Neutral Citation Number: [2006] EWHC 42 (Comm)

Case No: 2003 Folio 413

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27th January 2006

Before :

MRS JUSTICE GLOSTER, DBE

- -

Between:

R+V Versicherung AG	**Claimant**
- and -	
Risk Insurance and Reinsurance Solutions SA & Others	**Defendants**

- -
- -

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

Hearing dates: 26th/27th September 2005 – additional written submissions 29th September & 4th/5th October 2005

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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MRS JUSTICE GLOSTER, DBE

Mrs Justice Gloster, DBE:

1. This was a hearing to determine certain issues of principle in relation to the quantum of the claimant's claim, following the judgment on liability in the claimant's favour given by Mr Justice Moore-Bick (as he then was) on 18 November 2004, following an eight week trial.

2. The full factual background to this matter can be found in the judgment. For present purposes, I need only summarise the facts as follows.

3. The claimant, R+V Versicherung ("R+V"), is a major German reinsurance company with its main offices in Wiesbaden. The defendants are members of a group of companies that operates under the name "Risk Insurance and Reinsurance Solutions". I shall refer to the defendants collectively as "Risk". Risk carries on business in various jurisdictions as insurance intermediaries. The day to day operations of the group are under the general control of a Mr Jean-Claude Chalhoub who was based in the Paris office. He was also joined as a defendant to these proceedings for costs purposes.

4. The action principally concerned the negotiation and operation of two binding authorities (or "Binders") under which R+V authorised the first defendant Risk Insurance and Reinsurance Solutions SA ("Risk France"), to write contracts of reinsurance on its behalf obtained through the London market. The two Binders were negotiated and signed on 28 September 2001 by Mr Daniel Gebauer, the then chief (non-life) underwriter of R+V, on behalf of R+V. The first binder ("the SHTTL Binder") allowed Risk France to bind short tail property and contingency risks on behalf of R+V, subject to the terms of the Binder. The second binder ("the UNL Binder") allowed Risk France to bind personal accident risks on behalf of R+V, again subject to the terms of the Binder.

5. Each of the Binders was contained in a document with a number and letter reference which called itself a "reinsurance agreement", and which was signed and stamped on behalf of R+V. I shall refer to these documents as "the Slips". They made provision for commissions to be paid by R+V to Risk in respect of all the business written to its account at rates which were, as Moore-Bick J found, broadly in line with, but, if anything, more generous than, the prevailing market rates for business of this kind. Each slip also included a clause stating that the document contained the entire contract between the parties.

6. In fact, on the same date that the parties signed each of the Slips, Mr Chalhoub, on behalf of Risk, and Mr Gebauer and Mr Peter (a subordinate of Mr Gebauer), purportedly on behalf of R+V, signed documents calling themselves "Addendum No 1" to, respectively, the SHTTL and the UNL Binders ("the Addenda").

7. The Addenda purported to provide that Risk should receive an additional commission of 40% of the original gross premium in respect of all contracts written during the first year ("the 40% Deduction") and, in return, for R+V to receive what was described as a "cession" of 30% of the share capital of Risk Insurance and Reinsurance Solutions Limited ("Risk UK"), an English company formed by Risk to act as an intermediary agent in the London market. Risk UK had no right to any of the income under the Binders and at the time the shareholding had no value.

8. In the main action, it was R+V's case that the Addenda were entered into without the authority of R+V and as a result of a conspiracy between Risk and Mr Gebauer. R+V claimed payment of the sums deducted pursuant to the Addenda (whether as damages for breach of duty or on the basis that Risk was not entitled contractually to deduct the same), as well as outstanding premiums in respect of business to which R+V had been bound by Risk. R+V also claimed payment of premiums due under a third binder ("the ING Binder").

9. In his judgment dated 18 November 2004, Moore-Bick J gave judgment for R+V. In his conclusions he stated that:

> "248. …. In effect, therefore, the agreement committed R+V to making a significant payment to Risk to fund the operation with no clear entitlement to recover it. Mr. Gebauer knew that he did not have authority to make a contract of that kind without Mr. Kernbach's approval and I am satisfied that he was also well aware that neither Mr. Kernbach nor the board would have approved an arrangement of that kind. Indeed I think he must have been aware that the board would not have approved such an arrangement with any prospective partner, even with proper safeguards, in view of the tight financial restrictions it had imposed.
>
> 249. If, as I think, Mr. Gebauer understood very well that the terms agreed with Mr. Chalhoub involved the acquisition by R+V of a shareholding in Risk UK, there were at least two reasons as far as he was concerned for putting part of the agreement into an addendum, thereby making it easier to conceal both its existence and the true nature of its contents: first, the deduction in respect of the additional 40% commission (which was bound to come to the attention of the accountants as soon as detailed statements of account were supplied) could be passed off as a premium deposit; secondly, the acquisition of shares could be passed off (if anyone asked, which was not very likely) as a security arrangement in the nature of a pledge. …
>
> 250. … I am satisfied that Mr. Gebauer took steps to ensure that copies of the Addenda did not find their way onto the files. …
>
> 251. … In my view there is no escaping the conclusion 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."

10. Moore-Bick J went to hold that Mr Chalhoub knew that the arrangements did not have the approval of R+V. He continued, at paragraph 254:

> "254. In the light of all the evidence I am satisfied that the Addenda to the London binders were the result of a dishonest conspiracy between Mr. Gebauer and Mr. Chalhoub which began in the spring of 2001, led to the signing of the binders and their Addenda in July and September 2001 and was pursued throughout the remainder of 2001 and 2002 in the ways described earlier in this judgment. Having proposed a form of close co-operation between their two organisations, Mr. Chalhoub was able to take advantage of Mr. Gebauer's obvious enthusiasm for the London operation by persuading him to agree to terms that were very advantageous to Risk and manifestly disadvantageous to R+V. Since Mr. Gebauer was willing to co-operate, they were able to agree without any serious negotiation on the terms that were subsequently put into the Addenda in order that their existence and true nature could be concealed. The effectiveness of that step is apparent from the fact that between them Mr. Gebauer and Mr. Chalhoub were able to suppress the existence of the Addenda until the audit in March 2003 made it impossible to do so any longer. If the relationship between R+V and Risk had not broken down for other reasons and if Mr. Gebauer had taken over Mr. Kernbach's position in May 2003, it is quite possible that the Addenda would not have come to light until very much later, if at all. I am satisfied that Mr. Chalhoub was well aware that Mr. Gebauer had no authority to commit R+V to agreements on these terms and that he was in breach of his duty to R+V in purporting to do so."

11. Moore-Bick J, therefore, found that Mr Gebauer had no authority to enter into the Addenda, that this was known by the defendants (through Mr Chalhoub) and that the Addenda were entered into as part of a dishonest conspiracy between Risk and Mr Gebauer. The judge further found that R+V was entitled to terminate all its Binders with the defendants and could claim damages for conspiracy. The judge dismissed the first defendant's counterclaim for damages for wrongful termination.

12. The judgment did not deal with quantum or remedies, but provided that there should be judgment for R+V against the defendants for all sums due under the UNL, SHTTL and ING Binders (such sums to be assessed) and damages for conspiracy. Moore-Bick J made an order for an interim payment of £5 million on 16 December 2004. This has been paid out of certain London bank accounts held by the defendants, which are the subject of an asset preservation order obtained by R+V and which contain R+V premium monies. R+V is required to hold the £5 million in an account in London pending the determination of R+V's remedies.

13. By orders dated 16 December 2004 and 18 February 2005, the defendants were ordered to pay a total of £1 million on account of R+V's costs (other than costs in relation to remedies) on an indemnity basis.

14. Following the handing down of the judgment on liability, various directions were given in relation to remedies. In particular, an order was made for a joint expert accountant to be appointed to draw up an account of what was owed by each party under the Binders. Both parties have served pleadings in relation to quantum. By an order dated 11 March 2005 a two-day hearing was set aside to allow certain issues of principle in relation to remedies to be determined. This was originally listed for July 2005, but was relisted in May for 26 and 27 September, following Moore-Bick J's appointment to the Court of Appeal. The rationale for this hearing was that it would identify which disputed items should in principle be included in, or excluded from, the account to be prepared by the joint expert, and would identify which heads of damage were in principle recoverable by R+V, thus allowing the parties better to prepare for the final quantum hearing.

15. The matter came before me for a case management conference on 9 August 2005. At that hearing Risk sought to resist any issues of principle being determined prior to the final remedies hearing (even though they had previously appeared to support the idea) and sought to vacate the hearing listed for 26 and 27 September. I rejected Risk's arguments and ordered that the hearing on 26 and 27 September should proceed. Having heard submissions from the parties, I directed the issues that should be determined on 26 and 27 September.

16. By an application dated 7 September 2005, Risk made a further attempt to vacate the hearing and extend the time for service of evidence after changing solicitors for the third time. That application was dismissed by Christopher Clarke J. The final remedies hearing has now been listed for 20 March 2006, with a time estimate of three to six days.

17. At the hearing before me there was a further refinement and cutting down of the issues which I was asked to decide, in the light of late evidence served on behalf of Risk. Ultimately it was agreed, or I decided, that I should determine the following issues of principle, which I summarise before explaining the context in which they arise.

Issue A: the recoverability of the 40% Deduction:

i) Are the respective Binders and Addenda separate or single agreements?

ii) Has R+V ratified the Addenda (or the Binders and the Addenda, if the respective Binders and Addenda form single agreements)?

iii) If R+V has ratified the Addenda or binders and Addenda, does such ratification exonerate the defendants from the breaches of duty pleaded against them and/or is it open to the defendants to argue that they are exonerated from the breaches of duty pleaded against them in the light of the findings in the judgment and/or would such an argument amount to an abuse of process? (In fact, this issue did not arise for me to determine as

Risk conceded that, even if there had been ratification of the Addenda, there was no exoneration of Risk's breaches of duty.)

iv) Should the account between the parties take into account the 40% Deduction?

v) Are the defendants estopped from asserting that they are not liable for the tort of conspiracy and/or to repay the 40% Deduction (whether as damages or otherwise)?

vi) Are the defendants precluded in the light of the judge's findings from arguing that the 40% Deduction is not recoverable in damages and/or would it be an abuse for the defendants to seek to argue the same?

vii) Does the 40% Deduction constitute loss and damage to R+V as a result of the conspiracy;

viii) Is Risk liable to account as a constructive trustee for the 40% Deduction and/or liable to compensate R+V in equity for the said sum and/or liable in respect of secret profits received in fraud of R+V?

ix) Do the breaches of fiduciary duty alleged at paragraph 21 of the Points of Claim also amount to breaches of contract and, if so, what heads of loss are recoverable in principle as damages for breach of contract, subject to proof of causation and quantification?

Issue B: Risk's entitlement to other deductions

i) Is a claims handling fee payable in respect of claims not handled and/or paid by the defendants on behalf of R+V?

ii) What, if any, fees are the Defendants entitled to under the ING Binder? (It was agreed that this issue would not be decided at this stage.)

iii) How should profit commission be calculated?

iv) Should any credit be given in this claim for any sums due to the Defendants under the French property agreement?

Issue C: recoverability of costs and expenses

i) Which of the heads of loss listed at Schedule 2 of the Amended Points of Claim in relation to quantum are recoverable in principle, subject to proof of causation and quantification? In particular, can R+V recover damages in respect of its internal management and staff time and internal overheads except to the extent that R+V can prove that it has suffered a loss of profits due to the diversion of internal resources caused by an actionable wrong by Risk in relation to which R+V has succeeded in this litigation?

Why Issue A arises

18. Before I determine the various issues that arise under Issue A, it is necessary to give an indication of their relevance to the determination of the quantum claim.

19. Risk wishes to contend that R+V has ratified not only the Binders but also the Addenda. Risk alleges that the ratification of the Addenda was confirmed in R+V's letter dated 17 April 2003, by which R+V, having referred to the Binders "including the respective endorsements and memoranda", terminated the "contracts referred to above on the grounds of Risk's repudiatory breach of contract". Moore-Bick J found that R+V was "fully justified in treating both agreements as terminated with immediate effect" and made a declaration to that effect.

20. Risk accepts that its ratification argument can only succeed if the respective Binders and their respective Addenda are single transactions. If the transactions have been ratified, then Risk submits that, although R+V is not precluded from bringing a claim for damages for conspiracy, and although Risk does not suggest that ratification is a defence to R+V's claim for damages for conspiracy, nonetheless:

    i) Risk was, and is, entitled contractually to deduct the 40% commission notwithstanding R+V's claim for damages for conspiracy;

    ii) R+V has not suffered any loss or damage as a result of the conspiracy or the 40% Deduction because the "loss" of the 40% commission resulted not from the conspiracy but from R+V's decision to ratify the binders; alternatively to ii)

    iii) if, contrary to ii), loss has been suffered as a result of the conspiracy, then it cannot be taken necessarily to be the 40% Deduction since R+V has to prove the actual loss, if any, it has suffered as a result of the conspiracy; i.e., in general terms, the difference between the 40% "charged" by Risk and what it would have cost R+V to obtain in the market the reinsurance services provided by Risk.

21. Mr Colin Edelman QC, on behalf of R+V, contends, as a threshold point, that, in the light of Risk's conduct of its defence at trial, and the judgment of Moore-Bick J, it is not now open to Risk to argue that R+V ratified the Addenda by seeking payment of the premium due under the UNL and SHTTL Binders and/or by terminating the Binders with effect from 17 April 2003. Nor, submits Mr Edelman, is it open to Risk to argue that the 40% Deduction is not recoverable, or that Risk is exonerated, by reason of the ratification, for responsibility for its breaches of duty. Mr Edelman relies variously on *res judicata*, estoppel, and on the principle that it is an abuse, in subsequent proceedings, to run an argument for the first time when it could and should have been raised at an earlier hearing: see *Johnson –v- Gore-Wood* [2002] 2 AC at 22-34 per Lord Bingham, where he sets out the principles deriving from the original statement of Sir James Ingram VC in *Henderson –v- Henderson* 3 Hare 100 and the succeeding cases in the same line of authority.

22. Mr Hugo Page QC, on behalf of Risk, made it clear that he was not arguing that R+V was precluded by the alleged ratification from claiming damages for conspiracy; nor was he now arguing (as certain paragraphs of Risk's Defence to the quantum claim

had suggested) that Risk was in any way exonerated by the ratification from liability for its breaches. He now made the more limited submissions set out in paragraph 20 above, namely that the alleged ratification impacts both on the causation and the quantum elements of R+V's claim in damages for conspiracy.

Issues A (v) and (vi)

23. It has been a somewhat difficult task for me, not having been the trial judge, to decide whether Risk is indeed estopped or otherwise prevented on grounds of abuse of process from advancing the points which it now seeks to put forward. However, from a reading of the relevant written and oral submissions made at trial by Mr Alistair Schaff QC, leading counsel then acting for Risk, it does appear that he accepted that, if there were a dishonest conspiracy, then it followed that R+V had a claim for damages for conspiracy in respect of the 40% Deduction. Certainly there was never any suggestion at trial, and prior to the pleading of Risk's quantum Defence, that, if dishonesty were indeed proved, R+V could not then claim the 40% Deduction as damages because its loss was caused by the subsequent ratification of the Binders and the Addenda, and not by the conspiracy itself.

24. Thus, in Risk's opening submissions, the statement was made, at paragraph 47:

> "Ratification: or blowing hot or cold
>
> 47. If the court finds that Risk were party to a dishonest conspiracy to injure or cause loss by unlawful means, then there is no impediment to a claim for the 40% deduction as damages for conspiracy."

25. This was then followed, in paragraph 48-51 of the written opening, with detailed submissions as to how, absent dishonesty, R+V had no claim "in contract or otherwise" for the 40% Deduction, specifically because, in those circumstances, R+V must have ratified the Binder and the Addenda. In my judgment, the clear implication of this passage (and other passages in oral argument) was that Risk, by its legal representatives, was accepting, rightly or wrongly, that, in the event that the dishonesty case was proved against Risk, there would be no room for the deployment of any arguments based on ratification to deprive R+V of its claim for damages for conspiracy based on the loss arising from the 40% Deduction. To similar effect are Mr Schaff's written closing submissions at paragraphs 15-22; and the comments which he made orally on Day 27 of the transcript of the hearing, on 27 July 2004 pages 174-177 as follows:

> "MR SCHAFF: I am making a different point, which is that R+V are saying prior to termination, for the period prior to April 17th, 2003, they are entitled to recover the 40 percent deduction.
>
> MOORE-BICK J: Yes, I am with you. Sorry, it is my fault.
>
> MR SCHAFF: With respect, it is my fault, because that is the issue. I mean in the scale of things, one of the …

MOORE-BICK J: I think what slightly put me off my understanding was you said they had affirmed the contracts, it said they have not. They have purported to treat them as discharged.

MR SCHAFF: They have ratified them ab initio and terminated them from 17th April.

MOORE-BICK J: If they have purported to treat them as discharged by breach.

MR SCHAFF: Yes.

MOORE-BICK J: Not to avoid them.

MR SCHAFF: Absolutely. …

MR SCHAFF: But they are also claiming for the period prior to termination to say that, 'We, R+V, can get our hands on the 40 percent.

MOORE-BICK J: Yes, I think I probably lost sight of that.

MR SCHAFF: ' … and that is worth a fair bit of money as well'. My point about this is that in order to do that, they can only do that as damages for unlawful means conspiracy.

MOORE-BICK J: Yes.

MR SCHAFF: They cannot say, 'Yes, the contract was in existence up until termination', and say, 'Well, we will take all the nice profitable business out of that, but re-write the contract and not give you your 40 percent whilst the contract was under foot'. <u>The only way they get round that – and I accept this – is that if in fact the creaming off of the premium was the unlawful means conspiracy which they prove, then they can recover that as damages for the unlawful means conspiracy</u>. That is the only point I am making, but one just needs to put it in its legal context. So far as termination is concerned, that obviously is prospective and carries one forward to what would have been the end of 2004.

MOORE-BICK J: It is not being said that the addenda are severable from the main contract, is it?

MR SCHAFF: It is very difficult to say that.

MOORE-BICK J: There is nodding going on on the other side of the court.

> MR SCHAFF: You can say it, and obviously if it is fraudulent and it is part of the suspicion to defraud, then there is no problem of getting …
>
> MOORE-BICK J: It is not really a problem <u>if there is a conspiracy because you are going to get the money one way or another</u>.
>
> MR SCHAFF: <u>I agree</u>." (emphasis added)

26. At paragraph 255 of the judgment, the learned judge said:

> "In those circumstances when R+V discovered the existence of the Addenda it was in my view fully justified in treating both agreements as terminated with immediate effect and is entitled to recover damages for conspiracy. The precise nature and scope of the remedies to which it is entitled will be the subject of argument on a later occasion."

27. At that stage, the only claim for damages by R+V was in respect of the 40% Deduction (including the 40% deduction made in the business re-routed through the London accounts in respect of the French property business, to which I refer below, under Issue B(iv). In my view, it is unlikely in the extreme that the judge could have come to the firm conclusion that R+V "is entitled to recover damages for conspiracy" if there was any question remaining in play between the parties that ratification of the Addenda could subsequently be raised, notwithstanding the dishonesty finding, to support an argument by Risk that no loss whatsoever had been caused by the dishonest conspiracy, but only the ratification itself. If that was an argument that was going to be run by Risk then, in my judgment, that was an argument that had to be run at the liability trial because it was germane to the issue of liability. If, as Mr Page for Risk now submits, damage had only been caused by the deliberate choice of R+V to ratify the agency contract (by treating it as in existence until terminated on 17 April 2003), and not by the dishonest conduct of Mr Gebauer and Mr Chalhoub, then one of the necessary elements of the tort of conspiracy, namely damage, could not have been made out. Accordingly, in my judgment, it would not only be an abuse of process for Risk now to run that causation argument, but also it is precluded from doing so, on the grounds of issue estoppel, by the judgment of Moore-Bick J, who clearly concluded that R+V was entitled to damages for fraudulent conspiracy in respect of the 40% Deduction.However, that conclusion does not address the further point made by Mr Page that (irrespective of the causation issue) the <u>quantum</u> of any damages for the conspiracy was to be calculated by reference to the following factual and legal propositions:

    i) that the Addenda were part of the same agreements or transactions as the Binders;

    ii) that R+V's letter of 17 April 2003, terminating Risk's authority under the Binders on the grounds of repudiatory breach, also amounted to a ratification of the Addenda (by treating them as being in effect until that date) because there could not be reprobation and approbation of one single agreement;

iii) that Risk was contractually entitled to deduct the 40% commission;

iv) that, accordingly, the damages R+V had suffered as a result of the dishonest conspiracy had to be calculated by reference to the loss (if any) which R+V had suffered by being subject to agency contracts which provided for the 40% Deduction; and

v) that this involved R+V proving that:

a) it would have been able to underwrite all the risks that it did in fact underwrite under the Binders through another reinsurance intermediary and without paying the 40% Deduction, or, alternatively, establishing that it would have paid some lesser commission than the 40% Deduction; and

b) that it would in fact have entered into such business.

28. Thus, if I were to hold against R+V on Issues A(v) and A(vi) in relation to this quantum argument, the points identified at paragraphs 27(iv) and (v) above would fall for determination in the forthcoming March hearing. It was agreed that, insofar as issue A(iii) raised those points, it would not be decided at this preliminary hearing.

29. The way R+V puts its case on Issues A(v) and A(vi) can be seen from paragraphs 9-12 of its Reply in the Quantum Pleadings (excluding the references to exoneration, which is not a point now being taken by Mr Page, on behalf of Risk). R+V relied on the evidence given by Mr David Wilkinson, a partner of R+V's solicitors, LeBœuf Lamb Greene & MacRae, in support of its estoppel and abuse arguments. These arguments were amplified by Mr Edelman's written and oral submissions, where he referred to certain passages in the transcript of the hearing before Moore-Bick J as well as in Mr Schaff's written submissions. Put simply, the thrust of R+V's arguments was that the stance taken by Risk at trial was that it was common ground that, if R+V made its case in dishonest conspiracy, then it would receive back in full the 40% that had been "wrongfully deducted", and that no question of ratification in relation to the Binders and the Addenda would then arise. Mr Wilkinson said:

> "If Risk had sought to argue at the trial that R+V were prevented from recovering damages for conspiracy, even in circumstances where there had been dishonesty, then I would have instructed Mr Edelman QC to oppose and argue against this. I did not do so because I relied upon the concession by Risk that this was not the correct legal position, and that, if a dishonest conspiracy were proved then no issue of ratification could arise."

30. On behalf of Risk, Mr Page submitted, in summary, as follows:

i) Throughout his judgment, the judge had treated the Binder and the Addenda as part of the same contract and R+V was bound by this. Mr Page relied in particular on paragraphs 25, 249 and 251 of the judgment.

ii) It was clear from paragraph 255 of the judgment that the precise nature and scope of the remedies to which R+V was entitled in the light of the judge's finding that it was entitled to recover damages for conspiracy was going to be the subject of argument on a later occasion. Therefore, no concessions made by Mr Schaff could be regarded as concessions relating to quantum issues.

iii) The concessions made by Mr Schaff during the course of the trial (and in particular what he said on Day 27, pages 175 *et seq*) cannot, on their true construction, amount to any concession about the quantum of R+V's claim in damages as that issue was not relevant at the liability stage. The most Mr Schaff was conceding was that, if dishonesty were proved, there was a claim for damages in conspiracy, but he was not conceding anything about the amount of such damages, which remained to be proved in the normal way.

iv) The judge expressly found that there had been ratification of the Addenda.

v) Mr Schaff could not have been accepting that a contract made as a result of a conspiracy could not be ratified because that would have been "legally illiterate". Further, he could not have been conceding that the argument as to ratification (and as to not being able to approbate and reprobate) did not apply in the event of dishonesty, since that would have been legally nonsense, as dishonesty is irrelevant to ratification.

vi) There was no evidence of reliance sufficient to support an estoppel argument and Mr Wilkinson's statement did not provide such evidence.

vii) If the judge had thought that it was common ground that the full 40% Deduction was recoverable he would have said so in his judgment, rather than merely leaving the quantum issue open for resolution at a later date.

31. In my judgment, having carefully considered all the materials to which I was referred, including relevant passages from various statements of case, and the precise way in which Risk conducted its defence at trial, I consider it would be an abuse of process for Risk now to seek to argue a case based on ratification of the Addenda as being allegedly part of one transaction with the Binders, so as to reduce the quantum of R+V's claim below the value of the 40% Deduction and so as to require R+V to prove the quantum of its loss as the full 40% Deduction, as well as the points listed in sub-paragraph 27(v) above.

32. There is no issue estoppel or *res judicata* in the strict sense in relation to this point, as Moore-Bick J was clearly not addressing the issue of quantum itself. However, it is clear from *Johnson –v- Gore-Wood & Co* (above), and in particular the speech of Lord Bingham at pages 30-31 quoted below, that abuse of process is a different concept and does not require the establishment of a *res judicata* in the strict sense. Lord Bingham said:

> "It may very well be, as has been convincingly argued (Watt, 'The Danger and Deceit of the Rule in *Henderson –v- Henderson*: A New Approach to successive civil actions arising from the same factual matter' (2000) 19 CLJ 287), that what is now taken to be the rule in *Henderson –v- Henderson*

> has diverged from the ruling which Wigram V-C made, which was addressed to *res judicata*. But *Henderson –v- Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings that it should have been , so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abuse in the process of the court by seeking to raise before it the issue which could have been raised before. As one cannot comprehensively list all possible forms of abuse, so one cannot formulate any hard and fast rule to determine whether, on given facts, abuse is to be found or not. Thus while I would accept that lack of funds would not ordinarily excuse a failure to raise in earlier proceedings an issue which could and should have been raised then, I would not regard it as necessarily irrelevant, particularly if it appears that the lack of funds has been caused by the party against whom it is sought to claim. While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party's conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. Properly applied, and whatever the legitimacy of its descent, the rule has in my view a valuable part to play in protecting the interests of justice."

33. Nor, in my judgment, is it necessary, in order to show that the principle of abuse is engaged, for R+V to establish the strict elements of an estoppel by representation, although, as a further ground for my decision, I do in fact conclude that Risk is

effectively estopped by its conduct at trial from running this point, as a result of the representations which it made and R+V's reliance on them.

34. My reasons for my conclusion that it would, in all the circumstances, be an abuse of process for Risk now to run these arguments on quantum may be summarised as follows.

35. I reject Mr Page's submission that the judge treated the Addenda as part of the same transaction or contract as the Binders in the passages in the judgment upon which Mr Page relied. Likewise, I reject Mr Page's submission that the judge expressly found that there had been ratification of the Addenda. Neither of these two issues (viz. whether the Addenda were separate transactions from the Binders or whether there had been ratification of the Addenda) needed to be addressed by the judge in the light of Mr Schaff's concession as to the agreed position as between the parties at trial; namely that it did not matter whether or not the Addenda were separate or severable from the Binders and were made without authority (and therefore not contractually enforceable by Risk), since, even in the event that the Addenda had been ratified and were not separate or severable, the full amount of the 40% Deduction would be recoverable as damages for conspiracy. No reservation, either express or implied, was made by Mr Schaff at that time to the effect that R+V would have to prove the actual amount of its loss because of ratification of the Addenda. In my judgment, if that point were indeed being reserved for determination at the quantum hearing, it should have been expressly and unambiguously reserved. That was because, in the circumstances of this case, it was clearly the function of the trial judge, at the liability hearing, to determine all necessary factual matters so as to establish the parties' rights and obligations, so that the issue of the claimant's remedies and the quantum of its claim could be decided, at a later date, upon the basis of the judge's findings at trial, and without relitigating the issues ventilated at trial. A trial now, before me, of Issues A(i), A(ii) and A(iv) would in reality amount to a relitigation of issues that were before the judge at the liability hearing and which counsel for both parties agreed did not arise for determination in the event of a dishonesty finding. In my view, it would be abusive in the extreme if new counsel for Risk were entitled to run such arguments at this stage, given the basis upon which the litigation was fought before Moore-Bick J. It follows that I also reject Mr Page's remaining submissions as identified above.

36. In coming to this conclusion, I rely not only on the passages in the transcripts and written submissions referred to above, but also upon the following passages:

    i) A passage in the transcript of the hearing on 14 July 2004, at Day 23 of the trial, page 130 where agreement between Mr Edelman and Mr Schaff is recorded to the effect that there was no need for expert evidence to be called by either party at trial, whether as to authority or otherwise, since it was accepted on both sides that it was a case of dishonesty or nothing, and if the dishonesty case was proven, then the full amount of such loss was the 40% Deduction.

    ii) There was a post-judgment hearing on 18 February 2005 before Moore-Bick J, which was a case management conference at which, amongst other things, Risk sought permission to appeal. In the course of argument as to whether that application should be adjourned until after the quantum hearing, the following exchange took place between the learned judge and Mr Jeffrey Onions QC,

then leading counsel for Risk (after a further change of solicitors and counsel), at pages 30 to 31:

> "MR ONIONS: To contend that R&V would have made an agreement with Risk on more favourable terms is not something that they can contend in the light of that finding, so the point is that you are not comparing to assess the loss and damage, here is the agreement that was made and here is the agreement that would have been made – which is what my learned friend is trying to do by saying you take the binder but not the Addenda. What you are comparing is here is the agreement that was made and here they did not enter into any agreement at all. That is why we say the correct approach to loss and damage, actionable loss as a result of this conspiracy, is to compare the two positions, the position under the agreement that was made with the position as it would have been if no agreement had been made.
>
> MOORE-BICK J: The difficulty I have with that analysis is that it sounds to me as though what you are saying is although these persons engaged in a dishonest conspiracy, which involved removing substantial sums of money – the first year's premium – because the overall result was beneficial there is no loss to R&V, therefore no dishonest conspiracy, so it becomes a bit circular, and they can keep the 40 per cent. Is that right, is that the answer?
>
> MR ONIONS: My Lord, yes.
>
> MOORE-BICK J: They act dishonestly, knowingly dishonestly, yet they keep the fruits of their dishonesty.
>
> MR ONIONS: That is the result of the claimants saying we want to have the binders but not the Addenda.
>
> MOORE-BICK J: I can see an argument for saying you cannot have it both ways, you either get the benefits of the binders and pay the price, which includes the 40 per cent, or you do not, but that is an argument which goes to liability, not quantum. It is an argument that says, in effect, you chose to treat my conduct as lawful by adopting the agreement that I have made, warts and all, which includes 40 per cent going off to Mr Chaloub. That argument was never pursued in the litigation or trial." (emphasis added)

It is clear from the underlined passages that Moore-Bick J did not consider that such arguments would be open to the defendants.

37. I also refer to pages 34, lines 17-22 of the same transcript where Moore-Bick J accepted that Mr Schaff had accepted at trial "… that if he lost on dishonesty, he

lost". Again, that was in a context where the only claim for damages then being made was for the 40% Deduction.

38. In my judgment, the only sensible inference which can be drawn from Mr Schaff's conduct of Risk's defence at trial and the statements which he made, is that he was, in reality, accepting that, whilst the precise quantum of what amounted to the 40% Deduction was to be left open for further determination, there was no dispute in principle that the full 40% Deduction was recoverable as damages for conspiracy if dishonesty were proved. That was why Mr Schaff agreed with the judge's observation that there was no need for him to resolve the ratification and "severability" issues.

39. Although it is not strictly necessary for me to do so (since I have found on Issue A(vi) that it would be an abuse for Risk to seek to argue that the 40% Deduction is not recoverable in its entirety), I also hold under Issue A(v) that Risk is estopped from doing so. Had Mr Schaff stated that he was going to argue, at the quantum hearing, that the 40% Deduction was not recoverable in its entirety because of ratification of the Addenda, as opposed to making the representations that he did make, I have no doubt that Mr Edelman would have invited the learned judge to decide as issues at the liability hearing, not only ratification, but also the issue whether the Addenda were indeed separate transactions from the Binders, given, in particular the dishonest concealment of their existence and the description of the 40% commission as being in effect the consideration for the "cession" of shares in Risk UK. In my judgment, and contrary to Mr Page's submissions, R+V has indeed established reliance for the purposes of its estoppel argument. Accordingly, it is too late now for Risk to raise quantum arguments based on assertions of non-severability or separability, non-reliance and ratification.

40. Accordingly, in those circumstances, I do not need to decide, and do not decide, Issues A(i) and A(ii). Issue A(iii) does not arise in any event since Mr Page disavowed any arguments based on exoneration. As to Issue A(iv), it follows that the account between the parties should proceed on the following basis:

    i) that Risk has to repay the 40% Deduction that it has received to date; and

    ii) that Risk is not entitled to any further credit for the amounts equal to the 40% Deduction since either it was never entitled to deduct the 40% contractually, or alternatively, if it was *prima facie* so entitled, in the light of Moore-Bick J's judgment, Risk is obliged to repay the same amounts as damages for conspiracy.

41. Which of the two analyses is, in fact, the correct one, was the issue that, in my judgment, was effectively conceded by Mr Schaff at trial as not being necessary to decide in the event of a finding of dishonesty.

42. It also follows that, in the circumstances, it is not necessary or appropriate for me to decide Issues A(vii), A(viii) or A(ix).

Issue B(i): Is a claims handling fee payable in respect of claims not handled and/or paid by Risk on behalf of R+V?

43. The relevant provision in the Binders is:

> "Risk claim fees of 1% …"

44. Mr Page, on behalf of Risk submits that, on the wording of this clause, Risk is entitled to a 1% fee on all claims paid in respect of reinsurances written by Risk on R+V's behalf, irrespective of whether the claims were made or paid after the termination of Risk's agency or whether Risk itself performed any claims handling functions in relation to such claims. Mr Edelman, on behalf of R+V, submits that, on the true construction of the clause, the 1% fee is only payable on claims handled and/or paid by Risk prior to termination of its agency. In particular, he submits, that such a fee is not payable in respect of claims handled and paid by R+V since taking over the business.

45. The point is a short one. In my judgment, the provision, when read in the context of the Binders and their provision for payment of a commission of 8% on all original net premiums (a fee held by the learned judge to be more generous that prevailing market rates) is clearly what its says, namely a "claims" fee for handling claims, rather than a fee to which Risk can be regarded as entitled by simply writing the business, irrespective of whether it handles claims. It was common ground that it was calculated by reference to the claim amount paid.

46. Risk was also entitled to 2% commission in respect of administration costs, as well as its 8% commission. It seems to me that, as a matter of ordinary business common sense, it cannot be supposed that the parties envisaged that Risk would receive an additional 1% fee on paid claims if it did not in fact handle claims, because, for example, R +V had terminated its agency and appointed a new broker. Accordingly, I answer this issue in the negative.

Issue B(ii): what, if any, fees are Risk entitled to under the ING Binder?

47. It was agreed between the parties that this issue should not be decided at this hearing.

Issue B(iii): how should profit commission be calculated?

48. The Binders provided for Risk to receive a profit commission in respect of the business which it wrote on R+V's behalf. The relevant provisions were in the following terms:

> "Rate 25%
>
> Reinsurance expenses: 5%
>
> Profit commission, to be calculated at each anniversary date of the contract, first calculation to take place after 24 months of date of commencement on underwriting year basis. Results being premiums ceded less commissions, losses paid and case reserves for claims on know [sic] losses excluding IBNR

Losses carried forward 3 years."

49. The issue is whether the commissions and fees payable to Risk are, or are not, to be deducted prior to calculating Risk's 25% profit commission. It is common ground that profit has to be calculated after deduction of R+V's reinsurance expenses of 5% on the basis of the formula set out in the above provisions. However, Risk alleges that the commissions and fees payable to Risk (i.e. the 8%, the 2% and the 1% claim fees) are not to be deducted prior to calculating the 25% profit commission and that all that falls to be deducted under the head "commissions" are producing brokers' commissions.

50. I should say that I do not regard the evidence given at trial by Mr Gebauer or Mr Chalhoub as being of any assistance on this point; it is inadmissible as merely being evidence of their subjective intentions. Nor is the statement of Mr Mark Burbidge, one of the reinsurance market experts, of any assistance on this point. As Mr Page accepted, the point is essentially one of construction and Mr Burbidge does not purport to give any expert evidence of market practice or the like that would assist in my determination.

51. In my judgment, there is no justification for reading the word "commissions" as excluding Risk's fees or commissions or otherwise limited in the way Mr Page submits. As Mr Edelman submitted, Risk's suggested interpretation is contrary to the concept of a profit commission. Necessarily, if Risk's fees are not deducted, R+V is in effect paying a commission not on its <u>profits</u> (i.e. premiums net of commissions, expenses and allowable provisions for liabilities) but rather on its gross revenues. Thus, even if R+V had not made a profit, if Risk's commissions were taken into account, nonetheless, on Mr Page's construction, it would still be liable to pay 25% profit commission (effectively) on the amount of Risk's own fees. As with the previous point, that construction does not accord with ordinary business common sense. Accordingly, in my judgment Risk's fees and commissions of 8%, 2% and its 1% claims handling commission (where appropriate) must be deducted before calculation of the 25% profit commission. However, obviously, in calculating Risk's profit commission, no deduction need be made in R+V's favour in respect of the 40% first year commission, since whether or not the 40% Deduction is characterised as a commission which Risk was *prima facie* contractually entitled to receive, the reality is that R+V has not, in the event, had to bear that commission. Accordingly, I find against Risk on this issue.

Issue B(iv): Should any credit be given in this claim for any sums due to the Defendants under the French property agreement?

52. In these proceedings R+V claims the premiums received by Risk in respect of French property business written under a proportional quota share reinsurance contract reference PROFR+V30G1 signed by Mr Gebauer and another on behalf of R+V on 1 August 2001 ("the French Property Agreement"), on the basis that Risk accounted for such business through the SHTTL Binder and paid the premiums into the London accounts; see paragraphs 66 and 226 of the judgment. This, however, was an accounting measure, so as to enable Risk to take the 40% Deduction on these French property premiums.

53. During the course of argument before me on this issue, it emerged that it was common ground that Risk was not contending either: (a) that it was entitled, in respect of these premiums, to deduct the "English commissions" payable under the Binders; this was because the agreement between Mr Gebauer and Mr Chalhoub was that, as the French commissions were already being paid in France, only the 40% Deduction would fall to be recovered through the English account; or (b) that, in these proceedings, it was entitled to retain the "French Commissions" payable under the French Property Agreement. In the light of my conclusions on Issue A, it follows that no retention can be made by Risk in the account in respect of the 40% Deduction, since the full amount of the Deduction is either not due or recoverable as damages for conspiracy. Accordingly, Risk must account for the full amount of the premiums in respect of the French Property Agreement accounted through the SHTTL Binder and, as Mr Page accepted, must claim such commissions as it may be entitled to under that agreement in other proceedings.

Issue C: recoverability of costs and expenses

54. It became common ground in the course of the hearing before me that R+V was entitled in principle, and subject to quantification, to recover, as damages for conspiracy, external costs and expenses incurred as a result of the conspiracy. The precise terms of the agreed concession by Risk was as follows:

> "It is agreed 'that subject to issues of causation, remoteness and reasonableness of the expenditure and to 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.'"

Accordingly, if not agreed, quantification of these amounts will fall to be determined at the March hearing.

55. The real issue under this head, however, is whether, as R+V contends, and Risk disputes, R+V is entitled to recover, as damages, internal management and staff time and internal overheads, except to the extent that R+V can prove that it has suffered a loss of profits due to the diversion of resources as a result of an actionable wrong.

56. It is R+V's case that it could, if necessary, establish certain loss of profit (for example, as a result of increased expenditure because of greater overtime) as a result of the conspiracy and/or breach of contract. If necessary, R+V has said that it will amend its claim to claim its loss on that basis. However, R+V has submitted that there is no need for them to embark on such an expensive and artificial exercise. The proposition that R+V intends to make good at the final remedies hearing in March 2006 is simply that the management and staff time engaged in seeking to remedy and/or mitigate the wrong, and/or handle claims, caused a significant disruption to its business and that, but for the wrong, the staff in question would otherwise have been engaged on other matters. It is submitted that on that basis, R+V may recover for the expense of managerial and staff time spent in investigating and mitigating the conspiracy (and/or breach of contract) and handling the claims, without the need to show any specific loss of profit.

57. Risk, on the other hand, contends that R+V can only recover as damages internal management and staff time and internal overheads to the extent that it has suffered a loss due to the diversion of resources as a result of the conspiracy.

58. The authorities to which I was referred in this area are not easy to reconcile. In *British Motor Trade Association –v- Salvadori* [1949] Ch 556, the plaintiff was a trade association of which all British car manufacturers and authorised dealers were members. The Association had a policy of preventing the immediate resale of new cars in order to avoid price inflation given the shortage of supply. It therefore required dealers and purchasers to enter into a deed of covenant with the association not to resell for a period of 12 months. The defendants were members of a group of rogue traders known as the "Warren Street kerb market", who were either not members of the plaintiff association or on its stop list, and therefore could not acquire new cars through authorised channels. The defendants obtained new cars by devious means which either involved breaches of the deeds of covenant or procuring breaches by purchasers. The plaintiff was held to be entitled to recover as damages for conspiracy the costs of maintaining its investigation department insofar as they were attributable in "unravelling and detecting the unlawful machinations of the defendants", even though these costs were not specifically referable to a particular claim and even though no lost "profit" could be shown.

59. Roxburgh LJ said the following at page 569:

> "To resist such a counter-attack and also counter-attacks from various other directions, the plaintiffs maintain, and must maintain, a large investigation department, and the money actually expended in unravelling and detecting the unlawful machinations of the defendants which have been proved in this case before any proceedings could be taken must have been considerable. I can see no reason for not treating the expenses so incurred which could not be recovered as part of the costs of the action as directly attributable to their tort or torts. That these expenses cannot be precisely quantified is true, but it is also immaterial. Accordingly, the plaintiffs have proved the damage which is essential to the tort of conspiracy, and they are entitled to an inquiry accordingly.
>
> As I had already indicated, not all the overt acts are exclusively referable to the conspiracy. Two of them are referable, yet at the same time they involve breach of covenant. Two transactions, though forming no part of the conspiracy, represent breaches of covenant. As no conspiracy to make and break contracts by impersonation or otherwise is alleged, damages for each breach of covenant must be assessed separately, and great care must be taken to ensure that in no case are damages awarded twice over in respect of the same transaction. [Counsel for the defendants], however, contended that this is not enough. He submits that there should be no inquiry at all as regards damages for breach of covenant, because, as he contends, only nominal damages are recoverable. I do not think so. I think that as regards each

> separate breach the master must estimate as best he can the pecuniary loss which the plaintiffs have suffered having regard to the circumstances in which it occurred and the difficulties which have confronted the plaintiffs in detecting and unravelling it before they were in a position to take proceedings, and I shall direct an inquiry accordingly."

60. It is clear from this case (and, indeed, others) that in conspiracy, damages are at large and that the court is not over-concerned to require the plaintiff to prove precise quantification of its losses. Whilst I accept Mr Page's submission that the case does not go so far as to show that in any isolated case overheads can be claimed as loss without proving that the incurring of the overhead expenditure was directly attributable to the conspiracy, the case does show that it is not necessary to show a loss of profit that would otherwise have been made.

61. This approach was confirmed in another context by Forbes J in *Tate & Lyle Distribution –v- Greater London Council* [1982] 1 WLR 149. In that case, the defendant GLC had been responsible for causing silting of the River Thames, which prevented the plaintiff from having access to its barge mooring. The plaintiff claimed damages in respect of managerial time (which might otherwise have been engaged in the trading activities of the plaintiff company) which had to be spent on dealing with the initiation and supervision of remedial work. Forbes J said, at page 52E-F:

> "I have no doubt that the expenditure of managerial time in remedying an actionable wrong done to a trading concern can properly form the subject matter of a head of special damage. In a case such as this it would be wholly unrealistic to assume that no such additional managerial time was in fact expended. I would also accept that it must be extremely difficult to quantify."

62. What is clear is that Forbes J was referring to expenditure of time and not additional expenditure or loss of profit. Although he refused to award any sum in respect of management time because the time wasted had not been sufficiently particularised or proved, his conclusion is of assistance to Mr Edelman. Contrary to Mr Page's submissions, the point that such overheads were recoverable as damages was clearly argued, and I do not regard Forbes J's conclusion on the point as *obiter* as his decision on the point was a stage in his reasoning.

63. In *Lonrho –v- Fayed (No 5)* [1993] 1 WLR 1489 at 1497, the Court of Appeal approved *British Motor Trade Association –v- Salvadori*. The appeal related to the striking out of a claim as an abuse. Dillon LJ accepted that time spent investigating or mitigating a conspiracy was recoverable in principle.

> "*British Motor Trade Association v. Salvadori* [1949] Ch. 556 indicates that time spent in detecting and countering a conspiracy can be included in a claim for damages, at any rate if, as in that case, there is also other pecuniary loss; in a simple case where there is other pecuniary loss, that seems elementary justice. Mr. Munby submits that, since, with a "lawful means" conspiracy, damage is the gist of the cause of action, it would

> be self-serving to allow the mere cost of staff time, or payment to third parties, to investigate and uncover the conspiracy to count as damage and warrant the bringing of the action if the acts done by the conspirators have caused no other damage to the victim. But that, in my view, is a matter better gone into at the trial when fuller facts are available to show what actually was done by Lonrho staff that is claimed under this heading."

64. Stuart-Smith LJ (at 1505E-F) and Evans LJ (at 1507H) agreed with this part of Dillon LJ's judgment. I would accept (although this case was only an interlocutory strike-out application) that *Lonrho –v- Fayed* shows that, in principle, such a claim is good at law. The reference, however, to the potential need to prove some other pecuniary loss in addition to the time spent remedying or mitigating the damage is perhaps difficult, with respect, to understand. Either the claim for wasted employee time amounts to recoverable loss or it does not. Why should it make a difference whether there is another clearly recoverable head of loss?

65. However, although the Court of Appeal decided that the claim for staff time spent in detecting and countering a conspiracy could be maintained in the pleading although there was no loss, the Court was effectively ruling that the correctness of the proposition that damage could be shown in such circumstances was something that should be decided at trial.

66. There is, in any event, in this case, unarguably other pecuniary loss suffered by R+V, namely the 40% Deduction.

67. In *Standard Chartered Bank –v- Pakistan National Shipping* [2001] EWCA Civ 55, the Court of Appeal referred to *Tate & Lyle* and allowed an appeal against an award which had permitted a claim in respect of a proportion of an employee's salary who had been sent to work in Vietnam as a result of the fraud and was diverted from his normal duties. The claim was limited to some $30,000. Potter LJ stated, at paragraph 49, after referring to *Tate & Lyle*, and rejecting the claimant's claim in this regard:

> "No doubt it is true as the judge stated, that, in visiting Vietnam, Mr Griffiths was engaged in an unusual task. However, it is not suggested that his trip abroad, as an employee engaged in the business of SCB and in respect of whose responsibilities his salary was in any event payable, led to any significant disruption in SCB's business or any loss of profit or increased expenditure on SCB's part (save in respect of travel subsistence and out of pocket expenses which the judge awarded in any event)."

68. Therefore, *Standard Chartered Bank –v- Pakistan National Shipping* appears to require a claimant to show a significant disruption to its business, if no loss of profit or increased expenditure can be shown. It should be noted that the Court of Appeal does not appear to have been referred to *British Motor Trade Association –v- Salvadori* or *Lonrho –v- Fayed (No 5)*. In any event, in the present case, there is alleged to be significant disruption to R+V's business, as is demonstrated by Schedule 2 to the Quantum Particulars of Claim. This is of course a fact that will have to be established at the March hearing if not otherwise agreed.

69. In *Holman Group –v- Sherwood* (TCC 2001), the claimant suffered damages for the wasted time spent by its employees (both managers and staff) in fixing a negligently installed computer system known as SYMBAL. In his judgment, at paragraphs 72-78, HHJ Bowsher QC accepted as a general principle that a claimant should be compensated for the cost of managerial time wasted. The only reservation recognised by the judge was that, in order to recover, the claimant must present acceptable evidence of the wasted time. Having been satisfied that the Holman Group had adduced sufficient evidence to support the claim, the judge allowed all the heads of claim under the "Wasted Time of Directors and Staff" section of the claim. The disruption to the business in *Holman* was clearly significant.

70. Moreover, and significantly, HHJ Bowsher expressly held that it was irrelevant for the purpose of a wasted time claim whether or not an employee was profit making or non-profit making. He stated, at paragraph 78:

> "I do not accept the distinction Mr Woolf seeks to make between short and long periods of wasted time, nor his distinction between senior and less senior posts. In all cases, the claimants were paying for time which was to be of a benefit to them and they lost the benefit of that time. Even in the case of back-office staff who did not directly make a profit for the company, there was evidence that the brokers were distracted from their job of making profits when the back-office staff were not producing information and other back-up. So far as this Group is concerned, it is unrealistic to try to distinguish between profit makers and non-profit makers as the defendants have sought to do."

71. In my judgment, in not distinguishing between profit makers and non-profit makers, the judge was implicitly allowing a claim for wasted time that was not based on lost revenue (or lost expenditure) but simply on the value of the employees' work. The justification for this approach is to be found at paragraph 75 of HHJ Bowsher's judgment:

> "Every employer values each employee at more than the employee is paid, otherwise there is no point in employing him. If time had not been wasted sorting out the SYMBAL muddle, the employees concerned would not have been doing nothing. Mr Woolf also said that in the case of directors and senior employees, they do not work fixed hours and any time wasted on the SYMBAL muddle would have been made up in the evenings or at weekends. But, particularly in the case of directors and managers, the whole of any employee's time is a benefit to the employer. If an employee is deprived of the benefit or leisure, either in the evenings or at weekends, productivity during paid hours suffers."

Although counsel for the Defendant had conceded that time lost is claimable (see paragraph 72 of the judgment), I reject Mr Page's submission that this case is not a useful authority, as clearly there was some argument directed at whether a claimant has to show that such an employee was profit making.

72. However, in *Admiral Management Services Limited –v- Para-Protect Europe Limited* [2002] 1 WLR 2722, Stanley Burnton J had to decide, as a second preliminary issue (although the headnote to the report does not make this clear) whether the cost of work done by in-house computer experts, who were the claimant's employees, investigating and obtaining evidence of the defendants' torts was recoverable as damages. The claimant did not pay overtime to its staff who carried out the work and did not engage additional staff. Stanley Burnton J held that the expense of managerial time could not be recovered if the claimant would have spent the money in any event. He held that it was necessary to show either additional expense or a loss of revenue. The judge sought to distinguish the *British Motor Trades Association* case at paragraph 54:

> "The *British Motor Trade Association* case was unusual, because the plaintiffs were held entitled to recover the costs of their investigation department, although its existence was not due solely to the torts of the defendants in that case. However, the plaintiffs incurred the costs of the investigation department only because of the torts of the defendants and others like them. In the present case, there is no evidence that the claimant has incurred any additional expense as a result of the torts of the defendants or indeed of anyone else. The *British Motor Trade Association* case is not authority for the proposition that the salaries of staff investigating a tort committed to their employer are recoverable as damages if those salaries would have been paid even if there had been no tort."

73. Stanley Burnton J held that asking the court to "infer" damages from the very fact that employees had carried out work which they would not have done but for the defendant's tort might be sufficient to justify the grant of an injunction or the award of nominal damages, but was insufficient to ground a claim for substantive damages. He said, at paragraph 51:

> "It is not sufficient for a claimant merely to say that damage is obvious, or to assert that but for a tort its staff would have been gainfully employed and would have brought in their alleged charge-out rate, particularly when a claim is made for substantial and precisely-calculated sums based on alleged charge-out rates of the employees concerned and the time allegedly spent by them in relation to the claims against the defendants."

74. And at paragraph 55 he said:

> "In my judgment, a claimant in a case such as the present has no claim for damages in respect of the salaries paid to its employees during the period when they carried out work made necessary by the defendants' torts if those salaries would have been paid in any event. In such a case, the claimant has not incurred any expenditure as a result of the defendants' torts that it would not have incurred in any event. I therefore reject the

> claimants' claim to be entitled to the salaries paid to their employees."

75. Neither *Standard Chartered* nor *Holman* were cited in *Admiral*.

76. With respect to Stanley Burnton J, I have some difficulty with his reasoning, and in particular with his attempt to distinguish *British Motor Trades Association*. Why should there be any difference in principle between the recoverability of damages in respect of time spent by employees in a department specifically set up to investigate and mitigate anticipated and actual breaches of an Association's conditions of trade (as in *British Motor Trades Association*), and the recoverability of damages in respect of time spent by employees investigating actual torts committed against the claimant where there is no such department? In each case, the "wasted time cost" is incurred in anticipation of, or as a result of, the defendant's wrong, and the employee resource is *pro tanto* not available to the employer. It would indeed be a strange result if a claimant could recover the costs if he chose to subcontract the work, but not if he chose his own employees to carry it out.

77. In my judgment, as a matter of principle, such head of loss (i.e. the cost of wasted staff time spent on the investigation and/or mitigation of the tort) is recoverable, notwithstanding that no additional expenditure "loss", or loss of revenue or profit can be shown. However, this is 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 – see per Roxburgh LJ in *British Motor Trades Association* at 569. This is perhaps simply another way of putting what Potter LJ said in *Standard Chartered*, namely that to be able to recover one has to show some significant disruption to the business; in other words that staff have been significantly diverted from their usual activities. Otherwise the alleged wasted expenditure on wages cannot be said to be "directly attributable" to the tort. The quantification of such expenditure will, of course, have to be proved with sufficient particularity at the March 2006 hearing.

78. In any event, and even if I were wrong in the above conclusion, R+V is clearly entitled to recover as damages its additional staff costs of handling claims in respect of business written under the Binders after their termination in April 2003. However, as Mr Edelman rightly anticipated, in so doing, R+V will have to give credit, or make allowance, for the "claim fees" that R+V would have had to have paid to Risk under the Binders for the handling and paying of claims. Again, the quantum of such a claim will, in the absence of agreement, need to be established at the March 2006 hearing.

79. Finally, I would like to thank counsel for their most helpful written and oral submissions.

80. I will hear counsel as to the form of order.