[2011] CA (Bda) 13 Civ

The Court of Appeal for Bermuda

CIVIL APPEAL No. 12 of 2010

Between:

AMERICAN PATRIOT INSURANCE AGENCY INC.
KENNETH A. HENDRICKS
DIANE M. HENDRICKS

Appellants

-v-

MUTUAL HOLDINGS (BERMUDA) LIMITED

First Respondent

-and-

MUTUAL INDEMNITY (BERMUDA) LIMITED

Second Respondent

-and-

GLENN PARTRIDGE

Third Respondent

-and-

DAVID ALEXANDER

Fourth Respondent

-and-

RICHARD TURNER

Fifth Respondent

-and-

ANDREW S. WALSH

Sixth Respondent

Before: **Zacca, President**
Evans, J.A.
Baker, J.A.

Appearances: Michael Todd, QC, Jeremy Garrood, Andrew Martin for the Appellant
Robert Hildyard, QC, Ben Adamson for the Respondents

Judgment

Dates of Hearing: **7-11 March 2011**
Date of Judgment: **5 August 2011**

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EVANS JA:

Introduction

1. The Third plaintiff and her late husband, Kenneth Hendricks, were the owners of American Patriot, the First Plaintiff, a company which carried on business as an insurance agency but is now in administration. The business can conveniently be called "AMPAT", as counsel have done in their submissions to us, and Mr. and Mrs. Hendricks can be referred to individually or together, as necessary.

2. The three Defendant companies are members of the insurance group called 'Mutual', and the four individual defendants were officers and employees of different group companies at relevant times.

3. The Plaintiffs' claims include an allegation of fraud which understandably took central place both at the trial in May 2010 and in the judgment of Bell J. which he gave on 9 July 2010. But the case also raises issues of contractual interpretation and of company law that have acquired at least equal prominence on the hearing of the appeal.

4. The Judge dismissed the fraud allegation and decided the contractual and the company law issues in favour of the Defendants. Mr. and Mrs. Hendricks now appeal. AMPAT does not pursue its appeal, and one of the Defendants, Commonwealth Risk Services ("CRS"), is not a party to the appeal.

Background history

5. In 1997, AMPAT entered into a number of agreements with members of the Mutual group regarding what was described as the American Roofing Workers Program ("the Program"). That was a collective name for insurances placed by AMPAT on behalf of individual insureds who were introduced to it by a large Builders Supply business named the ABC Supply Group of Companies that Mr. and Mrs. Hendricks also owned. Three kinds of insurance were involved – Workers' Compensation, Automobile and General Liabilities.

6. For Mutual, the program was an Insurance Profit Centre ("I.P.C.") and AMPAT became an "I.P.C. Client". It is necessary to examine closely the agreements that were entered into in connection with the Program.

The Program

(1) The scheme

7. The Program was designed to bring insurance business to the Mutual group and was marketed as a 'rent-a-captive' scheme. To what extent it is similar to other schemes described in that way, the Court does not know. This judgment is concerned solely with this particular scheme and the contracts which made it up.

8. In outline, the scheme was as follows. The agent (the I.P.C. Client) proposed insurance contracts for approval by Legion, a Mutual group insurance company. Legion undertook to retain a small part of the risk, quantified as ten per cent. (10%) of the gross written premiums, and to reinsure with Mutual Indemnity, another group insurance company, up to a limit quantified as seventy per cent. (70%) of the gross written premiums and described as the Aggregate Attachment Point (A.A.P.). The net total of premiums received, after deducting agreed commissions and expenses, would not be sufficient to provide funds to cover that amount, with the result that there would be what was perceived as a 'gap' between the net amount of premium the Mutual companies would receive and their combined total liability for losses up to the amount of the A.A.P. The IPC Client (in this case, AMPAT) undertook to close this 'gap' by agreeing to indemnify Mutual Indemnity against the amount of the shortfall, and it provided collateral (cash or letter of credit) for its promise to do so.

9. With regard to losses exceeding the amount of the A.A.P., it was agreed (in this case) that Legion would take out Stop Loss re-insurance with third-party (market) re-insurers in the sum of US$5 million in excess of that figure. This meant that the Program provided expressly for losses up to the total of the AAP plus the US$5 million re-insurance, but it was silent as to what the position would be with regard to losses suffered by Legion in excess of that total. The only limit on the total amount of Legion's liability to its Insureds would be any limits agreed in the underlying insurance contracts, but under U.S. law no such limits were permitted in Workers' Compensation policies.

(2) Contracts

10. The above arrangements for "the Program" were set out in two contractual documents to which AMPAT was a party -

(1) First, a letter dated 23 March 1997 headed

> *"Subject: AMERICAN PATRIOT ROOFERS PROGRAM*
> *Effective Date: 04/01/97" [1 April 1997]"*
> *signed by James Agnew as Assistant Vice President of CRS (Commonwealth Risk Services LLC, the Third Defendant and a member of the Mutual Group) and countersigned by Lysa Saran on behalf of AMPAT; and*
> *(2) Secondly, a Limited Agency Agreement of the same date between Legion and AMPAT authorising AMPAT to receive and accept proposals for*

insurance on behalf of Legion, but not to bind any risk "without specific authorisation in writing from the Company [Legion]".

11. The I.P.C. Client also entered into a Shareholder's Agreement with one of the group's holding companies, in this case Mutual Holdings (Bermuda) Ltd. (hereinafter "Holdings"). Under it, Holdings agreed to issue a single Preference Share to the I.P.C. Client and to pay dividends equivalent to the amount of any profit made by the reinsurer Mutual Indemnity on the Client's program, whilst the I.P.C. Client undertook to indemnify Holdings against the amount of any losses that the Program had suffered (taking account in both cases of investment income received by Holdings). The Shareholder's Agreement, therefore, provided mechanism for transferring any underwriting gain or loss made by Mutual Indemnity to the IPC Client, and for giving the I.P.C. Client the benefit of any investment income received.

12. The Shareholder's Agreement was also dated 23 March 1997. It was signed by Mr. Hendricks on behalf of AMPAT and by David Alexander, the Fifth Defendant, as Vice President & Controller of Mutual Holdings (Bermuda), the Second Defendant (hereinafter "Holdings").

13. The re-insurance arrangements between Legion and Mutual Indemnity were contained in an agreement headed "Reinsurance Treaty No.103" and "Aggregate Excess of Loss Reinsurance Agreement" dated 1 January 1991. The parties were Legion and a number of Mutual Indemnity companies: Mutual Indemnity (Bermuda) Ltd. was added by Amendment 4 in 1996, effective as of April 1 1993. The re-insurance cover was defined in Article 3 and it is sufficient for present purposes to say that it was limited to the amount of Legion's liabilities up to the Annual Aggregate Retention for each Program. Article 3, therefore, did not re-insure Legion against losses in excess of that figure. Attached to the Treaty was a standard form of Exhibit which was to be completed and added to it annually in respect of each relevant i.e. re-insured Program. This contained the same information as the Program Summary that was attached to each Program Renewal, and it defined 'Annual Aggregate Retention' in the same way, that is, by reference to an agreed percentage of Gross Written Premium.

14. The Treaty, however, had been amended in 1993 when a new Article 3A was added, headed "3A <u>ADDITIONAL LIMITS OF LIABILITY</u>". This had the effect of increasing the re-insurance cover by US$5 million "any one program" but subject to a maximum of "$10,000,000 Ultimate Net Loss in the aggregate for all programs, any one underwriting year". The overall

result, therefore, was to increase the potential liability of Mutual Indemnity, as the re-insurer, by that amount in excess of the AAP figure referred to in the Program as the upper limit of the 'gap' and therefore beyond express terms of the indemnity given by the IPC Client to Mutual Indemnity under the Program.

15. Five points should be noted at this stage-

(1) The fourth Recital to the Shareholder's Agreement provided as follows-

> *"WHEREAS, this AGREEMENT, the POLICY [defined in the third recital as the policies of insurance issued by [Legion] to Insureds introduced by AMPAT] and the TREATY[defined in the second recital as the Reinsurance Agreement(s) between Legion and Mutual Indemnity (Bermuda) Ltd. as reinsurer] together constitute a single insurance program (hereinafter the "PROGRAM") which is a uniquely negotiated single contract and no part of the PROGRAM would have been entered into without the other parts being in force.";*

(2) AMPAT, the IPC Client, was not a party to the Treaty i.e. the Legion/Mutual Indemnity reinsurance referred to above. Its contents were never communicated to AMPAT nor were they asked for by Mr. and Mrs. Hendricks;

(3) the issues that have arisen in this case make it essential to distinguish between two separate indemnities that were promised by the IPC Client as part of these insurance and re-insurance arrangements. First, under the Program, the IPC Client undertook to indemnify Mutual Indemnity in the amount of the 'gap' between its liability as 70% re-insurer and the aggregate amount of premiums available to it. Secondly, under the Shareholder's Agreement it undertook to indemnify Holdings against any losses made by Mutual Indemnity on the Program, whilst receiving in the form of dividends the amount of any profit that it made. The distinction is vital to a full understanding of what happened in 2000 when the program came up for renewal for its fourth year;

(4) the effect of the arrangements for the insuring company, Legion, was that it had recourse, first, to the fund representing the premiums received from its Insureds; secondly, to its re-insurance up to the AAP limit with its associated company, Mutual Indemnity; thirdly, to the stop loss re-insurance placed with third-party re-insurers as envisaged in the Program; and fourthly, to the additional reinsurance provided by Mutual Indemnity under Article 3A of the Re-insurance Treaty, as amended. For this

reason, this additional reinsurance was described by the Defendants' witnesses, specifically by Mr. Alexander, as the "fourth layer" of cover for Legion (Witness Statement paragraph 58); and

(5) there was no reference to this additional re-insurance in the Program, but under the Shareholder's Agreement the IPC Client (AMPAT) could become liable to indemnify Mutual Holdings against losses made by Mutual Indemnity as reinsurer under the Program. Hence the importance of the distinction between the two undertakings to indemnify referred to in paragraph 15(3) above.

The Mutual Group

16. The parent company is Mutual Risk Management Ltd. ("MRM"), the Second Defendant. Its operations through subsidiaries covered a wide range of insurance activities, including in Bermuda and the USA, and a clear distinction was drawn between those which were 'on-shore' in the USA and 'off-shore', meaning Bermuda for the purposes of this case. Both the Third Defendant, CRS, which marketed the Program to AMPAT, and Legion, the insurance subsidiary which issued the underlying insurance policies to AMPAT's Insured, were 'on-shore' companies, operating only in the USA. The re-insurer, Mutual Indemnity, and Holdings, however, were both 'off-shore' companies operating in Bermuda.

17. The distinction was reflected in the roles played by different Mutual personnel during the relevant period when the 2000 Renewal of the Program was being negotiated. Initial dealings with AMPAT were conducted by Mr. Agnew on behalf of CRS and by Mr. Bossard on behalf of Legion and/or CRS, both on-shore companies. They consulted their senior officers, Mr. Partridge, the Fourth Defendant, who was Executive Vice-President of Legion, and Mr. Turner, the Sixth Defendant, who was President of CRS. Mr. Walsh, the Seventh Defendant, was General Counsel to the U.S. - based subsidiaries of the MRM group. All the above worked from the group's offices in Pennsylvania. When it became necessary for them to involve Mutual Indemnity and Holdings, they spoke to Mr. Alexander, and it was by telephone because he was in Bermuda.

The 2000 Renewal

18. The story in outline was as follows. At some time in February 2000, Mr. Agnew and Mr. Bossard on behalf of Legion/CRS met Mrs. Hendricks and Lysa Saran (Chief Operating Officer, and President) at AMPAT's offices at Oak Brook, Illinois. Also present was Scott Thomas, a lawyer advising AMPAT. There was concern about the level of under-reserving, in other words, as to whether sufficient reserves were held for claims arising under the existing and earlier Programs. In this context, the question arose whether Mr. and Mrs. Hendricks might be liable beyond the AAP and up to Legion's policy limits, if any (that is, limits under the underlying policies issued by Legion). According to Mrs. Hendricks, Messrs. Agnew and Bossard "stated that "it was possible" we bore such liability, but that they would check and get back to me".

19. After Messrs. Agnew and Bossard returned to Philadelphia, they had one or more meetings with Mr. Partridge (Vice President of Legion) and Mr. Turner (President of CRS). Although it is unclear whether there was more than one meeting, and how long it (or they) lasted, it is common ground that Messrs. Agnew and Bossard raised the issue that was causing concern to Mrs. Hendricks and which could affect her decision whether or not to renew the Program for 2000, namely, whether AMPAT was exposed to the risk of bearing losses in excess of the aggregate of the AAP and the reinsurance placed by Legion with third parties. Mr. Partridge and Mr. Turner either telephoned Mr. Walsh, the General Counsel to the USA subsidiaries of Mutual, or called him to the meeting, and they put the question to him. There was an acute conflict of evidence as to what he said in reply, but the next step was for Mr. Partridge to telephone Mr. Alexander in Bermuda. That was because it became necessary to consider the Shareholder's Agreement under which AMPAT had undertaken to indemnify Mutual Holdings against losses incurred by Mutual Indemnity with respect to the Program, and that was Mr. Alexander's responsibility rather than theirs.

20. After they had spoken to Mr. Alexander, there was some discussion between Messrs. Partridge, Turner, Agnew and Bossard as to the prospects for and the cost of buying reinsurance against any losses suffered during the previous three years of the Program (1997-2000) in excess of those reinsured either by Mutual Indemnity or by third party reinsurers. There was a telephone conversation with Mr. James Eaton, a London-based reinsurance broker.

21. What was said at this meeting or meetings, which came to be called collectively 'the Coverage Meeting', was the central issue of fact raised in evidence. Messrs. Agnew and Bossard said, in summary, that Messrs. Partridge and Turner confirmed their view that Mr. and Mrs. Hendricks were not liable under the Program in excess of the A.A.P. but nevertheless they proceeded to devise a scheme whereby Mutual could take advantage of their (Mr. and Mrs. Hendricks') belief that they were on risk for any excess over the aggregate of the A.A.P. and Legion's re-insurance with third party re-insurers. The scheme envisaged (1) charging Mr. and Mrs. Hendricks with a "premium" of $1 million to obtain re-insurance coverage for their supposed liability for the excess, if any, arising under the existing and previous years, and (2) amending the Shareholder's Agreement so as to include such liability for the coming year, 2000/2001.

22. Messrs. Partridge and Turner denied that there was any scheme, or any devious scheme. They said that they believed that Mr. and Mrs. Hendricks in fact could be liable in excess of the A.A.P., but only because Mutual Indemnity would be liable under Article 3A of the Re-insurance Treaty to indemnify Legion against losses in excess of the aggregate of the A.A.P. and the re-insurance placed with third party re-insurers, and Mutual Indemnity in turn could recover an indemnity from Mr. and Mrs. Hendricks under the Shareholder's Agreement.

23. On that basis, Mutual Indemnity's further liability would be subject to the agreed limit of $5 million (or less, under Article 3A), but it was not suggested that there was any discussion of the difference between the additional liability (limited) that might be incurred by Mutual Indemnity as re-insurer under Article 3A, and any further liability (unlimited) that might be incurred by Legion beyond that reinsured limit. Mr. Walsh, however, in his evidence which the Judge accepted said that when he had considered the matter, he told "them" (meaning Mr. Partridge and Mr. Turner) that in his view Mr. and Mrs. Hendricks would be liable under the Shareholder's Agreement to indemnify Mutual Indemnity against its liability for the additional re-insurance provided under Article 3A.

24. There is no written record of any of the above communications or of the meeting or meetings which comprised the Coverage Meeting.

Documents

(a) Emails

25. An internal email dated 27 March 2000 from Mr. Bossard to Messrs. Partridge and Turner, copied to Mr. Agnew, read as follows -

> *"Attached is the revised analysis [of projected losses]. As you will see, we are protected on a developed basis by our aggregate limits. Therefore, we should be able to collect a premium for "removing AMPAT from historical development of losses above the aggregate limit".*
> *Please review and provide your thoughts.*
>
> *James [Agnew] – have you received any additional feedback from Lysa regarding the price they are willing to pay?"*

26. On the next day, March 28, Mr. Bossard informed Lysa (AMPAT) by email that Legion had agreed to extend coverage under the existing Program until 30 April (renewal date was 23 March) but that it would not accept any new business until the terms for renewal were finalised. The email continued –

> *"Finally, if terms cannot be agreed by [1 April], Legion will begin to issue notice of non-renewals. We all agree that this action would be the kiss of death for this program and we hope that it does not come to this."*

The next paragraph referred to the possibility of obtaining some form of cover for AMPAT in respect of liabilities greater than the AAP limits for previous years. It read –

> *"On a positive note, we have a market that is interested in removing American Patriot from an excess aggregate exposure position in the prior years. The price should be in the range of $350k to $650k. There would be no limit to this protection. In addition, we have approached a number of markets that are interested in buying down the specific excess to $200k. We hope to have this finalised in the next day or two."*

27. On March 31, Mr. Bossard emailed AMPAT "Here are the requested documents". They included what he described as follows -

> *"Retro Buy Out – This is a firm quote from the reinsurers that participate on our aggregate excess layer."*

The document had been sent to him with an internal email, copied to James Agnew. Four days later, on 4 April, Mr. Bossard sent AMPAT (Sarah Lysa) a further email headed "Retro buy out" which he copied to Mr. Alexander as well as James Agnew. It read –

"Attached is the revised sample letter for the retro buy out.
Per your request, here are the two examples:
[figures followed]
I hope this will illustrate the structure……..."

The attached letter was a draft headed "Re; Aggregate Protection" to be signed by Mr. Alexander on behalf of Mutual Indemnity (Bermuda) Ltd.

28. The letter was re-drafted and eventually was sent by Mr. Alexander dated 20 April 2000. Meanwhile, on April 5, Mr. Agnew sent to AMPAT a preliminary proposal for the 2000 renewal, and on April 14 Mr. Bossard informed Messrs. Turner and Partridge, copy to James Agnew and others, that "American Patriot has agreed to renew the programme effective 3/23/00 based on following terms:

*"*They have agreed to pay Mutual Indemnity $480,000 with swing up to $1 million and down to $390,000 to remove them from an excess aggregate position on the 1997 through 1999 years. The 2000 proposal clearly illustrates that they are back on after the aggregate limits….."*.

29. The 2000 proposal there referred to included a "Program Structure" in a different form from previous years. A new paragraph read –

"The shareholder is responsible for any loss or losses excess of the Aggregate attachment plus the finite limit of $5,000,000 (see example below)."

That was followed by a table showing that the $5,000,000 referred to was the third party Stop Loss re-insurance obtained by Legion as part of the Program, and that losses beyond that level were "Responsibility of Shareholder". The proposal also stated –

"Shareholder Agreement:
Under the terms of the shareholder agreement to be executed between Mutual and [the Hendricks], in return for assuming liability for losses and expenses not covered by the reinsurers on the reinsurance slips, [the Hendricks] will be eligible for dividends as shown in the shareholder agreement. Please see attached draft".

The "attached draft" apparently was a draft of the letter dated 20 April 2000 which Mr. Alexander later signed on behalf of Mutual Indemnity, and which Mr. and Mrs. Hendricks countersigned.

(b) Letter dated 20 April 2000

30. The letter dated 20 April 2000 reads in part as follows –

> *"As part of the renewal proposal for the 2000-2001 program year, Mutual has agreed to purchase reinsurance to limit American Patriot`s obligations for the 1997 through 1999 program years. This reinsurance is in addition to the two aggregate stop loss coverages already in place .....The placement of this additional reinsurance will mean that Mutual will not seek reimbursement from Ken and/or Diane Hendricks under the Shareholder Agreements, for any losses that exceed the combined annual aggregate reinsurance protection provided under the Program for each year……*
> *In return, American Patriot has agreed to pay the provisional premium of $480,000 to Mutual as consideration for this protection. As stated, this excess aggregate protection will cover all losses excess of the aggregate, per line of coverage, for the 1997 through 1999 program years and carries a minimum and maximum charge based upon a rate per $1.00 of loss that penetrates above aggregate losses for all years combined.*
>
> | | *Minimum* | *Provisional* | *Maximum* |
> |---|---|---|---|
> | *Premium* | *$390,000* | *$480,000* | *$1,000,000* |
> | *Loss Penetration above Aggregate* | *less than $1,500,000* | | *greater than $3,000,000* |
> | *Rate per $1 of Penetrated loss for losses* | *$ .30* | | *$ .16* |
>
> *……*
> *With respect to the reinsurance to be purchased by Mutual,…….*
> *Please signify your agreement with this proposal by signing below. Formal acknowledgement of this revision to the Program will be contained in the revisions to the Shareholder Agreement, and will be effective upon the payment of the $480,000 fee….."*.

31. AMPAT paid the sum of $480,000 as requested, and later paid a further $520,000 bringing the total payment to $1 million. The proposed reinsurance never was purchased, and Mutual now accepts that it is liable to repay that sum to AMPAT. The fact that it was demanded and paid, however, remains relevant to the issues arising in this appeal.

(c) Amendment No.5 to the Shareholder Agreement

32. Amendment No.5 to the Shareholder Agreement eventually was signed by Mr and Mrs Hendricks on a date (unspecified) in 2000 and by Mr. Alexander on behalf of Mutual Holdings (Bermuda) Ltd. on 19 January 2001. Its wording has to be quoted in full. The parties were Mutual Holdings (Bermuda) Ltd. defined as "MUTUAL" and Mr. and Mrs. Hendricks defined as "SHAREHOLDER". It reads-

"WHEREAS, both SHAREHOLDER and MUTUAL are desirous of amending this Agreement to document SHAREHOLDERS liability under the Program.

WHEREAS, SHAREHOLDER retains a percentage of the losses.

WHEREAS, SHAREHOLDER has agreed to be responsible for all losses within their specific retention up to an aggregate attachment point as detailed in the proposals detailing the PROGRAM and attached hereto.

WHEREAS, INSURANCE COMPANY has purchased reinsurance coverage above SHAREHOLDERS attachment point to protect program as detailed in proposals and attached hereto.

WHEREAS, losses on the program may exceed the sum of the retention plus the coverage bought by INSURANCE COMPANY.

WHEREAS, this AGREEMENT, the POLICY and the TREATY together constitute a single insurance program (hereinafter the "PROGRAM") which is uniquely negotiated single contract and no part of the PROGRAM would have been entered into without the other parts being in force.

NOW THEREFORE, in consideration of the Mutual promises and undertakings set forth herein the parties do hereby agree as follows:

1. *SHAREHOLDER agrees to indemnify MUTUAL and/or INSURANCE COMPANY for any losses sustained which exceed the sum of the SHAREHOLDERS specific retention plus the additional reinsurance purchased by INSURANCE COMPANY.*
2. *All other terms and conditions shall remain unchanged.*
3. *The effective date of this Amendment No.5 shall be the 23rd. day of March, 1997 but will exclude years 1,2 and 3 of the program."*

Issues

33. Taking the above documents at their face value, their effect was to renew the Program for the year 2000/2001 on the basis that AMPAT undertook to indemnify "MUTUAL and/or INSURANCE COMPANY" in the terms of paragraph 1 of Amendment No.5 ("for any losses sustained which exceed the sum of SHAREHOLDERS specific retention", meaning the A.A.P. figure plus the third party reinsurance in the sum of $5 million purchased by Legion in accordance with the programme), but the obligation to indemnify was not to relate to years 1, 2 and 3 (1997 to 1998). So far as those years were concerned, reinsurance was to be purchased by Mutual, at Shareholders' expense. All this was consistent with an understanding that Shareholders would bear any losses sustained in excess of the A.A.P. limit plus third party insurance obtained by Legion, not merely during year 4 but from inception in 1997/1998.

34. If the effect of Amendment No.5 is as stated above, the position of the Shareholders was significantly different from what it was during years 1, 2 and 3. Then, their undertaking was to indemnify Mutual Holdings against any losses sustained by Mutual Indemnity [as re-insurer of Legion]. For 2000, it was expressed as an undertaking to indemnify Mutual "and/or Insurance Company", and the latter can only be read in this context as a reference to Legion. So, their undertaking was extended to include all losses sustained by the insurers, Legion, including any that were not reinsured.

35. The shareholders contend that that is the effect of the Amendment. How it came about that their potential liability was re-defined in this way is the central issue raised in these proceedings. They contend that the corporate and individual defendants represented to them that they were already liable under the existing i.e. 1997/1999 terms for all losses sustained in excess of the A.A.P. (except only those covered by third party reinsurance), that the representations (1) were false, and (2) were made fraudulently or negligently, and (3) induced them both to renew the Program for 2000/1 on terms including Amendment No.5 and to pay $1 million as a purported reinsurance premium in respect of 1997/9 liabilities which they did not bear under the previous terms.

36. The Respondents contend that the shareholders were liable under the 1997/9 Program terms for losses in excess of the A.A.P. and third party insurance aggregate, and they deny that any representations they made to that effect were false, or fraudulently or negligently made. They draw a distinction, however, between losses in excess of the aggregate that were re-insured with Mutual Indemnity under Article 3A of the Treaty (with a limit of $5 million or less), and further losses beyond that limit which were not so reinsured. They deny that they ever sought to impose those further losses on the shareholders, or represented that the shareholders were liable for them, and they contend accordingly that on its true construction the shareholders' undertaking under paragraph 1 of Amendment No. 5 was limited to losses that were re-insured under Article 3A. The Judge accepted that submission as to the interpretation of Amendment No.5, holding that "both sides were operating on the basis that the shareholders were exposed to [further] losses……. by reason of the operation of Clause 3A" and that "amendment number 5 does have to be construed with a view to achieving that result" (Judgment para.284).

37. Most of the evidence and by far the greater part of the judgment were concerned, understandably, with the history of the negotiation of the 2000 renewal and the allegations of fraud and negligent misrepresentation made by the shareholders against the individual defendants. The Judge made his findings on those factual issues without taking account of amendment no.5 ("I should no doubt have referred to amendment number 5 in relation to my finding on the fraud," Judgment para.282). In my respectful view, the drafting and intended meaning of the amendment forms a vital part of the story and of the context in which the fraud issues must be considered. (Ironically, perhaps, the Judge did refer to the amendment when he set out his findings on the issue of fraud, in paragraph 232, but clearly, in view of his later remark, it was only a passing reference.)

The Judge's findings

(a) The Coverage Meeting

38. The Judge held, first, that there were inconsistencies between the evidence of the witnesses called by Mr. and Mrs. Hendricks, namely, Messrs. Agnew and Bossard, one of which he regarded as serious (Judgment paragraph 212) and which he resolved in favour of Mr. Agnew. He found that Mr. Bossard's evidence to the Court regarding what Mr. Walsh said at the Coverage Meeting was inconsistent with what he had said in evidence at an arbitration hearing in 2003 and 2004, and he held that the later evidence given in Court was not the truth (Judgment paragraph 217). He rejected Mr. Agnew's evidence, to the extent that he supported Mr. Bossard on this topic, on the ground that "he must have been in error" (Judgment paragraph 218). He recognised that there were differences in the evidence given by the witnesses for the defendants, but "these are for the most part very minor" and not "remotely comparable" to those he had referred to above (Judgment paragraph 219).

39. Next, the Judge considered the question of "Credibility" (paragraph 220). He formed an extremely adverse view of Mr. Bossard as a witness (Judgment paragraph 220) and was satisfied that "his evidence is not reliable, and where it conflicts with the evidence given by the witnesses for the defendants, particularly in regard to the Coverage Meeting, I reject it" (paragraph 225). He found Mr. Walsh an impressive witness and accepted his evidence as to what he had said at

the Coverage Meeting, making it necessary to reject not only Mr. Bossard's account but also that given by Mr. Agnew, not only in relation to Mr. Walsh, but (apparently) generally –

> *"So I must make it clear that I do not accept that Mr. Agnew's evidence as to the events of the Coverage Meeting is the truth. By the same token, I do accept the evidence in relation to that meeting given by the four witnesses for the defendants, Mr. Partridge, Mr. Turner, Mr. Walsh and Mr. Alexander."* (paragraph 225).

40. The Judge's "Finding on the Issue of Fraud" was stated as follows –

> *"229. I do, therefore, find that the fraud in relation to the Coverage Meeting has not been proved, and I find that the position of Messrs. Partridge and Turner, and, to the extent that they were involved, Messrs. Walsh and Alexander, was that all of them believed that American Patriot/the Hendricks did have a liability beyond the third layer [meaning the reinsurance placed with third parties]. I reject the case for the plaintiffs that those gentlemen, or any of them, had no such belief, and were seeking to charge a dishonest premium to relieve American Patriot/the Hendricks from exposure where none existed."*

41. He then discussed the issue as to the difference between Mr. and Mrs. Hendricks' exposure (if they were exposed at all in excess of the A.A.P. and third party re-insurance aggregate) to the limited amount of the re-insurance cover given by Mutual Indemnity to Legion under Article 3A of the Treaty and the full, maybe unlimited liability of Legion under the underlying policies. That issue was identified in the pleadings. The claim "was always put on the basis that Messrs. Partridge, Turner, Walsh and Alexander resolved to take advantage of the Hendricks' lack of knowledge and understanding of the re-insurance obligations of Mutual Indemnity by telling them that they were responsible for losses "up to Legion/Villanova's policy limits" pursuant to the Shareholder's Agreement." (Judgment paragraph 230). The Defence included –

> *"29…….it is averred that American Patriot and the Hendricks are liable for losses in excess of the Aggregate Attachment Point up to the exposure of Mutual Indemnity to Legion (US$5million any one policy, US$10 million in aggregate in excess of the Aggregate Attachment Point plus $5 million) through the Shareholder Agreement"* (Defence to Counterclaim paragraph 29).

42. In this context, the Judge summarised the evidence given by the individual defendants regarding what was said at the Coverage Meeting –

> *"231……Mr. Partridge had said that there had been no discussion in relation to unlimited exposure, as opposed to the $5 million representing the fourth layer, and referred to the fact that the focus had been more on liability than on limit….Mr. Turner said that at the meeting he was not focusing on the extent of exposure if losses went into the next layer, so much as to where the exposure lay……Mr. Walsh's evidence was directed to the advice which he said he had given, which was that the exposure of the Hendricks above the A.A.P. was based on Mutual Indemnity's exposure. Mr. Alexander does not appear to have participated in that part of the conversation.*
> *232. So, for the avoidance of doubt, I should make it clear that I reject the allegation that the defendants witnesses conspired to defraud the Hendricks in relation to unlimited exposure above the AAP. I recognise that there are various subsequent documents which suggest, directly or indirectly, that the Hendricks had unlimited exposure. First is the letter of 20 April 2000, which uses the words "for any losses" that exceed the A.A.P. Similar language, not surprisingly, found its way into amendment number 5 to the Shareholder Agreement."*

43. The subsequent documents will be discussed below. At this point, it should be observed, with respect, that the Judge's reasoning in paragraph 231, quoted above, is unclear. It was common ground that the Hendricks were concerned at the possibility of exposure beyond the A.A.P. and that they had no knowledge of Article 3A of the Treaty, under which the additional re-insurance of Legion by Mutual Indemnity arose. If neither Mr. Partridge nor Mr. Turner had the Article 3A limit in mind (Mr. Turner's evidence suggested that he was unaware that there was a limit), and there was no reference to it, it is not easy to follow why they should have thought that the Hendricks' concern was not about an unlimited exposure, which was what Messrs. Agnew and Bossard were referring to, but was confined to that further limit.

(b) Documents

44. The Judge then considered the alternative plea of fraudulent and/or negligent misrepresentation, based on, first, Mr. Bossard's post-Coverage Meeting emails to AMPAT (Ms. Saran) dated 28 March 2000 and 31 March, secondly, on Mr. Alexander's letter dated 20 April 2000, and thirdly, a later letter dated 4 February 2002 demanding payment of the balance ($520,000) of the previously indicated "premium" of $1 million. As regards Mr. Bossard's emails, which were clearly "false and misleading" the Judge held that that he was an employee of Legion "and there is no evidence to suggest that in sending these he was acting on behalf of any of any of the defendants" (Judgment paragraph 238). He held that the pleaded representations

contained in the 20 April letter "fall with the allegation of fraud" (paragraph 239). But in paragraph 243 he dismissed the claim for damages for negligent representation on the ground on the ground that "no misrepresentation had been made".

45. As noted above, the Judge reached his conclusions regarding the fraud issue without referring to Amendment No.5 to the Shareholder's Agreement, as he acknowledged when he came to deal with it in paragraph 282. He then had to consider why the document drafted by Mr. Alexander, based on the 20 April letter, contained an unlimited indemnity ("SHAREHOLDER agrees to indemnify MUTUAL and/or INSURANCE COMPANY for any losses sustained") without referring to the Article 3A limit, if that was intended; and secondly, why the indemnity extended to losses sustained by an insurance company (which it is agreed can only mean Legion or Villanova, the insurers named in the Program) which was not a party to the Shareholder`s Agreement nor made a party to Amendment No.5. Subject to the legal issue whether the indemnity could be enforced contractually by the insurance company (a point taken by Mr. Walsh in his evidence (Judgment paragraph 155) though Mr. Alexander's evidence was that he drafted the Amendment personally, without taking legal advice), the indemnity as drafted gave Mutual exactly what Messrs. Agnew and Bossard said the defendants decided they wanted from the Hendricks, namely, an unlimited indemnity against losses sustained by the insurance companies, not merely losses sustained by Mutual Indemnity as their re-insurer.

46. The Judge held, however, that that interpretation of the Amendment was incorrect or, at least, that that was not the meaning that Mr. Alexander intended it to bear. He said this –

> *"281……..As I have indicated, Mr. Alexander accepted that the drafting, which he had undertaken without the benefit of legal advice, did not achieve the purpose for which it had been intended. Part of the reason for that was that Mr. Alexander's drafting was based upon the April 2000 letter, which itself was confusing in relation to the extent of losses covered. But amendment number 5 compounded the problem by purporting to create an obligation to indemnify Legion and/or Villanova, rather than Mutual Indemnity.*
> *282. The plaintiffs contend that Mr. Alexander's explanations in relation to the preparation of amendment number 5 are not to be believed, and the substitution of Legion/Villanova was described in their written submissions as being "obviously fraudulent". I should no doubt have referred to amendment number 5 in relation to my finding on the fraud, because the case for the plaintiffs is that the amendment represents clear documentary*

evidence of the carrying into effect of the fraudulent scheme discussed and agreed at "the Coverage Meeting".

283. I reject that characterisation. I am quite satisfied that the drafting inadequacies of amendment number 5 to the Shareholder Agreement were indeed genuine errors and not part of the theory of fraudulent conspiracy which I have already rejected. Whereas the Shareholder Agreement referred to their being an obligation to indemnify both Mutual Holdings and Mutual Indemnity, amendment number 5 referred to Mutual Holdings and/or "INSURANCE COMPANY", which while not defined was clearly a reference to Legion/Villanova.

284. But that could never have been the intention of the parties,……. The reality is that both sided were operating on the basis that:

- *American Patriot/the Hendricks were exposed to losses in the fourth layer, by reason of the operation of clause 3A of treaty 103.*
- *For the first three programme years, Mutual Indemnity had agreed to seek reinsurance protection for American Patriot/the Hendricks for an agreed premium of $1 million.*
- *In the event, when reinsurance could not be procured, Mutual Indemnity regarded itself as effectively self-insuring the risk, in recognition of the agreement to relieve American Patriot/the Hendricks of exposure in the fourth layer for the first three Programme years.*

I am satisfied that that was the common intention of the parties, so that amendment number 5 does have to be construed with a view to achieving that result. It was not intended (despite the bad drafting) to provide for unlimited exposure to American Patriot/the Hendricks, because that would have involved indemnifying Legion for its losses above the fourth layer, and there is no question but that the obligation of American Patriot/the Hendricks under the Shareholder Agreement was to indemnify Mutual indemnity's underwriting losses, and not those of Legion".

Comment (Documents)

47. The Judge's interpretation of Amendment No.5 and his reasons, in my respectful view, are wholly unconvincing. The two matters calling for an explanation are the unqualified reference to "any losses sustained", if the intention was to refer only to "further losses up the limit stated in Article 3A of the reinsurance Treaty", and the express references to the insurance companies who were not parties to the Shareholder's Agreement and for whose excess losses above reinsurance limits Mutual Indemnity was not liable. Neither of these was "bad drafting" or a "drafting inadequacy" nor is it easy to see why it was a "genuine error" to include the reference to losses suffered by the insurance companies if it was not intended to include them.

48. On the other hand, their inclusion makes complete sense if the intention was to achieve a situation where the Hendricks' undertaking to indemnify Mutual Holdings under the Shareholder's Agreement was extended beyond losses sustained by Mutual Indemnity, as reinsurer, to include losses sustained by the insurance companies (themselves forming part of the Mutual group of companies) which were not reinsured. That, in my judgment, is the clear meaning of Amendment No.5 if regard is had to its wording alone.

49. The Judge rightly had regard to the history of the amendment, which led back through the 20 April 2000 letter to the negotiations for the 2000 Program about which he made findings of fact. He said "The reality is that both sides were operating on the basis that – American Patriot/the Hendricks were exposed to losses in the fourth layer, by reason of the operation of Article 3A of treaty 103" (paragraph 284, quoted above). But he had not made findings to that effect, nor could he have done so, if only because the Hendricks (and probably, Messrs Agnew and Bossard also) knew nothing about Article 3A (and it was common ground that they were known to be concerned that they might be exposed to unlimited losses). There was no basis for imputing an intention to them that Amendment No.5 was concerned with a limited class of losses, whether by reference to Article 3A or for any other reason. Moreover, there was no clear evidence that any of the defendants, except Mr. Walsh and, possibly, Mr. Partridge, had the Article 3A limit in mind. And as for extending the indemnity to include losses suffered by Legion, as the Judge himself said "there is no question but that the obligation of American Patriot/the Hendricks under the Shareholder's Agreement was to indemnify Mutual Indemnity's underwriting losses, and not those of Legion" (paragraph 284).

50. What, then, was the evidence about references to Article 3A in the course of the negotiations? In the Judge's Overview (paragraphs 42 – 49) the issue under discussion was said to be whether the Hendricks were liable in excess of the A.A.P. (paragraph 44). The Judge summarised the Witness Statements as follows –

> *"47. ……Messrs. Agnew and Bossard were of the view that American Patriot and the Hendricks had no liability beyond the A.A.P., whereas Messrs. Partridge, Walsh and Alexander all said that they had understood Mutual Indemnity to have exposure at the fourth layer level, such that if losses reached into this level, Mutual Indemnity's exposure would in turn give rise to the indemnification obligations of American Patriot and the Hendricks."*

51. It was necessary to refer to their cross-examination, therefore, to discern the extent to which the defence witnesses distinguished in their own minds between unlimited liability "in excess of the A.A.P." and further liability subject to the limit stated in Article 3A of the Treaty through the operation of the indemnity agreement in the Shareholder's Agreement. Mr. Partridge knew of the Article 3A amendment to the Treaty, which he had signed in 1993 (judgment paragraph 109), but he said that "he did not appreciate what the limits were in layer 3A". "When asked in relation to the exposure being for $5million or unlimited, Mr. Partridge said that he could not recall thinking either way on that, but that the focus had been more on their liability, and not on the limit" (judgment paragraph 115). Mr. Turner said that he was "vaguely aware of clause 3A at this point, but was not sure that he had "connected the dots" in relation to the liability of American Patriot/the Hendricks……..at that point he was not focusing on the extent of the exposure if losses went into the next layer, so much as to where the exposure lay" (judgment paragraph 133). Mr. Alexander said that he was asked the general question "who was responsible for the payment of losses in the event that losses exceeded the third party reinsurance layer" and "he believed that he probably explained what he then understood to be the case, namely that there was nothing specific in the Shareholder's Agreement, but that the risks should fall on the IPC client unless ceded to a third party reinsurer." (Paragraph 158) He "did not draw a distinction between fourth layer losses and losses above that layer" (paragraph 160). He confirmed that "his answer was not based on any understanding that clause 3A applied" (paragraph 176).

52. Mr. Walsh, alone of the defence witnesses, said that he had the Article 3A limit clearly in mind, when he went back to Messrs. Partridge and Turner with his considered opinion after looking after the master copy of the Shareholder's Agreement which he kept in his office (judgment paragraph 152). It was not suggested that he spoke to Mr. Bossard or Mr. Agnew on that second occasion (ibid.).

53. This evidence, in my judgment, does not support the Judge's finding that in "reality" there was a common intention that amendment no. 5 to the Shareholder's Agreement, reflecting the 20 April 2000 letter, was limited to losses in the fourth layer arising "by reason of the operation of clause 3A of treaty 103" (paragraph 284). It was accepted that the Hendricks were

unaware of Article 3A (though it was contended that they could have demanded the right to see the Treaty, if they had sought to do so). There was no evidence or suggestion that Messrs. Bossard and Agnew were aware of it, nor that it was discussed at the Coverage Meeting, and the defence witnesses had somewhat ambivalent attitudes as to its relevance, as indicated above. The background, in my judgment, does not provide any basis for interpreting amendment no.5 as if the reference to "any losses" was limited to reinsured losses under Article 3A. Nor for finding that Mr. Alexander intended the reference to have that limited meaning only.

54. The first reference to the 20 April 2000 letter dealing with what was called the "retro buy out" was in an email from Mr. Bossard to AMPAT (Lysa Saran) dated 4 April 2000. It attached a draft which began "As part of the renewal proposal for the 2000-2001 program year, Mutual has agreed to purchase reinsurance to limit American Patriot's obligations for past years to losses up to the aggregate attachment point for each year, and will not seek reimbursement under the Shareholder's Agreement for any losses that exceed the annual aggregate reinsurance protection provided under the Program for each year…….In return, American Patriot has agreed to pay $480,000 to Mutual as consideration for this protection." The draft was to be signed by Mr. Alexander and copied to Mr. Agnew and Mr. Bossard. On the next day, 5 April 2000, Mr. Agnew sent preliminary proposals for the 2000 Program, to be signed by Mr. Alexander on behalf of Mutual Indemnity. These were copied to Mr. Turner, Mr. Partridge and Mr. Walsh, among others. They contained a clause which had not appeared in previous years (already quoted above)-

> *"Shareholder Agreement: Under the terms of the shareholder agreement to be executed between Mutual and Ken and Diane Hendricks, in return for assuming the liability for losses and expenses not covered by the reinsurers on the reinsurance slips, Ken and Diane Hendricks will be eligible for dividends as shown in the shareholder agreement. Please see attached draft."*

55. A revised draft of the "aggregate excess buy out letter" was sent to Mr. Alexander on 5 April 2000 for him to "print on his letterhead and sign and fax to Eric [Bossard] for his meeting tomorrow", and Mr. Bossard forwarded to Messrs. Partridge and Walsh the draft "that AMPAT will be signing tomorrow". This draft included "this excess aggregate protection will cover all losses excess of the aggregate…….for the 1997 through 1999 program years" which appeared in the final version dated 20 April 2000. It appears that agreement was not reached until that date,

although on 14 April Mr. Bossard reported to Messrs. Turner and Partridge that AMPAT "has agreed to renew the programme effective 23 March 2000 based on the following terms, the first term being –

> *"* They have agreed to pay Mutual Indemnity $480,000 with swing up to $1million and down to $390,000 to remove them from an excess aggregate position on the 1997 through 1999 years. The 2000 proposal clearly illustrates that they are back on after the aggregate limits."*

56. There is no mention in any of this correspondence of the Article 3A limit, nor of any other limit to the "all losses excess of aggregate" against which the proposed reinsurance was to provide cover for AMPAT. Nor is there any mention of the two insurance companies, Legion and Villanova. The Defendants contend that AMPAT's assumed liability for excess losses was limited to those suffered by Mutual Indemnity as reinsurers, and therefore it was impliedly subject to the limit stated in Article 3A. But that argument as to the meaning of the letter merely demonstrates that the express reference to the insurance companies in amendment no.5, which was the "formal agreement", intended to embody "the indemnification obligation set forth in the letter", was necessary in order to make it clear that the liability was unlimited, not subject to Article 3A.

57. Mr. Alexander drafted Amendment no.5 and he added the reference to "losses sustained by insurance companies". The nearest he came to explaining why he did this was in his Witness Statement, paragraph 72, where he said, "It was the responsibility of the onshore companies to arrange the reinsurance placement". This suggests that he recognised that the losses for which reinsurance was required would be borne by the insurance companies in the first instance, subject only to policy limit, and he believed that the IPC Client was liable for all excess losses over aggregate and reinsurance limits. But, in the Judge's words, "There is no question but that the obligation ….under the Shareholder's Agreement was to indemnify Mutual Indemnity's underwriting losses, and not those of Legion." (Paragraph 286) Amendment no 5 as drafted was an unjustified extension of the Shareholder's Agreement, and I would find, in the absence of any other sensible explanation, that it was demanded as a term of the 2000 program in order to impose on AMPAT/the Hendricks an obligation which they did not bear under the Program or under the Shareholder's Agreement without the amendment.

58. The circumstances in which, first, the letter dated 20 April 2000, and secondly, amendment no.5 itself, were drafted, are relevant to the question whether the changes from the previous arrangements were introduced knowingly, and if so for what reason. Mr. Alexander claimed that he drafted the amendment without the benefit of legal advice and without, so far as he could recall, consulting Mr. Walsh. Mr. Walsh confirmed this ("he did not believe that he spoke to Mr. Alexander about the issue" Judgement paragraph 152). It is perhaps surprising that Mr. Alexander did not do speak to Mr. Walsh when he was preparing a formal amendment to an agreement of which Mr. Walsh held the master copy in his office (ibid.). Extending the indemnity to losses sustained by the insurance companies clearly was deliberate and was unjustified, except as an extension of the previous terms. If the reference to "all losses sustained" appeared to be justified, as Mr. Alexander saw it, by his general feeling that IPC clients had an unlimited liability in respect of all losses in excess of the aggregate and of reinsurance limits, that was an untenable view and Mr. Alexander was, at the least, reckless as to whether it was justified, or not.

59. The documentary evidence establishes, therefore, that following the Coverage Meeting the Hendricks were required to undertake fresh liability under the Shareholder's Agreement, and they were offered unspecified "reinsurance" to cover their exposure to the risk of further excess losses under the first three years of the Program. It was not suggested to them that their exposure was limited by reference to the reinsurance Treaty or otherwise. They accepted the reinsurance proposal and paid a total of $1 million as the "premium" for that cover. It is not disputed that the decision to offer reinsurance to the Hendricks in return for a payment by them was made at the meeting or series of meetings that constituted the Coverage Meeting, and that it was made by Mr. Partridge and Mr. Turner on behalf of Legion and CRS respectively. The central factual issue is whether the individual Defendants believed that AMPAT/the Hendricks were at risk for that excess, or whether they decided to take advantage of the Hendricks' belief that they were, as was alleged by Messrs. Agnew and Bossard.

FINDINGS

(1) Mr. Walsh

60. The Judge found in no uncertain terms that Mr. Bossard gave false evidence regarding what Mr. Walsh said at the Coverage Meeting. The account in his Witness Statement read as follows –

> "He [Mr. Partridge] asked Andrew [Mr. Walsh], "*On the Reinsurance Agreement, does the client assume the risk above the aggregate stop loss?"* Andrew replied, "*no*". Glenn asked, "*Can't we change it?"* At this point I was not sure if he was joking. Andrew replied, "*no*" and after a pause said "*but we can change the amendment to the Reinsurance Agreement to say they are responsible above the Aggregate Attachment Point"*.

In his evidence at arbitration hearings in 2003 and 2004, however, Mr. Bossard said positively that Mr. Walsh had not added anything after saying that the Agreement could not be changed. The Judge found –

> *"But given Mr. Bossard's confirmation that his evidence in the arbitration was correct when he gave it, I would conclude that Mr. Bossard's evidence, in his witness statement and in cross-examination, that Mr. Walsh had added further words is not the truth, and I so find."*

Mr. Walsh's evidence was that when he was first asked the question by telephone, it was a novel issue and he needed to look into the position; when he did revert, some time later, he advised that Mutual Indemnity was liable for the fourth layer of losses, and that the Hendricks were liable under the Shareholder's Agreement to indemnify Mutual Indemnity in respect of losses in that fourth layer (judgment paras.143-144). But he also said this about the first enquiry, by telephone –

> *"He said that his recollection of the telephone call was not particularly good, but he did not believe that any one had asked him if the contract could be changed retrospectively. He said he might have been asked whether, if the liability were there [sic], a change could be made. He said his response to this was that the only way to do this was to change the reinsurance agreement retrospectively, but that could not be done, and he confirmed that this was the correct advice"* (Judgment para.143).

61. The difference between Mr. Bossard's and Mr. Walsh's evidence, therefore, was the specific issue whether Mr. Walsh had advised that the "Reinsurance Agreement" (meaning, it was accepted, the Shareholder's Agreement) could not be changed "retrospectively" or

"retroactively". In fact, Mr. Bossard had not used either of those words (see his Witness Statement quoted above, and the judgment para.60). But the Judge formed the clear view that Mr. Walsh had not spoken the additional words upon which the allegation of fraud made against him was based (see judgment para.216) and in my judgment it is not possible for this Court to reverse that finding of fact, notwithstanding that it involved rejecting Mr. Agnew's evidence also (judgment para.218).

62. It follows from this that the appeal against the Judge's dismissal of the claim against Mr. Walsh, the seventh Defendant, must fail, and the claims against the other defendants must proceed on the basis that Mr. Walsh did not advise at the Coverage Meeting that the Shareholder's Agreement could be amended retrospectively or retroactively.

(2) The Coverage Meeting

63. The Judge's Findings have been summarised above (paragraphs 38-42). Having preferred Mr. Walsh's evidence to Mr. Bossard's as to what he (Mr. Walsh) said when he was telephoned or called into the meeting by Mr. Partridge, the Judge comprehensively rejected Mr. Agnew's "evidence as to the events of the Coverage Meeting", as well as Mr. Bossard's, and "by the same token, I do accept the evidence in relation to that meeting given by ……Mr. Partridge, Mr. Turner, Mr. Walsh and Mr. Alexander." (Paragraph 225, quoted in paragraph 38 above) Unfortunately, there are no findings, apart from those relating to Mr. Walsh's participation, as to what those events were.

64. This makes it necessary to construct the course of the meeting from the evidence given by the six witnesses concerned. Inevitably, the starting point is Mr. Bossard's account (or accounts, bearing in mind the Judge's criticism of his inconsistency as a witness). Summarising what he said in his Witness Statement (judgment paras.60-61) and in cross-examination (judgment paras.66-70 and 73-75), his account was as follows-

(2) after returning to Philadelphia, he and Mr. Agnew arranged a meeting with Mr. Partridge, where they explained their and the Hendricks' concerns that losses under the current and two previous years' Programs might exceed even the $5million stop loss cover that had been placed with third party re-insurers: this was relevant also to the forthcoming renewal of the Program for 2000-2001;

(3) they explained to him that the Hendricks understood that they would or might be liable for losses in excess of that layer of cover;

(4) Mr. Partridge then asked "Are you sure they think they are on above the aggregate excess? Can you sell them retro insurance?"

(5) Mr. Agnew replied that this was possible: Mr. Partridge called Mr. Turner to his office, and the conversation was repeated;

(6) Mr. Partridge called Mr. Walsh on the telephone and asked "On the reinsurance agreement, does the client assume the risk above the aggregate stop loss?" and Mr. Walsh replied "No": there was then the conversation with Mr. Walsh about changing the terms of the agreement, about which the Judge made the findings set out above;

(7) Mr. Partridge then asked "how much can we get them to pay for it?" The figure of $1 million emerged, but there was a conflict of evidence between Mr. Bossard and Mr. Agnew as to whether Mr. Bossard or Mr. Partridge first suggested it. The Judge analysed this in detail (judgment paras. 212-215) and accepted Mr. Agnew's account. He rejected Mr. Bossard's evidence that Mr. Partridge had done so, which he regarded as "either an ill-conceived lie, or given with a reckless disregard for the truth" (para.215). The Judge's analysis does not refer to Mr. Partridge's evidence on this issue, which is perhaps unsurprising, because he said in his Witness Statement that "they had had a discussion about the cost of relieving the Hendricks of their liability, but he did not remember when that had taken place and did not think it had been at the meeting in question" (judgment para.106) and he reiterated this in cross-examination (para.124);

(8) Mr. Partridge commented that the figure of $1million was "logical" and he telephoned Mr. Alexander in Bermuda and explained the proposal to offer retro cover "for 1 million" which would be used to try and buy additional reinsurance for the benefit of Legion (judgment para.61);

(9) Mr. Alexander agreed that Mr. Bossard should prepare a draft letter for Mr. Alexander to send to AMPAT/the Hendricks, giving the appearance that Mutual Indemnity would purchase the cover by way of reinsurance; and

(10) Mr. Partridge then instructed Mr. Bossard to confirm to Ms. Saran (for AMPAT) that the Hendricks did have exposure beyond the AAP, that "they" would try to find

retrospective reinsurance in the market, and in due course that they had succeeded in doing so [for the $1 million premium] (judgment para.62).

65. Mr. Agnew's evidence differed from this, but mostly in what the Judge regarded as details, except as regards the source of the $1 million figure where he found "Mr. Agnew's version of events inherently much more likely" (paragraph 215). With reference to the nine stages described by Bossard (above), Mr. Agnew –

(2) and (2) agreed, but he said that they went to see Mr. Turner first and then moved on with him to Mr. Partridge's office "to bring him up-to-date" (para.78);

(3) and (4) he said that Mr. Partridge's reaction was "Can we get something for it?" He (Mr. Agnew) said that they were not looking to secure anything beyond the renewal, but Mr. Partridge "responded with detail as to the cost to Legion's own reinsurance protection, and said that he wanted to charge them something for that, carrying on to ask "What do you think they would pay?"(para.78);

(5) Mr. Partridge telephoned Mr. Walsh who responded "No, we cannot change the treaty" followed by a reference to the Shareholder's Agreement: in the light of the Judge's findings (above), this must have been to the effect that the AMPAT/the Hendricks could only be liable for losses in excess of the AAP by reason of their undertaking to indemnify Holdings against underwriting losses sustained by Mutual Indemnity as re-insurer;

(6) In answer to "what do you think they would pay?" (ref. (4) above) Mr. Bossard suggested US$1 million and they discussed with Mr. Partridge how this might be made more palatable for the Hendricks (judgment para.78);

(7) Mr. Partridge telephoned Mr. Alexander in Bermuda with Mr. Walsh as well as Messrs. Bossard and Agnew in his office. This was necessary because the Shareholder's Agreement became relevant. Mr. Agnew confirmed Mr. Bossard's evidence that Mr. Partridge explained to Mr. Alexander that the Hendricks misunderstood their position and that it was an opportunity "to retroactively adjust the Shareholder's Agreement" and "We think we can sell one million dollars for the reinsurance". Mr. Alexander said "OK". Mr. Agnew added that there was a

discussion about buying re-insurnace, not for the Hendricks, but for Legion, and that a call was put through to Mr. Eaton, the re-insurance broker in London.

66. The Defendants' witnesses do not dispute the outline of events described by Messrs. Bossard and Agnew. There was a meeting between them and Messrs. Partridge and Turner at which they reported the possibility of losses exceeding the A.A.P. in respect of the current and previous years of the Program. They also asked whether the Hendricks would be liable for such losses, stating that the Hendricks understood that they were but that Mr. Agnew and Mr. Bossard believed that they were mistaken in that view. Mr. Walsh was asked for his advice, and in consequence of his referring to the Hendricks' liability to indemnify Mutual Indemnity under the Shareholder's Agreement, Mr. Alexander was telephoned in Bermuda. The possibility of arranging retrospective reinsurance cover for the Hendricks' supposed liability in the current and previous years was discussed, and in that connection US$1 million was identified as the likely figure they could be charged for such cover.

67. Neither Mr. Partridge nor Mr. Turner claimed to have any clear recollection of what words were used at the meeting. That is apparent from the Judge's summary of their evidence, referred to above. Mr. Partridge said that he knew of the so-called fourth layer under Article 3A of the Re-insurance Treaty, which he had signed in 1993 (paragraph 104) but he said that he did not appreciate what the limits were under that Article and he did not focus on the fact that there was some limit (paragraph 115). He said that "he did not remember any discussion in which it was suggested that the Hendricks did not have that liability" (judgment 115). There is no indication, in Mr. Partridge's evidence, as recorded by the Judge, that he distinguished between the Hendricks' liability under the Program (which as Mr. Walsh correctly advised did not extend beyond the AAP) and their liability under the Shareholder's Agreement to indemnify Mutual Holdings against underwriting losses sustained by Mutual Indemnity. Mr. Turner was no more than "vaguely aware" that Article 3A existed (paragraph 133) and he did not suggest that it or the re-insurance limits under it were discussed.

68. In this state of the evidence, there was no justification for rejecting Mr. Bossard's and Mr. Agnew's evidence, if the Judge did reject it, that they told Messrs. Partridge and Turner that the Hendricks thought that they were liable for losses in excess of the AAP, a view with which they

(Messrs. Bossard and Agnew) disagreed (Mr. Agnew was "adamant" – judgment paragraph 87), and that Mr. Partridge's response was to the effect "Can we arrange retro-cover for them, and charge them for it?".

69. Moreover, it was effectively common ground that the next step was to clarify the legal situation with Mr. Walsh, who (on the Judge's findings) correctly advised that the Hendricks could not liable beyond the AAP under the Program, but that they might be liable to indemnify Holdings under the Shareholder's Agreement against any losses made by Mutual Indemnity, which could include underwriting losses made under the additional re-insurance provided to Legion under Article 3A of the Re-insurance Treaty. That led in turn to involving Mr. Alexander as the President of Mutual Indemnity and he approved a scheme that would include re-insurance cover for the Hendricks in respect of any losses that materialised from the current and previous years in excess of the AAP.

70. In this state of the evidence, there was little if any dispute as to the primary facts relating to the Coverage Meeting, apart from the specific question regarding Mr. Walsh's participation in it. The only significant issue was whether Messrs. Partridge, Turner and Alexander had a genuine belief that the Hendricks were liable for losses in excess of the AAP. All three claimed that they had, but for three different reasons. Mr. Partridge was aware of Article 3A but did not apply his mind to its limits. Mr. Alexander at that time believed that the IPC Client, namely AMPAT/the Hendricks, was liable for all losses not ceded to a third party insurer. He did not draw a distinction between fourth layer losses (Article 3A) and losses above that layer, and he confirmed that his answer to Mr. Partridge (to the effect that the Hendricks would be liable for excess losses) "was not based on any understanding that clause 3A applied" (judgment para.176). Mr. Turner, whose evidence has been quoted above, was probably a mixture of both.

71. But there was no suggestion by any witness that Article 3A was expressly mentioned at any stage of the meeting. Mr. Walsh said that he referred to the fourth layer (judgment paragraph 144) but not that he defined it by reference to Article 3A, which was necessary to distinguish it from unlimited liability. In fact, there was evidence that Messrs. Bossard and Agnew were unaware of its existence. Mr. Bossard said that "once the limits of the mainframe treaty were exceeded, the losses would fall back to Legion" (judgment paragraph 67). More specifically,

"Mr. Agnew was adamant that to his knowledge and understanding there was no genuine layer excess of the third layer" (judgment para.87). That seems to exclude the possibility of additional re-insurance of Legion by Mutual Indemnity under what Mr. Alexander called the fourth layer.

72. Reference should also be made to the evidence given by James Eaton, a London-based reinsurance broker, in a Witness Statement dated 25 October 2006 and in a Deposition. He recalled being asked to secure "retrospective aggregate stop loss cover for losses above the AAP" though he could not remember any conversations about pricing. He said that the losses he had in mind were losses that Legion would suffer (judgment paragraph 54) but Mr. Turner, to whom he reported at CRS, disagreed because he thought that the reinsurance was being sought for Mutual Indemnity (judgment paragraph 136). Neither suggested, however, that reinsurance cover was being sought for the Hendricks.

(3) Post-Coverage Meeting

73. In my judgment, evidence of subsequent events including the terms of the 2000 renewal of the Program are relevant and admissible to the issue whether the Defendants had a genuine belief that the Hendricks were liable for losses exceeding the AAP arising from the previous years (see paragraph 68 above). These have been set out above under the headings (a) Emails, (b) the 20 April 2000 letter, and (c) Amendment No.5 to the Shareholder's Agreement (paragraphs 25 to 32), as well as the 2000 Program itself (paragraph 29). Before considering these separately, I should also refer to Mr. Agnew's evidence that, after the Coverage Meeting, he "backed away from the renewal at this point because he did not wish to be directly involved" (judgment para.80). It appears that he was not cross-examined about this, and it provides some support, in my judgment, for his and Mr. Bossard's evidence that a scheme was devised at the Coverage Meeting which they found distasteful, because it involved taking advantage of the mistaken view that the Hendricks had formed.

(a) <u>Emails</u>

74. On 27 March 2000, Mr. Bossard's email to Messrs. Turner and Partridge stated "we should be able to collect a premium for "removing AMPAT from historical development of losses above the aggregate limit" ……have you any feedback from Lysa regarding the

price they are willing to pay?" This was not queried by either of the recipients, and its terms tend to support Mr. Bossard's account of what was discussed at the Coverage Meeting.

75. The later emails to AMPAT on March 28 and March 31 stated "we have a market" and "a firm quote from the reinsurers" for the "Retro Buy Out". Mr. Bossard was criticised by the Judge for sending these which "appear to have been fictitious" (paragraph 223). The Judge noted that Mr. Bossard was not cross-examined about these, although it was submitted that they were consistent with the plan agreed upon at the Coverage Meeting, but he concluded –

> *"…the reality is that the contents were not true, and there was no evidence to suggest that in writing them Mr. Bossard was acting on instructions from anyone else. I am bound to conclude that Mr. Bossard as the author of the emails was responsible for conveying false information to Ms. Saran"* (paragraph 224).

But there was evidence from Mr. Bossard himself that he sent the emails as part of the plan he was instructed to carry out by Mr. Partridge at the end of the Coverage Meeting. The issue in my judgment was whether the fact that Mr. Bossard sent them was consistent or not with his evidence that Mr. Partridge instructed him to do so, and in any event I would hold that the Judge was wrong to make this adverse finding against Mr. Bossard when he had not been asked for his explanation in cross-examination.

(b) <u>Letter dated 20 April 2000</u>

76. The letter was carefully drafted and signed by Mr. Alexander. It too was "fictitious" because Mutual had not agreed to purchase reinsurance in respect of AMPAT's obligations for the 1997/1999 Program years, nor did it ever do so. Moreover, the letter demanded payment of a "provisional premium of $480,000" by AMPAT to Mutual "as consideration for this protection", with provision to increase to a maximum of $1million. That was entirely consistent with Mr. Agnew's evidence of the arrangement discussed between Mr. Partridge and Mr. Alexander. The Hendricks were to be required to pay $1 million ostensibly as a reinsurance premium but it would be retained by Mutual as consideration for protecting them against "all losses" in excess of the AAP.

(c) <u>Amendment No. 5 to the Shareholder's Agreement</u>

77. On its true construction, in my judgment, this required the Hendricks to indemnify Holdings against underwriting losses suffered not only by Mutual Indemnity as reinsurers but also by Legion as original insurers under the AMPAT Program. If that is correct, it is entirely consistent with the object that Messrs. Bossard and Agnew say that the Amendment was intended to achieve, namely, to ensure that AMPAT/ the Hendricks would remain liable for losses incurred in excess of the AAP, without limit up to the sums insured by Legion. That went further than the limited amount for which Mutual Indemnity might be liable as additional reinsurance under Article 3A of the Reinsurance Treaty between them.

(4) **Conclusion**

78. The problem which Messrs. Bossard and Agnew took to their respective superiors, Messrs Partridge (Legion) and Turner (CWS), was the prospect of losses exceeding the aggregate of the AAP (up to which AMPAT/the Hendricks were liable, once the Loss Fund of premiums etc. was exhausted) and the stop loss reinsurance placed by Legion with third party reinsurers. They did not believe that AMPAT/the Hendricks would be liable for further losses, if they were suffered, which therefore would remain with Legion, and they were unaware of the additional reinsurance placed with Mutual Indemnity under Article 3A of the amended Reinsurance Treaty. But they also knew that the Hendricks had been advised, or were under the impression that they would be liable to indemnify Holdings for the excess. This was relevant to the negotiation of the 2000 renewal, as well as to the final settlement of the current and previous years' Programs for 1997/1999.

79. The implications were serious, for the Mutual Group generally and for Legion in particular. As Mr. Agnew correctly diagnosed, if the Hendricks were not liable, Legion was not reinsured for any excess over the additional reinsurance under Article 3A of its Treaty with Mutual Indemnity, the so-called fourth layer. Mr. Partridge did not say that he appreciated this, but it would be surprising if he did not.

80. Mr. Agnew gave evidence that Mr. Partridge's reaction was to think, not in terms of re-insurance for Legion in respect of previous years, but of ways in which the Hendricks might be

persuaded to pay for the cost of providing retroactive cover for any excess losses that might be incurred. ("What do you think they would pay?").

81. Mr. Partridge and Mr. Alexander then discussed the terms of a 2000 Proposal, later embodied in the 14 April 2000 letter and in Amendment No.5 to the Shareholder's Agreement. For 2000, there was an express undertaking by the Hendricks to indemnify Mutual against losses in excess of the AAP and reinsurance cover (clause 1). The position with regard to previous years was somewhat convoluted. Clause 3 provided, "The effective date of this Amendment No.5 shall be the 23rd. day of March 1997 but will exclude years 1, 2 and 3 of the program" (i.e. 1997-1999). But it was also a term of the 2000 renewal that the Hendricks would pay what the 20 April 2000 letter described as a premium of up to US$1 million to relieve them of liability "for any losses that exceed the combined annual aggregate reinsurance protection provided under the Program for each year". That was the liability which Mr. Bossard and Mr. Agnew had reported that the Hendricks might be willing to undertake.

82. There is no express reference in either of these documents to the additional reinsurance provided by Mutual Indemnity under Article 3A of the Treaty nor to the fact that it was subject to an upper limit of US$5 million (or less). Mr. Partridge was aware of the additional reinsurance cover but he also knew that if Legion's losses were to exceed that figure they would not be reinsured, either inside (by Mutual Indemnity) or outside the Group.

83. The documents that were drafted or approved by Mr. Partridge and Alexander after the Coverage Meeting therefore reflected the intention which Messrs. Bossard and Agnew said that Messrs. Partridge and Alexander formed during the meeting (including their telephone conversation), namely, to impose on AMPAT/the Hendricks the burden of any losses in excess of the AAP plus third party reinsurance protection provided for in the original (1997-1999) Programs.

84. Mr. Partridge believed that AMPAT/the Hendricks were indirectly liable to bear the additional losses reinsured by Mutual Indemnity up to the limit stated in Article 3A of the Treaty, by reason of their undertaking to indemnify Holdings in the Shareholder's Agreement, and the Judge so found. But that does not justify a claim that they should bear losses suffered by Legion

in excess of that limit, which were not re-insured by Mutual Indemnity, nor did Mr. Partridge claim that he believed that they were. Instead, he said that there had been no discussion in relation to unlimited exposure, and that he was thinking of the Article 3A limits, whatever they were (judgment paragraphs 114-115). The Judge accepted that evidence (paragraph 231). But it is not suggested that there was any express reference to article 3A or to additional reinsurance beyond that provided for in the Program, nor that AMPAT/the Hendricks and Messrs. Bossard and Agnew were aware of it. Their concern was that they were or might be exposed to liability for losses exceeding the AAP and third party reinsurance provided for in the Program. That was by definition unlimited, and if Mr. Partridge had only the Article 3A limit in mind he failed to make this clear to them.

85. It is not contended, however, that any contract was concluded at the meeting. Rather, the issue is whether the individual defendants had any genuine belief when the Renewal Proposal was made in the 20 April 2000 letter, and Amendment No.5 to the Shareholder's Agreement was later drafted, that AMPAT/the Hendricks had unlimited liability "for all losses" in excess of the AAP/stop loss reinsurance limits. Mr. Partridge, by distinguishing between unlimited and Article 3A limited losses, accepted that he had no such belief in respect of the former. Mr. Alexander claims to have had a general belief that the IPC Client had unlimited liability for all excess losses – such was the "business model" – but he took no steps to confirm whether that was legally correct and, on the Judge's findings, it was contrary to the advice given by Mr. Walsh to Mr. Partridge.

86. For these reasons, I would hold that both the 2000 renewal and Amendment no.5 to the Shareholder's Agreement, for which Messrs. Partridge and Alexander were responsible, were based on the assumption that AMPAT/the Hendricks were liable for losses suffered by Legion and/or Mutual Indemnity in excess of the AAP and third party reinsurance limits, both prospectively for 2000 and under the terms agreed for previous years, and I would further find that neither Mr. Partridge nor Mr. Alexander had any genuine belief that AMPAT/the Hendricks had unlimited liability in excess of those limits. They were certainly reckless as to what the legal liabilities were.

CLAIMS AND REMEDIES

(a) Pleadings

87. Two sets of proceedings were consolidated. First, Mutual Holdings issued a Specially Endorsed Writ dated 31 January 2003 claimed monies due "to the Plaintiff and/or Mutual Indemnity" under Clauses 3A and/or 3B of the Shareholder's Agreement and/or Specific Performance of those terms. By an amendment dated 11 August 2003 the claim was quantified in the sum of US$8,804,102. The defendants were AMPAT and the Hendricks. By paragraph 3 of the Defence and Counterclaim (later amended and re-amended to raise the company law issues), the Defendants denied the claims and sought rescission of the Shareholder's Agreement and/or Amendment No.5 on the grounds set out in the Statement of Claim in the second action, brought by them against three Mutual companies (Holdings, Mutual Indemnity and Commonwealth Risk Services) and four individual defendants (Messrs. Partridge, Alexander, Turner and Walsh). That action was commenced on 3 December 2004. Among other relief, not relevant for present purposes, the Plaintiffs claimed (1) an order setting aside Amendment No.5 "on the grounds that it was procured by fraud and deceit [as amended on 31 March 2010] or alternatively negligent misrepresentation" as alleged in relation to the Coverage Meeting and the 2000 renewal, and (2) damages for deceit or alternatively negligent misstatement in relation to the procurement of the payment of US$1 million as reinsurance premium and repayment of that sum. Against the four individual defendants, the plaintiffs' claimed damages for deceit and/or negligent misrepresentation or alternatively negligent misstatement, and damages for tortious conspiracy (together with Mutual Indemnity).

(b) The Judgment

88. The Judge dealt with the claims as follows. He found that "the fraud in relation to the Coverage Meeting has not been proved" on the ground that "all of them believed that AMPAT/the Hendricks did have a liability beyond the third layer" (paragraph 229). He dismissed the allegation "that the defendants' witnesses conspired to defraud the Hendricks in relation to unlimited exposure above the AAP" (paragraph 232) and the contention that AMPAT/the Hendricks were advised (after the Renewal and Coverage Meetings) that their exposure was unlimited" (paragraph 234).

89. He then considered "the alternative plea of fraudulent and/or negligent misrepresentation based first on Mr. Bossard's email to Ms. Saran of 28 March 2000….". Both it and its follow-up dated 31 March 2000 were false and misleading but, he continued, "Mr. Bossard was an employee of Legion, and there is no evidence to suggest that in sending these emails he was acting on behalf of any of the defendants" (paragraph 237). With regard to the letter dated 20 April 2000, he took what must be described, with respect, as a narrow point on the pleaded case. The letter stated that Mutual Indemnity had agreed to purchase reinsurance. The pleaded allegation was that that was false, because no additional reinsurance had in fact been purchased. The Judge held that the letter did not say that the additional reinsurance had been purchased, merely that Mutual Indemnity had agreed to purchase it and that it was "to be purchased". He concluded "There is nothing to this point." I respectfully disagree. Given that no agreement had been entered into, the representation was clearly false. Further allegations of falsity were rejected on the ground that "they fall with the allegation of fraud" (paragraph 239). This confirms that the Judge did not take account of these subsequent documents before deciding the allegation of fraud.

90. Next, the Judge dealt with the claim for damages for negligent misrepresentation, which he dismissed on the ground that he had held, in relation to fraudulent misrepresentation, that "there was no misrepresentation" (paragraph 243). That has to be interpreted in the light of his reasons stated above, namely that the emails were not authorised by any of the defendants, and representations made in the letter dated 20 April 2000 were not made fraudulently.

91. Finally, in relation to negligent misstatement, the Judge accepted that the 20 April 2000 letter "was predicated on the basis that AMPAT and/or the Hendricks had exposure at the fourth layer" and that the view expressed by Mr. Walsh, that the Hendricks could be liable under the Shareholder's Agreement to indemnify Holdings against Mutual Liability's reinsurance liabilities under Article 3A, was one which he agreed with (paragraphs 244-248). Because he had held that the letter (and Amendment No.5) did not refer to losses beyond the fourth layer, he did not consider what the consequences would have been if the documents on their true construction did contain representations to that effect.

CONCLUSIONS

92. In my judgment, the Judge erred in two respects. First, he decided the issue of fraud in relation to the Coverage Meeting alone, when it was necessary to take account of the whole sequence of events leading up to the 2000 renewal (on terms set out in the 20 April letter) and to Amendment No. 5 to the Shareholder's Agreement. Secondly, having found that there was no fraudulent intent, he held that the letter and the Amendment had to be interpreted consistently with that finding. That approach made it impossible to give the documents what I would hold is clearly their correct interpretation, and on that basis they did contain representations that AMPAT/the Hendricks were liable for all losses in excess of the AAP and third party reinsurance aggregate limit specified in the Program.

93. Were those representations wrong, and were they made fraudulently? Two justifications have been suggested. First, Mr. Partridge knew about the additional reinsurance for Legion with Mutual Indemnity under Article 3A, which arguably could lead to a recovery by Holdings from the Hendricks, but that was for a limited amount only. His own evidence was that the Coverage Meeting did not focus on the distinction between liability thus limited, and unlimited liability. The latter was the Hendricks' concern as reported by Messes. Bossard and Agnew, and it was not suggested that there was any legal basis for imposing unlimited liability on them. Secondly, Mr. Alexander's general belief that the "I.P.C Client" was so liable was unsupported by any legal opinion, and he refrained from involving Mr. Walsh in the preparation of the letter dated 20 April 2000 and of Amendment No.5. Both Mr. Partridge and Mr. Alexander, in my judgment, were at least reckless as to whether the assertion that AMPAT/the Hendricks were liable for "all losses" in excess of the AAP and third party reinsurance limit was legally justified, or not.

94. The allegation that they, at least, were engaged in a fraudulent scheme is made clear beyond doubt, in my judgment, by the fact that Amendment No.5 extends the scope of the Hendricks' undertaking to indemnify Holdings to include losses suffered by Legion. There was no reason to include these, except to protect Legion against excess losses not reinsured by Mutual Indemnity, and the inclusion was deliberate. It cannot be regarded as a drafting error or accidental in any other way. The issue was raised by Messrs. Bossard and Agnew at the Coverage Meeting, and if Mr. Partridge considered the implications for his company, Legion, he would have realised that there was a risk of excess losses that were not reinsured. He does not

claim that he failed to appreciate this, and he involved Mr. Alexander (but not Mr. Walsh) in producing Amendment No.5 so as to impose the liability on AMPAT/the Hendricks in the renewal terms for 2000. Technically, the amendment was not retroactive to the previous years, but the same result, of protecting Legion, was achieved by requiring them to pay a "reinsurance premium" for protection against their supposed liability for excess losses during those years, up to any limits contained in Legion's underlying insurance policies. In my judgment, Mr. Partridge was complicit in the demands made by the 20 April 2000 letter and recorded in Amendment No.5. Both documents were signed by Mr. Alexander on behalf of Mutual Indemnity.

95. With regard to the emails sent by Mr. Bossard on 29 and 31 March 2000 regarding a "market" and "firm quote" for reinsurance for the Hendricks' "excess aggregate exposure position", the Judge held that these were "fictitious" and "untrue" and he concluded that "Mr. Bossard as the author of the emails was responsible for conveying false information to Ms. Saran" (judgment paragraphs 222-224). This finding raises a number of issues, not least, whether the Judge was entitled to make these findings against Mr. Bossard when he was not cross-examined about them. His evidence was that he sent them following the Coverage Meetings and in order to implement Mr. Partridge's instructions, as he understood them. So it was not correct to say that that "there was no evidence to suggest that Mr. Bossard was acting on instructions from anyone else" (judgment paragraph 224). In my judgment, these otherwise unexplained acts by Mr. Bossard are clear evidence that he understood the outcome of the Coverage Meeting to be as he and Mr. Agnew stated in their evidence. Later in his judgment the Judge pointed out that Mr. Bossard was an employee of Legion, who was not a defendant, and by implication that therefore the emails were not relevant to any issue in the proceedings (paragraph 237). I would accept that view in relation to the corporate defendants, but in my judgment Mr. Partridge must accept responsibility for them.

96. For the above reasons, I would find and hold that Mr. Bossard's and Mr. Agnew's account of the Coverage Meeting was broadly correct, and that representations were made to AMPAT/the Hendricks thereafter to the effect that they had an unlimited liability to Holdings and/or Mutual Indemnity for losses incurred by Legion and/or Mutual Indemnity in excess of the AAP/third party reinsurance aggregate. Those representations included the emails sent by Mr. Bossard on 28/31 March 2000 and Mr. Alexander's letter dated 14 April 2000, and they were

unjustified on any view of the legal effects of the Program and of the Shareholder's Agreement. Both Mr. Partridge and Mr. Alexander knew that they were unjustified or they were at least reckless as to whether they were justified, or not. In my judgment, the evidence established a fraudulent conspiracy to which Mr. Partridge and Mr. Alexander were parties which was implemented by the 2000 Program Renewal and Amendment No.5 to the Shareholder's Agreement, finally signed in January 2001.

97. Mr. Walsh's involvement, in my judgment, was limited to giving what in essence was correct advice: AMPAT/the Hendricks were not liable for the excess losses under the 1997/1999 Program, but their undertaking in the Shareholder's Agreement to indemnify Holdings against losses suffered by Mutual Indemnity could extend to that company's additional reinsurance liability under Article 3A of the Reinsurance Treaty. Had they pursued the matter with him, Mr. Walsh might have raised issues as to whether the Hendricks were aware of the additional reinsurance (they were not) and he could only have advised that there was no justification for extending their indemnity to include losses suffered by Legion beyond those that were reinsured with Mutual Indemnity. He did not agree that the indemnity should be back-dated in any way, nor was he involved in the purported reinsurance discussions. The fact that he was not consulted again, by Mr. Partridge or by Mr. Alexander, even when Amendment No.5 was being drafted, was evidence in support of the allegations against them, but not against him. Mr. Walsh was not a party to the false representations that were made, nor to the fraudulent conspiracy, and the Judge rightly dismissed the claim against him.

98. Mr. Turner's position is ambivalent. The Judge set out his evidence in paragraphs 127 to 140 of the judgment. He had no clear recollection of the Coverage Meeting (paragraphs 127, 133 and 138), and the talk about obtaining reinsurance, he thought, was for the benefit of Legion or Mutual Indemnity (paragraph 133). That was a correct analysis of the situation, and he was not responsible, within the Group, for the affairs of either of those companies. He had no recollection of participating in any conversation with Mr. Alexander (paragraph 139). I would conclude that the Judge was correct to dismiss the allegations against him (paragraph 225).

99. As for the corporate defendants, I would hold that the above findings against Mr. Alexander constitute findings against Holdings and Mutual Indemnity also, on the basis of

vicarious liability. The claim against CWS fails with the dismissal of the allegations against Mr. Turner. The position of MRM (Mutual Risk Management Ltd.) will be considered in connection with Relief, below.

RELIEF

100. We were informed that the only 'live' issue between the parties is whether the 2000 Program and Amendment No.5 to the Shareholder's Agreement can be enforced against AMPAT/the Hendricks. That is because (1) accounts between Legion and Mutual Indemnity have been the subject of negotiation (and arbitration/litigation) resulting in a Commutation Agreement made in 2002 (which was entered into on the basis that Article 3A of the Treaty was not binding on Mutual Indemnity, a contention which Mr. Alexander was able to support at that time); (2) the sums claimed under outstanding Letters of Credit issued by the Hendricks related to the year 2000 only; (3) it is conceded that the AMPATS/the Hendricks are entitled to be refunded the US$1 million that was paid in respect of the alleged reinsurance premium; and no issues were raised as to the financial consequences of holding that the Plaintiffs'/Appellants' allegations succeeded.

101. I would hold that the appeal should be allowed to the extent indicated above, on the ground that the allegations of fraudulent misrepresentation and fraudulent conspiracy are proved against Holdings, Mutual Indemnity, Mr. Alexander and Mr. Partridge. I am satisfied that this is an exceptional case where the Court of Appeal is entitled, indeed bound, to reverse the Judge's findings as regards Mr. Partridge and Mr. Alexander which I am satisfied are plainly wrong (see *Twinsectra v. Yardley* [2002] 2 WLR 802 at para. 43 per Lord Hoffman at para. 43, *Ass. Generali SpA v. Arab Insurance Group* [2003] 1 WLR 579 (CA, England and Wales) and *Dundee Leeds Management Services v. Nitin Aggarwal* [2007] Bda.LR 47 (CA Bermuda). It appears to follow that the claim made by Holdings under the Shareholder's Agreement in Action 2003 No.26 must be dismissed, and I would so hold. In Action 2004 No.196, the claims against Mutual Indemnity, Mr. Partridge and Mr. Alexander (the First, Fourth and Fifth Defendants) succeed, but the claims against CWS, Mr. Turner and Mr. Walsh (Third, Sixth and Seventh Defendants) should be dismissed.

102. Mutual Risk Management Ltd, the Second Defendant, is the parent company of the Mutual Group. We have heard no argument as to whether it should or should not be held liable in the light of the findings set out above.

(Part 2)
CORPORATE ISSUES

103. If the 2000/2001 Programme Renewal and Amendment No.5 to the Shareholder's Agreement are set aside, as in my judgment they should be, it is unnecessary for this Court to determine the so-called Corporate Issues. They were fully argued, however, and it may be convenient to identify the issues and express a provisional view about them.

(a) Further background

104. Four provisions of the Shareholder's Agreement dated 23 March 1997 (ref. paragraph 11 above) must be noted. They are –

(i) Mutual Holdings agreed to issue and AMPAT agreed to purchase for $1000 one "non-voting preferred share of MUTUAL designated Series "C30" preferred share" (Clause 1, and the First Recital);

(ii) MUTUAL would cause a dividend to be declared on certain dates to AMPAT as "the owner of record" of such share "in an amount equal to the sum of" –

(A) investment income (net) earned by MUTUAL on the price received by MUTUAL for the share (namely, $1000);

(B) investment income or loss earned by Mutual Indemnity on funds received "under the TREATY" meaning reinsurance premiums paid by Legion/Villanova to Mutual Indemnity as reinsurers; and

(C) "Plus or minus the amount of underwriting gain or loss realised by INDEMNITY on the TREATY", defined as "one or more Reinsurance Agreements" entered into by INDEMNITY with Legion/Villanova as the relevant insurance company (Clause 2, and the Third Recital);

(iii) AMPAT as the Shareholder "hereby indemnifies and holds MUTUAL and Indemnity harmless against the cumulative sum of paragraphs 2(A), 2(B) and 2(C) minus the cumulative amount of dividends paid, being less than zero at any point in time." (Clause 3); and

(iv) MUTUAL agreed to repurchase the preferred share from AMPAT "on the Redemption Date" defined in Appendix No.1 as 1 June 2003 (Clause 6).

105. Amendment No.2 (undated, but signed in July 1998) had the effect of extending the period of the Program until 23 March 1999 and the Redemption date to 1 June 2004. Amendment No.3 likewise extended the period until 23 March 2000 and the Redemption Date to 1 June 2005. It also replaced Clause 2(B) but without altering the effect of the clause as stated above.

106. Meanwhile, Amendment No.1 had the effect of substituting Mr. and Mrs. Hendricks for AMPAT as the owner of one C30 series preferred share in MUTUAL upon payment of a further $1000. The wording is contradictory; it speaks of cancelling the share issued to AMPAT and issuing a further share to the Hendricks, but there are references to transferring the share issued to AMPAT to them. The difference is immaterial, however, because no share was ever issued to AMPAT, and no attempt was made to issue a share to Mr. and Mrs. Hendricks until much later, on 23 May 2010, in the course of the trial. The Amendment is undated but it was signed in July 1998.

107. Amendment No.4 was sent to the Hendricks in June 2000. It extended the period until 23 March 2001 and the Redemption Date to 1 June 2006. Amendment No.5 followed, but not until late 2000, in order to "document SHAREHOLDERS liability under the program", stating that they were responsible for "all losses" up to and in excess of the AAP plus reinsurance coverage bought by Legion/Villanova, and extending the indemnity to include "MUTUAL and/or INSURANCE COMPANY" in respect of "any losses sustained" in excess of the AAP plus third-party reinsurance coverage purchased by Legion/Villanova.

108. The AMPAT Program was not renewed in March 2001. Accounts between Mutual Indemnity and Legion/Villanova were settled between them by a Commutation Agreement dated 13 April 2003. Mutual Indemnity then disputed that it was liable to Legion under Article 3A of the Treaty, for losses in excess of the AAP. That was the opposite of what the Defendants said they believed in April 2000. The Commutation Agreement was entered into on that basis.

109. The result was that the sums paid by Mutual Indemnity as reinsurers of Legion/Villanova, in respect of which Mutual Holdings claimed an indemnity from the Hendricks, did not include any that represented losses in excess of the AAP. The issue as to whether the Hendricks were liable for such excess losses, with or without the Article 3A limit, therefore did not affect the amount of the claim.

(b) The issues

110. The Judge rightly identified "two broad areas", one relating to the failure on the part of Mutual Holdings to issue the preferred share to either AMPAT or the Hendricks, and the second to "the entire structure of the various IPC programmes operated by the companies within the Mutual Group. The latter is not dependent upon any factual situation, but is rather aimed at the concept, and in particular on the basis upon which dividends are declared in a particular programme, if an underwriting profit is realised on that programme" (Judgment paragraph 249). He considered the second issue first, and I shall do the same. The Plaintiffs' contention is that the scheme created by the Shareholder's Agreement was unlawful under Bermuda company law and therefore was void or *ultra vires* Mutual Holdings.

(1) Lawfulness

111. Mutual Indemnity was the reinsurer of Legion and/or Villanova and of other insurance companies in the Mutual group, not only in respect of the AMPAT programme, but of many other programmes constructed on the same lines. A preferred share was issued or was intended to be issued to each IPC shareholder, and Mutual Holdings undertook to pay a dividend to the shareholder, equivalent to the amount of any underwriting profit made by Mutual Indemnity (including investment profits) in connection with the programme in question. In return, the shareholder undertook to indemnify and "hold harmless" both MUTUAL (Mutual Holdings) and INDEMNITY (Mutual Indemnity) against, in effect, the risk of overall losses on the programme (clause 3(A) in the AMPAT/the Hendricks' Agreement).

112. The fact that Mutual Indemnity was not a party to the Agreement with the IPC shareholder immediately gives rise to legal issues as to how Mutual Holdings might be entitled to recover an indemnity against losses suffered by a third party (Mutual Indemnity), and as to whether the third party could enforce the promise to "indemnify and hold harmless" by the shareholder. Mutual Indemnity was a fully-owned subsidiary of Mutual Holdings and the

intention doubtless was that Mutual Indemnity's profits on individual programmes would be paid to Mutual Holdings in the form of dividends on its shareholding, thus enabling the parent company to pay a corresponding dividend on the preferred share held by the shareholder. When Mutual Indemnity suffered an overall loss on the programme, Mutual Holdings would neither receive nor become liable to pay a dividend, and the legal issue would arise whether it or Mutual Indemnity could recover the amount of the loss from the Shareholder under the indemnity promised by the Shareholder's Agreement. (Losses up to the amount of the AAP were secured by the IPC Client under the terms of the programme, but (before the changes introduced in 2000) those terms did not refer to the Shareholder's Agreement. The letter dated 23 March 1997 merely provided "Excess funds are to be returned to the Insured as Underwriting Profit" (Letter from CRS dated March 24, 1997) without specifying how that would be done.)

113. Putting those legal questions to one side, the first corporate issue is whether Mutual Holdings could lawfully undertake to pay a dividend equivalent to the profit made by Mutual Indemnity on a particular programme, regardless of whether other programmes were profitable, or not. The basic rule, not challenged by the Defendants, is that dividends can only be paid out of profits, for otherwise a reduction in capital or similar is necessarily involved. If the relevant programme shows a profit for the year in question, Mutual Indemnity can declare a corresponding dividend to Mutual Holdings which then is able to declare a dividend in favour of the IPC Client/Shareholder. But what if other programmes produce a loss, so much so that Mutual Indemnity is unable to pay a dividend to Mutual Holdings equivalent to the amount of its profit on the programme in question?

114. The Judge identified the issue in paragraph 251 of his judgment, and continued-

> *"This goes back to a point made by Alexander……that while Mutual Indemnity could suffer an underwriting loss, the effect of the indemnification provisions was that it did not ultimately suffer a loss on the particular programme which had made the underwriting loss".*

The "indemnification provisions" referred to were those contained in the programme whereby the IPC Client undertook "to secure the obligations of Mutual under this programme" (Paragraph IV (B) (i)). Indeed, the Client was required to provide collateral in the form of a Letter of Credit so that Mutual was doubly secured. As the Judge said, "the theory of the scheme was that Mutual

Indemnity would not suffer a loss by reason of the collateralisation arrangements". He recognised that there would be cases "when Mutual Indemnity experienced difficulties in realising its security" but he continued –

> *"…but the attack is a theoretical one, not dependent on a particular factual background, and it does not seem to me to have been made out"* (ibid.)

115. The Judge's holding, therefore, was that "the theory of the scheme" was sound, for all practical purposes; Mutual Indemnity "would not suffer a loss by reason of the collateralisation arrangements" and in practice it would always be able to realise its security. That implies that he considered that the arrangements were such that, in practice, Mutual Indemnity could not suffer a loss, even in respect of an individual programme; if he so held, I would respectfully disagree; and the following part of his judgment suggests that he did not mean to go so far –

> *"The scheme was designed such that Mutual Indemnity would declare a dividend to its shareholder Mutual Holdings in respect of the profits made on profitable programmes: Mutual Holdings would then similarly declare dividends to its preferred shareholders in accordance with the formula contained in the various shareholder arrangements. As Mr. Smith submitted, there was not one global scheme, but a number of separate ones. And losses did not form part of the calculation of profit, using that term as being referable to IPC clients as a group. If there was to be a loss because of difficulties realised by Mutual Indemnity in realising its collateral that was Mutual Indemnity's loss, which it had to make good. It was not a loss for the preferred shareholders, the IPC clients."* (Paragraph 251)

116. This analysis leads directly to the submissions made on behalf of the plaintiffs in support of this appeal. If the Judge's view is correct, the scheme enabled Mutual Holdings "to issue securities which track the performance of a particular account", as a Segregated Company is able to do under the Segregated Accounts Company Act 2000 (the quotation is from the explanatory note to clause 14 of the Bill which became section 14 of that Act). The fact that legislation was introduced that expressly permits this to be done does not mean that the same object could not be achieved under the Companies Act 1981 by which Mutual Holdings is governed. The issue is whether the arrangement was lawful under that Act.

117. In my judgment, the Judge's reasons do not cover a situation where Mutual Indemnity might suffer losses on unprofitable programmes that it was unable to recover in full from the collateral provided by those IPC Clients, to an extent where it failed to show an overall profit on

all the programmes and was unable to pay a lawful dividend out of trading profits to its parent company. Mutual Holdings then would be unable to pay, or pay in full, the dividends it had undertaken to pay to its Shareholders in respect of the profitable programmes. I would not dismiss this as no more than a theoretical possibility. First, commercial realities especially in the financial world make that, in my judgment, an optimistic view. Secondly, the story of the AMPAT/the Hendricks' renewal for 2000/2001 demonstrates how in practice Mutual Indemnity was or might have been exposed to greater liabilities than the "theory" recognised. That was its liability under Article 3A of the Reinsurance Treaty, as amended, amounting to up to $5 million in respect of each programme, in respect of which no collateral was provided by the IPC Client (so far as appears from the evidence in this case). If ever a situation arose in which Mutual Indemnity paid less by way of dividend to its parent than Mutual Holdings required to pay dividends to all its Shareholders, whose programmes had been profitable, Mutual Holdings could not lawfully pay the dividends in full. (At that stage, a further indemnification provision might become relevant; Mutual Holdings might contend that it or Mutual Indemnity would be entitled to recover an indemnity from other Shareholders whose programmes had been unprofitable for Mutual Indemnity; but that indemnity was unsecured and its effectiveness would depend on the solvency of IPC Clients whose programmes *ex hypothesi* were loss-making.)

118. For these reasons, I would accept the Plaintiffs' submission that Mutual Holdings' undertaking to pay dividends to AMPAT/the Hendricks equivalent to the net amount of profit realised for Mutual Indemnity by the AMPAT programme was contingent on the performance of other (unspecified) programmes during the year or relevant period. My provisional view is that the undertaking was *ultra vires* on that ground.

(2) Was a share issued?

119. As the Judge pointed out, the first issue (above) did not require any findings as to subsequent events, but the second "depends on a number of facts which are not in dispute" (judgment paragraph 252). The outline was straightforward. Nothing was done to issue a share to AMPAT or the Hendricks until 13 May 2010 when, in the Judge's words, "attempts were made by Mutual Holdings to remedy the position" (ibid.). On that date, a number of resolutions were passed by the directors of that company, and the Judge held –

> *"260. In my view, the resolutions of 13 May 2010 do operate to correct the previous defects in relation to the C30 preferred share, and I so find."*

120. Apart from the previous failure to issue a share to AMPAT or to the Hendricks, there is an issue as to whether a C30 preference share was ever created, regardless of whether it was issued or allotted before 13 May 2010. The authorised share capital of Mutual Holdings at inception was 12,000 common shares with a par value of $1.00. A statutory meeting of members held on 25 May 1993 resolved that the authorised share capital be increased from $12,000 to $12,000,000, and that $11,998,000 be classified as non-voting non-convertible redeemable preference stock. However, no par value was specified for additional shares. Instead, the meeting purported to authorise the Board of Mutual Holdings to establish the par value of shares to be issued from time to time. The Board did not purport to implement this resolution, until 13 May 2010.

121. On that date, resolutions were passed by the Board of Mutual Holdings (consisting of Mr. Alexander and Mr. Ezekiel), as follows -

(1) The Board noted that the authorised capital of the Company was increased by US$11,998,000 from US$12,000 to US$12 million by a shareholder`s resolution dated 25 May 1993, and that the sole Member had "approved, confirmed and ratified" that increase "by the designation of (a) 11,828 non-voting non-convertible redeemable preference shares of US$1,000 par value each……(in respect of US$11,828,000 of authorised unissued share capital)…..".

(2) The Board further noted that pursuant to Bye-law 3 "the Board has been conferred with authority to issue any shares…." and it resolved that "to the extent that the Board has exercised the above authority to issue any Redeemable Preference Shares, any and all such issuances ……be and are hereby approved, confirmed and ratified".

(3) The Board noted the Shareholder's Agreement entered into with AMPAT on March 23 1997 and resolved that "the entry into the Shareholder's Agreement by the Company be and is hereby approved, confirmed and ratified".

(4) The Board recited "the Board designated one USD Preference Share "(the "C30 Preference Share") and resolved that the designation be "approved, confirmed and ratified". The date of the (previous) designation was not stated.

(5) The Board recited "WHEREAS one C30 Preference Share was allotted and issued to AMPAT on 23 March 1997 pursuant to the Shareholder's Agreement" and it resolved

"that the allotment and issuance of [that] share to AMPAT on an unpaid basis as of 23 March 1997 pursuant to the terms of the Shareholder's Agreement be and are hereby approved, confirmed and ratified". The Board further resolved that "the Secretary of the Company be and is hereby authorised and instructed to enter the name of AMPAT into the register of members of the Company in respect of one C30 Preference Share as of 23 March 1997".

(6) The Board "approved, confirmed and ratified" both the execution of Amendment No.1 to the Shareholder's Agreement "which *inter alia* provides for the transfer of the AMPAT share to the Hendricks", and the transfer itself. The Board authorised and instructed the Secretary of the Company "to enter the name of the Hendricks into the register of members of the Company in respect of one C30 Preference Share as of 23 March 1997".

(7) Under the heading "Confirmation of Acts" the Board "approved, confirmed and ratified" in the widest possible terms all actions whatsoever taken by any officer or director of the Company on behalf of the Company at any time "in connection with the subject matter of these resolutions".

122. The first issue is whether a preference share was validly created by the 1993 Resolution. The Companies Act 1981 provides by section 45(1) –

> *"45 (1) A company limited by shares, or any other company having a share capital, if authorised by a general meeting and by its Bye Laws, may alter the conditions of its memorandum, that is to say, it may –*
> *(a) increase its share capital by new shares of such amount as it thinks expedient……".*

123. Bye-Law 39 provides -

> *"The Company may from time to time increase its capital by such sum to be divided into shares of such par value as the Company by Resolution shall prescribe."*

124. The Plaintiffs contend that no share was validly created by the Company, because the 1993 Resolution failed to establish a par value and it had no power to delegate that function to the Board. Moreover, the Board did not purport to do so, at any time before 13 May 2010, by

when the Redemption Date for the share under the Shareholder's Agreement was long past. It was common ground that neither AMPAT nor the Hendricks were entered in the Shareholder's Register.

125. The Defendants' response is that the effect of the 1993 Resolution was to authorise the Board to issue the share with a stated par value, and the Board did that on 13 May 2010. They assert that it never became necessary to complete the formalities of issuing and registering a share (Skeleton Argument paragraph 86) because the Programme never showed a profit, and the Plaintiffs never became entitled to a dividend. They contend that there was nothing in the Shareholder's Agreement which prevented Mutual Holdings from issuing the share at any time "whenever American Patriot (or later, the Hendricks) proffered the agreed subscription moneys of $1,000..." (ibid. paragraph 87). The Shareholder, they submit, was entitled to redeem the share "on or after" the Redemption Date (as the Judge held: para.256), and the Shareholder's Agreement remained in force notwithstanding that it was passed.

126. The Judge held that there was "nothing in the Shareholder's Agreement which would have prevented Mutual Holdings from issuing and allotting the preferred share whenever American Patriot (or the Hendricks) proffered the agreed purchase monies of $1,000" (paragraph 256. He further held that the passing of the Redemption Date did not mean that no share could be issued. No share certificate had been issued or presented for cancellation, which "means no more than that there was no repurchase, and hence no obligation to cancel the preferred share. That must, surely, have left Mutual Holdings in a position to issue the preferred share should it so choose" (paragraph 257).

127. If it were necessary to decide as a matter of company law whether a valid share could be issued after the Redemption Date had passed, when the shareholder preferred the agreed price, I would be inclined to accept the Defendants' argument and respectfully agree with the Judge's holding. If the Programme had shown a profit, and the Hendricks were entitled to receive a dividend, the share could no doubt have been issued at any time in order to regularise their standing, if that was necessary and they preferred $1,000 (assuming that they had not paid it before; it may be that both AMPAT and the Hendricks were debited with that amount in the relevant accounts). But that was not the situation here; the Hendricks did not proffer the price,

and it is alleged that Mutual Holdings was entitled to create the share without their assent. In that situation, it seems to me, the issue is whether the company could issue and allot the share at a time when the purported shareholder was entitled to redeem it, and sought to do so. That would be a pointless exercise, and the share would exist, if at all, only for a miniscule period of time.

128. Further issues of law arise with regard to the Board's Resolutions dated 13 May 2010. The Board purported to "approve, confirm and ratify", first, its own (previous) "designation" of one USD Preference Share for the purposes of the AMPAT Shareholder's Agreement (Resolution 4), secondly, the allotment and issue to AMPAT of the AMPAT share on 23 March 1997, and thirdly, the transfer of that share to the Hendricks pursuant to Amendment No.1 to the Shareholder's Agreement, on an unspecified date but "effective 23 March 1997". There was no evidence of any previous issue or allotment of a share to AMPAT, or of its transfer to the Hendricks, nor of the Board's previous "designation" of a share in connection with the AMPAT Shareholder's Agreement. In these respects, therefore, there was no previous act for the Board to "approve, confirm or ratify".

129. I therefore doubt whether the Hendricks ever acquired a valid C30 Preference Share in Mutual Holdings. Supposing they did not, it is necessary to consider whether their failure to do so is relevant to the contractual situation under the Shareholder's Agreement, which Mutual Holdings and/or Mutual Indemnity claim to enforce against them. The Hendricks contend that it is relevant, because Mutual Holdings' promise to issue the share was the consideration it gave for the indemnify it seeks to enforce against them. That consideration, they contend, has wholly failed.

130. The Plaintiffs correctly submit that language such as "total failure of consideration" is appropriate in claims for restitution, rather than as a defence to a claim made under an existing contract. The real issue, in my judgment, is whether Mutual Holding's failure to issue the promised preference share, assuming that none was issued, is a defence to the indemnity claim made under the contract.

131. In this situation, in my judgment, the correct enquiry is whether Mutual Holding committed a repudiatory breach of the Shareholder's Agreement, and if so, whether the

Hendricks accepted that breach and so terminated their obligations under it. The Defendants, and the Judge, have placed great emphasis on the fact that the Programme was operated as it was during the years 1997-2000 and (subject to these proceedings) in 2000-2001 also. It never became necessary to formalise the issue and allotment of the share, and none was requested by the Hendricks. There are no findings either that the Hendricks waived their right to call for the share or that they terminated the Shareholder's Agreement on the ground that no share was issued. In these circumstances, I express no view as to what the contractual situation would be, if the Shareholder's Agreement were not rescinded and set aside.

RELIEF

(a) Years 1997-2000

132. These losses were secured by Letters of Credit which have been paid (I understand) to Mutual Indemnity, and we were told that the only 'live' issues in the Appeal are those relating to the 2000/2001 renewal and the losses sought to be recovered under the programme and/or Shareholder's Agreement in respect of that year. That is reflected in the Relief sought by the Appellants and set out below.

133. The Appellants' Skeleton Argument suggests that if the Shareholder's Agreement is held to be *ultra vires* Mutual Holdings and therefore void, the Plaintiffs' claim to recover "all sums which American Patriot and the Hendricks respectively have paid for participation in the scheme should be restored to them. These sums amount to US$5,176,000, being the amounts drawn down under the various letters of credit," (paragraph 151). That was on the basis that the whole scheme, not merely the Shareholder's Agreement was void. As stated above, I understand that this further claim is not being advanced, and I mention it only so that the position can be clarified, if it is necessary to do so.

(b) Year 2000-2001

134. I would allow the appeals in respect of Mutual Holdings, Mutual Indemnity. Glenn Partridge and David Alexander accordingly, and dismiss those in respect of Richard Turner and Andrew S. Walsh. The position with regard to Mutual Risk Management Ltd. and Commonwealth Risk Services Ltd. can be clarified in the light of the Court's Judgment.

135. Where the appeal is allowed, the Court in my view should grant Declarations to the following effect –

(1) (a) that the renewal of the AMPAT Programme for the fourth year (2000/2001) was procured by the fraud or fraudulent misrepresentation of Legion and/or Mutual Indemnity Bermuda;

(b) that the renewal is rescinded and/or set aside; and

(c) that Mr. and Mrs. Hendricks [and American Patriot] have no liability to indemnify Mutual Indemnity (Bermuda) and/or Mutual Holdings (Bermuda) against any losses arising under the Programme in respect of that underwriting year.

(2) (a) that Amendment No.5 to the Shareholder's Agreement (dated 23 March 1997) was procured by the fraud or fraudulent misrepresentation of Legion and/or Mutual Indemnity (Bermuda);

(b) that the said Amendment No.5 is rescinded and/or set aside; and

(c) that Mr. and Mrs. Hendricks and AMPAT are not liable to indemnify Mutual Holdings Bermuda or Mutual Indemnity Bermuda or Legion against any losses arising under the said Programme in respect the underwriting year 2000/2001, whether under the Shareholder's Agreement or otherwise.

136. The form of the Court's Order including the terms of appropriate Declarations and further Orders dealing with Costs and other matters can be considered by the Court after receiving written and/or oral submissions, as the Court's Registrar may direct.

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Evans, JA

I agree

_____

Zacca, P

I agree

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Baker, JA