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Case No: 10587 OF 2008

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 7 July 2009

Before :

MR JUSTICE BLACKBURNE

- -

IN THE MATTER OF THE NAMES AT LLOYD'S FOR THE 1992 AND PRIOR YEARS OF ACCOUNT, REPRESENTED BY EQUITAS LIMITED

AND IN THE MATTER OF EQUITAS INSURANCE LIMITED (FORMERLY KNOWN AS SPEYFORD LIMITED)

AND IN THE MATTER OF PART VII OF THE FINANCIAL SERVICES AND MARKETS ACT 2000

- -

Robert Hildyard QC and Barry Isaacs (instructed by **Clifford Chance**) for the **Applicants**
Robin Knowles CBE QC (instructed by **Lloyd's Legal Department**) for the **Society of Lloyd's**
Christopher Symons QC and Robert Purves (instructed by **FSA General Counsel's Division**) for the **FSA**
Christopher Stockwell (In person)
Stephen Merrett (In person)

Hearing dates: 24 and 25 June 2009

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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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MR JUSTICE BLACKBURNE

In the matter of The Names at Lloyd's for the 1992 and Prior Years of Account, represented by Equitas Limited
and In the matter of Equitas Insurance Limited (Formerly known as Speyford Limited)
and In the matter of Part VII of The Financial Services and Markets Act 2000

Mr Justice Blackburne :

Introduction

1. This is the hearing of an application brought by Equitas Ltd ("EL") and Equitas Insurance Ltd ("EIL") for an order under section 111 of the Financial Services and Markets Act 2000 ("the 2000 Act") sanctioning a scheme for the transfer to EIL of the 1992 and Prior Business carried on at Lloyd's. Section 111 is to be found in Part VII of the 2000 Act concerned with business transfer schemes. At the conclusion of the hearing I indicated that I was willing to sanction the scheme. I have approved the order recording the sanction. The order, to which a copy of the scheme is attached, sets out undertakings by the two applicants, by various associated entities and also by the Society of Lloyd's ("Lloyd's") and by Lioncover Insurance Company Limited to be bound by the scheme and to do what is necessary or expedient to give effect to it. There is also an undertaking by Equitas Holdings Ltd ("EHL") to comply with promises set out in a letter designed to ensure the maintenance of the applicants' minimum capital requirements. The order sets out (pursuant to section 112 of the 2000 Act) a series of provisions, mirroring the terms of the scheme, to give effect to the transfer and related matters.

2. I indicated when sanctioning the scheme that I would set out in writing why I felt able to give the sanction. I do so in recognition of the interest in and importance of the scheme and in deference to the very considerable work that has been devoted to its preparation, including matters that have been addressed in the written and oral submissions of those who have appeared before me at the hearing of the application. I hope that I will be forgiven if, despite the care and thoroughness of the written and oral submissions, I express myself with brevity.

3. The scheme is intended to bring finality - although some loose ends overseas remain - to a process which began with a reconstruction and renewal plan promoted and implemented by Lloyd's in the second half of 1996. Lloyd's R&R, as it has been described, came in the wake of huge losses suffered by the Lloyd's market in the late 1980s and early 1990s as a result, principally, of the historic asbestos and pollution liabilities which Names had underwritten. Complex litigation followed. Doubts were raised as to Lloyd's continuing solvency and liquidity. Lloyd's R&R was designed to stem the litigation through a settlement arrangement, separate the 1992 and Prior Business from the continuing business conducted at Lloyd's and provide Names with reinsurance to close in respect of their liabilities for the 1992 and Prior Business, thereby enabling Names with no other years of account remaining open to resign their membership of Lloyd's. The basis and rationale of Lloyd's R&R is more fully described in *Society of Lloyd's v Leighs & ors* [1997] CLC 759.

4. The reinsurance to close was achieved on 3 September 1996 through the Equitas Reinsurance Contract (as it has been referred to) whereby liabilities in respect of the 1992 and Prior Business of (i) all the closed year non-life syndicates reinsured to close directly into any open year syndicate and (ii) all the open year non-life syndicates were reinsured into Equitas Reinsurance Ltd ("ERL") which was specially set up and authorised for the purpose. In addition, closed-year Names who

participated in non-life syndicates for 1992 and earlier years of account were indemnified by ERL in the event that their existing reinsurance to close ("RITC") were to fail. ERL in turn entered into the Equitas Retrocession Contract with EL on the same date pursuant to which it retroceded its reinsurance and indemnity obligations to EL, a wholly-owned subsidiary of ERL. Under the terms of the Equitas Retrocession Contract ERL delegated responsibility for the run-off to EL.

5. The business of Names who underwrote on the PCW and Warrilow syndicates was, for reasons I do not need to explain, reinsured by Lioncover Insurance Company Ltd ("Lioncover") in the case of PCW and Centrewrite Ltd ("Centrewrite") in the case of Warrilow, both of which are subsidiary companies of Lloyd's. As part of Lloyd's R&R, ERL agreed under reinsurance contracts entered into in February and December 1997 to reinsure Lioncover and Centrewrite in respect of their liabilities relating to the 1992 and Prior Business of PCW and Warrilow Names. Certain other 1992 and Prior Business was also reinsured into ERL by separate reinsurance contracts and, like the Lioncover and Centrewrite obligations, retroceded to EL under the Equitas Retrocession Contract.

6. Lloyd's R&R also provided for the establishment of Equitas Policyholders Trustee Ltd ("EPTL") the primary purpose of which is to hold on trust for the benefit of policyholders certain rights of the Names as reinsureds under the Equitas Reinsurance Contract.

7. On 10 November 2006 EL and EHL entered into what has been described as the NICO Retrocession Contract with National Indemnity Company (of Nebraska, USA) ("NICO") and Equitas Management Services Ltd ("EMSL"), pursuant to which EL retroceded to NICO its liabilities under the Equitas Retrocession Contract. The retrocession was subject to a limit of $5.7 billion over and above the existing reserves of EL as at 31 March 2006 net of claims payments made and reinsurance recoveries received between 1 April 2006 and 31 March 2007. The operational functions, including responsibility for the management of the run-off in relation to the 1992 and Prior Business, were delegated to EMSL, ownership of which, as part of the transaction, was transferred to NICO. It was renamed Resolute Management Services Ltd ("RMSL"). Since the NICO Retrocession Contract came into effect on 30 March 2007 RMSL has been responsible for the day-to-day conduct of the run-off of the transferring 1992 and Prior Business.

8. EL is a wholly-owned subsidiary of ERL. In their turn ERL, EIL and EPTL are wholly-owned subsidiaries of EHL which, in its turn, is wholly owned by the trustees of the Equitas Trust. Those trustees hold the rights and powers attaching to the shares in EHL upon trust for the benefit of the Names in their capacity as reinsureds under the Equitas Reinsurance Contract.

9. Economic finality for Names in respect of the pre-1993 difficulties and the litigation that it had spawned was to a large extent achieved through the NICO Retrocession Contract of 2006. However, neither the Equitas reinsurance nor the NICO retrocession arrangements resulted in legal finality for Names who remained directly liable to policyholders in respect of the 1992 and Prior Business under the original

policies: Names continued to be exposed in respect of their liabilities to such policyholders in the event that EL should be unable to pay to a policyholder the entire amount of a Name's liability. The purpose of the scheme now before the court for its sanction has been to achieve legal finality under English law for Names by transferring to EIL the legal liabilities of Names under those original policies.

The scheme

10. The scheme has been structured to result in as little change as possible to the existing reinsurance and run-off arrangements. In particular, RMSL will continue to be responsible for the day-to-day conduct of those arrangements. The only material changes for the transferring policyholders, as they have been described, are that EIL becomes the insurer or reinsurer of the transferring policies instead of Names under English law and the laws of other EEA States and of any other jurisdiction which recognises the transfer effected by the scheme, recovery from Names will no longer be possible under English law and under the laws of such other states and jurisdictions, and a further $1.3 billion of reinsurance cover becomes available from NICO under the NICO Retrocession Contract in consideration of the payment by EL of a premium of £40 million.

11. The scheme has the following particular features: the policies, assets and liabilities (together the Transferring Business) are transferred to EIL; the relevant rights and obligations of the Names as reinsureds under the reinsurance contracts that cover the Transferring Business transfer to EIL, with amendments to those contracts to reflect the fact that the Transferring Business is transferred from the Names to EIL; the interest of the Names as reinsureds and various outstanding obligations of the Names as reinsureds under the Equitas Reinsurance Contract are transferred to EIL (subject only to the previous assignment in favour of EPTL put in place at the time of Lloyd's R&R); the reinsurance structure relating to Lioncover is simplified but with the equivalent protection made available to transferring policyholders of PCW Names that was available to them prior to the transfer; there are similar (although, for historical reasons, not identical) provisions in the case of Centrewrite; the terms on which EPTL holds the rights of Names as reinsureds under the Equitas Reinsurance Contract, assigned to it at the time of Lloyd's R&R and held for the benefit of transferring policyholders, are varied to reflect the transfer of the Transferring Business to EIL; any judicial, quasi-judicial, administrative or arbitration proceedings pending by or against any of the Names in connection with the Transferring Business are continued by or against EIL such that EIL is entitled to all defences, claims, counterclaims and rights of set-off hitherto available to the Names; EIL discharges on behalf of the Names (alternatively, indemnifies them against) all liabilities under the transferring policies and, to the extent that they would be recoverable by the Names under the various reinsurance contracts but for the scheme, any other liability or expense incurred in connection with the Transferring Business.

Jurisdictional requirements

12. The court's power, conferred by section 111 of the 2000 Act, to sanction a business transfer scheme is subject to a number of jurisdictional threshold conditions set by

Part VII: (1) the scheme must be a business transfer scheme (in the instant case, an insurance business transfer scheme within the meaning of section 105); (2) the "requirements" imposed by section 108(1) - to be found in the Financial Service and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001 - must be complied with save and to the extent that the court has waived them; (3) there must, by section 109(1), be a report on the terms of the scheme ("a scheme report") by a person fulfilling the qualifications set out in section 109(2) and the report must be in a form approved by the Financial Services Authority ("the FSA"), and (4) by section 111(2)(a), (b) the court must be satisfied (i) that the appropriate certificates have been obtained and (ii) that the transferee - EIL in the instant case - has the authorisation required to enable the business which is to be transferred to be carried on in the place to which it is to be transferred (or will have the authorisation before the scheme takes effect).

13. By order made on 28 November 2008 Floyd J granted waivers of certain of the "requirements" but did so on certain terms.

14. I am satisfied, without going into detail, that the scheme is an insurance business transfer scheme and that the other threshold conditions have been fulfilled.

The scheme report

15. In this context I need refer only to the scheme report required by section 109. This has been furnished by Mr Allan Kaufman who is the managing director of Navigant Consulting (Europe) Ltd. On 16 June 2008 his appointment as independent expert was approved by the FSA pursuant to section 109(2).

16. A question was raised about Mr Kaufman's independence. The suggestion was that, as a non-executive director of a particular managing agency, Mr Kaufman was subject to some kind of conflict of interest. But the agency in question was not authorised until March 2007 and has no connection to any business written at Lloyd's prior to 1993. It is doubtful whether, even if those matters were to give rise to a conflict of interest, the matter is one for the court except, possibly, as one going to the exercise of the court's discretion under section 111. The matter, as it seems to me, is primarily one for the FSA in that, as I have described, under section 109(2) the person who is to provide the report must be a person "appearing to the [FSA] to have the skills necessary to enable him to make a proper report" and must be "nominated or approved for the purpose" by the FSA. The issue having been raised, however, Mr Kaufman's directorship was drawn to the attention of the FSA which has made clear that, in its view, the directorship has not compromised Mr Kaufman's independence. For what it is worth, I am entirely of the same view. Indeed, I regard any suggestion to the contrary as little short of mischievous.

17. Mr Kaufman's main report is dated 8 April 2009. It is, if I may say so, a model of clarity, both of exposition and analysis and of presentation and ease of comprehension. It is a lengthy, objective and extremely well prepared document. It assumes that EIL will be authorised and have an initial capitalisation on terms consistent with the report's conclusions. I am satisfied that EIL has been authorised

and will be sufficiently capitalised. After a careful analysis of the existing Equitas arrangements, the terms of the scheme, the various policyholder groups and other parties who are or might be affected by the transfer to be effected by the scheme, Mr Kaufman concludes that "there are no groups of Policyholders, or other parties,… that are materially disadvantaged in the event of the Transfer". He goes further: he concludes that "[o]verall Policyholders gain from the Transfer". Not the least of the reasons for this conclusion is the availability of the further $1.3 billion of additional reinsurance from NICO.

18. As foreshadowed in his main report, Mr Kaufman has furnished a Supplemental Report. It is dated 15 June 2009. In it, he confirms his earlier opinions (summarised above). In giving that confirmation Mr Kaufman has assumed that certain matters concerned with the execution of various bonds and undertakings and other like matters will have occurred. I am satisfied that all of these matters have been sufficiently attended to.

The court's discretion

19. Under section 111, the court has a discretion whether or not to sanction a scheme. According to section 111(3), in exercising that discretion the court "must consider that, in all the circumstances of the case, it is appropriate to sanction the scheme". The correct approach to the exercise of the discretion is conveniently set out in the following passage from the judgment of Evans-Lombe J in *Re: Axa Equity and Law Life Assurance Society plc* [2001] 2BCLC 447 at [6] (given when the relevant legislation was the Insurance Companies Act 1982, the material provisions of which are now to be found in Part VII):

> "(1) The…Act confers an absolute discretion on the court whether or not to sanction a scheme but this is a discretion which must be exercised by giving due recognition to the commercial judgment entrusted by the company's constitution to its directors.
>
> (2) The court is concerned whether a policyholder, employee or other interested person or any group of them will be adversely affected by the scheme.
>
> (3) This is primarily a matter of actuarial judgment involving a comparison of the security and reasonable expectations of policyholders without the scheme with what would be the result if the scheme were implemented. For the purpose of this comparison the …Act assigns an important role to the independent actuary to whose report the court will give close attention.
>
> (4) The FSA by reason of its regulatory powers can also be expected to have the necessary material and expertise to express an informed opinion on whether policyholders are

> likely to be adversely affected. Again the court will pay close attention to any views expressed by the FSA.
>
> (5) That individual policyholders or groups of policyholders may be adversely affected does not mean that the scheme has to be rejected by the court. The fundamental question is whether the scheme as a whole is fair as between the interests of the different classes of persons affected.
>
> (6) It is not the function of the court to produce what, in its view, is the best possible scheme. As between different schemes, all of which the court may deem fair, it is the company's directors' choice which to pursue.
>
> (7) Under the same principle the details of the scheme are not a matter for the court provided that the scheme as a whole is found to be fair. Thus the court will not amend the scheme because it thinks that individual provisions could be improved upon…"

In so stating Evans-Lombe J was summarising principles derived from the judgment of Hoffmann J in *Re London Life Association Ltd* (unreported) 21 February 1989. The references in the citation to "the company's directors" is, in the instant case, to the boards of directors of EL and ERL.

20. The conclusions of the expert, Mr Kaufman, set out in the scheme report and summarised above, are a powerful endorsement of the fairness of the scheme as between the interests of the different classes of persons affected by it.

21. Although the FSA is not concerned to give its approval to the scheme - rather, its role is whether to object - its views are, like those of the expert, ones to which, as the passage from the judgment of Evans-Lombe J makes clear, the court will pay close attention. Unsurprisingly, in a scheme of the importance of the instant one, the FSA has been closely consulted, and its views canvassed, on the scheme as it has developed. Mr Robert Hildyard QC, appearing with Mr Barry Isaacs on behalf of the applicants, described this as an "iterative process". It is a process which, in the case of the FSA, has resulted in no less than three reports, the first dated 27 November 2008, the second dated 20 April 2009 and the third dated 18 June 2009. The third report, which is a very comprehensive and impressive statement, sets out the FSA's identification and evaluation of what it describes as the "key regulatory issues" raised by the scheme. It sets out its conclusions on each of those issues. Based on that evaluation the FSA, which was represented before me by Mr Christopher Symons QC and Mr Robert Purves, does not object to the scheme. In paragraph 70 that report, the FSA states that it:

> "…considers that the increase in financial resources available to the Equitas group that would result from the approval of the Scheme and the consequent purchase of further reinsurance from NICO will benefit policyholders and thereby contribute to

> the FSA's consumer protection objective. It will be noted that the Independent Expert concludes that no group of policyholders would be materially disadvantaged by the Scheme. Based on discussion with and challenge to the Independent Expert, the FSA accepts this conclusion."

22. The report goes on to summarise objections and representations that had been received in respect of the scheme. It carefully considers each of them and concludes that they provide no ground for the FSA to object to the scheme. I will come to those matters, so far as I need to, a little later.

Publicity

23. Before doing so, it is appropriate to refer to the steps taken to draw the terms of the scheme to the attention of persons likely to be affected by it, principally, of course, the transferring policyholders and Names. The evidence discloses that, in accordance with the order made by Floyd J on 28 November, the steps taken to notify interested persons of the intention to apply for the scheme resulted in 630 letters to individual policyholders (I ignore those that were returned undelivered), 180 letters to brokers, 254 letters to solicitors who had acted for claimants under employer's liability policies, and nearly 7,800 letters to reinsurers under policies relating to the Transferring Business under which a recovery is expected. The letter summarised the background to and effect of the scheme, Mr Kaufman's conclusions and what action the recipient should take if he needed further information or believed that he would be adversely affected by the scheme. In addition, in a series of well-attended presentations (here and in the USA) to transferring policyholders, Names and their representatives, the scheme was explained and discussed. Two open-meetings were convened in London, attended by approximately 250 Names. Helplines and a website were set up, and an e-mail enquiry facility established, together with widespread advertisement of the scheme in a variety of newspapers here and abroad. I do no more than mention some of the steps taken to publicise the scheme.

24. The result of this widespread publicity, according to Mr Dan Schwarzmann, a partner of PricewaterhouseCoopers LLP who are advisers to Equitas in connection with the scheme, was that by 15 June 2005, of the 565 telephone calls, e-mails or letters written by way of response, only nine persons raised substantive issues in relation to the scheme. Those nine included the two persons, Mr Christopher Stockwell and Mr Stephen Merrett, who have appeared in person before me. In addition three others asked that their correspondence be brought to the court's attention. I have read that correspondence. The matters raised by the other four were also drawn to my attention.

Scheme concerns

25. The concerns expressed by those persons raised the following issues which merit comment.

26. One focused upon the effect of the scheme on persons holding policies of reinsurance ("cedents") and, in particular, whether they will continue to be able to take credit for

reinsurance. This in turn is linked to the existence in several jurisdictions, in accordance with local regulatory requirements, of trust funds or other arrangements to secure the obligations of Names in respect of claims by policyholders. Such arrangements exist in the USA, Canada, Australia and South Africa. The nature of those arrangements is described in the scheme report.

27. In the USA, cedents are able to claim credit for their reinsurance purchased from underwriters at Lloyd's provided the underwriters at Lloyd's maintain US trust funds in accordance with local US regulatory requirements. The arrangements to enable them to do so have been in existence for many years. The maintenance of this position, and the effect generally of the scheme, is obviously of great importance to the affected cedents, and also to the underlying policyholders, not least because of the number of US Names and underlying policyholders and the extent of the US liabilities reinsured by Equitas. The better view is that the transfer effected by the scheme, even if sanctioned by this court, will not be recognised or enforced in the courts of the USA unless and until a formal application is made by Equitas to a US court, in which event recognition will be a matter for determination by that court. The same is likely to be true elsewhere outside the EEA, notably in Canada, Australia, New Zealand and South Africa.

28. Nevertheless, the evidence which has been filed abundantly satisfies me that, pending recognition by those other jurisdictions of the transfer effected by the scheme (which recognition may never occur), underlying policyholders and cedents will not be disadvantaged. In particular, cedents in the USA will continue to be able to claim credit for reinsurance. Pending recognition, a separate US trust fund will exist, to be called (for short) the EILATF, to enable transferring policyholders who hitherto have been able to access an existing trust fund called the EATF (and, via that fund, other funds) to secure their claims, to access those same funds in respect of any judgments entered against EIL but which otherwise remain unsatisfied.

29. Another concern has been whether, once a transfer to EIL has been effected in accordance with the scheme, EIL will in turn propose a solvent scheme of arrangement under Part 26 of the Companies Act 2006 with a view to a "cut-off scheme". The position here, according to the evidence, is that EIL has no plans to promote one. Understandably it is unwilling to commit itself never to do so. Equally, it would be open to a group of creditors to seek to promote such a scheme.

30. The FSA does not see the possibility of a future solvent scheme of arrangement as a ground for objection to the present scheme. Nor do I. The possibility of such a scheme, should one ever be proposed, is very much for the future. There are sufficient safeguards, not least the need for the court's sanction if such a scheme is to be effective, to discount the possibility as a matter which should militate against this court to giving its sanction to the present scheme. I have approached the possibility accordingly.

31. That leaves the matters raised by Mr Christopher Stockwell and Mr Stephen Merrett who both attended the hearing in person to speak to their concerns. Both are (or were) Names. Mr Stockwell, it appears, was appointed by Lloyd's in 1992 to be

chairman of the Open Year's Panel set up to consider the problem of the open years at Lloyd's. He says that it was the committee that he chaired that wrote a report that first published the idea of what became Equitas. He says that at that time and until 1997 he was Chairman of the Lloyd's Names' Association's Working Party which co-ordinated the work of over forty action groups and, he states, played a key role in the negotiations which led to Lloyd's R&R. He says that since 1997 he has been chairman of the Lloyd's Names Association and, since 2002, of the Names Action for Compensation and Defence in Europe, both of which represent mainly former Names who have ceased underwriting. He says, and I accept, that he has taken a keen interest in the whole process that created Equitas and in the subsequent proposals to reinsure the liabilities of former Names to Equitas and thence to NICO.

32. Mr Merrett was, in respect of the 1992 and Prior Business, a Name on open years and, as such, reinsured by Equitas. He was a Name on earlier years of account closed by reinsurance to close into those open years. For a number of years he was Deputy Chairman of Lloyd's. In addition, he is both executor and a beneficiary of the estate of his late father and late mother, both of whom were Names on a number of Lloyd's syndicates.

33. Their main point concerned the nature of reinsurance to close, at any rate as it has affected closed years of account. They say that their belief, shared by others, is and has been that reinsurance to close operated to absolve an affected Name from any further liability to the insured policyholder (in that the liability was novated to the reinsurers to whom the policy was ceded), that various statements emanating from Lloyd's and others encouraged them in that belief and that the present scheme was founded on the assumption that this was not so but that, on the contrary, the Names in question had remained liable in law all along. They fear that, unless this question - the true nature of reinsurance to close - is definitively established, there can be no certainty that the scheme will work as evidently intended. Their other main point questioned whether EL had the authority to act in respect of closed year Names when entering into the Equitas Reinsurance Contract.

34. It has been made clear repeatedly over the years that reinsurance to close by members of a syndicate does no more than insure the continuing liabilities of the syndicate members into another syndicate (very often the same members) in another underwriting year. The fact that it is called "reinsurance to *close*" does not mean that the liability of the syndicate members so reinsured is thereby extinguished (or closed). That this has been the considered understanding over very many years - as well as the position in law - was examined in detail most recently by David Steel J in *Harris v Society of Lloyd's* [2008] EWHC 1433 (Comm). It arose in connection with a claim in deceit founded on the allegation that the claimants became members of Lloyd's in reliance upon a fraudulent representation that reinsurance to close constituted a novation. The claim was struck out. The disappointed claimants sought permission to appeal. Refusing permission to appeal (and refusing reconsideration of the permission applications at an oral hearing), Longmore LJ was emphatic that the applications were "totally without merit". In so stating he recognised that the "question of novation (whether statutory or otherwise) was at the heart of the case".

35. As to the question of authority, it is clear that, by a combination of (1) Lloyd's power to appoint a substitute agent to act on behalf of Names, including Closed Year Names, (2) the exercise by Lloyd's of that power by appointing Additional Underwriting Agencies (Number 9) Limited as substitute agent to enter into the Equitas Reinsurance Contract (and the other related reinsurance contracts) on behalf of the affected Names, (3) the authority given by those contracts to ERL to conduct the run-off of the 1992 and Prior Business, and (4) delegation of that authority by ERL to EL under the Equitas Retrocession Contract, EL had the necessary authority to act in relation to the scheme. I shall not trouble to set out the various Lloyd's byelaws and enabling powers whereby this was achieved. That authority exists whether or not the Name in question has signed an undertaking to be bound by Lloyd's byelaws. See *Society of Lloyd's v Leighs* [1997] CLC 759 and *Society of Lloyd's v Noel* [2002] EWCA Civ 397.

36. The Financial Services and Markets Act 2000 (Control of Transfer of Business Done at Lloyd's) Order 2001 as amended by the Financial Services and Markets Act 2000 (Control of Transfer of Business Done at Lloyd's) (Amendment) Order 2008 applies the provisions of Part VII of the 2000 Act relating to insurance business transfers to transfers of business from members and former members of Lloyd's. It does so explicitly by ensuring that part VII applies to schemes for the transfer of the whole or any part of the business carried on by "one or more underwriting members of the Society or by one or more persons who have ceased to be such a member (*whether before, on or after 24th December 1996*)" (emphasis added). The reference to 24 December 1996 was to clear up a lacuna in the legislation which, as previously drawn, applied only to a person who had ceased to be an underwriting member on, or at any time after, 24 December 1996.

37. Apart from the difficulty that their concerns about these two underlying points - the nature of reinsurance to close and the question of authority allied with the application of Part VII to persons who had ceased to be underwriting members of Lloyd's prior to 24 December 1996 - were without substance, both Mr Stockwell and Mr Merrett had an additional difficulty: that was to demonstrate that, even if their underlying points had validity, each was "adversely affected" by the scheme. Neither was able to satisfy me that he was. Mr Stockwell referred to the possibility that there might be a lesser return of premium to Names if liability were assumed to exist (under reinsurance to close) where previously it was believed that none existed, than is the prospect of recovery, absent the scheme. Mr Merrett speculated that he and others might suffer a greater exposure as members of the Society than they would otherwise. I was quite unable to see why this should be so in either case. Moreover, in his Supplemental Report Mr Kaufman has considered the position on the assumption that reinsurance to close does indeed operate as a novation under English law. He did so mindful of and in response to the contention that reinsurance to close operated to novate the Names' liability in law. He concludes - and I see no ground for disagreeing - that the exact nature of reinsurance to close "does not affect my analysis of the Transfer" (ie that it does not materially disadvantage policyholders or other identified affected parties even if - as would be the case in the event that reinsurance to close operated as a novation - the responsible Names were only the open year Names).

38. It seemed to me, as I listened to them, that Mr Stockwell and Mr Merrett wished to wage battles which have either long since been fought and lost or raise issues which, at best, should be directed at others and do not go to the merits of the scheme. I had the impression that their concern was not that the scheme should not be sanctioned but that the court should withhold its sanction until these other points are first explored and, if necessary, made the subject of a ruling.

Result

39. Having taken this view of the points raised by Mr Stockwell and Mr Merrett, and having taken into account the two reports of Mr Kaufman and the third report of the FSA, together with the lengthy and helpful submissions, both written and oral, addressed to me by Mr Hildyard I had no doubt at the conclusion of the hearing that I should sanction the scheme and I so indicated. I would only add that I have carefully read the scheme document and the explanation of it set out in the evidence and skeleton arguments placed before the court. I should also add that the Society of Lloyd's was represented before me by Mr Robin Knowles CBE QC to answer any point that might arise upon which the Society's assistance could be provided. In the event none did. It hardly needs stating that the scheme has the Society's fullest backing.