$"

The first three accounts were designated by Risk as the FAC accounts. The second three accounts were designated by Risk as the HAT accounts.

37. The SHTTL and UNL binders each provided as follows: -

"SETTLEMENTS	Risk to collect premiums into, and pay claims straight from, the Reinsurers escrow bank account to be established by Risk in the name of the Reinsurer – Bank Interest on the account are the property of the Reinsurer."

38. The ING binder had a similar provision: -

"SETTLEMENTS	Risk to collect premiums on behalf of Reinsurer and pay claims into and straight from, an escrow bank account to be established by Risk to the benefit of the Reinsurer – Bank Interest on the account are the property of the Reinsurer."

39. The SHTTL and UNL binders each also provided as follows: -

> "18. Fees and costs owed to Risk to be paid by Reinsurer every end of week on all monies collected by, or credited to the Reinsurer alternatively taken by Risk from the Reinsurer escrow bank account."

40. The ING binder had a virtually identical provision as follows: -

> "14. Fees and costs owed to Risk to be paid by Reinsurer every end of week on all monies collected by, or credited to the Reinsurer, alternatively Fees and costs may be taken by Risk from the escrow bank account mentioned in item SETTLEMENT."

41. Contrary to what is pleaded by R+V these six accounts were not in the event escrow accounts. Risk never set up formal escrow accounts. Moore-Bick J found that it was likely that the escrow account proposal was dropped to avoid having to seek approval for the setting up of the accounts from R+V's board as this might have alerted R+V to the conspiracy – see his judgment at pages 46-47 and in particular at paragraph 169. Although no formal escrow accounts were opened, Risk did open specific accounts to receive the premium due to R+V and in order to keep the monies separate from Risk monies. R+V's name was included in the name of the London accounts. Mr. Wyatt, a director of Risk UK and the person responsible for setting up the London accounts under the instructions of Mr. Chalhoub, described the monies as being "ring-fenced" and described also a desire to ensure that the monies were not seen to be Risk UK's monies for tax purposes – see in particular the judgment of Moore-Bick J at paragraph 165.

42. In my interlocutory judgment of 22 March 2006 I made clear my understanding that the findings of Moore-Bick J as to the circumstances in which bank accounts were opened by Mr. Wyatt applied equally to all six accounts mentioned in Paragraph 25 of the original Re-Amended Particulars of Claim. Indeed at page 19 of my judgment I specifically referred to the HAT accounts as surrogate for the escrow accounts, by which I did not mean that they were the surrogate rather than that the FAC accounts were the surrogate – I meant that all six accounts were surrogate accounts for escrow accounts.

43. I also recorded at page 4 of the judgment my understanding that the six relevant accounts were set up to receive and to receive alone R+V premium, my understanding that the three accounts into which the ING quota share premium was paid were designated the HAT accounts and my understanding that the HAT accounts were used to hold sums other than ING premium. In my judgment I recorded that Mr. Page did not, as I understood him, controvert the broad proposition that the HSBC accounts were set up to receive R+V premium alone. At page 6 of my judgment I said this: -

> "In the light of those considerations there would seem to me to be, in principle, a good arguable case that the money in these accounts, even though they were not escrow accounts in R+V's name, was intended to be, or was, impressed with a trust in its favour. If it was not so impressed, Mr. Wyatt's purpose in ring-fencing the money and ensuring that it was not the property of Risk UK for tax purposes might have been defeated."

At page 15 I said this: -

> "However, for the reasons which I have already given, and which are largely based upon findings by Mr Justice Moore-Bick, it seems to me highly unlikely that Risk can be beneficially entitled to the monies in the HSBC accounts. There is, as I understand it, further material which supports that conclusion.

> In his skeleton argument, Mr Edelman records that, at the March 2002 inauguration in London, Risk specifically stated in its presentation that:
>
> > "The monies are paid by producers direct into a special bank account in your name so there are no possible delays or withholding of funds. Bank interest is for you to keep. Unlike any other underwriting agency we do not manage premium payments. They go directly into your account with no credit delay so you have the entire benefit of the cash flow."
>
> Mr Edelman also points out that one of the slides at the presentation given by Risk, which described the flow of money, showed premiums and bank interest going into an account described as:
>
> > "Intrust bank account in London for R&V."
>
> See also the references in the judgment of Mr Justice Moore-Bick at paragraphs 55 to 56.
>
> Mr Edelman submits that the evidence clearly establishes that the monies in the London accounts are held on trust for R&V. All the requirements for a trust – certainty of intention, subject matter and beneficiaries – are satisfied. It was clearly the intention that the monies paid into the London accounts be kept separate from Risk's assets and be held by Risk for the benefit of R&V.
>
> It seems to me overwhelmingly likely that R&V will make good these propositions."

44. In that judgment I also recorded, at pages 11-13, my understanding, on the basis of the evidence put before me, that only three (in fact properly understood only two) of the accounts at HSBC apparently now contain sums of any consequence. The Canadian dollar HAT account contains Can $164,630.52. The US dollar HAT account contains US$ 907,747.36 to which there is to be added a money market deposit of US$ 3,477,000.00 which is to be treated as part of the US dollar HAT account because deriving therefrom.

45. In his closing submissions at the subsequent hearing Mr Page without warning submitted that the HAT accounts were not set up under the "London Binders," and that there is no evidence as to why they were set up. He submits therefore that there is no basis in either the contracts or the evidence for the imposition of a trust upon the money in these accounts, these being, as I have already recorded, the only accounts in which there is any money of any consequence.

46. This new approach seems to me contrary to Risk's pleaded case. Paragraph 25 of the Re-Amended Particulars of Claim alleges that the six bank accounts, wrongly described there as escrow accounts, were established pursuant to the requirement

contained in the UNL, SHTTL and ING binders. Paragraph 24 of the Re-Amended Defence admits that the accounts referred to in Paragraph 25 of the Particulars of Claim were established and does not address the proposition that they were established pursuant to the requirement contained in the binders. One would have thought that if Risk had a positive case to the effect that the HAT accounts were not set up under the London binders it would have been pleaded. Furthermore, paragraph 58(2) of the Defence to Points of Claim in relation to Quantum proceeds upon the unspoken assumption that the findings of Moore-Bick J as to the circumstances in which Mr Gebauer and Mr Chalhoub agreed not to open escrow accounts are equally applicable to all six HSBC accounts, without any distinction being drawn between the FAC and the HAT accounts.

47. It is therefore in my judgment too late now to suggest that R+V has failed to bring forward evidence as to the circumstances in which the HAT accounts were set up. R+V has conducted itself in reliance upon Risk's stance in the litigation in relation to these six accounts. However Mr. Page accepted that any money paid into the HAT accounts under the ING binder is held in trust, presumably either for the benefit of R+V or for the benefit of ING. He also accepts, I think, and if not I hold, that money paid into the HAT accounts pursuant to the ING quota share treaty is held in trust. This means that the money in the Canadian dollar HAT account is accepted to be trust money. So also Mr. Page accepts that since the US $907, 747.36 in the US dollar HAT account came by way of transfer from the FAC sterling account, it too is trust money. He accepts that of the money market deposit of US $3,477,000.00, US $2.5 million represents ING premium paid under the quota share treaty and is likewise held in trust. As to the balance of US $900,000.00 odd Mr Page accepts that it is reasonable to infer that this too represents premium that was in the first instance R+V premium and that if it was not paid under the ING quota share treaty then it is likely that it was paid pursuant to the ING binder.

48. My conclusion therefore is that all the money in the HAT accounts is trust money. It is not money in which Risk has any beneficial interest.

49. Mr. Page suggests that because the FAC accounts were set up pursuant to the SHTTL and UNL binders and because those binders provided: -

> "Fees and costs owed to Risk to be paid by Reinsurer every end of week on all monies collected by, or credited to the Reinsurer alternatively taken by Risk from the Reinsurer escrow bank account"

therefore it is arguable that Risk had a right to withdraw its commission from these accounts. He suggests that by analogy with the effect of the Solicitors' Accounts Rules discussed by Park J in Sheikh v. Law Society 2005 EWHC 1409 at paragraph 65 a sum equal to the commission due may cease to be trust money. I do not consider that this a valid analogy. The Solicitors' Accounts Rules provide the mechanism, issue of a bill, pursuant to which client money becomes office money. There is no similar mechanism provided in the binders. In my judgment Risk is provided with no more than a contractual entitlement to draw on the account or accounts, an entitlement which would require the cooperation of R+V if it were to be effective had escrow accounts been established as envisaged. So far as I can see this conclusion is of no

practical consequence to Risk. R+V is a solvent party from whom it can recover its commission as and when it is established to be due.

50. The upshot is that no arguments have been advanced which persuade me that my provisional conclusions expressed in my judgment of 22 March 2006 were incorrect. In these circumstances I am satisfied that R+V is entitled to the declaratory relief which I have set out at paragraph 35 above, subject only to the slight amendment which I suggested in the course of argument in order to safeguard the position of ING. Accordingly, I shall grant a declaration in the following form: -

> "All monies held in the bank accounts referred to at paragraph 25 of the Re-Amended Particulars of Claim, including for the avoidance of doubt any related money market accounts in which the monies are or have been held from time to time, together with any interest, are held on trust by the Fourth Defendant either for the benefit of the Claimant or for the benefit of ING. Neither the Fourth nor any other Defendant has any beneficial interest therein."

I shall also make the second of the declarations set out in paragraph 35 above in the form requested.

Contempt of Court

51. On 2 March 2006 the First and Fourth Defendants, to whom I shall continue to refer in this context as "Risk" issued an Application Notice which sought relief in the following terms: -

> "The First and Fourth Defendants, the "Applicants" intend(s) to apply for an order (a draft of which is attached) that
> 1) Dr Andreas Hasse of the Claimant/Respondent be committed to Prison; and/or
> 2) R+V, the Claimant/Respondent be restrained from intimidating or attempting to intimidate a witness in these proceedings namely Mr Wolfgang Kernbach; and/or
> 3) Such further or other order as may seem just to the Court for the contempts of the Respondent..
>
> Because the Respondent have intimidated and/or interfered with Mr Kernbach as a witness or potential witness in these proceedings in the following manner:
>
> 1) The Respondent promised to pay Mr Kernbach a fee for his work on the case for them including giving evidence but informed him that on the advice of their London lawyers they were not to pay the said fee until after the proceedings had concluded;
> 2) Dr Hasse of the Respondent informed Mr Kernbach that if he gave a witness statement for the Applicants that would give rise to repercussions by the Respondent."

The first affidavit of Henry Page sworn in support of this application makes clear that Risk sought relief going beyond that sought in the Application Notice. Paragraph 18 thereof reads: -

> "Third, in case Mr. Kernbach still feels too threatened to cooperate fully with Risk, Risk asks for an Order for a letter of request for Mr. Kernbach to be examined in Switzerland under CPR 34.13 and 34 PD 5. The subject of the examination will be to explain in greater detail paragraph 10 of Mr. Kernbach's annexe to his fax of 10 February 2006."

I will revert in due course to Mr. Kernbach's annexe.

52. Dr. Hasse is the head of R+V's legal department. Although Risk sought his committal to prison, he was not even named as a Respondent to the application. This is only the first of multiple deficiencies in this application. By the time that the matter was debated before me it was accepted that there were failures to comply with the RSC Order 52 Practice Direction such as would justify the Court in simply striking out the committal application in exercise of its powers under SCPD 52.5 (3). However Mr. Edelman, acting here both for R+V and Dr. Hasse, submitted that the Court should exercise its wider powers to strike out. SCPD 52.5 provides as follows: -

> "5. The court may, on application by the respondent or on its own initiative, strike out a committal application if it appears to the court:
>
> (1) that the committal application and the evidence served in support of it disclose no reasonable ground for alleging that the respondent is guilty of a contempt of court,
>
> (2) That the committal application is an abuse of the court's process or, if made in existing proceedings, is otherwise likely to obstruct the just disposal of those proceedings, or
>
> (3) that there has been a failure to comply with a rule, practice direction or Court order."

53. On 15 March 2006 R+V issued its own Application Notice seeking an order that: -

> "the defendant's application for (1) a committal order against Dr. Andreas Hasse and (2) a restraining order against the claimant, be struck out because (i) the commital application and the evidence served in support of it disclose no reasonable ground for alleging that Dr. Hasse is guilty of a contempt; (ii) the commital application is an abuse of the court's process; (iii) there has been a failure to comply with Supreme Court Practice Direction 52."

54. SCPD 52.8 provides that a committal application may not be discontinued without the permission of the court.

55. At one stage in his argument Mr. Hugo Page for Risk submitted that since neither R+V nor Dr. Hasse had been personally served with the application it had no status, so that the question of permission for its withdrawal did not arise. If he were wrong about that he asked for permission to withdraw it. In earlier written submissions Mr. Page had asked for the applications in relation to this matter to be re-fixed at a future date far enough ahead to enable the requirements of German law with respect to service to be complied with.

56. In effect the battle lines were drawn as follows. Mr. Page recognised that by reason of procedural defects and, more substantively, a failure to serve R+V and Dr. Hasse with the application to commit, he was in no position to invite the court either to give relief in accordance with that application or, more realistically, even to give directions with a view to the issues raised thereby being tried. Mr. Edelman on the other hand was anxious that the court should strike out the committal application on substantive rather than merely procedural grounds in a manner which would preclude resurrection of the application by Risk.

57. At the conclusion of the hearing on 30 March 2006 I indicated that I would strike out the application to commit Dr. Hasse, giving my reasons later, which I now do. I reserved my judgment so far as concerns the applications both against and by R+V, the former for injunctive and ancillary relief, the latter seeking to strike out the former.

58. Mr. Kernbach was an important and perhaps crucial witness in the trial before Moore-Bick J. He was until December 2002 a director of R+V and he was the member of the management board responsible for external reinsurance operations, i.e. reinsurance of risks written by insurers outside the R+V group. Mr. Gebauer reported to Mr. Kernbach. One of the central issues in the trial was whether Mr. Gebauer kept Mr. Kernbach properly informed about the existence and terms of the London binders, including the addenda which provided for payment of a 40% commission. Moore-Bick J found that Mr. Gebauer concealed important information from Mr. Kernbach. Moore-Bick J dealt exhaustively with the evidence of Mr. Gebauer and Mr. Kernbach on these matters, particularly testing it by reference to the contemporary documents and the inherent probabilities. Obviously the impression made by Mr. Kernbach as a witness will have been one factor weighed in the balance, but since Moore-Bick J rejected his evidence on certain matters (in one case as wholly incredible) and regarded him as having lied to an internal R+V investigation about another matter, I would venture to suggest that it may not have loomed large in the exercise. Indeed, at paragraph 127 of his judgment Moore-Bick J recorded his conclusion that it would be unsafe to approach the matter with any firm preconceptions about the relative reliability of Mr. Kernbach, Mr. Gebauer and Mr. Chalhoub. At paragraph 153, at the end of his long analysis of all of the relevant evidence, documentary as well as oral, Moore-Bick J recorded certain firm conclusions. These included that Mr. Gebauer did discuss with Mr. Kernbach at quite an early stage the idea of underwriting facultative business in London through Risk, but only in the most general terms. Moore-Bick J continued: -

> "I am equally satisfied, however, that he did not any stage make it clear to Mr. Kernbach that R+V was expected to provide Risk with funding in the form of a 40% commission on the first year's premiums or that R+V would obtain a holding, or, for that matter, an interest of any kind, in the share capital of Risk UK. I am also satisfied that Mr. Gebauer failed to inform Mr. Kernbach of the final terms agreed with Mr. Chalhoub and did not inform him that contracts had been signed, either in July or September."

59. Risk says that since there was no other evidence supporting the positive conclusion that Mr. Gebauer did not inform Mr. Kernbach of the 40% commission, it can only have been reached on the basis of Mr. Kernbach's own evidence. I do not accept that this is an accurate characterisation of the situation. I do however accept that an allegation that R+V put pressure on Mr. Kernbach "to continue to say what the Claimant wanted to hear, and not to assist Risk" is an allegation of the utmost gravity which relates to evidence of central importance at the trial. It is however also important to bear in mind that I am not concerned with an application to set aside Moore-Bick J's judgment. I am concerned simply with an application to commit for contempt of court.

60. The evidence in support of the application to commit goes considerably beyond the brief reasons for seeking the relief set out in the Application Notice. A mere promise to pay a former employee a fee for work done in preparing for litigation and giving evidence therein is not improper. Nor is it of itself improper as I see it to indicate that on the advice of lawyers the fee is not to be paid until after the proceedings have concluded. Of course such an indication could be improper if it carried with it some implicit threat that the fee would only be payable in the event that employee had given favourable evidence, or perhaps if the evidence had had the desired effect. So also serious questions could arise as to the disclosure of such arrangements to the opponent party and to the court. However what is said in sub-paragraph 1 of the Application Notice does not seem to me of itself necessarily to amount to an allegation of improper conduct. The same might also be said of sub-paragraph (2) despite the obviously pejorative overtones of the word "repercussions." What is there alleged might well amount to some form of improper pressure, but the allegation is as it seems to me incomplete without the addition of the context, the nature of the discussion and not least the nature of the repercussions. On any view therefore the Application Notice does not, as SCPD 52.2.6 requires, set out in full the grounds on which the committal application is made. It would not however be right to strike it out as disclosing no reasonable ground for the allegation of contempt without examining also the evidence served in support of it – see SCPD 52.5(1).

61. The primary evidence in support is a summary corrected and approved by Mr. Kernbach himself of the main points of a telephone conversation between a Mr. Van Hagen, a French lawyer, and Mr. Kernbach on 20 December 2005. Mr. Kernbach was sent Mr. Van Hagen's note of this telephone conversation on 1 February 2006. On 10 February he returned it corrected, pointing out also that German and not English is his native tongue. It is this document which Mr. Henry Page described as Mr. Kernbach's "annexe." Paragraphs 9 and 10 of the corrected note read: -

> "9. Following the termination of Mr. Kernbach's contract, R+V agreed to pay him a fee for all the time he spent working for the Company after his contract had lapsed. The London lawyers had advised R+V however not to pay any fee until the case was over.
>
> 10. Mr. Chalhoub approached Mr. Kernbach in September 2005 and asked for a witness statement, which was refused by Mr. Kernbach. It is common knowledge that Mr. Kernbach gave evidence in London on the demand of and for R+V and that Dr. Hasse Chief of the Legal Department of R+V had warned that any statement for Risk could give rise to repercussions by R+V."

62. It is on the basis of paragraph 9 of Mr. Kernbach's note that Mr. Henry Page said this in his first affidavit: -

> "It has now emerged, in a letter from Mr Kernbach to my colleague Mr van Hagen received on 10th February 2006 (HCMP 1 p 1-2), that in September 2005 the Claimant was still exerting pressure on Mr. Kernbach (Mr van Hagen's letter and summary is at HCMP 1 p 2a-b). The Claimant exerted pressure in two ways, though without disclosure by the Claimant I cannot be certain that there are not others. The first way in which the Claimant appears to have exerted pressure on Mr Kernbach is by promising to pay him for his time working for the Claimant including, presumably giving evidence before Moore-Bick J, and then refusing to pay until the case was over. This is calculated to put Mr Kernbach under pressure to continue to say what the Claimant wanted to hear, and not to assist Risk."

63. Paragraph 10 of Mr. Kernbach's note relates to matters after the conclusion of the London trial, whilst questions of damages remained at large. The hearing before Gloster J began on 26 September 2005. Of this paragraph Mr. Page says, at paragraph 13 of his first affidavit: -

> "Secondly, Mr Hasse, whom I believe to be the head of the Claimant's legal department, appears to have warned Mr Kernbach that *"any statement for Risk could give rise to repercussions by R+V"*. An informed guess as to the nature of those repercussions can be derived from evidence given at trial that in Germany misconduct by an employee can lead to withdrawal of salary and pension rights."

64. The response of R+V to these allegations has been threefold. First, in a letter of 22 February 2006 R+V's London solicitors Messrs LeBoeuf Lamb said this: -

> "No "threats" have been made against Mr. Kernbach; all that has happened is that Mr. Kernbach has been reminded of the

> duties and obligations that he owes to his former employer under German law. The communications that have passed between R&V and Mr. Kernbach are confidential to the parties and our clients have no desire to share then with Risk."

Dissatisfied with that response, on 23 February 2006 Mr. Henry Page of Messrs Penlaw posed three specific questions of Messrs LeBoeuf Lamb:-

> "1. Did Dr Hasse or did he not inform Mr. Kernbach that there would be repercussions for him if he assisted Risk with evidence in this case? In this connection R+V's alleged legal rights as former employers under German law are wholly irrelevant.
>
> 2. Was Mr Kernbach promised a fee for his work for R+V on the case including his evidence?
>
> 3. Was Mr Kernbach told that he could not be paid this fee until after the case was over. If so, why? We are unable to see what innocent explanation for this there can be."

On 1 March 2006 Messrs LeBoeuf Lamb replied in these terms: -

> "1. He did not. As an aside, R+V's rights are of paramount importance and both they and we will strive to protect those rights.
>
> 2. No.
>
> 3. Not applicable."

Finally Mr. David Wilkinson of Messrs LeBoeuf Lamb swore an affidavit on 15 March 2006. Paragraphs 5 and 6 read: -

> "5. In relation to the allegation that the Claimant agreed to pay Mr Kernbach, it is significant there is no evidence whatsoever of the circumstances in which the alleged agreement between the Claimant and Mr Kernbach was made – when it was made, who by, in what circumstances, what the fee was for and the details said to have been agreed. This is not altogether surprising given that I am told by Dr Hasse that the Claimant categorically denies that it has ever entered into an agreement to pay money to Mr Kernbach for the time he has spent on the case. The key point here, however, is that the evidence put forward by the Defendants (even if uncontradicted) could not possibly provide a sustainable basis for a finding of contempt.

> 6. The allegation that Dr Hasse warned Mr Kernbach about giving evidence for Risk again does not give rise to a prima facie case of contempt. The statement in paragraph 10 of Mr Van Hagen's note lacks any detail as to when the alleged "warning" was given by Dr Hasse, what the alleged repercussions would be and the context in which it was apparently given. I am told that the discussion he had with Mr Kernbach about giving evidence for Risk related to giving expert evidence and that Dr Hasse quite properly told Mr Kernbach that this would be inappropriate as there would be a conflict of interest given the fact that Mr Kernbach had given factual evidence at the trial and he owed fiduciary duties to the Claimants as a former director. I am informed by Dr Hasse that pursuant to paragraphs 93 and 404 of the German Company Law ("Aktientiengesetz") a member of a board of directors of a company in Germany continues to owe that company a fiduciary duty of utmost good faith after his retirement as a director and that an example of that duty is the obligation to keep secret the knowledge that he acquired while acting as a director of that company. The key point again, however, for present purposes is that the material relied on by the Defendants as evidence of contempt is plainly insufficient to found an allegation of contempt."

65. The final twist in this tale is that on 23 March 2006 Mr. Henry Page swore a second affidavit in which he revealed for the first time that he had been party to the telephone conversation between, as he put it, inter alia Mr. Van Hagen and Mr. Kernbach on 20 December 2005. Paragraphs 4, 8 and 9 of that affidavit read: -

> "4. I was party to the telephone conversation between (inter alia) Mr van Hagen and Mr Kernbach on 20th December 2005. In that conversation Mr Kernbach informed us that at the time when R+V asked him to go to London as a witness the Chairman of R+V informed him that he would be compensated for anything he did for R+V after termination of his contract. No specific amount was discussed. Then in 2005 he asked to be paid for his time having worked 170/180 hours including travel. He was told by Dr Hasse that R+V could not pay because the case was going on and that R+V's London lawyers had advised them not to do any payment now and they could consider a payment afterwards. He also said other things that give me reason to believe that improper pressure was put on Mr Kernbach by R+V which are referred to hereunder and/or referred to in Mr Kernbach's written summary of 10 February 2006. Mr

> Kernbach also made it clear that he would not talk to Risk any further and that any further communications would have to be in writing.
>
> 8. At paragraph 6 Mr Wilkinson accepts, on instructions, that there was a conversation between Dr Hasse and Mr Kernbach in which Dr Hasse told Mr Kernbach that it would be a conflict of interest and a beach of his duties to R+V, including a duty to keep secret his knowledge acquired while acting as a director of the company. This is an admission of almost all of Risk's case on this subject. It carries the implication that R+V would take legal action against Mr Kernbach if he gave evidence for Risk, which is a clear contempt.
>
> 9. However Mr Kernbach says that Dr Hasse went further and told him that if he helped Risk with evidence there would be repercussions in the form of suspension of his pension and refusal to pay his fees. This is consistent with what Mr Wilkinson admits Dr Hasse as saying. It is important that Mr Wilkinson's carefully worded affidavit does not deny this. Mr Kernbach's statements, read with Mr Wilkinson's admissions, plainly do give rise to a prima facie case of contempt."

66. Obviously I cannot on this application resolve factual issues concerning what was said by R+V and/or Dr. Hasse to Mr. Kernbach. I would merely observe (1) that I do not agree with Mr. Page that Mr. Wilkinson's evidence carries the implication which he suggests in the last sentence of paragraph 8 of his second affidavit and (2) the first sentence of paragraph 9 of Mr. Page's second affidavit goes beyond what is stated in Mr. Kernbach's own summary. Mr. Kernbach apparently has his own independent legal representation in Germany. A Dr. Filippi of the German firm of lawyers representing Mr. Kernbach has confirmed that Mr. Kernbach "gave a Witness Statement in London in June 2004 and that this was given without any pressure or threats from R+V Insurance, or any of its employees."

67. Insofar as Risk suggests that Mr. Kernbach's evidence at trial was influenced by improper pressure brought to bear upon him by R+V, or by Dr. Hasse on its behalf, that is a matter upon which Risk can rely in seeking to have the judgment of Moore-Bick J set aside, if so advised. Nothing I say in this judgment is intended to or can properly have any bearing on Risk's freedom of action in that regard.

68. Insofar as Risk suggests that Mr. Kernbach was improperly prevented from assisting it in relation to the quantum hearings, and injunctive relief is sought preventing the perpetuation of such improper pressure, that is of course now water under the bridge. I have struggled to understand what relevant factual evidence Mr. Kernbach could in fact have given, bearing in mind that Risk joins issue with the suggestion by R+V that

Mr. Kernbach was approached with a view to his assisting as an expert. Evidence as to whether R+V could or would have obtained the Risk portfolio by other means became irrelevant in the light of Gloster J's rulings although it is I suppose said that it was not at the relevant time appreciated that that would prove to be the case. The only other matter upon which it is suggested that Mr. Kernbach could have given factual evidence is as to "what was going on in R+V's offices in late 2002." I cannot rule out that Mr. Kernbach may have had something relevant to contribute on that score but it is not immediately obvious to me that it would have added to or subtracted from the picture as it has otherwise emerged. If there are grounds upon which to seek to set aside the various judgments including those relating to quantum or upon which to suggest that R+V should be denied the further assistance of the court in enforcing any of the judgments it has obtained against Risk, then Risk has its remedies and again nothing I say in this judgment is intended to impinge upon that. I cannot think however that injunctive relief is any longer of any utility. In reality, the only purpose of Risk in pursuing R+V for contempt is in order to further the investigation of what precisely transpired between R+V and/or Dr. Hasse and Mr. Kernbach with a view, possibly, to inviting the Court in due course to impose a fine upon R+V. The purpose of pursuing the proceedings against Dr. Hasse is in order to secure his committal to prison as punishment for what he is alleged to have done by way of interference with the course of justice.

69. If and insofar as R+V or anyone acting on its behalf is shown to have acted improperly in obtaining judgments against Risk, the Court does not lack powers to ensure that R+V is denied the fruits of its wrongdoing. However as I see it the purpose of this free-standing allegation of contempt against both Dr. Hasse and R+V is, at any rate now that injunctive relief is no longer appropriate, purely and simply in order to seek to persuade the court to impose sanctions by way of punishment for what has allegedly been done. In my judgment it is clear that the court lacks jurisdiction to entertain such an application. This is unsurprising. What is alleged is not that R+V, as a litigant before the court, has failed to do what it was ordered to do or done that which it was ordered not to do. What is alleged is that R+V and/or Dr. Hasse have interfered with or obstructed the course of justice, which as Mr. Edelman observes is a crime usually prosecuted by the Attorney General. This is classified as criminal contempt – see Arlidge, Eady and Smith on Contempt, 3rd Edition, at paragraphs 3-1 and 3-27. It is criminal contempt even if committed in relation to civil proceedings – see Arlidge at paragraph 3-28. However the acts alleged to constitute the criminal conduct are all acts committed overseas by foreign nationals or by a foreign corporation. Subject to immaterial exceptions, the court has no jurisdiction in respect of acts done abroad, save insofar as they amount to a breach of an order of the court by a person who is already amenable to the jurisdiction of the court in respect thereof. The learned editors of Arlidge expand upon the point at paragraph 3-40 as follows: -

> "One of the difficulties about dealing with breaches of Court orders which take place abroad concerns the question of whether the alleged contemnor can be deemed to be before the Court (as in the case of a litigant who has been duly served, including by way of substituted service). Once such a person is, in that sense, truly before the Court, there seems to be no reason why a breach would not be susceptible to the law of

> contempt. By contrast, when the act in question is done by a person who is not regarded as before the Court, even in the artificial sense, there can only be an act of criminal contempt. In that context, the Court would have no jurisdiction in respect of acts done abroad, in the absence of specific statutory provision."

70. In relation to the contempt here alleged it is clear in my judgment that the court simply lacks jurisdiction to deal with it as contempt, i.e. in the exercise of a criminal jurisdiction, notwithstanding the court may properly exercise a criminal jurisdiction within the confines of civil proceedings. As I have already indicated, that does not mean that the court is powerless to deal with the consequences of the conduct alleged insofar as it has affected the outcome of litigation conducted before it. What the court lacks however is the power to impose punishment for the alleged crime. That is not surprising. Subject only to specific exceptions grounded in the common law or created by statute, the court does not have a criminal jurisdiction extending beyond the boundaries of England and Wales. That is why neither the Rules of Court nor any relevant European Regulation provide a mechanism pursuant to which Risk may effect service or seek permission to effect service of its Application Notice upon either R+V or Dr. Hasse.

71. Mr. Page made the bold submission that what is stated in the last sentence of paragraph 3-40 of Arlidge is not justified by the authority cited in support thereof, Lakah Group v Al Jazeera [2002] EWHC 2500, a decision of Eady J, himself one of the learned editors of Arlidge. With respect I disagree, but in a sense this is irrelevant since what is stated in the relevant passage is in any event a statement of basic principle for which there is ample authority elsewhere. The Lakah Group case happens simply to be one example of the basic principle in operation. Similarly I regard nothing said in Attorney General for England and Wales v Tomlinson [1999] 3 NZLR 722 as detracting from this basic principle. Even as against R+V, Mr. Page's problem is that Risk's allegation is not of a civil contempt consisting in disobedience to an order of the court to whose jurisdiction R+V has submitted but rather of a criminal contempt in respect of which the court has no contempt jurisdiction in respect of acts done abroad.

72. It was for these reasons that I struck out the application to commit Dr. Hasse to prison. The court has no jurisdiction to entertain the application. However as I have demonstrated precisely the same is true of R+V in respect of the matters alleged against it. Whatever other powers it may have to deal with the consequences of R+V's alleged conduct, the court has no jurisdiction to deal with that conduct as a contempt of court committed by R+V. Accordingly Risk's Application Notice of 2 March 2006 must be struck out.