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Case No: 2012 Folio 1093

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

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 27 June 2014

Before :

MR JUSTICE EDER

- -

Between :

THE FEDERAL MOGUL ASBESTOS PERSONAL INJURY TRUST

Claimant

- and -

(1) FEDERAL-MOGUL LTD
(formerly T&N plc)
(2) CURZON INSURANCE LTD
(3) CENTRE REINSURANCE INTERNATIONAL COMPANY
(4) MUENCHENER RUECKVERSICHERUNGS-GESELLSCHAFT
(5) EUROPEAN INTERNATIONAL REINSURANCE COMPANY LTD

Defendants

- -
- -

IAIN MILLIGAN QC and RICHARD FISHER (instructed by **Hogan Lovells International LLP**) for the **Claimant**
PAUL STANLEY QC (instructed by **Sidley Austin LLP**) for the **First Defendant**
PETER RATCLIFFE (instructed by **CMS Cameron McKenna LLP**) for the **Second Defendant**
CHRISTOPHER BUTCHER QC and JAWDAT KHURSHID (instructed by **Edwards Wildman Palmer UK LLP**) for the **Third, Fourth and Fifth Defendants**

Hearing dates: 17-20, 24-26, 31 March, 1-3 April 2014

- -

Approved Judgment

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

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MR JUSTICE EDER

Mr Justice Eder:

I. Introduction

1. The claimant in these proceedings is a Trust (the "Trust") established in circumstances described more fully below by an order of the US Bankruptcy Court on 8 November 2007 and in accordance with the terms of a Joint Plan of Re-Organisation (specifically the Fourth Joint Plan of Re-organization for Debtors and Debtors in Possession (as Modified)) (the "Plan") and a Trust Agreement.

2. Pursuant to the Plan, the Trust is, in effect, authorised to bring claims on behalf of a very large number of individuals in the US who have allegedly suffered injury as a result of exposure to asbestos and asbestos related products supplied and/or distributed over a lengthy period by the first defendant ("T&N") and its subsidiaries (the "Asbestos Claims"). For convenience and unless otherwise stated, references to T&N in this Judgment include T&N's subsidiaries.

3. The second defendant ("Curzon") was and is T&N's captive insurer under the terms of an Asbestos Liability Policy ("ALP"). In summary, the ALP provided cover of £500 million in excess of £690 million with effect from 1 July 1996 against T&N's liabilities for personal injury claims caused by asbestos anywhere in the world arising from their activities prior to the policy inception date. In its turn, Curzon ceded its liabilities under the ALP in equal shares to the 3rd, 4th and 5th Defendants (respectively "Centre Re", an Irish subsidiary of Zurich Re, "Munich Re" and "EIRC", a Barbadian subsidiary of Swiss Re – collectively referred to as the "Reinsurers") under a Reinsurance Agreement (the "Reinsurance") although, as referred to below, EIRC's share was subsequently reduced by virtue of a settlement made in the context of separate Court proceedings. The ALP and the Reinsurance are often referred to as the "Hercules Programme".

4. In very broad terms, the main issues concern the ability of the Trust to obtain certain declarations with regard to the obligations of the Reinsurers relating to the handling and settlement of any Asbestos Claims which the Trust wishes to advance against T&N. In essence, the Trust says that pursuant to the Plan, it has itself established an appropriate mechanism for valuing individual Asbestos Claims in accordance with what are called Trust Distribution Procedures ("TDPs"); that the TDP value ascribed to individual Asbestos Claims is considerably lower than the likely settlement or award value for such claims if litigated in the US tort system, certainly if the costs of defending the claims are taken into account; that putting on one side any question of time-bar, handling claims in such manner is an economic "no-brainer"; and that the only businesslike approach is for the Reinsurers to settle them in accordance with an administrative process reflected in the TDP standard i.e. without resort to the US litigation process. On this basis, the Trust now seeks various declarations as set out below.

5. On the main issues, both T&N (represented by Mr Stanley QC and his team) and Curzon (represented by Mr Ratcliffe and his team) are broadly neutral. The main battle lies between the Trust (represented by Mr Milligan QC and his team) and the Reinsurers (represented by Mr Butcher QC and his team). In essence, on the main issues, it is the Reinsurers' case that the Trust has no standing to seek any declaratory

relief; alternatively that such relief should be refused on various grounds. In particular, the Reinsurers say that there is no obligation on them to handle or to settle the Asbestos Claims by reference simply to the value ascribed to them by the TDPs; that the Reinsurers will consider any such claims as may be presented by the Trust in good faith; and that unless otherwise settled by agreement, any Asbestos Claims should, if necessary, be pursued by the Trust in the US tort system in the usual way. In response, the Trust says that although such an approach might, in the long run, lead to certain claims being defeated, it will do so at a price that will exceed the cost of settling such cases at TDP value.

6. In addition, there are other ancillary issues in relation to which one or more of the parties seek declaratory relief as referred to below.

II. Background

7. T&N is an English company formerly known as T&N plc and originally Turner & Newall Ltd. For much of the 20th century, it was a major producer and distributor of asbestos and products containing asbestos. In particular, together with two of its subsidiaries, Gasket Holdings Inc ("Flexitallic") and Ferodo America Inc ("Ferodo"), it used to distribute products containing asbestos in the United States. As is now well known, asbestos is (at least in certain forms) a serious potential danger to the health of anyone who is exposed to it. In particular, exposure to asbestos can cause four main diseases:

   i) Mesothelioma (predominantly a cancer of the lining of the lungs (pleural mesothelioma); it is always fatal and is almost exclusively caused by exposure to asbestos. It is scientifically recognized as a signature asbestos disease);

   ii) Asbestos-related lung cancer (which is almost always fatal);

   iii) Asbestosis (a scarring of the lungs which is not always fatal but can be a very debilitating disease, greatly affecting quality of life); and

   iv) Diffuse pleural thickening (a thickening of the membrane surrounding the lungs which can restrict lung expansion leading to breathlessness).

8. Several factors can contribute to determine how asbestos exposure affects an individual, including (i) dose (how much asbestos an individual was exposed to); (ii) duration (how long an individual was exposed); (iii) size, shape, and chemical makeup of the asbestos fibres; (iv) source of the exposure; and (v) individual risk factors, such as smoking and pre-existing lung disease. In many cases, the symptoms only appear many years after the original exposure.

9. Asbestos litigation in the US began in the 1960s and thereafter exploded. According to the American Academy of Actuaries, the management of this litigation by both litigants and courts in the US became an almost insoluble problem. Many companies which had manufactured, sold or distributed asbestos were faced with a large number of claims which eventually resulted in them filing for bankruptcy. Over the last 40 years or so, various possible solutions and part-solutions have been canvassed and implemented (including the Wellington Agreement as considered, for example, in *Hiscox v Outhwaite (No 3)* [1991] 2 Lloyd's Rep 524); but these have generally

foundered or been only partly successful for one reason or another. The result is that there remains a very large number of claimants who have allegedly suffered personal injury as a result of exposure to asbestos many years ago and whose claims have even now still not been resolved.

10. By the mid-1990s, T&N's principal business had moved away from asbestos and had focussed instead on engineering. However, it remained exposed to its legacy of asbestos related claims. The nature and basis of such claims was explained in a detailed written statement of Paul J Hanly Jr who is a qualified US attorney and partner in Hanly Conroy Bierstein Sheridan Fisher & Hayes LLP and (apart from a brief hiatus) acted as defence Counsel for T&N, Flexitallic and Ferodo from 1981 until 2001. This statement was put in evidence by the Trust. By agreement, Mr Hanly did not give oral evidence because none of the other parties wished to cross-examine him. Based on Mr Hanly's statement, the following would appear to be uncontroversial.

11. During the 20th century, T&N ultimately became, and was for many decades, the largest vertically-integrated asbestos company in the world being involved in every aspect of asbestos, from the mining and milling of the mineral (at its mines and mills in southern Africa and Canada), through the manufacturing processes (at its factories in England, India, Africa, North America and Western Europe), to the sale, distribution and installation of its asbestos-containing products (through its sales, distribution and installation companies throughout the world). Every one of the T&N companies, both in the U.K. and abroad, manufactured products using all of the asbestos fibre types - including crocidolite (blue asbestos), amosite (brown asbestos), and chrysotile (white asbestos).

12. In the event, T&N found itself as a defendant in asbestos cases in both the US and other countries. The basic elements of the causes of action against T&N and its subsidiaries were (i) failure to warn based on strict products liability and (ii) negligence. T&N was first named as a defendant in a US asbestos personal injury case in 1977. Thereafter, it was faced with a deluge of claims in the US arising principally out of three areas of its historical business.

13. First, the manufacture of a sprayed product known as "Limpet" (i.e. a cement and asbestos mixture sprayed directly onto surfaces for fireproofing, thermal insulation, acoustical insulation and correction, condensation control and decorative finishes). Limpet had the highest concentration of asbestos of any product produced and distributed in the US, and contained amosite or crocidolite (the worst type of asbestos). Claims were generally brought by persons involved in the team applying the Limpet, bystanders to the spraying process (such as painters or electricians) or persons who were exposed to the clothes of someone involved in the process (i.e. family members or neighbours). Limpet was used extensively throughout the US on, for example, ships, submarines, in the manufacture of railway cars and locomotives, for thermal insulation and fireproofing in various industrial plants, and for fireproofing on public and private buildings.

14. Second, ownership from 1934-1962 of a company called Keasbey & Mattison Co. (and, to a lesser extent, its ownership in other years of two Canadian subsidiaries). Keasbey was the head Limpet licensee in the US from 1934 to August 1962. Like T&N, it was a vertically-integrated manufacturer and seller of asbestos-containing

products and, by the 1950s, had ten plants located in various US States. It was a frequent correspondent with its parent, T&N, regarding the hazards associated with asbestos. Keasbey sold a wide variety of asbestos-containing materials throughout the US between 1934 and 1962, at which time its assets were sold to unrelated US Companies. It was dissolved in 1967. Although there were certain legal precedents in certain states to the effect that T&N was not Keasbey's alter ego, claims were pursued against T&N on the basis of legal theories such as agency, conspiracy, concert of action, joint venture and subsequently on the basis that T&N supplied raw fibre to Keasbey. Once it became apparent to the plaintiffs' bar in 1988/1989 that T&N was the near exclusive supplier of fibres to Keasbey, it was no longer necessary for plaintiffs to establish the "*alter ego*" theory.

15. Third, the supply of raw asbestos fibre that was used in a myriad of asbestos products manufactured and distributed in the United States. Such fibres were not only used by T&N for its own products but were provided to other unrelated asbestos manufacturing companies. This gave rise to claims from those exposed in the course of their work at other manufacturing plants owned by third parties, as well as those exposed during the course of distribution.

16. T&N meticulously maintained virtually every piece of paper it ever created or indeed received from third-parties concerning asbestos, including literally thousands of documents demonstrating probably the earliest knowledge in the world of the potential health hazards of working with or around asbestos; indeed, there was really no development of any significance in the history of knowledge about the hazards of asbestos in which T&N was not involved, either directly or through one of its subsidiaries. Additionally, T&N's historical records contained numerous documents evidencing that the company regarded all types of asbestos – amosite, chrysotile and crocidolite – as capable of causing disease, and debunking the notion that there was or could be proved to be a safe form of asbestos or safe level of asbestos exposure. According to Mr Hanly, the existence of these records became of "profound importance" with regard to the litigation against T&N.

17. Ferodo was a manufacturer of asbestos-containing automotive friction products such as brake linings and disc pads. Ferodo was first named in an asbestos personal injury claim in the United States in November 1979. Almost all Ferodo cases with demonstrated product identification involved former brake mechanics who claimed to have contracted asbestos-related disease from exposure to Ferodo products during the installation and replacement of asbestos-containing brake systems.

18. Flexitallic was manufacturer of a type of gasket known as the "spiral wound gasket" which was used in industrial environments especially in plants where extremely hot or acidic liquids were transported through the plant via pipe. Flexitallic was first named in an asbestos personal injury claim in the United States in January 1976. This gasket contained asbestos and plaintiffs alleged that they were exposed to asbestos when they or co-workers removed the gasket from pipe flanges.

1976-2001: T&N's core strategy

19. As explained by Mr Hanly, T&N's core strategy remained constant throughout the period from 1976 to October 2001 (when T&N sought the protection of formal insolvency proceedings) viz to settle as many cases as it could; as cheaply as possible;

consistent with the cash flow needs of the company; and to avoid trials. In particular, if and to the extent that T&N considered that there was evidence of exposure to a T&N defendant's product sufficient to survive a motion for summary judgment by the T&N defendant, and evidence of an asbestos-related disease or condition, T&N viewed the claim as being, in practice, indefensible and therefore a claim that ought to be settled as quickly and cheaply as possible. Settlement was viewed by T&N as invariably leading to a lower cost resolution of the claim as compared to litigation. This was because evidence of exposure to a T&N product and evidence of illness caused by asbestos exposure was very likely to lead to jury verdicts against T&N and very considerable awards for damages. The dangers posed by jury awards at trial, and potentially crippling effects of not settling asbestos claims early, are well-illustrated by the examples given by Mr Hanly viz a US$ 10 million award (including US$ 7 million in punitive damages) against T&N for a mesothelioma case tried in Missouri in 2001; a US$ 4.2 million mesothelioma verdict against Flexitallic in 2001 from a jury in California and a jury verdict of US$ 35 million against Flexitallic and a co-defendant in Texas in 2001 in respect of claims brought on a consolidated basis by 22 non-malignant plant workers.

20. As a consequence, during the 20 years in respect of which Mr Hanly was US defence counsel for T&N and its subsidiaries, between 200,000 and 300,000 asbestos personal injury claims involving T&N alone were settled (in excess of 100,000 for Flexitallic and Ferodo), with trials occurring during the same period in only circa 100-200 cases. According to Mr Hanly, trying even 1% of the pending case load (say 200 cases a year) was calculated by T&N to have amounted to financial suicide. The lack of punitive damages awards reflects the fact that T&N did its best to avoid allowing cases to get to verdict.

The Center for Claims Resolution

21. As explained by Mr Hanly, T&N were initially (i.e. from 1976 to 1985) what he describes as "stand-alone" defendants. Thereafter, T&N became members of two joint defence/claims handling entities viz from 1985 to 1988, the "Asbestos Claims Facility" ("ACF"); and later from 1988 to late 2000/early 2001, the "Center for Claims Resolution" ("CCR"). The CCR was, in effect, a joint claims-handling and defence organisation consisting of approximately 21 members who were mainly asbestos product manufacturers. The essence of the arrangement was that if you were a member of the CCR and a plaintiff provided evidence of exposure to one of the CCR members' products, the other members who had been named in the plaintiff's complaint had to contribute to that settlement notwithstanding that the plaintiff had not proffered any evidence of exposure to the products of those other defendants. Although this meant that the T&N defendants could be potentially contributing to settlements where there was no evidence of exposure to those defendants' asbestos-containing products, it was, according to Mr Hanly, their judgment, and the judgment of the members of his team, that the cost savings and the protection that the CCR offered were far greater than was available if the T&N defendants became "stand-alone" defendants in the tort system, without the benefit of cost sharing arrangements for indemnity and legal expense.

22. The role played by the CCR and its methodology in handling and settling claims is explained by Mr Hanly in paragraphs 62-79 of his statement. Given the importance

attached to such matters by Mr Milligan, it is convenient to set out in full the material part of this section of Mr Hanly's statement:

> "*62. The CCR actively sought to settle claims whenever it could. Often these settlements were made between the CCR and plaintiffs' attorneys in respect of a large group or inventory of claims. The settlement would cover a variety of asbestos-related diseases, including malignancies and non-malignancies. Thousands of cases were routinely settled before, or even without, the actual filing in a court; this saved all parties substantial sums and generally resulted in lower per-case average settlement costs as compared to costs associated with filed cases.*
>
> *63. The attached CCR Settlement Agreement is an example of a typical settlement agreement entered into during the time T&N was a member of the CCR [pages 279 to 310 of PJH-1].*
>
> *64. The settlement was entered into by the CCR, on behalf of 16 members, and Plaintiff Counsel, as agent for 6,379 "Present Plaintiffs". The Present Plaintiffs are plaintiffs or claimants represented by Plaintiff Counsel who "presently have lawsuits pending in the Courts of Maryland, or who are or were residents of the State of Maryland and/or whose substantial occupational exposure to asbestos-containing products occurred in Maryland" [page 279 of PJH-1].*
>
> *65. The settlement was based on each plaintiff's alleged disease and was predicated on the assumption that each plaintiff's claim was not time barred. The plaintiffs were required to have provided "evidence of an asbestos-related disease and product identification information sufficient to qualify for payment" [page 282 of PJH-1].*
>
> *66. The settlement covers a number of asbestos-related diseases, divided between the following categories:*
>
> *(a) Non-Malignant I;*
>
> *(b) Non-Malignant II;*
>
> *(c) Mesothelioma:*
>
> *(d) Lung Cancer; and*
>
> *(e) Other Cancer.*
>
> *67. The medical evidence required for each disease level is set out in Appendix B to the settlement agreement [pages 297 to 305 of PJH-1].*

68. In order to qualify as a Mesothelioma claim, for example, the plaintiff had to submit a report by a Board-certified Pathologist, or a licensed physician acceptable to the CCR establishing that the plaintiff had mesothelioma. In order to qualify for a Lung Cancer claim, the plaintiff had to submit a report by a Board-certified Pathologist, Internist, Pulmonary Specialist, or a licensed physician acceptable to the CCR establishing that the plaintiff had lung cancer and that the condition was causally related to asbestos exposure.

69. Appendix C to the settlement agreement sets out the exposure requirements that a plaintiff would have to demonstrate before CCR paid under the settlement [pages 306 to 310 of PJH-1]. The plaintiff had to provide adequate "product identification". This was evidence of exposure to a defendant's asbestos-containing product sufficient to survive a motion for summary judgment.

70. The plaintiff could demonstrate exposure to a company's (CCR member's) asbestos-containing products in four ways:

(a) The plaintiff could demonstrate presence at an agreed-upon jobsite during an agreed-upon exposure period. An "agreed-upon jobsite" was a jobsite where the plaintiffs and the CCR agreed that the products of some particular company, such as T&N, had been used during a specified time frame so the issue would not have to be litigated.

(b) The plaintiff could provide a first person sworn affidavit that he worked at a particular site, for a specified period of time and during that time had been exposed to a CCR member's, such as T&N's, asbestos containing products.

(c) Alternatively, or in addition, the plaintiff could provide a co-worker affidavit or testimony from his co-workers that they worked during the same years as plaintiff and that they all worked with and around the products of T&N, for example.

(d) The plaintiff could demonstrate from documentary evidence from T&N's files, for example, the sale of asbestos-containing products at a particular time to a particular company or particular job site where he was exposed. I remember that some sites, such as the Bethlehem Steel Facility, for example, had a large number of records dating back decades that indicated when and to what extent it was purchasing asbestos-containing products and had the names of the manufacturers on file.

71. In addition, a plaintiff was required to establish by affidavit or comparably reliable evidence that he or she had regular

"occupational exposure for a period of at least one year (three months in mesothelioma cases) during a period when products supplied by one or more CCR members were used at that work site".

72. In my experience, although the exact criteria used by the CCR changed over time and would vary depending on the identity of the plaintiffs' attorneys on the other side, the medical and exposure criteria described above can be described as typical of the evidence usually required by CCR to settle claims.

What factors did the CCR take into account in negotiating settlement amounts?

73. As I have said above, the CCR sought to resolve claims through settlement whenever it could and would do so on the basis of evidence of an asbestos-related disease and evidence sufficient to survive a motion for summary judgment of exposure to a T&N product.

74. In terms of the settlement amount or quantum being paid to resolve a claim or group of claims, the CCR took into account a number of additional factors.

75. The severity of the plaintiff's disease was the most important factor.

76. Other factors included the strength of the evidence of exposure to one of the products of the T&N Defendants, the particular jurisdiction in which a case was pending (as some jurisdictions left T&N exposed to particularly high awards) and the history of the appellate court in that jurisdiction in remitting or modifying jury verdicts. The identity of the plaintiff's doctor, expert witness or treating physician would also play some role in the pricing of a claim for settlement, particularly for non-malignancies.

77. The identity of the plaintiffs' attorneys was also a very important factor. I have already said that the requirements for settlement varied depending on the identity of the plaintiff attorney. So too did the settlement amount. The T&N Defendants and the CCR were very aware that some plaintiff lawyers were better at trying cases than others and therefore posed more of a threat in terms of potential exposure to catastrophic awards.

78. As the core strategy of the T&N Defendants, whether handling claims itself or through the ACF and then the CCR, was to resolve as many asbestos cases as it could, consistent with the cash flow of the company, it was better to settle cases

> *earlier rather than later. Generally speaking, the earlier we settled an asbestos claim, the cheaper it was to do so as the plaintiff would not have expended the significant cost associated with working up to trial. If you waited until the case was trial listed on the docket of a judge with a firm or semi firm trial date that could materially increase the settlement value of the claim.*
>
> *79. In my experience, the mass consolidations or groupings of claims also worked to the advantage of the T&N Defendants if those cases could then be settled together. The prospect of facing discovery and trial of 5,000 consolidated cases could be daunting, but settlement of large groups of claims usually worked to the financial benefit of the T&N Defendants, as generally speaking mass consolidations led to lower per case settlements. The CCR settlement agreement described at paragraphs 63 to 72 above settled 6,379 claims in one go. This type of settlement was by no means unusual. In fact, in my experience, the vast majority of claims against the T&N Defendants were settled by the CCR by way of group settlement.*"

The Asbestos Liability Policy

23. According to a letter dated 3 December 1996 from the then Chairman of T&N, a decision was taken to put in place insurance arrangements which were apparently intended to draw a line under the exposure to asbestos related claims faced by T&N and to enable the engineering business to develop unimpaired by that exposure. The result was the ALP and the Reinsurance both dated 27 December 1996.

24. As stated above, the ALP provided cover of £500 million in excess of £690 million with effect from 1 July 1996 against T&N's liabilities and those of its subsidiaries for personal injury claims caused by asbestos anywhere in the world arising from their activities prior to the policy inception date.

25. The ALP contains four main sections viz section I – Coverage of Asbestos Claims; section II – Limit of Insurance; section III – Conditions; and section IV – Definitions. The ALP is governed by English law (section III.9). The premium was £92,046,000 (section IV.14). By virtue of section III.16, T&N has an option to commute the ALP before 1 July 2016 and to receive a payment of £34 million in return (i.e. about 1/3rd of the premium 20 years after it was paid).

26. For present purposes, it is the proper scope and effect of section III.4 headed "Policyholder's Claims Handling" which lies at the heart of the major dispute between the Trust and the Reinsurers. However, it is necessary to explain first the overall structure and other main features of the ALP.

27. Section I.1 sets out the "insuring agreement" and section I.2 the "exclusions" to coverage. In summary, the former provides that the Policyholder (i.e. T&N) is indemnified during the Period of Insurance up to the Limit of Insurance against

Ultimate Net Loss ("UNL") in excess of the Retained Limit. The Period of Insurance is the period between the Inception Date, i.e. 1 July 1996 (section IV.4) and exhaustion of the Limit of Insurance or commutation (section IV.9). The Limit of Insurance is £500 million (section IV.8) and the Retained Limit is £690 million (section IV.15).

28. UNL is defined by section IV.17 (so far as material) as follows:

> "*(a) All sums paid in fact by the Policyholder or any Subsidiary as cash or the purchase cost or (if lower) the fair market value of in kind disbursements (whether legal liability exists or not) in settlement of any Asbestos Claims, including but not limited to actual and consequential damages, costs and expenses allowed or awarded, and punitive, exemplary and multiple damages;*
>
> …
>
> *(c) Plus all reasonable and proper amounts paid in fact by the Policyholder or any Subsidiary as cash or the purchase cost or (if lower) the fair market value of in kind disbursements (whether legal liability exists or not) for costs, fees and expenses that are attributable to the defence or disposition of one or more Asbestos Claims, or the pursuit of subrogation rights, including but not limited to costs, fees and expenses of the Claims Handling Designee (other than salaries and other overhead costs of the Policyholder or its Subsidiaries), plaintiffs costs, lawyers, paralegals, investigators, witnesses, experts and other persons for the litigation, adjustment and investigation of such claims;*"

29. A Subsidiary means any of those listed in Schedule B. Schedule B includes Flexitallic and Ferodo. Thus T&N is indemnified against the settlement of any Asbestos Claim by Flexitallic or Ferodo.

30. An Asbestos Claim means (section IV.1):

> "*… any written demand … with respect to which the Policyholder or any Subsidiary, is alleged to be, or may be responsible … by whomever made … anywhere in the world … seeking monetary relief … for Personal Injury alleged to have been caused in whole or in part by the Asbestos Hazard.*"

It must also have been notified to T&N or the Subsidiary during the Period of Insurance (section I.1a and b) and excludes, among other things, an Asbestos Claim made before the Inception Date (section I.2.a.i), founded on exposure after the Inception Date (section I.2b) or under a workers' compensation statute or any similar US law (section 1.2d), i.e. so far as the US is concerned, to date it has been confined essentially to product liability.

31. Personal Injury includes not only disease and death, but also loss of support (section IV.10):

> "*Personal Injury means bodily injury (including fear of bodily injury), sickness, disease, mental anguish, emotional distress or mental injury sustained by a person, including death, loss of support, services, consortium, companionship, society and other valuable services resulting from any of these at any time.*"

32. Asbestos Hazard means (section IV. 2):

> "*… the mining, manufacture, sale, distribution, use, installation or removal of, or handling or exposure to, asbestos, asbestos products, asbestos fibres or asbestos dust.*"

33. Section III.12 is headed "Non-Transferability" and provides as follows:

> "*This Policy confers no rights, powers or obligations on any person or organisation other than the Insurer and the Policyholder. Neither this Policy nor any of the rights, powers, or obligations of the Insurer or the Policyholder under it may be in any way transferred or assigned to any other person or organisation without express written consent by the Insurer and the Policyholder. The granting of such consent shall be at the sole and absolute discretion of each of the parties. The Policyholder consents to the Insurer transferring all of its right and powers to its reinsurers of this Policy.*"

34. Section III.1 is headed "Insolvency" and provides in material part as follows:

> "*1. Insolvency*
>
> *a. No Insolvency Event affecting the Policyholder or any subsidiary and no act of any liquidator, receiver, administrator, trustee in bankruptcy or other person administering the estate of any of the foregoing as a consequence of any Insolvency Event (…) shall cause any liability of the Insurer hereunder to become due earlier or for a higher amount than would have been the case if such Insolvency Event had not occurred or if such act had not been committed …*
>
> *b. Payment in fact by the Policyholder or any Subsidiary as a cash disbursement or the delivery of an in kind benefit in discharge of an Asbestos Claim shall be a condition precedent to the liability of the Insurer hereunder, except that after an Insolvency Event occurs in relation to the Policyholder or any Subsidiary*

> *i. the Insurer shall be liable to pay the Policyholder even though the Policyholder (if the Insolvency Event occurs in relation to it) or the Subsidiary (if the Insolvency Event occurs in relation to it) is unable to discharge its liability in respect of such Asbestos Claim …*
>
> *c. The existence, quantum, valuation and date for payment of any sum which the Insurer is liable to pay the Policyholder under this Policy shall not be affected by any term in any composition or scheme of arrangement or any similar such arrangement, entered into between the Policyholder or any Subsidiary and all or any of its creditors, except to the extent the Insurer serves written notice to the contrary on the Policyholder in relation to any composition or scheme of arrangement …*"

35. An Insolvency Event is defined by section IV.5. It included the filing for bankruptcy in the US and the petition for administration in England by T&N on 1 October 2001.

36. Section III.4 is headed "Policyholder's Claims Handling" and as I have said lies at the heart of the major dispute between the Trust and the Reinsurers. It provides in material part as follows:

> "*4. Policyholder's Claims Handling*
>
> *a. Subject to the terms and conditions of this Policy and except if either an Insolvency Event affects the Policyholder or Ultimate Net Loss reaches the Retained Limit, the Policyholder shall have full, exclusive and absolute authority, discretion and control, which shall be exercised in a businesslike manner in the spirit of good faith and fair dealing, having regard to the legitimate interests of the parties to this Policy and of the reinsurers thereof, with respect to the administration, defence and disposition (including but not limited to settlement) of all Asbestos Claims, including but not limited to the appointment of one of more Claims Handling Designees.*
>
> *b. The Policyholder shall not, and shall ensure that each Subsidiary shall not, without prior written approval of the Insurer, such approval not to be unreasonably withheld or delayed:*
>
> *i. Terminate, appoint, or replace any Claims Handling Designee provided that once Ultimate Net Loss has reached the amount of Five Hundred and Fifty Million British Pounds Sterling (GBP550,000,000), the Insurer shall be entitled to terminate, appoint or replace any Claims Handling Designee;*

ii. *Agree to any settlement of Asbestos Claims likely to result in the Policyholder and the Subsidiaries in the aggregate pursuant thereto paying or incurring an amount (including costs associated with investigation and defence directly allocated to such Asbestos Claims) in excess of One Million British Pounds Sterling (GBP1,000,000) any one claimant, One Hundred and Fifty Thousand British Pounds Sterling (GBP150,000) on average per claimant, any one group settlement, or Twenty Million British Pounds Sterling (GBP20,000,000) in the aggregate any one group settlement.*

c. *The Policyholder shall specify to each Claims Handling Designee that claims handling by such Claims Handling Designee be conducted in a businesslike manner in the spirit of good faith and fair dealing having regard to the legitimate interests of the parties to this Policy and of the reinsurers thereof.*

d. *The Policyholder and the Insurer agree that the appropriate standard of performance for a Claims Handling Designee cannot be specified completely as of the Policy Signing Date. Notwithstanding this agreement, the Policyholder agrees that it will from time to time specify a standard of performance for any Claims Handling Designee that takes account of the best practice for handling Asbestos Claims at the relevant times, in the relevant circumstances and in the relevant jurisdictions. The Policyholder and the Insurer agree that the standards adopted by the Center for Claims Resolution as of the Policy Signing Date take account of the best practice as of that date for Asbestos Claims within the United States and Canada.*

e. *…..*

f. *In the event of either an Insolvency Event in relation to the Policyholder or Ultimate Net Loss reaching the Retained Limit, the Insurer shall have (and shall retain until the first to occur of exhaustion of the Limit of Insurance, commutation or the Insurer so determining) the full, exclusive and absolute authority, discretion and control, which shall be exercised in a businesslike manner in the spirit of good faith and fair dealing, having regard to the legitimate interests of the parties to the Policy and the reinsurers thereof, of the administration, defence and disposition (including but not limited to settlement) of all Asbestos Claims, including but not limited to the appointment of one or more Claims Handling Designees.*" (Emphasis added)

37. As to these provisions, it is convenient to mention a number of features which are potentially critical in the context of the issues which arise in these proceedings:

    i) First, section III.4d imposes an obligation on the Policyholder from time to time to specify a "standard of performance" for any Claims Handling Designee that takes account of the "best practice" for handling Asbestos Claims at the relevant times, in the relevant circumstances and in the relevant jurisdictions.

    ii) Second, section III.4d also stipulates that the standards adopted by the CCR as of the Policy Signing Date take account of the best practice as of that date for Asbestos Claims within the United States and Canada. Thus, Mr Milligan submitted that the CCR standards in effect provided the contractual yardstick for determining the appropriate standard for claims handling. As described more fully below, the main thrust of his submission was in very broad terms that the claims handling procedures adopted by the Trust were broadly similar to the standards adopted by the CCR and/or (in any event) represented "best practice".

    iii) Third, section III.4f is triggered "*In the event of either an Insolvency Event in relation to the Policyholder or Ultimate Net Loss reaching the Retained Limit.*" It is common ground that an "Insolvency Event" has indeed occurred and that section III.4f has therefore been triggered. On this basis, Mr Butcher submitted that section III.4d is inapplicable; that any consideration of the standards adopted by the CCR is irrelevant; that in accordance with section III.4f, it is the Insurer (i.e. Curzon) which has the "*authority, discretion and control*" of the "*administration, defence and disposition*" of Asbestos Claims; and that, by virtue of the Reinsurance (see below), it is the Reinsurers who now have such "*authority, discretion and control*".

38. It is these issues which lie at the heart of the major dispute between the Trust and the Reinsurers.

The Reinsurance

39. By the Reinsurance, each of the three Reinsurers re-insured Curzon against $33^{1}/_{3}$% of Curzon's exposure under the ALP (Article 1.1). (As already noted, EIRC's share was subsequently reduced as a result of a settlement in separate Court proceedings.)

40. The period of the Reinsurance Agreement is the same as that of the ALP (Article 3.1). The premium was £92 million (Article 9.1). There is provision for commutation which is back-to-back with the ALP (Article 14.1). The Reinsurance is governed by English law (Article 15.1).

41. By Article 4.1, Curzon transferred all of its rights and powers under the ALP to the Reinsurers. The exercise of those rights and powers by the Reinsurers is regulated by Article 8. Article 8.1(f) provides:

> "*Notwithstanding anything contained herein to the contrary, it is a condition of this Agreement that:*
>
> …

> *(f) if the Cedant shall become entitled to the full, exclusive and absolute authority, discretion and control of the administration and defence and disposition (including but not limited to settlement) of all Asbestos Claims, including the appointment of one or more Claims Handling Designees pursuant to SECTION III – CONDITIONS, Clause 4 f. of the Policy, that authority, discretion and control shall be exercised by a majority of the Reinsurers pursuant to the transfer in Article 4 hereof, and the Cedent shall provide all such assistance as the Reinsurers or a majority of them may reasonably require (subject only to requiring Reinsurers meeting the Cedant's reasonable and proper out of pocket costs) in respect thereof and shall account to the requiring Reinsurers for all recoveries and other benefits and materials obtained as a result of such assistance.*"

Subsequent Events

42. As stated above, these insurance arrangements were apparently intended to draw a line under the exposure to asbestos related claims and to enable T&N's engineering business to develop unimpaired by that exposure. However, the exposure proved to be far worse than had supposedly been expected by T&N: between 1976 and 2001, T&N resolved 245,000 asbestos personal injury claims at a cost of US$ 835 million; in 2000 alone it had spent US$ 350 million dealing with asbestos liabilities; and by 2001 it had 114,000 lawsuits pending against it. Further, as explained by Mr Hanly, the CCR had all but collapsed by January 2001 and the T&N defendants were forced back out in the tort system on their own. Meanwhile, Professor Tweedale published a book in 2000 entitled "*Magic Mineral to Killer Dust: Turner & Newall and the asbestos hazard*" which was highly critical of T&N as exemplified by the following passage at pp279/280:

> "*The company's attitude towards matters of health over so many years may be regarded as strikingly irresponsible. In the last decade or so, T&N has tried to defend itself in court actions by arguing that it has always applied government safety regulations, that it has always adequately warned workers about the risks, that it has paid "fair" compensation, and that it has supported medical research. Its archive shows such claims owe more to public relations than to fact. Turner & Newall provided significant opposition to the government dust control and medical schemes between the 1930s and 1960s; it neglected to implement such scheme fully both in the UK and especially overseas; it failed to warn customers; refused frequently to admit financial and moral liability for the consequences of its actions; often paid only token amounts of money for industrial injuries and deaths; tried to browbeat doctors, coroners and the Medical Board; sought to suppress research linking asbestos and cancer; gave the government inaccurate data about disease among its shipyard workers; and disseminated imprecise information about the 'safety' of asbestos.*

…

> *As one lawyer has remarked, there was just so much money being made by this huge multinational business, that 'they were not persuaded that enough people were dying or suffering an asbestos-related disease to find substitute materials or shut down and walk away. There was always an acceptable level of death.'"*

43. Meanwhile, in 1998, T&N was acquired by Federal-Mogul Corporation, a Michigan corporation. On 1 October 2001 Federal-Mogul, T&N and some of its subsidiaries, including Flexitallic and Ferodo, filed for bankruptcy in the US under Chapter 11 of the US Bankruptcy Code. On the same day, an order was made in England appointing administrators over T&N (and its subsidiaries) under s8 of the Insolvency Act 1986. It is common ground that those events constituted an Insolvency Event (as defined) under the ALP; and that, as a result, the claims handling rights of T&N were transferred to Curzon under the ALP and thence to the Reinsurers under the Reinsurance. At the time that the insolvency proceedings were commenced, approximately 114,000 lawsuits were pending against T&N alone in the US, 158,000 against Flexitallic and 41,000 against Ferodo.

44. As part of the Chapter 11 proceedings, the US Bankruptcy Court estimated the then net value of T&N's asbestos related liabilities in the US alone to be US$ 9 billion; and as a consequence of the insolvency, claims against T&N and its subsidiaries were stopped whilst the US and English courts determined the most appropriate way to preserve the viable businesses of the Federal Mogul group and to maximise the value available to creditors. It was in this context that there emerged a proposed draft Plan of Reorganisation under Chapter 11 of the US Bankruptcy Code which went through various iterations over a period of time and eventually culminated in the creation of the Trust. This part of the history of the background was the subject of a detailed witness statement of Mr Elihu Inselbuch, served on behalf of the Trust. Mr Inselbuch (who also gave oral evidence) is a US attorney and partner of Caplin & Drysdale who were retained in 2001 to represent the Asbestos Claimants Committee ("ACC") which had been established as part of the Federal Mogul bankruptcy to represent the interests of "present" asbestos personal injury victims. After the Trust was established, the ACC ceased to exist and in its place the Trust Advisory Committee ("TAC") was established again to represent the interest of "present" asbestos personal injury victims. Mr Inselbuch has throughout acted as Counsel to the TAC.

45. Meanwhile, between 2001 and 2007, various cases involving T&N, Curzon and one or more of the Reinsurers were heard in England viz:

    i) EIRC brought proceedings in 2001 in which it claimed that it was entitled to avoid the Reinsurance because of misrepresentation or non-disclosure. That case settled in late 2003, during the trial, on terms whereby EIRC's share was reduced. For present purposes the details are immaterial.

    ii) In the context of the administration of T&N, issues arose between Munich Re and Centre Re and the T&N's administrators, and were resolved either by Blackburne J, the Court of Appeal, or the House of Lords.

iii) During the administration, various issues arose concerning the compatibility of the draft Plan as it then stood (i.e. in its Third Amended form), with the ALP. These were considered in a Judgment of David Richards J in *Freakley v Centre Reinsurance International Co* [2004] EWHC 2740 (Ch), [2005] Lloyd's Rep IR 264 ("*Freakley*") and resulted in an Order being made by him dated 29 November 2004 declaring, in effect, that no article, term or other provision of that draft Plan could, as a matter of English law, alter or vary the terms of the ALP or the Reinsurance and making further declarations (amongst others) as follows:

> "*Transfer*
>
> *2. On a true construction of the Asbestos Liability Policy, the Plan in its present form does not involve a transfer or assignment of T&N's rights under the Asbestos Liability Policy in breach of Section III.12 thereof.*
>
> *Claims Handling*
>
> *3. The terms of the Plan in its present form, on their true construction and as a matter of law, do not in and of themselves involve a breach of Section III.4 of the Asbestos Liability Policy by depriving Curzon of claims handling rights in breach of the Asbestos Liability Policy or involve a breach by Curzon of Article 4.1 of the Reinsurance Agreement, provided that this Declaration is without prejudice to the right of Curzon and/or the Reinsurers to argue at some future date that the Plan if confirmed or any other plan of reorganization that is confirmed involves a breach of contract in either of those respects if any court in the United States of America should construe or apply the Plan or any other plan of reorganization that is confirmed so as wholly or partially to deprive Curzon or the Reinsurers of their claims handling rights.*"

iv) In 2005 there were further proceedings in the context of the administration in which David Richards J considered various complaints on the part of Centre Re and Munich Re that the terms of settlement of EIRC's avoidance proceedings would breach T&N's obligations to them.

Although nothing in these cases decides the issues that are now before the Court, they are of potential relevance in particular because the Reinsurers say that by reason of the conduct of the T&N administrators in certain of these proceedings, the Trust is now in effect precluded from claiming certain of the relief sought in the present proceedings.

The Federal Mogul Asbestos Personal Injury Trust – the "Trust"

46. By an order of the US Bankruptcy Court on 8 November 2007 approved by the US District Court on 13 November 2007, the Trust was, in effect, established in accordance with the terms of the Plan and a Trust Agreement.

47. The Plan is a long a complex document. In essence, its purpose was to enable the viable parts of the Federal-Mogul group to be re-organized free of liabilities for Asbestos Personal Injury Claims (as defined in the Plan) and to provide a trust fund for partial payment of those claims. The Effective Date (as defined) was that on which the Debtors (as defined) notified the Bankruptcy Court that the conditions precedent had been fulfilled. In the event that was 27 December 2007. By the order (i) the Trust was created in accordance with the terms of the Plan and the Trust Agreement; (ii) subject to Article IV of the Plan, the Trust assumed liability for all Asbestos Personal Injury Claims and was obliged to make distributions from Trust Assets to the holders of such claims; (iii) subject to Article IV of the Plan, the Debtors were released from liability for Asbestos Personal Injury Claims; and (iv) except as provided by the Plan, all Persons (as defined) were permanently enjoined from pursuing any proceedings against the Debtors in respect of any Asbestos Personal Injury Claim.

The Fourth Joint Plan of Re-organization for Debtors and Debtors in Possession (as Modified) – The "Plan"

48. As summarised by Mr Milligan in his opening submissions, the main features of the Plan are as follows:

    i) At the outset, the Trust's assets consisted, so far as relevant, of Class B Common Stock of Re-organised Federal-Mogul. The Trust's assets did not include the ALP because, unlike US policies, the benefit of it was unassignable without the consent of the Reinsurers. The Trust subscribed for 57.5% of the Class B Common Stock of Re-organized Federal-Mogul for £338 million. That debt (the Stock Repayment Obligation or "SRO") was left outstanding and the benefit of it was assigned by Re-organized Federal-Mogul to Re-organized T&N by way of capital contribution (Section 4.5.5(b)).

    ii) Except as provided in the Plan, the Released Parties (as defined) which included T&N and its Subsidiaries covered by the ALP, were discharged from all liability for Asbestos Personal Injury Claims. Thus, the holders of Asbestos Personal Injury Claims against T&N and its Subsidiaries covered by the ALP can themselves only make a claim against the Trust (a Trust Claim) (Sections 4.5.2(a) and 4.5.8(a)). However, the Trust itself is irrevocably authorised to make claims against T&N and its Subsidiaries covered by the ALP as agent on behalf of those with Asbestos Personal Injury Claims (an Asbestos Claim) (Section 4.5.8(a)). The Trust can also authorise others to make such a claim irrespective of whether a Trust Claim has been made.

    iii) An Asbestos Personal Injury Claim can be established against Re-organized T&N and its Subsidiaries by judgment, arbitral award or agreement (ie settlement) (Section 4.5.9). Once established, the claim can only be discharged

in one of four ways prescribed by Section 4.5.10(a), which provides in material part as follows:

> "*(a) Once a Debtor HPE Asbestos Claim has been established pursuant to Section 4.5.9, or a CVA Asbestos Claim has been established pursuant to the Principal CVAs, the liability of any Reorganized Hercules-Protected Entity concerned in respect of that Claim, and in respect of any costs and interest due or which may become due in relation thereto, may only be satisfied and discharged by payment or deemed payment to the Trust or the U.K. Asbestos Trustee, as applicable, as agent of the holder of the Claim, as follows:*
>
> *(i) … by setting off against the liability in respect of an established Debtor HPE Asbestos Claim an equivalent amount of the Stock Repayment Obligation … and in order to effect such set-off, where such consent is given, Reorganized T&N hereby agrees to assign and transfer, for no consideration and at the time that the option is exercised (or, if later, at the time that such consent is given), to the applicable Reorganized Hercules-Protected Entity such part of the Stock Repayment Obligation as is equal to the Debtor HPE Asbestos Claim that has been so established;*
>
> *(ii) … by the Trust paying the whole or part of the Stock Repayment Obligation to Reorganized T&N for the purpose of enabling Reorganized T&N to satisfy, or … to arrange for the relevant Reorganized hercules-Protected Entity to satisfy, the liability …*
>
> *(iii) by payment by the relevant Reorganized Hercules-Protected Entity out of funds made available (whether by loan or in any other manner agreed between Reorganized Federal-Mogul and the Trust and/or the U.K. Asbestos Trustee) to:*
>
> *(1) Reorganized T&N, or*
>
> *(2) (with the prior written consent of Reorganized Federal-Mogul) any other Reorganized Hercules-Protected Entity other than Reorganized T&N,*
>
> *by the Trust and/or U.K. Asbestos Trustee and/or any other person for the purpose of satisfying any Debtor HPE Asbestos Claims that have been established pursuant to Section 4.5.10 and/or any CVA Asbestos Claims that have been established pursuant to the Principal CVAs; or*

> *(iv) by payment out of any Hercules Recoveries payable and to be applied under Section 4.5.12(a) Secondly or Thirdly …*"

iv) The holders of the Asbestos Personal Injury Claims against Re-organized T&N covered by the ALP assigned their right to the proceeds of their claims to the Trust (Section 4.5.7(a)). They also assigned to Re-organized T&N such rights as they had under the ALP by virtue of the Third Parties (Rights against Insurers) Act 1930 (Section 4.5.7(b)), thus enabling T&N to collect on the ALP in respect of Asbestos Claims not only against its Subsidiaries but also against itself.

v) The Plan permits commutation of the ALP (Section 4.5.21(a)).

vi) On the expiry of the ALP (whether by exhaustion or commutation), the Trust assumes sole liability for all Asbestos Personal Injury Claims (Section 4.5.20(a)(i)) and Re-organized T&N and its Subsidiaries are automatically discharged.

vii) The Trust is obliged, in accordance with the Plan, to indemnify Re-organized T&N and the Subsidiaries covered by the ALP (the Hercules Protected Entities – Section 1.1.118), against the costs of defending themselves against Asbestos Personal Injury Claims (Section 4.4).

viii) Finally, the Plan expressly provides that Re-organized T&N and the Subsidiaries shall retain the right to exercise all defences which they would otherwise have to reduce or defeat liability for any Asbestos Personal Injury Claim (Section 4.5.8(e)).

49. As contemplated by the Plan and the Trust Agreement, Asbestos Personal Injury Claims were to be considered and assessed by the Trust in accordance with certain Trust Distribution Procedures ("TDPs"). The original TDPs referred to in the Plan were subsequently updated although it is common ground that, for present purposes, the changes are not significant. References in this Judgment are to the TDPs ultimately adopted in 2010.

The Stock Repayment Obligation ("SRO")

50. For reasons which appear below, the SRO was and remains a significant feature of the Plan. In particular, it is important to note that, under the Plan, the SRO is repayable by the Trust either (i) by set-off against asbestos claims, or (ii) in cash in order to meet asbestos claims or (iii) after 20 years. The amount of the SRO (i.e. £338 million) was apparently fixed so as to approximate to the outstanding amount of T&N's retention under the ALP. As explained by Mr Stanley in his Opening Submissions, the effect in commercial terms is that T&N, using assets provided for the purpose by its parent company, "pre-paid" to the Trust the anticipated amount of asbestos claims that would be needed to exhaust the retention; and the Trust received that value in the form of shares with a value of £338 million. It was in effect an interim payment. As claims were established, part of this value would be appropriated towards them. There was then a long-stop date, at which point it was apparently assumed that the Trust would have succeeded in establishing any asbestos claims it wished to establish; at

this point, if anything remained (i.e. if the interim payment proved excessive) the balance would be returned to T&N. The practical effect of this is as if Reorganized Federal-Mogul had put T&N in possession of an account containing £338 million, with the mandate to use it (only) to pay asbestos claims for the following twenty years, with any balance thereafter remaining to be retained by T&N. The difference was that the account is not with a third party bank, but with the Trust.

The Power of Attorney

51. By section 4.5.11(a), the Plan required T&N to grant to the Trust a power of attorney "*to enable the Trust to take all necessary and/or appropriate steps … to pursue Hercules Recoveries in respect of Debtor HPE Asbestos Claims*"; and pursuant thereto, T&N duly issued a Power of Attorney dated 27 December 2007 (the "POA"). By clause 6(b), the POA is governed by English Law. Clause 1 of the POA provides as follows:

> "*1. The Attorney is appointed to:*
>
> *(a) take all necessary and/or appropriate steps to pursue or recover Hercules Recoveries in respect of Debtor HPE Asbestos Claims including without limitation:*
>
> *(i) the giving of any instructions to the Hercules Payment Agents (being instructions which are not inconsistent with the terms of the Plan); and*
>
> *(ii) seeking payment (by whatever means) of Hercules Recoveries from Curzon, the Reinsurers and/or any third party;*
>
> *(b) to receive payment of Hercules Recoveries which are permitted by the Plan;*
>
> *(c) appoint or remove one or more substitute attorneys at such times and on such terms as the Attorney (including a substitute or substitutes) shall consider necessary or desirable (and so that each substitute has full power as the Grantor's attorney in accordance with the terms of his appointment); and*
>
> *(d) do anything else which the Attorney considers to be necessary or desirable to achieve the purposes set out above including, without limitation, the signing, registration or recording of any document, including this Specific Power of Attorney, with any relevant person or authority.*"

In essence, clauses 1(a) and 1(d) are relied upon, if necessary, by the Trust in support of its case that it has standing to obtain the declarations which it seeks in these proceedings. I consider this further below.

Analysis Research and Planning Corporation ("APRC")

52. In January 2008, the Trust appointed Analysis Research and Planning Corporation ("ARPC") to be its executive director. The President of APRC is Mr B Thomas Florence. He provided a signed statement and gave oral evidence on behalf of the Trust with regard, in particular, to the processing of the incoming claims (the "Trust Claims"). As explained by Mr Florence, the role of APRC is, in essence, to provide advice to the Trustees on how to manage the Trust so as to ensure that the Trust processes Trust Claims presented to it in accordance with the terms of the Plan.

Delaware Claims Processing Facility ("DCPF") and the Trust Distribution Procedures ("TDPs")

53. In April 2010, the Trust appointed the DCPF to assist it in processing the incoming claims and to implement the TDPs in accordance with the Trust's instructions. The CEO of DCPF is Mr John Mekus. He provided a written statement and gave evidence on behalf of the Trust with regard to how, from a practical point of view, incoming Trust Claims are handled, evaluated, and allowed or rejected by the DCPF on behalf of the Trust in accordance with the TDPs.

54. The DCPF began accepting claims on behalf of the Trust on 25 August 2010 and began reviewing claims on 14 October 2010. To understand the scale of the task facing the Trust and the DCPF, it is worth noting that the DCPF employs more than 300 people to review Trust Claims. According to Mr Mekus, the average tenure of the claims reviewers is 6 years and over 60% have post-high school education which means that the DCPF has an experienced team of claims reviewers. There is one manager assigned for every six reviewers. In addition there are eight qualified nurses on the staff who routinely share their knowledge with other reviewers should questions regarding medical advice evidence arise in the context of claims submissions. However, although two of the claims reviewers have legal backgrounds, DCPF do <u>not</u> use a team of lawyers to review the filed claim submissions.

55. As stated above, the Trust Claims are assessed by reference to the TDPs. These are contained in a lengthy and complex document extending to some 76 pages. As helpfully summarised by Mr Milligan in his opening submissions, the TDPs prescribe eligibility for compensation by reference, among other things, to disease type, the identity of the company to whose product the victim was exposed and scales of value. It is an important part of the Trust's case that the form and content of the TDPs reflect the well-established practice developed in previous US bankruptcies. In summary, it is the Trust's case that the TDPs are designed to provide fair, equitable and substantially similar treatment for all existing and future Asbestos Trust Claims (Section 1.1): their goal is to treat all claimants equally, paying them (within the constraints of the limited funds available) as equivalent a share as possible of the value of their claims based on historical values for substantially similar claims in the US tort system (Section 2.1(a)). In summary, the main features of the TDPs are as follows.

56. There are four separate subfunds from which payments are to be made (Sections 2.1(a) and 2.1(b)). Only the first of those four subfunds, the T&N Subfund, is relevant. (The other three relate to other companies in the Federal-Mogul group and have the benefit of other insurance policies the benefit of which was transferred to the Trust by the Plan.)

57. In order to make a Trust Claim, the claimant (or his representative) must submit a standard Claim Form together with any supporting documentation. Section VI regulates the form and materials required to make a claim. This can be done by hardcopy, browser interface, bulk upload or web service. As stated in Part 9 of the Proof of Claim Form, the contents of the Form have to be certified by the claimant under penalty of perjury.

58. Section V regulates the processing and payment of claims once made. Section 5.1(a)(2) purports to regulate the tolling of applicable statutes of limitation. Essentially, a claim against the Trust is not time-barred provided that it was not time-barred when Federal-Mogul filed for bankruptcy and that the claim is then made within 3 years and 6 months of the Trust opening for business (the Initial Claims Filing Date – 25 August 2010) or the diagnosis of the relevant disease, whichever is the later. Claims arising after the 3 year + 6 months limit (i.e. February 2014) will be admitted in accordance with the State limitation statutes applicable to them.

59. Section 5.3(a)(1)(C) defines eight disease levels by reference to which claims are to be made and the type of diagnosis required to establish the disease within each level. The disease levels are as follows, levels V-VIII being malignant diseases:

VIII	mesothelioma
VII	lung cancer 1 (cancer combined with another asbestos disease)
VI	lung cancer 2 (cancer without another asbestos disease)
V	other cancer
IV	severe asbestosis
III	asbestosis/pleural disease
II	asbestosis pleural disease
I	other asbestos disease

60. Section 5.3(a)(3) ascribes values to each level of disease for, among others, T&N Claims, divided between Scheduled Value, Average Value and Maximum Value. Mr Mekus was unable to explain in evidence how these values had been determined although it was Mr Milligan's submission that the values reflected the historic experience of the contributions made by T&N and its subsidiaries for their share of responsibility in settlements in the US tort system. In that context, he relied on what is stated in Section 2.2(b) of the TDPs:

> "*The Disease Levels, Medical/Exposure Criteria, Scheduled Values, Average Values and Maximum Values … have all been selected and derived with the intention of achieving a fair allocation of the assets held by the T&N Subfund … as among their respective claimants suffering from different disease processes in light of the best information available, considering historical settlement data and the rights which each group of claimants would have in the relevant tort system absent the Debtors' bankruptcies.*"

61. Further, according to a report prepared in 2004 by a Dr Peterson for the purpose of the bankruptcy proceedings, the values were assessed on a conservative basis as at that date i.e. 2004. The values are confined to compensatory damages: claims for punitive damages are not allowed (Section 7.4).

62. The claimant must make his claim by reference to the highest disease level for which his claim qualifies (Section 5.3(a)).

63. Section 5.7(a)(1) defines the medical evidence required for the different disease levels. Section 5.7(a)(2) requires the Trust, before paying a claim, to have reasonable confidence that the medical evidence is credible and consistent with recognized medical standards.

64. Section 5.7(b) defines the evidence of exposure to the product of (in this instance) T&N or its subsidiary required to establish causation of the disease in question. In particular, section 5.7(b)(3) requires a demonstration of exposure which is meaningful and credible. In broad terms, this can be done in one of two ways. First, the claimant can allege exposure by reference to the claimant's presence at one or more approved "site lists" which are downloadable from the Trust website. These identify "documented" or "conceded" sites where T&N and/or Flexitallic asbestos-containing products are known to have been present or used over particular periods. Alternatively, the claimant can seek to demonstrate exposure to a T&N, Flexitallic or Ferodo asbestos containing product by reference to particular documents or other evidence. In addition, the claimant must provide satisfactory evidence of exposure to a T&N/Flexitallic/Ferodo asbestos-containing product. If a claimant worked in an occupation/industry combination listed on the presumptive Significant Occupational Exposure ("SOE") Rating List which is downloadable from the Trust's website, for a stipulated period, then no further evidence of SOE is required. Otherwise, the claimant must provide a specific description of relevant exposure.

65. On receipt of a claim, the first step in the review process is called "Intake Review". The purpose of this review is simply to filter out claims where there is insufficient basic information. If a claim passes the Intake Review it joins the "Review Queue". The review process includes consideration of all medical documents in order to identify any exposure information including job sites, employment years and occupations.

66. Claims are reviewed in one of two ways, namely by Expedited Review or Individual Review. Expedited Review is available for all disease levels, except level VI (lung cancer 2) which can only proceed by way of Individual Review (Section 5.3(a)(1)(A)). If the claimant chooses Expedited Review, the claim is processed and, if accepted, the claimant will be offered the Scheduled Value. Individual Review is available to a claimant whose claim does not satisfy the medical and exposure criteria (Section 5.3(a)(2)(A)) or who claims a greater value than the Scheduled Value (Section 5.3(a)(2)(B)). In the former case, the Trust can offer the Scheduled Value if the claim would be cognizable and valid in the US tort system. In the latter case, the Trust can determine a value up to the Maximum Value, but it may determine a value which is less than the Scheduled Value; ie in the latter case the Trust's exposure is capped, and the claimant takes a risk that his claim may be valued at less than the Scheduled Value; this is a risk which he always has to take in respect of a level VI claim (lung cancer 2).

67. The Individual Review also applies to Extraordinary Claims (Section 5.4(a)). An Extraordinary Claim applies to all disease levels, except level I, where the claimant can establish more extensive exposure to the products of T&N or its subsidiaries than to the products of other manufacturers than would have been the case on average and that he has little likelihood of substantial recovery elsewhere (*ibid*). If an Extraordinary Claim is accepted, the Trust can determine a value up to 5 times the Scheduled Value for disease levels II-V and VII-VIII and up to 5 times the Average Value for disease level VI (*ibid*).

68. The Trustees are required to consider the cost of investigating and uncovering invalid claims so that the payment of valid claims is not further impaired (Section 7.2).

69. As envisaged by the Plan, once the value of the claim has been determined, the Trust pays to the claimant the Initial Payment Percentage (currently established at 6% of the claim value (Sections 2.3 and 4.2), the first instalment of which is 3% (Section 2.7)). Whether the Initial Payment Percentage is adjusted under Section 4.2 or any further instalment is paid will depend on the assets available to the Trust, including in particular any recovery by T&N under the ALP and the volume of claims, including "future" claims as compared to current projections.

70. I should make plain that the above is no more than a brief summary of the review process. A much fuller explanation appears from the statements of Mr Florence and Mr Mekus including a helpful illustration of the assessment of a mesothelioma claim set out in Appendix 1 to Mr Mekus' written statement.

An example

71. However, I do not think it is necessary for present purposes to expand on this further save perhaps to set out by way of illustration the example which I quote verbatim from Mr Milligan's opening submissions by reference to a US resident who has died from mesothelioma contracted as result of exposure to asbestos contained in a product manufactured by T&N. His widow makes a claim for compensation against the Trust (referred to in the Plan and in these proceedings as a Trust Claim), choosing Expedited Review. On behalf of the Trust, the DCPF assesses the claim in accordance with the TDPs, which includes verifying the location, duration, time, extent and nature of his exposure to asbestos products for which T&N is responsible and the cause of death. Assume that the DCPF accepts the claim. It will then offer the Scheduled Value for a Level VIII claim (US$ 200,000). If the widow had not opted for the Scheduled Value by way of Expedited Review, she could have taken a risk and have asked for an Individual Review at the outset. Once the value of the claim has been established, the widow will then receive 3% of it, but will receive more (currently anticipated to be double) if the Trust collects on the ALP. The Trust then makes an Asbestos Claim on behalf of the widow against T&N. The Asbestos Claim is asserted at full value, i.e. it is not limited to the TDP value. That claim is then handled by the Reinsurers on behalf of T&N. If the claim is accepted and settled, minimal further cost is incurred and the claim (and the costs incurred in handling it) will erode the Retained Limit under the ALP and in due course the Limit of Insurance. If, however, the claim is rejected by Reinsurers on behalf of T&N, the Trust has no choice but to sue T&N in the US tort system as agent of the widow (which claim is unlimited by the compensation paid by the Trust under the TDP, or by the value attributed to such a Level VIII claim). According to Mr Milligan, not only does that

immediately start to rack up legal costs but, more importantly, if the DCPF has done its job properly in assessing the claim in the first place, the case will ultimately either be settled at a much higher level, or T&N will run the risk of a jury award which will far exceed the compensation which the Trust has paid, or the value of a Level VIII claim under the TDP. The consequence is that the Trust's assets and, in due course, the insured layer, are eroded by irrecoverable legal costs that benefit the lawyers, not the victims.

The claims processed by the Trust/DCPF

72. By the end of 2010, the DCPF had received approximately 150,000 Trust Claims. As at the end of July 2013, this number had risen to 487,737. As at 31 July 2013, 233,454 of the 487,737 filed claims had been reviewed by the DCPF claims reviewers. Of these reviewed claims, 62,839 claims have been paid or evaluated as payable by the DCPF. The total TDP value of the 62,839 claims approved as at 31 July 2013 was US$ 1,271,208,994. Of the 487,737 filed claims, 34,144 have been filed in respect of mesothelioma. Of the 34,144 filed mesothelioma claims, 17,715 have been reviewed by the DCPF claims reviewers. Of the reviewed mesothelioma claims, 7,694 have been approved. The total TDP value of the 7,694 mesothelioma claims approved as at 31 July 2013 was US$ 854,447,581. The approval rates were as follows:

All disease levels: T&N: 26%; Flexitallic: 32%; Ferodo: 5%

Mesothelioma only: T&N: 32%; Flexitallic: 48%; Ferodo: 48%

73. In the course of the trial, Mr Mekus provided updated figures to 5 March 2014 which showed 964,349 for total filed claims for all disease levels of which 67,953 had been approved; 59,796 for total filed mesothelioma claims of which 8,557 had been approved. Approval rates on reviewed claims have remained broadly similar to those stated in the previous paragraph. It is common ground that, at the latest by the end of this year, the DCPF is likely to have approved claims the total TDP values of which would exceed the insurance cover.

The Trust actions in the US tort system

74. Following the confirmation of the Plan and in anticipation of a large number of Asbestos Claims being filed in the US tort system by the Trust, the Reinsurers put in place a claims handling framework in the US in order efficiently and cost-effectively to manage and defend those expected lawsuits. This framework is explained in a witness statement of Ms Stephanie Boone who also gave oral evidence. Ms Boone is a Senior Vice President with Swiss Re Corporate Solutions and whose involvement in this matter has included, in close consultation with all the Reinsurers, overseeing the Reinsurers' response to Asbestos Claims asserted by the Trust. In particular, the Reinsurers instructed McKenna Long & Alridge as National Coordinating Counsel and appointed a third party vendor in order to set up and maintain a database of Asbestos Claims to deal with such claims in as efficient and systematic a manner as possible.

75. However, in the event, the Trust did not file a large number of Asbestos Claims in the US tort system. By 2011, the Trust had only filed one such Asbestos Claim on behalf

of a Mr and Mrs Plummer (the "Plummer Action"). The initial demand in that case was some US$ 10 million. However, in September 2011, the Reinsurers agreed to settle this claim for US$ 3.85 million. Thereafter, the Trust has filed only a small number of other Asbestos Claims against T&N entities on behalf of various individuals viz Barraford; Robinette; Lydon; Reid; Murray; Gallagher; and Podeworny. The cumulative value of the claimants' demands in Barraford, Lydon and Robinette is some US$ 34,500,000. The demands in the other four cases have not yet been made. In addition, since December 2013, the Trust has filed a further 15 cases.

The 200/50 claims presented to T&N/the Reinsurers

76. On 21 December 2012, the Trust wrote to T&N, copying the Reinsurers to "present" 200 anonymised mesothelioma claims for "review, evaluation and settlement". There is no evidence as to how these claims came to be selected for presentation. A fair assumption might be that these constituted the Trust's strongest cases or were otherwise a representative "sample" of some kind – but there was no evidence to this effect. These claims have not been filed in the US tort system by the Trust. Upon receipt of the claims, the Reinsurers carefully reviewed the documents provided in relation to each of the claims. On 22 May 2013, the Reinsurers responded to the Trust in effect rejecting the claims on the basis (as stated in the letter) that "… *the information provided did not establish or even credibly demonstrate a liability on the part of T&N or its subsidiaries in respect of any of the 200 claims …*"; and detailing what they considered to be the deficiencies which they had identified in respect to each of the claims in the letter in itself and in a spreadsheet attached to the letter. In particular, the letter identified what were stated to be "*certain common failings in relation to the 200 claims*" viz:

> "*A. Time Bar – Statutes of Limitations and/or Repose. A large proportion of the 200 Claims (86%) are time barred under one or more of the relevant statutes of limitations and/or repose. Where it is apparent from the information provided that a Claim is likely time barred, no further deficiencies need be identified: time bar is, of itself, sufficient reason to regard a claim as not viable in the tort system. However, for the sake of completeness, other obvious deficiencies noted have also been identified and listed in the attached schedule.*
>
> *The 200 Claims also suffer from one or more of the following deficiencies:*
>
> *B. Existence of alternative asbestos exposures. Claims have evidence of significant alternative exposures to asbestos or asbestos-containing products for which T&N is not responsible.*
>
> *C. Lack of credible evidence identifying exposure to a T&N product. Claims do not include competent, sufficient and/or credible evidence of exposure to asbestos or asbestos-containing products for which T&N is responsible.*
>
> *D. Lack of credible pathology/autopsy confirmation of asbestos-related disease. Claims lack competent, sufficient*

> *and/or credible evidence of specific medical causation of asbestos-related disease or death arising from exposure to asbestos or asbestos-containing products for which T&N is responsible.*
>
> *E. Non-asbestos-related cause of death. Claims show that the claimant died from cause(s) other than asbestos exposure or, in some case, no cause of death is indicated.*"

Time Bar ?

77. Of these alleged "failings", it is important to note that the Reinsurers say that the first point (i.e. time bar) is of overwhelming significance; and that the vast majority of the claims appear to be time barred as against T&N and its subsidiaries. In particular, breaking down the 200 claims by sub-fund, it is the Reinsurers' case that (i) of the 34 in the T&N Sub-Fund, 29 are barred by statutes of limitations, and of the balance, 2 are barred by statutes of repose and only 3 are not yet time barred; (ii) of the 127 Claims in the Flexitallic Sub-Fund, 113 are barred by statutes of limitations, and of the balance, 7 are barred by statutes of repose and only 7 are not yet time barred; and (iii) of the 39 claims in the Ferodo Sub-Fund, 36 are barred by statutes of limitations and only 3 are not yet time barred. Details of particular cases are given in the expert report of Mr James Stengel served on behalf of the Reinsurers. These figures are summarised in the following table:

Sub-Fund	Barred by Limitations	Barred by Repose	Total Barred	%
T&N	29	2	31 out of 34	91.2%
Flexitallic	113	7	120 out of 127	94.4%
Ferodo	36	0	36 out of 39	92.3%
TOTALS	178	9	187 out of 200	93.5%

78. In addition, the Reinsurers say that with regard to an additional 50 claims submitted by the Trust and which are said to have been selected randomly by the Trust, all but one are time barred. Further, the Reinsurers say that at least 3 of the actions identified above which the Trust has brought in the US tort system and 12 out of the 15 actions filed since December 2013 are all time-barred as well.

79. In this context, the Reinsurers refer, in particular, to one of the actions which the Trust has brought in the US tort system i.e. the *Barraford* Action in respect of which the Trust originally made a demand of some US$ 10 million but which claim has recently been dismissed with prejudice by the US District Court for the District of Massachusetts on the basis that it is time barred. The reasons for such dismissal are set out in a recent detailed Judgment dated 25 February 2014. It is the Trust's case that that Judgment is wrong and it is, as I understand, now the subject of appeal.

80. As to this time bar point, the parties served reports from US lawyers viz Mr Paul M Singer on behalf of the Trust and the Hon Melanie L Cyganowski (Ret) on behalf of the Reinsurers; and both experts gave oral evidence in the course of the trial. As summarised in a Joint Memorandum signed by these experts and as explained further in the course of their oral evidence, they expressed opposing views and conclusions with regard to the time bar point. The detail does not matter. For present purposes, it

is sufficient to note that the view expressed by Mr Singer was that there had been an automatic "stay" under section 362(c)(2) of the US Bankruptcy Code which had not been terminated; whereas Ms Cyganowski's view was that such stay had been terminated because a discharge was, in effect, granted when the Plan became effective on 27 December 2007. It was not clear whether the parties were seeking to persuade me to give my own ruling on the time bar point. However, as I indicated in the course of the trial, given the existence of pending proceedings in the US tort system where this is very much a live point and, in particular, the further pending appeal in *Barraford*, it seems wholly inappropriate for me to determine the point in the course of these proceedings; and I decline to do so. In truth, it would be a futile exercise. For present purposes, it seems that the only proper course is to proceed on the basis that the decision with regard to the time bar point in *Barraford* is, at the very least, arguably right.

Other deficiencies ?

81. In addition to the time bar point, the other deficiencies referred to in the Reinsurers' letter dated 22 May 2013 were the subject of detailed consideration by Mr James L Stengel. He is a US attorney who has been a partner at Orrick, Herrington & Sutcliffe since 1998 and is currently the Lead Director of the firm's Board. While at Orrick, he has maintained an active litigation practice with a primary, although not exclusive, focus on products liability and mass tort litigation. Together with appendices, his expert report served on behalf of the Reinsurers extends to over 150 pages and focuses on the standard of claims handling relevant to the present case. His counterpart was Mr Michael K Rozen, who is also a US attorney and since 1993 has worked at a firm now called Feinberg Rozen with substantial experience in the handling of mass tort claims derived exclusively from the perspective of the defendant corporation and the judiciary. Together with appendices, his report served on behalf of the Trust extends to over 100 pages. In the usual way, those experts provided a Joint Memorandum and thereafter provided written supplementary Reports. Both Mr Stengel and Mr Rozen gave oral evidence.

82. On the basis of Mr Stengel's evidence, Mr Butcher's submissions with regard to the 200/50 claims submitted by the Trust were summarised in his opening submissions in material part as follows:

    i) Some would simply be rejected in the US tort system. A stark example is Claim 33055429, where the claimant indisputably died of gunshot wounds some 16 years ago, where the deceased and his spouse were unaware of any asbestos-related disease during his lifetime and where, consequently, the deceased's purported mesothelioma obviously had no impact on his quality of life and no causal role in his death. Although the DCPF, applying the terms of the TDP, approved the claim for payment by the Trust and assigned a value to it of US$ 200,000, the claim would be quickly rejected if brought as an Asbestos Claim in the US tort system. It now appears from Mr Rozen's supplemental report that this claim is being investigated for fraud.

    ii) Of particular importance as regards other claims among the 200 Claims is the evidence of alternative sources of exposure. Although, in a technical sense, the materiality of such evidence should depend on the extent to which the controlling law permits defendants to divide liability among all potentially

responsible parties, in fact strong alternative exposure evidence is highly relevant to the merits of any claim. Statements made by a plaintiff in earlier proceedings and representations made by the plaintiff to trusts are directly relevant as binding admissions of exposure to another manufacturer's product. Any such evidence, therefore, would be vigorously sought and used by a defendant in the US tort system as evidence that another's products caused the claimant's injuries. By itself, such evidence is a critically important variable, going to the heart of whether or not liability may be established against T&N and its Subsidiaries.

iii) The 200 Claims present several types of evidence demonstrating that an exposure to a product not manufactured by a T&N entity may be entirely or partially responsible for the claimant's alleged injuries. Thus, the majority of the claim files record that the claimant had previously filed asbestos-related lawsuits where no T&N entity was named as a defendant. Similarly, many claim files include documents showing that the claimant had filed a claim with, and often received payment from, another trust. The claim files also often include affidavits alleging exposure to other defendants' products. The work history and jobsites listed by claimants frequently suggest that they may have been exposed to other manufacturers' products.

iv) In fact, over 85% of the 200 Claims contained at least one type of alternative exposure evidence, and frequently more than one. Simply by way of example, in Claim 31122125 (which was valued by the Trust at US$ 50,000), the claimant sought compensation for asbestos exposure resulting from his exposure to "*Flexitallic gaskets used at Newport News Shipbuilding and Dry Dock Co.*", but the claim file also reveals that he had previously filed an asbestos-related lawsuit that did not name any T&N entity as a defendant. The surgical pathology consultation report in the file, moreover, states that he was exposed to asbestos insulation products while employed at a Johns Manville Plant.

v) This example is drawn from the files provided by the Trust under cover of its letter dated 21 December 2012. As James Stengel has noted, however, these files do not contain anywhere near the volume or quality of information that would be obtained by a defendant in the US tort system, which would look to thoroughly investigate any statements by a plaintiff or other evidence regarding his exposure history outside the particular case and would therefore seek to obtain discovery relating to claims filed by a plaintiff both in the US tort system and also with other bankruptcy trusts.

vi) Although the Trust attempted to present the 200 claims anonymously, it has been possible to identify the claimants in some cases and a cursory investigation, much less extensive than the discovery process in the US tort system, has revealed additional information relevant to the alternative exposure enquiry. Thus, for example, in Claim 31000716 (which was valued by the Trust at US$ 50,000), the claimant revealed in his deposition taken during the course of a previous lawsuit that he smoked one to one and a half packs per day of Kent micronite cigarettes for years, a fact which had been omitted from his Trust claim form. While smoking history is generally not

considered in mesothelioma cases, the exception is the smoking of Kent micronite cigarettes, as the filters of that particular brand contained asbestos.

vii) The filings in the US tort system have also revealed the existence of settlements with other defendants, pursuant to which some of the claimants making the 200 claims had already received large sums. For example the claimant in Claim 31106754 (which was valued by the Trust at US$ 60,438) appears to have received US$ 202,500 from US Gypsum in a lawsuit, and undisclosed amounts from four other defendants.

viii) Such facts would be taken into account by a defendant either in support of a sole satisfaction rule defence, where a defendant would argue that the claimant was required to seek full compensation for his single injury through a single lawsuit, or at least by way of off-set against any settlement concluded or adverse judgment handed down in the US tort system.

ix) In addition, some of the 200 Claims have insufficient credible evidence of the product or products to which the claimant alleges exposure. Beyond a selection of the relevant sub-fund against which the Trust Claim was made, some of the 200 Claims make no reference to the product to which the claimant alleges to have been exposed. Others provide only affidavits of co-workers, rather than an affidavit from the claimant himself regarding the alleged exposure. This is a critical issue: a defendant in the US tort system would certainly make use of the absence of evidence under oath from then-living claimants in defending against such claims.

x) Even where the Trust claim form does specify a product, the product identified often presents significant causation issues. Historically, most mesothelioma plaintiffs had clear, heavy industrial or occupational exposure and an assertion of direct exposure to Limpet spray could, if indicative of a sufficient dose, support a finding of a causal relationship between the exposure and a claimant's injury. By contrast, claims brought today tend to involve uncertain and in many cases indirect exposure paths and, accordingly, attempts were made to prove causation by reference to the "*single fiber*" theory of exposure. This theory, however, has now been rejected by a number of courts, including, most recently, in *In Re Garlock*. In that case, Judge George Hodges of the United States Bankruptcy Court for the Western District of North Carolina found that the "*any exposure*" theory, which is based upon studies involving very high exposures to raw fibres, was inapplicable and fundamentally flawed in the context of exposure to chrysotile asbestos, the type that had been used in Garlock's gaskets. One of T&N's Subsidiaries, Flexitallic, was also a gasket manufacturer and this decision, accordingly, has particular significance to it. The products produced by Ferodo, moreover, are also similar to the products produced by Garlock and Flexitallic in terms of their limited potential to cause asbestos-related diseases. There is, therefore, likely to be a serious issue as to whether the products produced by Flexitallic and Ferodo are even capable of causing asbestos-related diseases. This is very significant, as the vast majority of the 200 Claims allege just this sort of exposure.

xi) Even without the complete picture that would be available as a result of the adversarial process in the US tort system, these defects and others indicate that

the 200 Claims would be unlikely to be pursued or, if pursued, to survive in the US tort system.

III. The declarations sought by the Trust

83. Against that background, the Trust now seeks various declarations as follows:

i) The Plan is consistent with, and has not caused T&N to breach the terms of, the ALP.

ii) On the true and proper construction of the ALP and the Power of Attorney, the exercise of any power conferred on the Trust by the Power of Attorney to act in the name of T&N in order to (a) pursue recoveries from Curzon under the ALP; and (b) enforce the terms of the ALP, including section III.4, against Curzon/the Reinsurers, is consistent with, and does not amount to a breach of, section III.12 of the ALP.

iii) On the true and proper construction of the ALP and the Reinsurance Agreement, and following the occurrence of an Insolvency Event, the Reinsurers are subject to the right and power, and duty, to specify a claims handling standard in accordance with sections III.4c, 4d and/or 4f of the ALP;

iv) The TDP Standard is, or is more stringent than, the current best practice for handling Asbestos Claims as applicable within the United States and Canada generally, alternatively that is true save in respect of any Asbestos Claim in respect of which there is a valid defence, alternatively an arguable defence, of limitation or repose under US State law;

v) If specified as the standard of performance for the Claims Handling Designees appointed for the purpose of the ALP, the TDP Standard would be regarded as a standard which takes account of the best practice for handling Asbestos Claims at the relevant times, in the relevant circumstances and in the relevant jurisdictions for the purpose of, and on the true and proper construction of, sections III.4c, 4d and/or 4f of the ALP generally, alternatively that is true save in respect of any Asbestos Claim in respect of which there is a valid defence, alternatively an arguable defence, of limitation or repose under US State law;

vi) In the present circumstances, and for the purpose of, and on the true and proper construction of, section III.4c, 4d and/or IV.4f of the ALP:

a) If the Reinsurers instruct Claims Handling Designees to conduct claims handling, or settle Asbestos Claims, by reference to any standard which is materially more demanding or rigorous than the TDP Standard, this would cause Curzon to breach the obligation to conduct claims handling in a businesslike manner in the spirit of good faith and fair dealing, having regard to the legitimate interests of the parties to the ALP and of the Reinsurers generally, alternatively save in respect of, and only to the extent of, any Asbestos Claim in respect of which there is a valid defence, alternatively an arguable defence, of limitation or repose under US State law;

b) A failure by the Reinsurers to instruct the Claims Handling Designees to conduct claims handling, or settle Asbestos Claims, in accordance with the same or a materially similar standard to that contained in the TDP Standard would cause Curzon to breach the obligation to conduct claims handling in a businesslike manner in the spirit of good faith and fair dealing, having regard to the legitimate interests of the parties to the ALP and of the reinsurers thereof generally, alternatively save in respect of, and only to the extent of, any Asbestos Claim in respect of which there is a valid defence, alternatively an arguable defence, of limitation or repose under US State law; and

c) A failure by the Reinsurers to adopt a claims handling system which not only adopts an appropriate standard in respect of each claim presented, but also takes into account (based on the available evidence, including data made available to the Reinsurers by the Trust and/or the DCPF) the likely volume and amount of claims presented, or which are likely to be presented, against T&N, and the fact that claims presented by the Trust on behalf of victims will already have been subjected to assessment in accordance with the TDP Standard, would cause Curzon to breach the obligation to conduct claims handling in a businesslike manner in the spirit of good faith and fair dealing, having regard to the legitimate interests of the parties to the ALP and of the reinsurers thereof.

vii) On any reasonable, businesslike, good faith and/or fair analysis of the claims data extrapolated from the claims evaluation process conducted by the DCPF in relation to the claims filed with the Trust:

a) The corresponding Asbestos Claims (alternatively the corresponding Asbestos Claims for malignant diseases, and/or the corresponding Asbestos Claims other than those to which there is a valid defence, alternatively an arguable defence, of limitation or repose under US State law) which are and will, be available to the Trust for presentation against T&N and/or its Subsidiaries on behalf of the victims, if assessed by T&N and/or Curzon and/or the Reinsurers in accordance with a claims handling standard that is materially no more onerous, demanding or rigorous than the TDP Standard, will, or are likely to, exceed the Retained Limit and the Limit of the Insurance for the purpose of the ALP; and

b) Regardless of whether, as the Trust contends, the TDP Standard takes account of the current best practice for handling Asbestos Claims at the relevant times, in the relevant circumstances and in the relevant jurisdictions in all respects, T&N and its Subsidiaries are exposed to Asbestos Claims that have value (including settlement value) in the US tort system on such a scale that:

i) A failure by the Reinsurers to instruct the Claims Handling Designees to conduct claims handling, or settle Asbestos Claims, (alternatively Asbestos Claims for malignant diseases, and/or Asbestos Claims other than those to which there is a

valid defence, alternatively an arguable defence, of limitation or repose under US State law), in accordance with the same or a materially similar standard to that contained in the TDP Standard would cause Curzon to breach the obligation to conduct claims handling in a businesslike manner in the spirit of good faith and fair dealing, having regard to the legitimate interests of the parties to the ALP and of the reinsurers thereof; and/or

ii) The obligation contained in section III.4f of the ALP to conduct claims handling in a businesslike manner in the spirit of good faith and fair dealing, having regard to the legitimate interests of the parties to the ALP and of the reinsurers thereof requires claims handling to be conducted in a manner which (i) considers the claims or likely claims as a whole, (ii) minimises expenditure on defence costs and other transaction costs in defending Asbestos Claims to the extent reasonably practicable to do so (iii) does not litigate Asbestos Claims (iv) does not duplicate (save on a reasonable audit basis) the review of claims conducted by the Trust pursuant to the TDP, in order to achieve the most cost effective result and maximise (or preserve) the ALP recoveries available for T&N and its Subsidiaries.

viii) Satisfaction of the claim presented by the Trust on behalf of Mr and Mrs Plummer in respect of the *Plummer* Action through a set-off against the Stock Repayment Obligation (as defined in the Plan) constituted payment in fact in settlement of an Asbestos Claim for the purpose of the condition precedent in section III.1b of the ALP, and for the purposes of forming part of the UNL under the ALP.

ix) In the event that the sum of US$ 2,675,000 due under the *Robinette* settlement is paid as proposed in the Trust's letter of 13 March 2014 pursuant to Section 4.5.10(a) (ii) of the Plan, such payment would constitute payment in fact in settlement of an Asbestos Claim for the purpose of the condition precedent in section III.1b of the ALP, and for the purposes of forming part of the UNL under the ALP.

x) In the alternative to paragraphs (viii) and (ix), and in the event that satisfaction of any Asbestos Claims presented by the Trust on behalf of a victim against T&N as provided for, and in accordance with, the mechanisms set out in any of Sections 4.5.10(a)(i), (ii), (iii) and (iv) of the Plan would not constitute payment in fact in settlement of an Asbestos Claim for the purpose of the condition precedent in section III.1b of the ALP, and for the purposes of forming part of the UNL under the ALP, T&N is unable to discharge its liability in respect of such Asbestos Claim for the purpose of section III.1b of the ALP, and payment by T&N is not a condition precedent to the liability of Curzon to indemnify T&N against the liability of T&N to the Trust in respect of an Asbestos Claim which has been established.

xi) If the US State law requirement regarding limitation, which would have been applicable to Asbestos Claims but for the Insolvency Event, the proceedings

pursuant to Chapter 11 of the US Bankruptcy Code and/or the Plan, have been tolled by virtue of section 108 and section 362 of the Bankruptcy Code, Reinsurers' right to administer, defend and dispose of Asbestos Claims on behalf of T&N and its Subsidiaries will not have been circumscribed or otherwise affected, and, accordingly:

a) T&N is not precluded from presenting any losses as UNL for the purposes of the ALP and/or is entitled to an indemnity in respect of any losses under the ALP in respect of any Asbestos Claim which, but for the tolling of the US State law requirements with respect of limitation periods, would have been time-barred; and

b) The effect of the Plan will not have been to cause T&N to breach or otherwise to act inconsistently with the express or implied terms of the ALP or any duty of good faith.

84. I should mention that the wording of the declarations sought by the Trust went through various iterations in the course of the proceedings – and indeed during the trial itself. The wording set out above is in the form as finally submitted by Mr Milligan although he emphasised (rightly in my view) that the Court was not necessarily bound by or anchored to the precise words of the relief as set out in the claim form or particulars of claim; and that if any particular part of such wording was objectionable, it was always open to the Court to modify it and to make one or more declarations in a form as may be just and appropriate.

85. The declarations fall into four broad categories viz:

i) The first two declarations concern the "standing" of the Trust to claim the declarations as set out in (iii)-(vii).

ii) Declarations (iii)-(vii) concern the obligations of Curzon/Reinsurers with regard to claims handling and, in particular, the scope and effect of sections III.4c, 4d and/or 4f of the ALP.

iii) Declarations (viii), (ix) and (x) concern the methodology utilised and contemplated to be utilised by the Trust in relation to the settlement or discharge of claims presented by the Trust – including specifically with regard to the *Plummer* and *Robinette* actions.

iv) Declaration (xi) concerns potential limitation issues and also the effect of the Plan and its relationship with the ALP.

IV. The Trust's standing to claim declaratory relief

86. The Reinsurers raised a threshold issue viz that the Trust had no standing to claim at least some of the declaratory relief. The main focus of this issue was the declarations sought with regard to claims handling (i.e. declarations (iii)-(vii)).

87. In summary, Mr Butcher submitted as follows:

i) The Trust has no standing to interfere in contractual relations, to which it is not a party, in connection with the administration, defence and disposal of

Asbestos Claims, which it, the Trust, has brought and is entitled to bring against T&N and its Subsidiaries; that a claimant is not entitled to dictate how his claim should be dealt with by a defendant.

ii) Absent exceptional circumstances, a third party is not entitled to interfere with the rights of parties to a contract, as otherwise the whole principle of privity would be undermined.

iii) Any such interference is particularly unwarranted in the present circumstances, when there is no dispute between the contractual parties as to the Reinsurers' exercise of their rights; and when section III.12 of the ALP expressly stipulates that the ALP is not intended to confer rights on anyone other than the parties to the contract.

iv) The position is compounded here, where the Court is being asked to interfere with the exercise by the Reinsurers of extremely wide contractual powers and discretions. As set out below, the circumstances in which the Court can interfere with the exercise of such rights, even at the instance of a party to the contract, are very limited indeed. But the Court must be even more reluctant to do so at the instance of a third party, with opposing interests to the party which has the discretion.

88. This is disputed by the Trust on two main grounds. First, Mr Milligan submitted that the Trust has a sufficient interest to claim the declarations sought by virtue of the Power of Attorney as referred to above. Second, Mr Milligan submitted that in any event the Trust has sufficient interest to justify its standing to claim the declarations sought. I propose to consider these submissions in reverse order.

Sufficient interest of the Trust to seek declarations

89. Mr Milligan accepts, of course, that the Trust is not a party to the ALP or the Reinsurance. Nevertheless, Mr Milligan submitted that that is not a necessary precondition of the grant of declaratory relief. In that context, he submitted that the law has moved on since *Meadows Indemnity Co Ltd v Insurance Corpn of Ireland Plc* [1989] 2 Lloyd's Rep 298 and that, as stated by Millett LJ in *In re S* [1996] Fam 1 at pp21-22, provided that the legal right in question is contested by the parties and that each of them would be affected by the determination of the issue, "*… the court should be astute not to impose the further requirement that the legal right in question should be claimed by either of the parties to be a right which is vested in itself*". Further, Mr Milligan relied upon the judgment of Jacob LJ in *Nokia Corporation v Interdigital Technology Corporation* [2006] EWCA Civ 1618 at [20]; and also of Aikens LJ in *Rolls Royce Plc v Unite the Union* [2010] 1 WLR 318 where, having noted that "*[t]here is no doubt that the circumstances in which the court will be prepared to grant declaratory relief are now considerably wider than they were thought to be after Gouriet and Meadows*", he (Aikens LJ) summarised the principles concerning the grant of declaratory relief (at [120]) as follows:

> "*(1) The power of the court to grant declaratory relief is discretionary.*

> *(2) There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them. However, the claimant does not need to have a present cause of action against the defendant.*
>
> *(3) Each party must, in general, be affected by the court's determination of the Issues concerning the legal right in question.*
>
> *(4) The fact that the claimant is not a party to the relevant contract in respect of which a declaration is sought is not fatal to an application for a declaration, provided that it is directly affected by the issue; (in this respect the cases have undoubtedly "moved on" from Meadows).*
>
> *(5) The court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish, even on "private law" issues. This may particularly be so if it is a "test case", or it may affect a significant number of other cases, and it is in the public interest to decide the issue concerned.*
>
> *(6) However, the court must be satisfied that all sides of the argument will be fully and properly put. It must therefore ensure that all those affected are either before it or will have their arguments put before the court.*
>
> *(7) In all cases, assuming that the other tests are satisfied, the court must ask: is this the most effective way of resolving the issues raised? In answering that question it must consider the other options of resolving this issue.*"

90. Mr Milligan submitted that although Aikens LJ dissented in *Rolls Royce Plc v Unite*, his summary of the principles concerning the grant of declaratory relief has been treated as authoritative in subsequent cases (save in respect of point 2, because the dispute can also apply to rights which come into existence in the future). In particular, with this caveat, in *Milebush Properties Ltd v Tameside Metropolitan Borough Council* [2011] EWCA Civ 279 the Court of Appeal (see Mummery LJ at [46]; Moore-Bick LJ at [87] and Jackson LJ at [95]) held that the judge at first instance had given a proper self-direction in law on the principles governing declaratory relief by reference to the judgment of Aikens LJ in *Rolls Royce Plc v Unite*, when considering the submission that, although Milebush was not a party to the agreement in respect of which declaratory relief was sought, it was directly affected by the issue of construction of the clause in issue. In particular, Mr Milligan referred to the passage at [44] where Mummery LJ stated: "… *the discretion to grant a declaration now covers a wide range of cases. The authorities show how it may be granted in private law proceedings about the disputed construction of a document affecting the claimant, even though the claimant was not a party to it.*"; and also at [88]:

> "*88. In my view the authorities show that the jurisprudence has now developed to the point at which it is recognised that the court may in an appropriate case grant declaratory relief even though the rights or obligations which are the subject of the declaration are not vested in either party to the proceedings. That was certainly the view of the court in In re S and it is also the clear implication of the observations in Feetum v Levy and the Rolls-Royce case that things have moved on since Meadows. In the Mercury case it was not considered relevant that BT had rights under the licence and it was no bar to the proceedings that Mercury did not. To that extent the position is mirrored in this case, in which Tameside has obligations under the agreement but Milebush has no rights. I can see no reason in principle why the nature of the underlying obligation should be critical, although there may well be other reasons why in the particular case a declaration should not be granted. The most important consideration is likely to be whether the parties have a legitimate interest in obtaining the relief sought, whether to grant relief by way of declaration would serve any practical purpose and whether to do so would prejudice the interests of parties who are not before the court.*"

91. Further, Mr Milligan submitted that Aikens LJ's summary has also been treated as authoritative and applied in a number of recent first instance cases such as *Pavledes v Hadjisavva* [2013] EWHC 124 (Ch) at [24]. In summary, Mr Milligan submitted that it is wrong to suggest that declaratory relief will only be granted in "exceptional" circumstances; that what is required is that the claimant is "directly affected" by the declaration sought; that provided that a person has a "real commercial reason" for seeking the declaration, they have standing to do so; and that is indeed the case so far as the Trust is concerned.

92. As to these submissions, I readily accept that the law has "moved on" since *Meadows.* In particular, I accept that, as submitted by Mr Butcher and contrary to what Lord Diplock had said in *Gouriet v Union of Post Office Workers* [1978] AC 435, the jurisdiction to grant a declaration is not, as a matter of law, limited to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it, and not those of anyone else; and that, as appears from the helpful discussion of the long line of authority going back to the famous dictum of Pitchford LJ in *Guaranty Trust Co of New York v Hannay & Co.* [1915] 2 KB 536 at p562 in *Zamir &* Woolf, The Declaratory Judgment, 4th Ed, paras 5-08 to 5-30, the modern approach is one of "greater flexibility".

93. However, whilst accepting that the grant of declaratory relief is discretionary and therefore not subject to rigid rules, it seems to me that Mr Butcher is right in saying that the cases in which it has been recognised that declarations may be granted in a wider category of case than suggested by *Gouriet* are far removed from the present. In particular, as submitted by Mr Butcher, *Rolls Royce* was a case in which the claimant employer and the defendant union had entered into collective agreements; and both wanted the resolution by the court of the impact of an EC Directive; *Milebush* was a case in which it was held by the Court of Appeal (Moore-Bick LJ dissenting) that it

was not appropriate for a non-contracting party to bring private law proceedings for a declaration on the meaning and effect of a planning obligation under the Town and Country Planning Act 1990; and *Pavledes* simply decided that the court can grant a declaration as to rights of light, in circumstances where there is no imminent threat of infringement. Specifically, so far as I am aware, there has been no case in relation to an ordinary commercial situation, where a third party has been found entitled to a declaration as to the meaning or performance of a contract to which he is not a party, in circumstances where the parties to that contract are not in dispute. In this context, Mr Butcher submitted that the potentially remarkable consequences of the court entertaining applications for such declarations are obvious: chains of sale contracts, charterparties and sub-charterparties, and insurances and reinsurances (as in *Grecoair v Tilling* [2005] Lloyd's Rep IR 151) are all examples of where, if available, third parties might seek to intervene in the contractual relations of others by way of declaration.

94. In summary, I therefore accept the main thrust of Mr Butcher's submission that a person not a party to a contract generally has no locus, save perhaps in exceptional circumstances, to obtain a declaration in respect of rights of other parties to that particular contract at least where the contracting parties themselves are not in dispute as to their respective rights and obligations. As Mr Butcher pointed out that is consistent with the ratio of the judgment of May LJ (with whom Nourse LJ agreed) in *Meadows* at p309; and, although I fully accept (as I have said) that the law has moved on since that case, it seems to me that this remains the general position at least as a matter of the court's discretion even after the more recent cases cited above including the *Rolls Royce* case. In particular, as emphasised by Aikens LJ in paragraph 2 of his summary of the applicable principles in that case: "*There must, in general, be a real and present dispute between the parties before the court as to the existence or extent of a legal right between them*" – although, at the risk of stating the obvious, I fully recognise the importance of the words "in general".

95. So far as the present case is concerned, Mr Butcher submitted that there were here no "exceptional circumstances" which might justify a departure from the general position; and that, on the contrary, there was a number of compelling reasons against the grant of declaratory relief in favour of the Trust.

96. First, Mr Butcher submitted that there is no relevant dispute between T&N, Curzon and the Reinsurers. In answer, Mr Milligan accepted that these parties are not "at odds". However, he submitted that this is simply because T&N has no interest itself in the outcome and that it is for that reason that the Trust has to do battle on its behalf as the "guardian of the bankrupt estate". Be that as it may, it seems to me that the important point remains that there is no relevant dispute between the contracting parties themselves.

97. Second, Mr Butcher submitted that the present dispute relates to how a tort claim by the Trust against T&N should be handled and that the Trust (which is, of course, the party seeking the relevant declaration(s)) has interests which are directly opposed to those of one or more of the contracting parties (i.e. T&N, Curzon and the Reinsurers). In answer, Mr Milligan submitted that this confuses the defence of the tort claim with the value of the policy; and that the Trust and T&N have a common interest in the value of the ALP which is the subject-matter of the present dispute. However, in my judgment, this answer does not really address the point made by Mr Butcher.

98. Third, Mr Butcher submitted that insurance arrangements are paradigmatically ones which cannot be prayed in aid by non-parties; that this is reflected in the ordinary rules as to their being *res inter alios acta*; that the availability of insurance to a claimant in a tort action has no effect on the liability of the defendant to the claimant; and that the availability of insurance to a defendant in such an action has no effect on the claimant's claim against the defendant. In answer, Mr Milligan submitted that these matters are not analogous to the present dispute in particular because, unlike the present case, the defendant is not subject to any contractual restriction in respect of claims handling. I doubt that the latter observation is necessarily correct; but even if it were correct, I am not persuaded that this weakens the general point made by Mr Butcher.

99. Fourth, Mr Butcher relied on the fact that the ALP specifically provides, by section III.12 that the ALP "*confers no rights, powers or obligations on any person or organisation other than the Insurer and the Policyholder*". In response, Mr Milligan submitted that this is not in point at all because the Trust is not claiming it has any rights under the ALP but rather that T&N does and that they are of value to the Trust. I agree that this is, perhaps, not one of Mr Butcher's strongest points. Further, I readily accept that the Trust has its own obvious commercial interest for seeking declaratory relief; although, as submitted by Mr Butcher, it is difficult if not impossible to say that this is a relevant or at least sufficient "*legitimate interest*", to use Moore-Bick LJ's terminology, in this context. However, the effect of granting declaratory relief as sought by the Trust would, at least indirectly, be to confer a "right" in favour of the Trust which would be inconsistent with this contractual wording; and, to this extent, it seems to me that this is a valid point in favour of Mr Butcher's argument.

100. For all these reasons, Mr Butcher's submissions summarised above both individually and collectively persuade me that (the POA apart) the Trust has no proper standing to seek declarations (i) and (iii)-(vii) and that the court should, in the exercise of its discretion, refuse to grant such declaratory relief irrespective of the underlying merits of the substantive arguments advanced by the Trust.

Power of Attorney

101. As set out above, Mr Milligan submitted that in any event, the Trust had standing to seek declaratory relief by virtue of the POA. I have already quoted the relevant terms of the POA but, at the sake of repetition, I should note that Mr Milligan relied, in particular, on the two provisions which expressly authorise the Trust "*to take all necessary and/or appropriate steps to pursue or recover Hercules Recoveries in respect of Debtor HPE Asbestos Claims including without limitation … seeking payment (by whatever means) of Hercules Recoveries from Curzon, the Reinsurers and/or any third party*" (clause 1(a)(ii)); and "*do anything else which the Attorney considers to be necessary or desirable to achieve the purposes set out above, including …*" (clause 1(d)) (emphasis added).

102. Thus, Mr Milligan submitted that, on its face, the POA not only authorises the Trust to make recoveries from Curzon under the ALP on behalf of T&N once the liability of T&N or its subsidiaries has been established and satisfied, as the Reinsurers accept, but also authorises the Trust on behalf of T&N both to pursue such recoveries (clause 1(a)) and to do anything else which the Trust considers necessary or desirable to

achieve that purpose (clause 1(d)). In particular, he submitted, that if, for example, Curzon were to attempt to avoid the ALP for non-disclosure before any Asbestos Claim has been made, these provisions would plainly authorize the Trust, on behalf of T&N, to seek a declaration there and then to the effect that Curzon was not entitled to avoid; that to conclude otherwise would give rise to the absurd result that the Trust would be required to pursue Asbestos Claims under the Plan without knowing whether they would serve any useful purpose; that these current proceedings are no different; and that therefore the POA in effect gives the Trust the necessary specific authority to seek the present declarations.

103. In essence, Mr Butcher submitted that, on its true construction, the POA provides only a limited authority to the Trust; that it is concerned only with the act of recovering sums from Curzon in relation to Asbestos Claims that have been established pursuant to Section 4.5.9 of the Plan and satisfied by T&N and its subsidiaries pursuant to Section 4.5.10 of the Plan once a claim could be made by T&N under the ALP; and that it does not authorise the Trust to enforce the terms of the ALP against Reinsurers, in place of T&N. In support of that submission, he relied on what he referred to as the "sequence" point i.e. the fact that Section 4.5.11(a) which I have already quoted and which, in effect, required T&N to grant the POA to the Trust appeared where it did in the Plan i.e. immediately following Sections 4.5.9 and 4.5.10. In effect, Mr Butcher submitted that the physical position of the clause informs its proper construction. Second, he submitted that if the POA did, on its face, have the meaning ascribed to it by Mr Milligan then it would be inconsistent with section III.12 of the ALP and that the POA should, in effect, be construed so as to avoid this result.

104. I confess that I have found this point particularly difficult to resolve. On the one hand, it seems to me that the wording of clause 1(d) of the POA is, as Mr Milligan submitted, of wide scope and his arguments in that regard have a superficial attraction which is very persuasive. As to the counter-arguments, I agree that Mr Butcher's "sequence" point is not very strong. However, on balance, the conclusion I have reached is that the power of attorney is of no assistance to Mr Milligan in the present context for two main reasons.

105. First, although clause 1(d) of the POA does appear, at first blush at least, to be of wide scope, it seems to me important to note that the authority which it gives to the Attorney (i.e. the Trust) is limited to acts which the Attorney considers to be necessary or desirable "*… to achieve the purposes set out above …*". Those "*purposes*" are to "*pursue or recover Hercules Recoveries in respect of Debtor HPE Asbestos Claims …*" There was some debate before me as to the difference, if any, between "*pursue*" and "*recover*", Mr Milligan emphasising the former and Mr Butcher submitting that there was no material distinction between the two. There was also some debate as to the effect of the words "*including without limitation …*" in clause 1(a), Mr Butcher arguing that the following sub-clauses supported a narrow genus, the counter-argument being, of course, that the following sub-clauses could not create any genus because of the introductory words "*without limitation*". Be that as it may, it seems to me perhaps of greater importance to note the definition in Section 1.1.120 of the Plan of the term "Hercules Recoveries" i.e. that it means (in relevant part) "*… all amounts received or recoverable in respect of the Hercules Coverage …*" I am very conscious of the importance of avoiding an over-semantic approach; and I do not say that Mr Milligan's construction can be rejected out of hand. However, it

seems to me that the construction advanced by Mr Butcher derives at least some support from this statement of the "purposes" and the definition of "Hercules Recoveries". In particular, it seems to me difficult to describe the present proceedings as being in pursuit of what is "recoverable" in respect of the Hercules Coverage; rather they are concerned, at best, to determine the scope of such coverage and what may be recoverable. Further, it seems to me difficult to suppose from the wording of the POA that it was the objective intention of the parties (i.e. T&N and the Trust) that the effect of the POA was to give the Trust a power and authority to seek the Court's assistance by way of declaratory relief with regard to the claims handling obligations under the ALP/Reinsurance.

106. Second, despite Mr Milligan's submissions to the contrary, I found Mr Butcher's arguments with regard to section III.12 of the ALP very persuasive. I accept of course that this is a provision in the ALP which is obviously entirely separate from the POA as well as, of course, the Plan. However, it seems to me that the ALP provides an important part of the factual matrix or backdrop which is relevant to the proper construction of the POA. I did not understand Mr Milligan to suggest otherwise. Rather, the main thrust of his submission was that there was no relevant inconsistency between the POA and section III.12. In particular, Mr Milligan submitted that in so far as the POA authorises the Trust to enforce the terms of the ALP on behalf of T&N, there has been no relevant "transfer" or "assignment" of any rights under the ALP; and in that context, he relied upon the decision of the Court of Appeal in *Barbados Trust v Bank of Zambia* [2007] 1 CLC 434. Further, Mr Milligan submitted that no issue arises as a consequence of any "conflict". In particular, he emphasised that the Trust does not by these proceedings seek to exercise the claims handling rights but rather to determine the scope of the Reinsurers' obligation to which the exercise is subject. Moreover, relying upon the statement of Lord Browne-Wilkinson in *Linden Gardens Trust Ltd v Lenesta Sludge Disposal Ltd* [1993] 1 AC 85 at p108, Mr Milligan submitted that in any event, if there were any inconsistency, the POA would be ineffective to that extent and that there was no question of section III.12 of the ALP having been breached in any sense which confers a remedy on Curzon or therefore the Reinsurers.

107. In my view, even accepting Mr Milligan's argument that the Trust is merely seeking to determine the scope of the Reinsurers' obligations with regard to claims handling, the main flaw in his argument is that the assertion of a right or entitlement by the Trust to seek declaratory relief as it is seeking to do in these proceedings is a right which the Trust does not have under the ALP. As I have already concluded, such right or entitlement is limited to the parties to the ALP. To the extent that Mr Milligan seeks to rely upon the POA, such reliance necessarily depends, as it seems to me, on an assertion that, on a true construction of the POA, the right or entitlement to claim such declaratory relief as been transferred, at least in part, to the Trust. Despite Mr Milligan's protestations to the contrary, it seems to me that even such limited transfer is inconsistent with section III.12 of the ALP.

108. Given that the POA is, as I have said, an independent contract, I recognise that this conclusion is not necessarily fatal to the proper construction of the POA and Mr Milligan's reliance upon it. However, as I have stated, the ALP is part of the relevant factual matrix and, as such, there are, in my view, very strong arguments that the POA should be construed in a manner consistent with it. Further, in my view, those

arguments are even more powerful when viewed in the context of the long gestation period during which the Plan came to be finalised including the background of the proceedings before David Richards J in *Freakley* where there was a strong focus on the importance of ensuring that the Plan did not breach the terms of the ALP or was inconsistent with it.

109. For these reasons, I decline to grant declaration (ii) – at least as formulated. However, it may be convenient to grant some form of declaratory relief to reflect my conclusions as stated above. In particular, my tentative view is that it would be convenient to grant the following declaration: "*The Power of Attorney does not give the Trust authority to seek declarations (i) and (iii)-(vii).*" However, it may be thought that this is unnecessary and I would therefore propose to leave this open as well as the precise wording of any declaration to be considered following delivery of this judgment.

Judicial estoppel/abuse

110. As I have already mentioned, in the alternative, Mr Butcher raised an argument that the Trust was, in effect, precluded from claiming any declaratory relief by virtue of a "judicial estoppel" or an "estoppel by conduct" as a result of the conduct of T&N's administrators (by which the Trust accepted it was bound) in earlier proceedings before David Richards J. This was the subject of some evidence and debate during the present trial. However, in light of my conclusions above, it is unnecessary to consider this point further save that I should note that such an argument would seem to be irrelevant in the context of Mr Milligan's reliance upon the POA because the version of the Plan which David Richards J had to consider was an earlier version which apparently did not contain any reference to a POA.

Conclusions on "standing"

111. For all these reasons, it is my conclusion that the present claims by the Trust for declaratory relief in relation to claims handling as set out in declarations (iii)-(vii) fail *in limine* and accordingly they should be refused for that reason. However, in case I am wrong, I go on to consider the substantive issues between the parties with regard to claims handling.

V. Claims Handling – Declarations (iii)-(vii)

112. This part of my Judgment is concerned with declarations (iii)-(vii) which raise overlapping issues to some extent and can conveniently be dealt with compendiously.

113. I have already identified certain parts of the Trust's case when referring to the terms of the ALP and the Plan. However, it is convenient to set out the various steps of Mr Milligan's submissions which were, in essence, as follows:

i) Before the Insolvency Event, section III.4a of the ALP entitled T&N to handle claims but also obliged it to do so in a businesslike manner in the spirit of good faith and fair dealing having regard to the legitimate interests of T&N, Curzon and the Reinsurers, i.e. to exactly the same standard as under Section III.4f of the ALP. The standard to which T&N was both entitled and obliged to handle claims before the Insolvency Event was further elaborated by sections

III.4c and 4d of the ALP. If T&N appointed a Claims Handling Designee, it was required to specify the same businesslike standard to the Claims Handling Designee (section III.4c). It was also agreed implicitly, if not explicitly, by section III.4d that that standard included the adoption of best practice for handling Asbestos Claims in the relevant circumstances and in the relevant jurisdictions and that, as of the Policy Signing Date i.e. 3 January 1997 the standards adopted by the CCR took account of best practice in the US.

ii) It follows, therefore, that if the Reinsurers appoint a Claims Handling Designee pursuant to section III.4f, the Claims Handling Designee must adopt the same standard. Given that a Claims Handling Designee cannot act without instructions, in practice the Reinsurers must specify that standard to any Claims Handling Designee appointed by them.

iii) Thus, although sections III.4c and 4d do not directly apply after an Insolvency Event, the standards embraced within them must apply equally to the standard under section III.4f after an Insolvency Event. In other words, sections III.4c and 4d inform part of the content of section III.4f.

iv) Furthermore, given that the standard of claims handling required of Curzon and the Reinsurers after the Insolvency Event is exactly the same as the standard required of T&N before the Insolvency Event, viz the businesslike standard, the standard cannot have changed as a result of the Insolvency Event, unless the legitimate interests of T&N, Curzon or the Reinsurers have changed in a material respect as a result of the Insolvency Event.

v) The legitimate interests of Curzon and the Reinsurers have not changed as a result of the Insolvency Event. Whether before or after the Insolvency Event, they did not include, for example, running up costs to the detriment of T&N (see *The Mercandian Continent* [2001] 2 Lloyd's Rep 563 at 572 §(7)), withholding approval of a settlement in order to delay payment or defending a claim regardless of its merits (see *Gan v Tai Ping (No 2 & 3)* [2001] Lloyd's Rep IR 667 at 697 rhc and 699 lhc).

vi) However, the legitimate interests of T&N have changed in one respect. After the Insolvency Event, the legitimate interests of T&N are exclusively those of its existing creditors (*Brady v Brady* [1988] BCLC 20 at 40G). For these purposes, T&N's existing creditors include those who may be admitted as such by way of compromise, whether legal liability exists or not (see the definition of UNL in section IV.17a of the ALP and Schedule 4 Part 1 §2 of the Insolvency Act 1986). They therefore include those with Asbestos Claims which might reasonably be compromised: see *Palmer v Palmer* [2008] Lloyd's Rep IR 535 at 542-543.

vii) For the purpose of section III.4f, the legitimate interests of T&N, Curzon and the Reinsurers, and *a fortiori* if the legitimate interests of T&N are those of its existing creditors, entail disposing of Asbestos Claims against T&N and its Subsidiaries in the most cost-effective way, i.e. the least cost in the aggregate of compensation for victims and litigation costs for the resolution of all claims.

viii) The most cost-effective disposal entails maximising that part of the insolvent estate available for distribution to existing creditors and minimising that part which would be paid to new creditors, such as defence lawyers and expert witnesses.

ix) Furthermore, best practice in achieving the most cost-effective disposal at the time when the ALP was issued was that adopted by the CCR. As confirmed by Mr Hanly, the primary mandate of the CCR was to settle, rather than try, claims; in practice, the CCR settled claims early, even before the claims were filed in court, thus minimising costs, and in large groups on the basis of an administrative scheme; the CCR's settlement requirements consisted essentially of evidence of exposure to the defendant's product and evidence of an asbestos-related disease sufficient to survive a motion by the defendant for summary judgment. Mr Rozen also confirmed that because settlements were generally achieved on a group basis, the CCR did not generally evaluate claims on an individual basis.

x) The standard of claims handling required of Curzon and the Reinsurers is therefore the same as that required of T&N before the Insolvency Event, save that Curzon and the Reinsurers must now have regard to the legitimate interests of T&N's existing creditors, including those with claims of value in the US tort system.

xi) The TDPs are broadly similar to the system operated by the CCR and represent "best practice" with regard to evaluation and settlement of claims. In essence, settlement by reference to the TDPs provides the most cost-effective way of disposing of the claims.

xii) Any solvent company exposed to the volume of Asbestos Claims to which T&N and its subsidiaries are exposed and with the history of T&N would jump at the opportunity to settle all of those claims on the basis of the TDPs, or on some similar basis. An insolvent company, or even one with only limited funds available to expend on time-wasting and prevaricating defences, would likewise adopt a TDP process with alacrity; as indeed all the major (and some minor) asbestos liability defendants in the US have done as part of their own Plans of Re-organization under section 524(g) of the US Bankruptcy Code. It is only because the Reinsurers are aware that the consequence of accepting that proposition is that the limits of the ALP would be blown that they are forced to argue that T&N and its Subsidiaries would be better off litigating Asbestos Claims individually in the US tort system.

114. I do not accept these submissions for the following reasons.

115. First, underlying much of Mr Milligan's argument is the theme that the individual claimants have suffered personal injuries and that they deserve to be compensated. However, at the risk of repetition, it is important to bear in mind at all stages of the argument that the ALP and the Reinsurance do not provide coverage for the injuries suffered. Rather they provide coverage in respect of T&N's liability for such injuries. To my mind, this is a crucial distinction which is fundamental to a proper understanding as to the scope of the ALP. In this context, I bear well in mind Mr Milligan's assertion in his final written submissions that the Trust's primary concern

is to try to avoid wasting costs by litigating each of these claims in the US tort system unless it has no other choice but to do so; and that those wasted costs could amount to hundreds of millions of US dollars which would otherwise be available to the victims of the T&N entities' asbestos poisoning. At first blush, that is, of course, an entirely laudable objective – even putting on one side the fact that, as I was told, the plaintiffs' attorneys are likely to be on contingency fees of between 30-40%. However, ultimately, the questions I have to determine turn on the proper scope and effect of the ALP in the context of well-established rules of liability insurance.

116. Second, given the concession made by Mr Milligan that sections III.4c and 4d of the ALP do not directly apply after an Insolvency Event and that an Insolvency Event has indeed occurred, I am unpersuaded as to the value of the attempts made by Mr Milligan to seek, in effect, to elide the provisions in the ALP with regard to, on the one hand, claims handling prior to insolvency and, on the other hand, claims handling after insolvency. I see no reason in principle why the obligations of T&N/Curzon/Reinsurers with regard to claims handling should necessarily be the same in those two quite different situations; and, on the contrary, I can well understand that such obligations might be treated differently. As Latham LJ observed in the course of argument in the Court of Appeal in the 1930 Act proceedings, the intention of the parties in providing for the transfer of the right to administer, defend and dispose of Asbestos Claims on the occurrence of an Insolvency Event was to ensure "*certainty or foreseeability*":

> "*… as long as you have T&N solvent and running its business, there is a sufficient commonality of interest up to the Retained Limit [that] the insurers are perfectly content for T&N to deal with it because they would expect T&N to deal with it much the same way as they would, up to the Retained Limit. But whilst you have T&N in the hands of some form of insolvency procedure, all sorts of other factors may bear on the decision-making process in T&N and that is a good reason for the Insurers wanting to take the decision-making process out of T&N's control.*"

The position is perhaps more complex because although it is common ground, as I have said, that there has been an Insolvency Event, nevertheless it is not, as I understand, correct to say that T&N is now "insolvent"; and, at the risk of repetition, I accept that the position might be different if, for example, sections III.4c and 4d of the ALP did continue directly to apply after an Insolvency Event. However, as I have said, Mr Milligan made plain that this was not part of his case. On this basis, I do not accept his submission that the standards embraced within them continued to apply under section III.4f of the ALP after an Insolvency Event or that the former words "inform" part of the latter.

117. Third, the arguments advanced by Mr Milligan do not seem to me to pay proper or sufficient regard to the ordinary language of section III.4f of the ALP. As to such language, Mr Butcher submitted in summary as follows:

i) Pursuant to section III.4f of the ALP, in conjunction with Article 4.1 of the Reinsurance, Reinsurers have the "*full, exclusive and absolute authority, discretion and control*" of the administration, defence and disposition

(including but not limited to settlement) of all Asbestos Claims. As David Richards J observed in his judgment in the Settlement Proceedings, this language used to describe Reinsurers' contractual rights is more emphatic and wider than is usually found in provisions of this nature.

ii) Effect is to be given to each of the three elements, "*full, exclusive and absolute*":

a) Reinsurers have the "*full*" authority, discretion and control, not just a part of it. The corollary is that no one else has any part of the authority, discretion or control; it rests wholly and entirely with Reinsurers;

b) Reinsurers have the "*exclusive*" authority, discretion and control, not just a share of it. The corollary is that no one else has any share of the authority, discretion or control; it rests solely and uniquely with Reinsurers; and

c) Reinsurers have the "*absolute*" authority, discretion and control, not just a qualified right to it. The corollary is that no one else has any right to qualify the authority, discretion or control; it rests finally and unconditionally with Reinsurers.

iii) Similarly, effect is to be given to each of the three elements in "*authority, discretion and control*" of the administration, defence and disposition (including but not limited to settlement) of all Asbestos Claims:

a) The fact that Reinsurers have full, exclusive and absolute "*authority*" means that they have full, exclusive and absolute entitlement and permission to act in connection with the administration, defence and disposition of all Asbestos Claims. The corollary is that no one else has any entitlement or permission to act in these regards;

b) The fact that Reinsurers have full, exclusive and absolute "*discretion*" means that they have full, exclusive and absolute freedom to act as they see fit in connection with the administration, defence and disposition of all Asbestos Claims. The corollary is that no one else's views as to what should be done are relevant or can limit Reinsurers' decisions; and

c) The fact that Reinsurers have full, exclusive and absolute "*control*" means that they have full, exclusive and absolute power to direct how things are to be done in connection with the administration, defence and disposition of all Asbestos Claims. In *Groom v Crocker* [1939] 1 KB 194 at p203, the concept of "*absolute control*" in the context of a claims control clause in an insurance policy was said to "*give to the insurers the right to decide upon the proper tactics to pursue in the conduct of the action, provided that they do so in what they bona fide consider to be the common interests of themselves and their assured*". At p223, it was further said that such right was to be exercised "*without bringing into the account extraneous considerations wholly foreign to*

the subject matter of the insurance". The corollary is that no one else has any power to direct in these regards.

iv) As to the "*administration, defence and disposition (including but not limited to settlement)*" of all Asbestos Claims:

a) The "*administration*" of all Asbestos Claims means the management or conduct of all such claims and, as David Richards J observed in his judgment in the Settlement Proceedings, includes the right to be notified of such claims, the right to investigate them, and the right to process and adjust them;

b) The "*defence*" of all Asbestos Claims means the denial or rebuttal of all such claims and includes the right to protect or shield T&N and its Subsidiaries from such claims; and

c) The "*disposition (including but not limited to settlement)*" of all Asbestos Claims means the act or process of dispensing with all such claims and, as David Richards J observed in his judgment in the Settlement Proceedings, includes the right to be decide whether to pay them, to defend them and to settle litigation.

v) Each of the foregoing provisions is incompatible with the suggestion made by the Trust that it is entitled to place limits on the exercise by Reinsurers of their contractual right to handle Asbestos Claims brought against T&N and its Subsidiaries. Put together, the language of section III.4f of the ALP, in conjunction with Article 4.1 of the Reinsurance, confers on Reinsurers extremely wide rights to handle all such claims, to the exclusion of all others.

118. In broad terms, I accept these submissions subject to one important point viz the Reinsurers' "… *full, exclusive and absolute authority, discretion and control* …" in section III.4f of the ALP are obviously qualified by the words immediately following which are introduced by the words "… *shall be* ..." (i.e. the imperative) and which, in my view, therefore require such authority, discretion and control to be exercised in a certain way i.e. "… *in a businesslike manner in the spirit of good faith and fair dealing* …" having regard to the matters stipulated in the last part of the clause. In my view, these are important words which cannot be ignored, should not be watered down and, contrary to Mr Butcher's submission, limit the Reinsurers' rights.

119. As to this part of the wording of section III.4f, Mr Butcher submitted as follows:

i) As regards the exercise of contractual rights "*in a businesslike manner*", this requires Reinsurers to act professionally, as a business would act, and to take all proper steps to administer, defend and dispose of Asbestos Claims brought against T&N and its Subsidiaries, consistent with the objectives of the business; see *Insurance Co of Africa v Scor (UK) Reinsurance Co Ltd* [1985] 1 Lloyd's Rep 312 at 330, where Robert Goff LJ observed that, under a follow the settlements clause, reinsurers relied on the "*professionalism*" of insurers and thus required the insurers to have acted "*in a proper and businesslike manner*"; and also *Assicurazioni Generali SpA v CGU International Insurance*

Plc [2003] Lloyd's Rep. I.R. 725 at [33]-[36]; [2004] Lloyd's Rep I.R. 457 at [18].

ii) The requirement of "businesslike manner" is similar to the requirement in a follow settlements clause in a reinsurance contract that the insurer's settlements are binding provided that it has taken 'businesslike steps' or acted in a "businesslike manner". The essential object of the requirement there is to ensure that the insurer should have taken adequate steps to restrict the liabilities recognised as payable under the insurance. In that context, Mr Butcher relied in particular on a number of cases viz *Western Assurance Co of Toronto* [1903] 1 KB 376, *Excess Insurance Co. Ltd v Matthews* (1925) 23 Lloyds Law Rep 71, *ICA v Scor* (above) and *Gan v Tai Ping (No 3)* [2002] CLC 870, 883-4. Accordingly, the concept of "*businesslike manner*" relates essentially not to what it is decided to do, but to the way in which it is done; and there is no inconsistency between the width of the contractual discretion conferred on (Curzon and thus) Reinsurers by the clause stating that they have "*full, exclusive and absolute authority, discretion and control*".

iii) If, contrary to the foregoing, "*businesslike manner*" were interpreted as constraining the decisions which (Curzon and thus) Reinsurers can take, it is still only a very loose constraint. This is because, if the term is applicable to the nature of the decision made, there would be a whole range of decisions which might all be "*businesslike*". After all, businesses do not all take the same decisions in a particular set of circumstances. The concept would only exclude courses of conduct which no similarly situated business could take. The clause as a whole shows that it is for Reinsurers to decide what should be done, and they could decide on any course which falls within the very wide spectrum of what businesses might do. And they would be able in taking this decision to "*have regard to*" the interests of the parties to the contract and to their own interests – as to which see sub-paragraph (v) below.

iv) As regards the exercise of contractual rights "*in the spirit of good faith and fair dealing*," this phrase requires Reinsurers to act honestly and conscionably vis-à-vis the other parties to the contracts: see *Yam Seng Pte Ltd v International Trade Corp Ltd.* [2013] 1 Lloyd's Rep. 526 at [136]-[141].

v) As regards the exercise of contractual rights "*having regard to the legitimate interests of the parties to this Policy and of the reinsurers thereof*", these words require Reinsurers to take notice of or pay attention to the legitimate interests of *the parties to the contracts*, namely T&N, Curzon and Reinsurers. When a decision maker is to "*have regard to*" something, he can ascribe to it such weight, including no weight, as he thinks fit, as long as he is not acting irrationally: *JML Direct Ltd v Freesat UK Ltd* [2010] All ER (D) 21 at [21]-[22], per Moore-Bick LJ. Whether, to what extent and in what manner Reinsurers should act after taking notice of or paying attention to such legitimate interests are matters for Reinsurers alone to decide. What is clear, moreover, is that Reinsurers are not required by the clause to have regard to any competing interests, whether they can be regarded as "*legitimate*" or otherwise, of persons who are not parties to the ALP. This includes the interests of the Trust, either in its own right or as agent of alleged victims of asbestos-related diseases. Such interests are not referred to in section III.4f.

Furthermore, as section III.12 of the ALP makes explicit, the ALP "*confers no rights, powers or obligations on any person or organisation other than the Insurer and the Policyholder*".

vi) Given the width of the powers and discretions conferred on Reinsurers, there can be no question of any intervention by the Court in the exercise of those contractual rights, or dictation as to how they are to be exercised, in the present case. In this regard, Brooke LJ said the following in *Ludgate Insurance Company Ltd v Citibank NA* [1998] Lloyd's Rep IR 221 at [35], a case concerned with a provision in the London Market Letter of Credit Scheme giving a bank a broad power or discretion to retain collateral in support of letter of credit issued by it pursuant to this scheme:

> "*It is very well established that the circumstances in which a court will interfere with the exercise by a party to a contract of a contractual discretion given to it by another party are extremely limited. We were referred to Weinberger v Inglis [1919] AC 606; Dundee General Hospitals Board of Management v Walker [1952] 1 All ER 896; Docker v Hyams [1969] 1 Ll R 487; and Abu Dhabi National Tanker Company v Product Star Shipping Company Limited [1993] 1 Ll R 397 ("The Product Star"). These cases show that provided that the discretion is exercised honestly and in good faith for the purposes for which it was conferred, and provided also that it was a true exercise of discretion in the sense that it was not capricious or arbitrary or so outrageous in its defiance of reason that it can properly be categorised as perverse, the courts will not intervene.*"

vii) Similarly, Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (Nos 2 and 3)* [2001] Lloyd's Rep I.R. 667 at [64], [67] and [73], a case concerned with a claims co-operation clause in a facultative reinsurance policy, and Dyson LJ in *Paragon Finance Plc v Nash* [2002] 1 WLR. 685 at [41], a case concerned with a variable interest clause in a mortgage agreement, both observed that, in the context of a contractual discretion, unreasonableness connotes conduct or a decision to which no reasonable person having the relevant discretion could have subscribed.

viii) In each of those cases, the focus was on the prevention of abuse of discretionary rights for an improper purpose. See also *Socimer International Bank Ltd v Standard Bank London Ltd* [2008] 1 Lloyd's Rep 558 per Rix LJ at [66]. Most recently, in *Unique Pub Properties Ltd v Broad Green Tavern Ltd* [2012] 2 P. & C.R. 17 at [52]-[53], Warren J summarised the principle to be derived from the authorities in this way, namely that a contractual discretion must be exercised honestly and in good faith and must not be exercised arbitrarily, capriciously or unreasonably, unreasonableness being assessed in the sense that no reasonable person would exercise the discretion in the manner proposed.

120. I agree with Mr Butcher's submissions as set out in sub-paragraphs (iii), (iv) and (v) of the previous paragraph, but not otherwise. In particular, it seems to me that the fact that the section III.4f provides expressly that the authority, discretion and control shall be exercised in the manner stipulated means that this is not a case where one party has an unqualified contractual discretion; and, in my view, the authorities referred to in that context by Mr Butcher (in particular, *Socimer* and *Unique Pub Properties*) are therefore of only limited assistance. In principle, it seems to me that the question whether Reinsurers are acting in a *"businesslike manner in the spirit of good faith and fair dealing"* having regard to the stipulated matters involves, to some extent at least, an objective test which, although somewhat open-textured, is certainly capable of review by a Court; and that, if the Court were to conclude that Reinsurers were acting in a manner which was not "businesslike" in the spirit of good faith and fair dealing having regard to the matters stipulated, then I see no reason why such unbusinesslike conduct would not constitute an ordinary breach of contract by Reinsurers. As submitted by Mr Milligan, this conclusion is consistent with the approach of Teare J. in *Pacific Basin IHX Ltd v Bulkhandling Handymax AS* [2012] 1 CLC 1 at [55] and Popplewell J. in *Barclays Bank plc v Unicredit Bank AG* [2013] 2 Lloyd's Rep 1 at [63]. For the avoidance of doubt, I also do not accept the distinction at least in the present context sought to be drawn by Mr Butcher that the concept of "businesslike manner" relates essentially not to what it is decided to do but to the way in which it is done.

121. Fourth, I am not persuaded by Mr Milligan's arguments that the "legitimate interests" referred to in section III.4f and which Reinsurers are required to have regard to in exercising their authority, discretion and control are, in effect, extended to include T&N's creditors. As referred to above, Mr Milligan relied, in particular, on a passage from the judgment of Nourse LJ in *Brady v Brady* [1988] BCLC 20 at p40G which is in the following terms:

> "*The interests of a company, an artificial person, cannot be distinguished from the interests of the persons who are interested in it. Who are those persons? Where a company is both going and solvent, first and foremost come the shareholders, present and no doubt future as well. How material are the interests of creditors in such a case? Admittedly existing creditors are interested in the assets of the company as the only source for the satisfaction of their debts. But in a case where the assets are enormous and the debts minimal it is reasonable to suppose that the interests of the creditors ought not to count for very much. Conversely, where the company is insolvent, or even doubtfully solvent, the interests of the company are in reality the interests of existing creditors alone.*"

As submitted by Mr Butcher, this part of Mr Milligan's case appears to be founded on the misconception that T&N is insolvent. Further, quite apart from the fact that the decision of the Court of Appeal in *Brady* was overturned in the House of Lords, it does not seem to me that these observations of Nourse LJ which were made in the specific context of that case and, in particular, ss151 and 152 of the Companies Act 1985 have any real bearing on the scope and effect of section III.4f of the ALP.

Equally, I do not consider that the citation from *Palmer v Palmer* relied upon by Mr Milligan in this context is of any assistance. Rather, as Mr Butcher submitted, it seems to me that the wording of this clause is plain viz that the "legitimate interests" to which Reinsurers are required to have regard are limited to the "*parties to the [ALP]* ..." (i.e. T&N and Curzon) and Reinsurers.

122. In my judgment, this last conclusion is most important. In particular, it seems to me to undermine another recurrent theme running through a large part of Mr Milligan's case that in exercising their authority, discretion and control, Reinsurers were and are contractually obliged to have regard to the interests of the Trust or even the individual claimants – although, as I have already stated, I readily accept that both Curzon and Reinsurers were and are, of course, under a general obligation to act in good faith vis-à-vis T&N and otherwise comply with their obligations under section III.4f as I have described them to be.

123. Drawing these threads together and accepting, as I do, that section III.4f of the ALP does impose a contractual obligation on Reinsurers to exercise their authority, discretion and control in the manner stated above, the fundamental question, in my view, is whether it can be said that by requiring the Trust to pursue any claims in the US tort system, Reinsurers are exercising their authority, discretion and control in an unbusinesslike manner otherwise than in the spirit of good faith and fair dealing having regard to the legitimate interests of T&N/Curzon/Reinsurers ?

"Businesslike"

124. As to that fundamental question, Mr Milligan submitted that the adoption of the TDPs (as a form of administrative scheme available for handling all Asbestos Claims), or some similar scheme, is "best practice" and is the only businesslike manner for the handling of claims by the Trust against the T&N entities. In particular, Mr Milligan submitted that although the TDPs did not produce information regarding each claim that is sufficient to prove liability in the US tort system at trial, nevertheless they constitute what he described as an "effective standard". I have already summarised the main features of the operation of the TDPs and I do not propose to repeat what I have already stated. These were addressed in considerable detail by Mr Mekus in particular at paragraphs 88 to 106 of his statement; and in an appendix (appendix C) to the Trust's closing written submissions. Again, I do not propose to set that out in full. For present purposes, it is sufficient to note that, as Mr Milligan emphasised, it is not enough for a claimant simply to say that he/she is suffering from an asbestos related disease and was at a site on the site list. In short, the claimant must provide medical evidence of an asbestos-related disease; the claimant must provide evidence that he was in the same place at the same time as a T&N Company's asbestos-containing product by way of a legal verified document, such as a sworn affidavit, which also identifies a specific T&N product or, alternatively by certifying (or the claimant's attorney certifying) under penalty of perjury that the claimant worked at a site where it is known that the T&N Company's asbestos-containing product was present at a specified time; and, in addition, the claimant must explain how he was exposed to the T&N company's asbestos containing product by reference to his industry/occupation or by answering Question 7b in the claim form, again both of which are certified under penalty of perjury. Further, for certain disease levels, the claimant must also demonstrate their cumulative exposure to asbestos for a period of five years with minimum of two years prior to 31 December 1982 in an industry and

an occupation in which the claimant was exposed to asbestos (by reason of handling, fabricating, altering, repairing or working with asbestos products or by working in close proximity to workers engaged in those activities).

125. In light of the above, Mr Milligan submitted that, if a claim is able to meet the requirements of the TDP standard, and the approval rates on reviewed claims demonstrate that this is no easy task, then it is indicative that the claim would also be able to survive a parallel motion for summary judgment in the US tort system and, on any view, would necessitate the T&N entity undertaking discovery. The scope of that process was put to and described by Ms Boone in cross-examination. Ms Boone accepted that even where there was a potential limitation defence, the costs of discovery were likely to be incurred in any event; that, on average, the costs of this discovery process will be in the range of $150,000-$300,000. Further, Mr Milligan relied upon the evidence of Mr Stengel who accepted that dismissal of claims on the pleadings is rare; and challenges on time bar would generally necessitate discovery. Consequently, Mr Milligan submitted that claims which have been approved by the DCPF will have settlement value because there is sufficient credible evidence of an asbestos related disease and exposure to a T&N entity product such that they cannot be disposed of summarily (and therefore face a real risk of adverse verdict at trial) or at least because their defence would entail the cost of discovery; and that it was on just the same basis that Mr Hanly described T&N's prior practice to resolving claims:

> "*Irrespective of which of the four periods we were in, if my team and I concluded that there was evidence of exposure to a T&N Defendant's product sufficient to survive a motion for summary judgment by the T&N defendant, it was our belief that the claim brought against the T&N Defendant would, in practice, be indefensible and should therefore, in the interests of the company, be settled as quickly and cheaply as possible. Settlement would, in our experience, almost invariably lead to a lower cost resolution of the claims as against litigation.*"

126. The substance and wisdom of this was, submitted Mr Milligan, recognised by Mr Stengel, even in a case where liability might be capable of dispute when he stated in evidence: "*A: I think it's a fundamental point of defence of these cases that sometimes you make an economically rational judgment to settle a case, even though you believe there is no liability.*"

127. As to these submissions, I accept (as stated above and confirmed by Section III Clause 4d of the ALP) that the methodology of claims handling utilised by the CCR represented "best practice" as at the date of the ALP; and I am also prepared to accept (at least in general terms) that the TDPs are broadly similar to the claims handling procedures adopted by the CCR. Further, I am prepared to accept for present purposes that it might be possible to conclude that an insured who settled claims in similar circumstances according to the TDPs was perhaps acting in a reasonable and "businesslike" manner because the total or aggregate amount paid was lower, or was estimated to be no greater, than its total exposure even though certain payments were made to third parties in respect of whom there was no actual liability. (For present purposes, I ignore a not altogether dissimilar point originally considered and rejected on the facts by the arbitrator (Mr MacCrindle QC) in *Hiscox v Outhwaite (No 3)* and by Evans J in his judgment at [1991] 2 Lloyd's Rep 524, 531.) However, in my view,

it does not necessarily follow that Reinsurers are acting in breach of their obligations under section III.4f as I have found them to be in refusing to accept the TDPs as the contractual yardstick for claims handling and settlement purposes. In my judgment, that is the fundamental flaw in this part of Mr Milligan's argument. At the risk of some repetition, my reasons – many of which overlap to some extent - are as follows.

"Best practice"

128. First, references to what is or may be "best practice" are, in my view, not directly relevant in the context of section III.4f for the reasons already stated. I recognise that the position might be otherwise if Mr Milligan were right in his submission that, as a matter of the construction of the ALP or the Reinsurance, there was some overriding contractual obligation whether by way of "best practice" or otherwise which, in effect, obliged Reinsurers to handle and settle claims by reference to the TDPs. However, for the reasons stated above, such argument is, in my view, fundamentally flawed. In any event, the evidence is that what are handled in accordance with trust distribution procedures are, at most, claims on trusts. As Mr Rozen conceded, there is no practice of any corporate defendants (as opposed to trusts) entering into an administrative arrangement equivalent to the TDPs as a way of handling asbestos related claims against it. In essence, the TDPs provide a convenient mechanism for distributing a limited amount of funds amongst a group of claimants *inter se*; but, in my view, they do not of themselves constitute the necessary legal basis for imposing liability on T&N, Curzon or Reinsurers.

2014

129. Second, I am not persuaded that the manner in which Asbestos Claims were handled historically in the late 1990s and early 2000s (whether by the CCR or any other group settlement scheme) is to be regarded now (i.e. in 2014) as "best practice" or otherwise has some continuing relevance to the manner in which Reinsurers ought to handle Asbestos Claims today. In this context, I accept the evidence of Ms Boone as appears from the following part of her cross-examination:

> "*Q. Were you aware that … the CCR sought, and indeed generally succeeded, in settling claims in groups?*
>
> *A. That was true through the 1980s and the 1990s, even after the CCR was disbanded. It is no longer an option that most defendants consider as a result of the Silica litigation and some changes in the asbestos litigation landscape and all of the perceived fraud that had been perpetrated upon asbestos defendants and Silica defendants alike … What has shifted is the focus not only on the plaintiff's bar to identifying only the best mesothelioma cases, but on the defence side as well, really forcing the cases to be sorted out one at a time. So, you no longer see those inventory settlements … So it is no longer customary in the US to see mass settlements like that. It's just not common. So this gets back to your questions about why didn't I study up on the Georgine settlement or why didn't I go try to figure out an administrative scheme in approaching, at the time, the Plummer case or however many cases had been filed in 2012. It's just not relevant any longer.*"

"Effective Standard"

130. Third, Mr Milligan's description of the TDPs as an "effective standard" is beguiling but it begs the question: "effective" for what purpose? As Mr Butcher submitted, the Trust's primary interest is in the equitable distribution of funds as efficiently as possible without regard to whether liability in fact exists. That is the main focus of the TDPs. As Mr Milligan fairly accepted, the TDPs did not produce information regarding each claim that is sufficient to prove liability in the US tort system at trial. Rather, as summarised above, the main thrust of his case was that, at the very least, if a claim is able to meet the requirements of the TDP standard then it is "indicative" that the claim would also be able to survive a parallel motion for summary judgment in the US tort system with the result that Reinsurers would be forced to incur substantial costs up to at least completion of discovery. In certain instances, that may be right. However, I do not accept that this is necessarily so; and the experience with regard to the 200/50 claims is to the contrary even ignoring any time bar point.

131. As submitted by Mr Butcher, the main reason for this is that there is a difference between the exposure information required to establish claims under trust distribution procedures (including the Trust's own TDPs) and in the US tort system – as recognised not only by various plaintiffs' attorneys and other commentators cited by Mr Butcher (which it is unnecessary to quote at length) but also by Mr Inselbuch in his evidence to the task force on asbestos litigation and bankruptcy trusts that was set up by the American Bar Association.

132. Even accepting Mr Mekus' evidence and the points summarised by Mr Milligan in Appendix C to the Trust's closing submissions, this difference is undeniable and, in my view, significant. In particular, I accept Mr Butcher's submission that the TDPs are essentially a "tick-box" exercise created with the principal purpose of ensuring the process of making and filing a claim and having that claim approved as straightforward as possible. This is readily apparent from the Instructions for Filing a Claim Form document, the "pop-up box" features when accessing the online system, the Trust User Online Form and the TDP Claim Form itself. Mr Milligan is, of course, right to emphasise that the claimant is required, in effect, to complete the details under a statement of truth and at the risk of criminal sanctions by way of penalty for perjury. However, it is a matter of debate as to how effective this is in deterring false or exaggerated claims; and, in any event, it seems to me difficult, if not impossible, to say that a defendant (or its insurer) is necessarily acting in an "unbusinesslike" way in refusing to accept that claim submission at face value and by desiring to require such claimant to prove his/her case in court and have his/her evidence tested in court by proper discovery and cross-examination.

133. In addition, as submitted by Mr Butcher, it is manifest that quite apart from the fact that the TDPs do not require claimants to be deposed in relation to their exposure claims and the absence of proper discovery and cross-examination, there are certain features of the TDPs which are obviously less rigorous than those which exist in the US tort system. In particular:

    i) The claims are scrutinised only by reference to the information which is provided in the Claim Form or as supplemented. The Trust does not consider alternative exposure evidence at all. In other words, the Trust is not interested in any exposures to the asbestos-containing products of non-T&N entities. Nor

does it investigate prior litigation or possible fraud. Settlements with other trusts have no effect on claims under the TDPs.

ii) The claims are valued not by reference to any individual analysis of the documents provided to the DCPF but rather by reference to a computer algorithm provided by the Trust, the precise components of which could not be explained by Mr Mekus and were something of a mystery.

iii) An important part of the tick-box exercise is the identification of exposure to a T&N product which can simply be asserted by reference to a site list made available on the Trust's website and are generally treated by the Trust as determinative of exposure and product identification;

iv) The TDPs do not require individual claimants to undergo medical examination by the Trust's own doctors but instead rely on an assessment of the limited documents submitted to the Trust;

v) The time-bar provisions of the TDPs differ from those applicable in the tort system.

134. In light of the above, I am unable to accept the assertion initially made by Mr Inselbuch in evidence that the difference between the TDPs and US tort system was a "distinction without a difference" although, in fairness to him, he eventually conceded albeit somewhat reluctantly in the course of his cross-examination at Day 2/134-138 that he too had drawn a distinction; and Mr Rozen also accepted what is, in my view, obvious viz that the Trust system is less rigorous than the litigation system would be. Mr Stengel's evidence was that the fact that a claim has passed muster under the trust system, says "nothing" about its viability or value in the tort system. That is a somewhat extreme view which, as formulated, probably goes too far. However, I would certainly agree that the fact that a claim has passed muster under the trust system says nothing necessarily about its viability or value in the tort system.

Divergence of views

135. Fourth, as I have stated, there is no monopoly of what may be "businesslike". Unsurprisingly, the literature shows a wide divergence of views with regard to litigation strategy between, on the one hand, plaintiffs and their attorneys and, on the other hand, defendants and their attorneys with regard to claims handling strategies; and criticisms of the way in which asbestos trusts work have been articulated by academics, legislators and journalists. This material was the focus of considerable attention in the course of the trial and was the subject of detailed discussion in Mr Butcher's final written submissions. In the event, it is, I think, unnecessary to consider this material in any detail. For present purposes, I would merely note one of the many articles (by Shelley, Cohn & Arnold) which comments on the fact that "… *Trust Advisory Committees] that oversee the operation of trusts [are] heavily influenced, if not controlled outright, by counsel for the asbestos claimants*"; and "… *the asbestos claimants and their contingency-fee attorneys have a strong incentive to design user-friendly TDPs that easily dispense funds in order to permit claimants to withdraw as much money as possible from the trusts as quickly as possible*". As Mr Butcher submitted, the present Trust is no different in this regard: the members of the Trust's Trust Advisory Committee are all representatives of major firms of plaintiffs'

attorneys. However, the fact that it may be "businesslike" for the Trust to adopt the TDPs for the purpose of claims handling and settlement does not necessarily mean that it is "unbusinesslike" for Curzon/Reinsurers to adopt a different course.

The future

136. Fifth, as submitted by Mr Butcher, what the Trust is seeking to do is to invite the Court to come to various conclusions as to what would happen if the TDP were not adopted by Reinsurers and then to say that, in the light of that, Reinsurers should conduct claims handling in the way that the Trust wants. Thus, Mr Butcher submitted that the Trust wants the Court to take the view that it would bring very many claims in the US tort system; that they would be good claims which would have a settlement or disposition value higher than TDP values; that they would be brought in the near future; that defending them would involve enormous expenditure; and so on. However, as submitted by Mr Butcher, it is simply impossible to know that these things would happen in the way that the Trust says and the evidence of the 200/50 claims suggests at least that many claims that the Trust might bring would be weak.

Inevitability

137. Sixth, for the purposes of this part of the argument, I am prepared to accept that if the position were that it was (on a balance of probability) inevitable that the Upper Limit would be exceeded, there might be an argument that the Reinsurers' position that the Trust had to pursue individual claims in the US tort system was "unbusinesslike" or even inconsistent with the duty of good faith by analogy, for example, with the observations of Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] 1 Lloyds IR 667 at pp697-699 – although I should emphasise that I do not express any view one way or another on this point. However, in this regard, it is important to note that the Trust's case as to the factual premise of such an argument wavered to some extent. As set out in paragraph 10 of his final written submissions, Mr Milligan asserted that it was "obvious" that the limits of the ALP have been or will be exceeded in due course by the scale of Asbestos Claims that are or will be available to the Trust for presentation against T&N entities at least if *Barraford* is subsequently shown to have been wrongly decided. However, Mr Milligan accepted, in effect, that this was an overstatement or at least required qualification; and he reformulated the Trust's case to say that it was "*obvious that the scale of Asbestos Claims that are or will be available to the Trust for presentation against the T&N entities is such that, if settled or litigated to judgment, would already have exceeded, or will in due course exceed, or are likely in due course to exceed, the limits of the ALP, at least if Barraford is subsequently shown to have been wrongly decided*". Such reformulation is also reflected in the amended wording of the declarations. However, in my view, even this reformulation does not really address what seem to me to be fundamental difficulties in the way of the case advanced by Mr Milligan.

138. In considering this part of the Trust's case, Mr Milligan relied heavily on the evidence of the extrapolation experts (Dr Peterson and Mr Kaufman) who agreed (subject to one caveat which Mr Milligan said had been answered) that the DCPF is likely to approve claims against the Trust with a TDP value of at least US$ 2,789.9 million which is equivalent to approximately £1,650 million (which includes 8,410 future mesothelioma claims); and that the DCPF has already approved or is likely to approve before the end of the year claims with a value which exceeds the Retained Limit and

the Upper Limit i.e. £1,190 million. That agreement was reached based on assessing the extrapolation exercise on a conservative basis; and both agree that these estimations could be far higher.

139. However, it is important to emphasise that this extrapolation exercise was carried out to estimate the TDP value of the claims against the Trust and on the basis of old data (the reliability of which in 2014 is open to some doubt) and various assumptions which are, in certain respects, somewhat speculative. Further, it is also important to note that this figure of US$ 2,789.8 million included US$ 821 million for claims which, it is said, are likely to be filed with the Trust in the period up to 2050. The value of such claims if they were actually brought as Asbestos Claims against T&N in the US tort system was not (at least originally) assessed. On this basis, Mr Butcher submitted that the exercise that has been carried is irrelevant and that, in any event, it does not assist the Trust. For his part, Mr Milligan submitted that, if anything, these figures are very conservative because it is likely that awards made in the US tort system will be substantially higher than the TDP values. Insofar as may be necessary, Mr Milligan also relied on further figures produced by Dr Peterson although, in my view, this late attempt to "fill the gap" was objectionable and indeed impermissible.

140. Putting these points on one side, the main difficulty with this headline figure of £1,650 million is that it includes claims which are time-barred if *Barraford* is right. As I have said, it is my view that I should proceed on the basis that the time-bar point as upheld in *Barraford* is arguably right. The Trust has sought to suggest that claims which are or may be time barred nonetheless have a settlement value because it would cost more to defend them than it would to make nuisance payments to the Trust not to bring them in the first place. I am prepared to assume that this view may have some validity and cannot be rejected out of hand. However, views on this topic obviously differ; and it seems to me impossible to conclude that it would be "unbusinesslike" for Reinsurers to refuse to settle any claims which are or might arguably be time-barred even if such claims had been approved by the Trust at a certain TDP value.

141. As to those claims that are not arguably time-barred, the problem is that it is difficult, if not impossible, to know what the actual estimate should be if the arguably time-barred claims were to be excluded. The fact is that such exercise has not been carried out. Mr Butcher submitted that on the assumption that a similar proportion of claims were time-barred as in the case of the 200/50 claims, a total of 93.5% and 98% would be time-barred leaving only perhaps some 200 or so non time-barred claims against T&N itself available to the Trust. On this basis, he submitted that the TDP value of the non time-barred claims approved and pending with the Trust excluding unimpaired non-malignant claims would appear to be under US$ 85 million or about £50 million; and, of these, the mesothelioma claims against T&N would appear to have a value, based on Dr Peterson's figures, of about US$ 51.7 million equivalent to about £26.4 million. Further, Mr Butcher submitted that the proportion of these claims in which Limpet would be identified as the product to which the claimant had allegedly been exposed is uncertain. In the case of Flexitallic and Ferodo, Mr Butcher submitted that the equivalent estimates based on Dr Peterson's figures were US$23.1 million and US$ 7.9 million respectively – although Mr Butcher submitted that there were particular difficulties in way of any claimant pursuing such claims in the US tort system which these estimates do not take into account. Thus, Mr Butcher submitted that these figures are a long way short of the sums required to exhaust the Retained

Limit (£690 million) irrespective of the precise current level of the UNL (which lies somewhere between £203 million and £406 million) let alone the Upper Limit (£500 million excess of £690 million).

142. Mr Milligan submitted that these figures were all flawed in particular because (i) the original headline figure was itself conservative for the reasons already stated above; (ii) they presuppose that the 200/50 claims are a representative sample as to which there was no evidence; and (iii) they ignore the further claims submitted since the original extrapolation exercise was carried out. Mr Milligan may well be right that Mr Butcher's figures are flawed. However, given the difficulties I have outlined above, it seems to me impossible to reach any positive conclusion based on the evidence of the extrapolation experts that if claims were settled or litigated to judgment in the US tort system, the UNL (including costs) would exceed the Retained Limit let alone the Upper Limit. In my view, that is certainly the case if *Barraford* is right; but even if *Barraford* is wrong, the evidence of the extrapolation experts would not, in my view, justify the positive conclusion referred to above.

143. Notwithstanding, Mr Milligan submitted, in effect, that there was other ample evidence by commentators as to the general level of judgments and settlements of various types of cases in the US tort system to support the conclusion that the Upper Limit will be exceeded if such claims were brought and defended in the US tort system - particularly if the costs of defending such claims were taken into account. In particular, Mr Milligan relied on one report by Bates & Mullin which stated that average verdict values for mesothelioma claims between 2001 and 2006 were US$ 7.5 million. As to settlement values, Mr Milligan submitted that given that over 95% of cases in the tort system settle and that, of those which go to verdict today (in a system where the "big dusties" such as T&N have all gone bankrupt), 50% are plaintiff's verdicts and 50% defendant's, that would suggest that a claim which would survive a motion for summary judgment would have a settlement value of the order of 50% of its verdict value; and that if the Bates & Mullins average verdict figure is right, this might suggest an average settlement value for such claims of perhaps US$ 3 million. That latter figure is consistent with the actual settlements entered into in the *Plummer* and *Robinette* actions (at US$ 3.85 million and US$ 2.675 million respectively) which were heavily relied on by Mr Milligan.

144. Mr Butcher submitted that this exercise was also flawed for various reasons, in particular because (i) the Bates & Mullins' figures were out of date; (ii) on the basis of the evidence of Mr Hanly, Mr Stengel and Mr Rozen, a substantial number of the claims by insulators and others with heavy industrial exposures will already have passed through the system and the number of Limpet claims will probably be in decline; and (iii) the *Plummer* and *Robinette* actions had unusual characteristics and were not representative. He referred to other evidence which showed much lower average figures. For example, Mr Rozen's view was that the 100% share of the settlement value of a mesothelioma claim would be in the range US$ 1 million to US$3 million. The only published data in evidence as to settlement values of claims in the US tort system would appear to be that in respect of mesothelioma claims by Bates & Mullin in 2007 of US$ 1.0 million to US$ 1.4 million, of which the target defendant's share would be about US$ 600,000 with contributions of US$ 100,000 each from 3-5 more defendants together with small contributions of US$ 15,000 from others and, across all claims, an average of about US$ 50,000 per mesothelioma claim

resolved accounting for both settlements and dismissals – although, again, these figures are from some time ago and their relevance today is, to say the least, questionable. Mr Butcher submitted that this latter figure is very close to T&N's own experience in 1997-1998 when the average settlement value as calculated by Dr Peterson was US$ 45,974.

145. Whilst I fully accept that this data is of some interest and indicates average historic settlement figures in excess of TDP values, I do not consider that it ultimately assists in determining the issues which arise in the present case. Plainly, the Upper Limit of the ALP may well be exceeded if a sufficient number of "good" claims are identified and pursued by the Trust. That is a statement of the obvious. However, what that number might be is plainly a matter of very considerable uncertainty and, looking ahead, may well be affected by changes in the asbestos litigation landscape. In my view, it is quite impossible to say now (even on a balance of probability) that it is inevitable that the Upper Limit will be exceeded (including defence costs) if the Trust brings claims in the US tort system such that Curzon/Reinsurers are, in effect, contractually bound under the ALP/Reinsurance to accept the TDP values ascribed by the Trust.

Legitimate interests

146. Seventh, section III.4f of the ALP requires only that T&N/Curzon/Reinsurers have regard to the legitimate interests of the parties to the ALP and of Reinsurers. For reasons already stated, it does not extend to the interests of alleged victims of asbestos-related disease, nor to the Trust. In principle, it seems to me that Mr Butcher is right in his submission that Reinsurers are *prima facie* entitled to test the Trust's appetite to pursue Asbestos Claims and, if necessary, to require such claims to be proven in the US tort system in the usual way provided of course that they do not act otherwise than in good faith and, consistent with section III.4f, they exercise their authority, discretion and control thereunder in a "businesslike" way etc having regard to the legitimate interests of T&N/Curzon and themselves. In this context, I also agree with Mr Butcher that the effect of section III.4f is to permit Curzon (and thus Reinsurers) to continue "*to handle the claims to ensure that the ultimate net loss, if it exceeds the retained limit, will do so by as little as possible*", a business objective which Lord Hoffmann described as "*sensible*" in his speech in the House of Lords in the 1930 Act Proceedings. Equally, subject always to the overriding obligation of good faith and the requirements of section III.4f, it seems to me that Reinsurers also have a legitimate interest in ensuring that the UNL, if it exceeds the Retained Limit, will do so as late as possible. T&N, insofar as it has any continuing interest, has no interest which conflicts with this.

147. In this context, Mr Butcher emphasised the fact that, as stated above, the Trust has filed only a limited number of claims in the US tort system; and he highlighted the reasons why, as he submitted, this was so. Ultimately, such reasons and the subjective motivations of the Trust are, in my view, irrelevant to the issues which arise for determination in these proceedings. However, such conduct is perhaps understandable in the light of certain features of the US tort system and the present insurance arrangements which help to focus the arguments advanced on both sides by, on the one hand, the Trust and, on the other hand, the Reinsurers. First, unlike in England, the financial costs of bringing and establishing Asbestos Claims against T&N in the US tort system would ordinarily fall on the Trust and would be irrecoverable from

T&N. Although that is not invariable it is the general rule. Second, as a result of the Plan, the Trust will not actually derive any financial benefit under the ALP until the Retained Limit is reached and, as things stand, it is common ground that the Retained Limit has not been reached. The actual amount of "headroom" before the Retained Limit is reached was not agreed and is a matter of some debate between the parties. However, it is common ground that such "headroom" is, on any view, very substantial indeed. The result is that for the time being at least and until the Retained Limit is reached, the Trust will not recover any money from Curzon/the Reinsurers even if they are successful in obtaining judgments against T&N. Third, as noted above, the definition of UNL in the ALP includes "costs" with the result that the costs incurred by or on behalf of T&N in defending Asbestos Claims will, in effect, reduce the amount that would otherwise be available to pay such claims under the ALP at least to the extent that they are "reasonable and proper". Fourth, under Section 4.4 of the Plan, the Trust is in effect obliged to indemnify T&N (at least in the first instance) against such defence costs.

148. There can be little doubt that these features (both individually and collectively) operate as disincentives to the Trust pursuing claims in the US tort system. From a commercial point of view, there would seem equally to be no doubt that if the Reinsurers could simply be persuaded to pay over the amount of their insured layer i.e. £500 million by way of some global settlement of all potential claims, this would ultimately benefit the many thousands of individual claimants (as well as their lawyers who, I was told, are instructed on the basis of contingency fees of between 30%-40%). However, be all that as it may, I agree with Mr Butcher that there is no question of unfairness to the Trust in its having to incur such costs and expend such effort in pursuing claims in the US tort system. Indeed, as he submitted, that is precisely what the Plan envisaged and provided for; that any defendant in the US tort system would have regard to the Trust's apparent unwillingness to do so, and the lengths to which the Trust has gone in trying to avoid having to implement the Plan, in seeking to reduce or defeat its liability for the Asbestos Claims which the Trust alone is entitled to bring; and that the Reinsurers, on behalf of T&N, are in no different position. In particular, again as Mr Butcher submitted, it seems to me that (again subject, of course, to the overriding duty of good faith and the terms of the ALP) Reinsurers are in principle entitled to test the Trust's appetite to pursue Asbestos Claims and, if necessary, to require such claims to be proven in the US tort system in the usual way.

149. In any event, at the risk of repetition, Mr Butcher submitted (rightly in my view) that the ALP is self-regulating in this regard, viz if and to the extent that the Reinsurers were to incur claims handling and defence costs unreasonably, then such costs would not form part of the UNL and the Reinsurers would have to bear them themselves. Moreover, although Mr Milligan maintained that the Reinsurers' position was contrary to the terms of the ALP, it is important to note that that he expressly disavowed any suggestion that the Reinsurers were in the present case acting in bad faith.

Experienced Reinsurers

150. Eighth, the present proceedings are concerned with the decisions of three very experienced Reinsurers. Mr Butcher submitted, in effect, that the best evidence of what a business may do in the present circumstances is what is in fact being done;

and, in support of that submission he relied on the evidence of Ms Boone; and also the evidence of Mr Stengel that what T&N and, by extension, Reinsurers are doing at present is "the only viable way you could defend these claims at this point of time". In my judgment, that goes too far. Plainly, given my earlier conclusions, the actions and conduct of the Reinsurers are in no way contractually determinative of what is "businesslike" for the purposes of section III.4f of the ALP. However, the general point is, in my view, valid. I was particularly impressed by the evidence of Ms Boone. As I have stated, she has had the task of overseeing the Reinsurers' response to Asbestos Claims asserted by the Trust; and explained in a measured way how Reinsurers have put in place a proper system to consider and deal with any claims that the Trust might seek to advance. In my view, it is quite impossible to characterise her approach on behalf of the Reinsurers as "unbusinesslike" or being of a manner which was otherwise than in the spirit of good faith and fair dealing having regard to the legitimate interests of T&N/Curzon and the Reinsurers; and, in this context, it is worth repeating and emphasising again that if and to the extent that the Reinsurers were to incur claims handling and defence costs unreasonably, then such costs would not be UNL and the Reinsurers would have to bear them themselves.

151. For all these reasons, and if, contrary to my earlier conclusion, the Trust has sufficient standing to claim declarations (i), (iii)-(vii), I would refuse to grant such declarations in any event.

VI. Payment Issues – declarations (viii), (ix) and (x)

152. As stated above, these declarations concern the methodology utilised and available to be utilised by the Trust under the Plan in settlement or discharge of claims presented by the Trust – including specifically with regard to the *Plummer* and *Robinette* actions. Baldly stated, the main thrust of Mr Butcher's case is that such methodology does not operate to reduce the UNL as defined in the ALP.

153. I turn first to consider declarations (viii) and (ix) as to which there was considerable common ground between Mr Milligan and Mr Stanley. In preparing this part of my Judgment, I was much assisted by the detailed analysis contained in Mr Stanley's opening written submissions including his helpful summary of the relevant expert evidence. Subject to minor caveats, I agree with that analysis and what follows is based largely on such submissions with such modification as may be appropriate.

154. The issues raised by declarations (viii) and (ix) essentially turn on the proper construction of the relevant terms of the ALP. In particular, the ALP deals with the relationship between payment and UNL in two sections. In section IV.17 defining "Ultimate Net Loss", the ALP refers to:

> "*[a]ll sums paid in fact by the Policyholder or any Subsidiary as cash or the purchase cost or (if lower) the fair market value of in kind disbursements (whether legal liability exists or not) in settlement of any Asbestos Claims …*"

and similarly to

> "*… all sums paid in fact by the Policyholder or any Subsidiary as cash or the purchase cost or (if lower) the fair market value*

> *of in kind disbursements in satisfaction of a judgement on any Asbestos Claims …*" (Emphasis added)

In addition, section III.1b of the ALP – part of a condition dealing with insolvency – provides:

> "*Payment in fact by the Policyholder or any Subsidiary as a cash disbursement or the delivery of an in kind benefit in discharge of an Asbestos Claim shall be a condition precedent to the liability of the Insurer hereunder …*" (Emphasis added)

155. These provisions accordingly make four points: (i) in general, in order to create UNL, T&N must have "paid in fact" – the ALP is thus properly characterised as a policy which (subject to other terms) is "pay-to-be-paid"; (ii) such payment is contemplated to take one of two forms, either "as cash" or by an "in kind disbursement"; (iii) if the payment is "as cash" then the amount of the payment is the amount of the resulting UNL – subject to the provisions dealing with currency, which stipulate how non-sterling payments are to be converted to sterling (section III.14); and (iv) the value of "in kind disbursements" is the lower of their purchase cost or fair market price.

156. By section III.1 of the ALP, those provisions are modified when an insolvency event has occurred in that "after an Insolvency Event":

> "*… the Insurer shall be liable to pay the Policyholder even though the Policyholder (if the Insolvency Event occurs in relation to it) or a subsidiary (if the Insolvency Event occurs in relation to it) is unable to discharge its liability in respect of such Asbestos Claim …*"

That provision does not in terms say that, in those circumstances, the definition of UNL is modified. But as submitted by Mr Stanley, that must be implicit. For otherwise, although payment in fact would not be a condition precedent to liability, it would be impossible to incur any loss capable of reimbursement without having made payment. In those circumstances, one necessarily falls back to the usual position under English law that the establishment of liability (by judgment, award, or settlement) fixes loss for the purposes of indemnification: *West Wake Price & Co v Ching* [1957] 1 WLR 45, 49.

157. T&N and all its relevant subsidiaries have suffered insolvency events, and accordingly section III.1 of the ALP governs. As submitted by Mr Stanley, that remains true although T&N is no longer subject to active insolvency proceedings: section III.1 is not dependent on any continuing state, but on an event having occurred; just as the claims handling rights transferred to Curzon and the Reinsurers when T&N entered administration and bankruptcy do not return to T&N, so section III.1 continues to apply.

158. In this context, the Trust raised the question whether the effect of this provision is, after an insolvency event (i) to disapply the "pay-to-be-paid" régime *tout court*, or (ii) to disapply it only in so far as T&N is, following the insolvency, unable to pay in cash or in kind. In essence this turns on whether the words "even though" T&N is unable to discharge its liability should be read as meaning "if and in so far as …" as to which

T&N reserved its position although Mr Stanley agreed that, even on the interpretation most favourable to the Reinsurers, the requirement of payment is disapplied if, as they contend, none of the permissible methods of discharge under the Plan constitute payment.

159. As already stated above, once a claim is established against T&N by judgment, arbitral or agreement (i.e. settlement), the effect of Section 4.5.10(a) of the Plan is that such claim can only be discharged in one of the four ways presented thereunder. I have already quoted the material part of that section, but in essence the four prescribed methods are as follows: (i) by set-off against the SRO; (ii) by a process pursuant to which the Trust actually repays part of the SRO and T&N receives that cash and transfers it to the Trust; (iii) from cash made available for the purpose of paying such claims (the Plan contemplates that the Trust may lend money to T&N which T&N would then repay in due course out of recoveries made under the ALP); and (iv) by payment out of certain recoveries made under the ALP (once the retention is exhausted). These are the only ways in which T&N can discharge its liability; enforcement in respect of asbestos claims is not permitted in relation to any other asset. Thus, Section 4.5.6 of the Plan provides that the liability of T&N and its Subsidiaries for Asbestos Claims:

> "*… shall continue in full, but recourse to the assets of the Reorganized Hercules-Protected Entities [as T&N and its Subsidiaries were described] in respect of such liabilities shall, by operation of the Plan, be limited in and to the assets of the relevant Reorganized Hercules-Protected Entity as specifically referred to in Section 4.5.10(b) and shall otherwise be without recourse as to the relevant Reorganized Hercules-Protected Entities or any of their assets.*"

160. As to these four payment methods, the main focus of the argument was with regard to payment methods (i) and (ii) which relate to the *Plummer* and *Robinette* actions respectively i.e. declarations (viii) and (ix). As to such declarations, it was common ground between all parties that the Trust had sufficient standing to claim declaration (viii); and with regard to such declaration Mr Stanley abandoned his neutrality and joined arms with Mr Milligan against Mr Butcher. With regard to declaration (ix), Mr Stanley submitted that I could and should grant such declaration again joining arms with Mr Milligan; and although Mr Butcher accepted that I could grant such declaration, he submitted that I should not entertain the issue raised by the declaration principally because it was, he said, premature. I do not accept that latter submission. On the contrary, it seems to me both convenient and desirable to consider the relief sought and to grant such declaration as may be appropriate.

161. In the course of the trial, there was debate as to whether I should also determine whether the other two payment methods i.e. (iii) and (iv) would, if utilised, satisfy the requirements of the ALP and, in particular, constitute UNL thereunder. Mr Butcher's position was that the declarations claimed by the Trust did not cover such issues; that such issues were, in any event, hypothetical and did not arise; and that I should not therefore determine them. If I understood Mr Stanley's position correctly, he broadly aligned himself with Mr Butcher on this point although perhaps with less vigour. Mr Milligan's position fluctuated somewhat. Initially, I understood that the Trust did indeed seek declarations with regard to payment methods (iii) and (iv); but I then

understood that the declarations sought by the Trust were limited to payment methods (i) and (ii) i.e. declarations (viii) and (ix). However, Mr Milligan submitted in his closing reply that the Trust needed to know whether (as he put it) there was anything wrong as a matter of law with payment methods (iii) and (iv); that the Court should not allow Mr Butcher "to wriggle forever into the future"; and that I could and should address these issues. In the event, I have decided in the exercise of my discretion that I should say nothing about payment methods (iii) and (iv). It is right that they are referred to in the context of declaration (x); but, as formulated, the declaration there sought is in the alternative to declarations (viii) and (ix) and given my conclusions as set out below with regard to those latter declarations, declaration (x) in fact becomes moot. Moreover, as submitted by both Mr Butcher and Mr Stanley, declaration (x) is hypothetical; and, in that context at least, Mr Stanley made plain that he did not positively support the making of such declaration.

162. I therefore revert to consider declarations (viii) and (ix):

i) As to *Plummer*, that case was settled by an agreement dated 8 September 2011 negotiated and approved by the Reinsurers who handled the claim. That settlement established that T&N would pay the sum of US$ 3.85 million. By a side letter of the same date, Federal-Mogul Ltd, ie T&N, agreed with the Trust on behalf of Mr and Mrs Plummer to convert that dollar figure to sterling and to set off the agreed sterling equivalent of the settlement amount i.e. £ 2.4 million against the SRO in accordance Section 4.5.10(a)(i) of the Plan.

ii) As to *Robinette*, that case was settled for the sum of US$ 2.675 million on 10 March 2014. By a letter dated 13 March 2014, the Trust, purportedly as agent for Mr and Mrs Robinette, notified T&N of the election of its option under Section 4.5.10(a)(ii) of the Plan to 'pre-pay' US$ 2.675 million of the SRO to T&N for the purpose of enabling T&N to satisfy its liability in connection with the Robinette Action. It is not clear to me whether that "pre-payment" has or has not yet been made. However, as I understand, such pre-payment and transfer back either has or will be made pursuant to that agreement.

163. In both cases, the Trust and T&N say that there has (or will be) a "payment in fact" by or on behalf of T&N such that both payments either have or will form part of the UNL. This is disputed by the Reinsurers.

164. This dispute gave rise to three main issues viz

i) Do the payment mechanisms referred to above result in T&N making payment in fact for the purposes of the ALP ?

ii) If so, is that payment a payment in "cash" or in "kind"?

iii) If it is a payment "in kind", what is the lower of its purchase cost and its market value?

165. In relation to the last of these issues, T&N and the Reinsurers served expert reports viz from Professor Stuart Gilson on behalf of the Reinsurers and from Mr James Gilbey on behalf of T&N. Those individuals also prepared a joint statement and both gave oral evidence.

166. In essence, as summarised by Mr Stanley, the evidence of Professor Gilson with regard to the *Plummer* settlement was that "value of the SRO is negligible or zero and that the value of any set-off against the SRO is therefore also negligible or zero". In particular:

i) He noted that the SRO does not appear as an asset in T&N's accounts, having been "derecognized" in 2007. He concluded that the SRO is not expected to generate any net cash flows for T&N.

ii) He noted that the SRO is not mentioned in the Trust's accounts, and concluded that the payment of the SRO by the Trust is "subordinated" to the claims of asbestos claimants. He also expressed the belief that there is "no evidence to suggest that the repayment of the SRO can be expected at maturity".

iii) He expressed the view that there is no market in which the SRO could be traded, and that no buyer would be likely to be found for it since its value at maturity is likely to be negligible, and it has no benefit to any business other than T&N as it was "created … specifically for T&N to serve as an offset against Asbestos Claims brought against T&N". It also follows from the fact that no market is available that the "comparable transactions methodology" cannot be used to value the SRO, since there are no comparable transactions

iv) Using discounted cash flow method, he estimated the value of the SRO as "negligible or equal to zero".

167. As to the other payment methods referred to in Section 4.5.10(a) of the Plan, (including in relation to *Robinette*), Professor Gilson expressed the view that these payment methods do not "have the same economic impact on T&N as a cash payment funded out of T&N's own cash resources".

168. In summary, as summarised by Mr Stanley, Mr Gilbey expressed the following views:

i) The discharge of T&N's liability to the Trust by set off "results in the same net asset position from a financial reporting and accounting perspective as if physical transfers of cash had been made by each of the parties in respect of their respective liabilities". He therefore concluded that "*[f]rom an accounting perspective, I consider satisfaction of the Plummer Settlement Amount by way of set-off against the SRO to be the same as if it had been satisfied by a physical transfer of cash at the same time as the Trust made a physical transfer to T&N of an equivalent cash sum in satisfaction of a proportion of the SRO*".

ii) He did not think that it is appropriate to draw conclusions from the Trust's accounting treatment of the SRO, and in any event expressed the view that it is not unreasonable to deduce that the SRO is not mentioned in the Trust's accounts because the Trust expects that its obligations under the SRO will be fully used by T&N to meet its asbestos liabilities to the Trust before the maturity date.

iii) The same assumption explains why the SRO was "derecognised" in T&N's 2007 accounts, which is explained in note 21:

> "*The assets concerned will be utilised by the US Trust and the UK Trust to settle the liabilities arising with no prospect of any residual benefit to the Company, and thus the Company will not have access to or benefit from these assets which do not represent future economic benefits that are controlled by the Company. Therefore the Director considers that derecognition of the assets and liabilities is the most appropriate way of reflecting these transactions.*"

Mr Gilbey pointed out that this does not show that the SRO was of no value to T&N. On the contrary, it had and retained value for T&N as an asset against which asbestos liabilities could be set off.

iv) Mr Gilbey agreed with Professor Gilson that there is no real market in which the value of the SRO could be determined. He thinks that "*it would appear to be inappropriate to opine on the value of the SRO by reference to its 'market value'*".

v) He accordingly agreed that the "comparable transactions" method is not appropriate.

vi) Unlike Professor Gilson, however, he did not consider that it is appropriate to estimate the fair market value using a discounted cash flow method, because he thinks there is too much uncertainty.

169. Against that background, I turn to consider the three main issues identified above with regard to the two relevant payment mechanisms which require consideration.

Payment in Fact

170. *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 (HL) shows that the meaning of "payment" in an insurance context is not always clear. As submitted by Mr Stanley, it seems to me that with regard to both *Plummer* and *Robinette* (i) T&N was under an ascertained liability to the Trust; (ii) a transaction has taken place (or will take place) between T&N and the Trust; and (iii) that transaction has resulted (or will result) in the satisfaction and discharge of T&N's liability to the Trust. Accordingly, I accept that there is (or will be) in each case "payment in fact".

Cash or Kind

171. The next question is whether T&N's payment in each case is (or will be) a payment "as cash" or as an "in kind disbursement". This is a question of construction. At this stage, I would only say that the reference to a payment "as cash" cannot be taken literally as meaning only payment in money bills or other legal tender: cf *The Chikuma* [1981] 1 Lloyd's Rep 371, 375-376 in the context of similar words in the shipping context.

Set-off

172. As stated above, the payment method used in *Plummer* was that set out in Section 4.5.10(a)(i) of the Plan:

> "*[A] Debtor HPE Asbestos Claim … may … be discharged … (i) (at the option of either the Trust or Reorganized T&N, and notwithstanding that the obligation to the Trust is in its capacity as agent of the holder of that Claim against the Reorganized Hercules-Protected Entity) by setting off against the liability in respect of an established Debtor HPE Asbestos Claim an equivalent amount of the Stock Repayment Obligation …*"

173. Is such set-off a payment in "cash" or "in kind"? As submitted by Mr Stanley, since it is assuredly a payment, and since the ALP contemplates only two types of payment, it must be one or the other. If the core case of a payment in "cash" consists of the physical transfer of money from one person to another, it is not a payment of that sort. But equally, if the core case of a payment "in kind" consists of the transfer of something other than cash from one person to another (some shares, for example) it is not that either.

174. In essence, Mr Stanley submitted that this method was properly characterised as a payment in "cash" for the following reasons:

i) If the parties followed the method whereby the Trust repays cash to T&N, thereby reducing the outstanding sum due under the SRO, and T&N pays an equal amount of cash to the Trust to discharge its liability, there would clearly be a "cash payment". The set-off method is, in substance, no different. The set-off simply achieves the result of payment and counter-payment, as if physical transfers had taken place.

ii) That is consistent with the rationale for the set off of mutual debts in law. As Lord Campbell put it in *Livingstone v Whiting* (1850) 15 QB Rep 722, 723; 117 ER 632: "*If the parties met, and one of them actually paid the other in coin, and the other handed back the same identical coin in payment of the gross debt, both would be paid. When the parties agree to consider both debts discharged without actual payment it has the same effect, because in contemplation of law a pecuniary transaction is supposed to have taken place by which each debt was then paid*." There are many situations in which payment is made by set-off or by some other form of adjustment of liabilities where it is treated in every way as the equivalent of a cash payment. See also *Re Harmony and Montague Tin and Copper Mining Co* [1873] LR 8 Ch App 407 (CA Ch) 414 (Mellish LJ): "*[I]t is a general rule of law, that in every case where a transaction resolves itself into paying money by A to B, and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards.*"

iii) Such set-off would not ordinarily be described as involving any "in kind disbursement". T&N does not "disburse" some part of the SRO to the Trust in lieu of a cash payment against its own liabilities. Instead, the liabilities are set-off against each other as if cash had been paid in both directions.

iv) It is also correct as a matter of the accounting treatment of the asset, as Mr Gilbey points out, which explains why T&N "derecognized" the SRO in 2007.

175. Mr Butcher submitted that this analysis is flawed because T&N did not "in fact" pay any cash to Mr & Mrs Plummer or to the Trust acting on their behalf; that T&N's reliance on the general position with regard to the effect of set-offs does not assist; that the repayment of the debts in issue in the present case is inextricably tied to, and governed by, the terms of the Plan; and that it would simply be inappropriate to ignore the commercial reality of the situation and to ascribe full value to those debts. In support of those submissions, Mr Butcher relied in particular on the evidence of Mr Gilbey in cross-examination:

> "*Q. Well, the SRO has been derecognised because it will be utilised by the US trust to settle liabilities arising with no prospect of any residual benefit to T&N.*
>
> *A. By the US trust utilising it, T&N has also in effect been able to derecognise its liabilities because it no longer has to pay them as being offset against the SRO.*"

176. I recognise that these submissions derive support from the evidence of Professor Gilson which was is, in practical terms, that the set-off does not have "economic value" because it does not reflect an "economic cost" to T&N. However, as submitted by Mr Stanley, it seems to me that this is irrelevant and also over-simplistic; there was an "economic cost" in the form of an actual transfer of value from Reorganised Federal-Mogul to the Trust, effectively as a form of advance payment against T&N's anticipated obligations for asbestos claims, which was intended to benefit T&N as a capital contribution; and this has no effect on liability under the ALP, which expressly allowed T&N to make arrangements (for instance by way of insurance) to defray the "economic cost" of liabilities within the retained limit. For present purposes, the only question is whether the undoubted payment made by set-off is to be treated, under the ALP, as a payment in "cash", or whether it is a payment "in kind" which requires valuation. For the reasons just stated, I agree with Mr Stanley's submission that it is the former.

177. In any event, Mr Butcher raised a discrete point viz that any "cash" paid by T&N would have been paid not to the Trust in its capacity as agent for Mr and Mrs Plummer, or any other alleged victim of asbestos-related disease, but to the Trust in its own rights, as the "debtor" under the SRO. Thus, he submitted that Section 4.5.10(a)(i) of the Plan expressly recognises the disconnect; and that the attempt to conflate the two is inapt to satisfy the requirements of section III.1b and section IV.17a of the ALP. I do not accept that submission. Under the Plan, the right to receive the proceeds of an asbestos claim is the Trust's own right, which it enjoys by virtue of assignment from the Asbestos Claimants: see Section 4.5.7 (a) of the Plan.

Payment by/back to the Trust

178. This is the payment method that has or will be utilised in *Robinette* and which is provided for by Section 4.5.10(a)(ii) of the Plan:

> "*[A] Debtor HPE Asbestos Claim … may … be discharged … (ii) (at the option of the Trust) by the Trust paying the whole or part of the Stock Repayment Obligation to Reorganized T&N for the purpose of enabling Reorganized T&N to satisfy … the*

liability (any such sum to be received and held by Reorganized T&N in trust for that purpose)."

Under this method T&N receives cash (from the Trust) and pays it (to the Trust) in satisfaction of the relevant asbestos claim. The discharge occurs when T&N pays the cash. As submitted by Mr Stanley, this is, in my view, a discharge in "cash" not discharge "in kind". Professor Gilson's evidence was that if such a repayment/payment occurs "*T&N does not incur any economic cost … [Its] assets are not diminished or depleted and its economic liabilities are not increased*" because "*T&N does not have to use its own net cash balances to pay cash to the Trust*". That is or at least may be correct, but in my view it is not the relevant question for present purposes. As submitted by Mr Stanley, the position would not be materially different if, for instance, T&N had insured the outstanding amount of the retention with another insurer, and then used cash paid by the other insurer to meet its liability to the Trust. In one sense that is what T&N has done here: the SRO represents a sort of "insurance fund", paid for by Reorganized Federal-Mogul's transfer of shares to the Trust. It happens that the "insurer" is the Trust itself. In these circumstances, I agree with Mr Stanley that this does not prevent a cash payment from being a cash payment.

179. For these reasons, it is my conclusion that these two payment methods referred to above are properly characterised as, in effect, payments in fact and as "cash" and I would grant declarations accordingly in favour of the Trust and T&N. As it seems to me, the Trust are therefore entitled to the declarations (viii) and (ix) as set out above – although the wording probably needs to be tweaked to reflect fully my conclusions as set out above. I hope this can be agreed between the parties.

Value

180. In so far as the payment methods identified above constitute payments "as cash", no question arises as to their "purchase price" or their "fair market value". Those questions only arise if the payments are not "as cash" but are properly characterised as "in kind disbursements". Thus, if I am correct in the conclusions stated above, it is irrelevant and unnecessary to consider any question of "value"; and it follows that much of the evidence of Professor Gilson and Mr Gilbey as summarised above is irrelevant. However, in case I am wrong and, in particular, if the *Plummer* settlement payment was an "in kind" disbursement, then I accept Mr Stanley's submissions which were, in summary, as follows:

i) The experts agree that no "fair market value" can be attributed to it by looking at comparable transactions; there is no established market for the SRO.

ii) In broad terms, the essential issue is whether the correct approach is to identify a "fair market value" of nil (per Professor Gilson) using a discounted cash flow (DCF) method, or whether (per Mr Gilbey) the use of a DCF method does not produce anything which could appropriately be described as a "fair market value", and in practical terms either no fair market value can be produced, or the value should be taken as the value to T&N.

iii) The experts agree that "fair market" valuation requires a willing buyer and a willing seller, and that their existence is purely a matter of speculation.

iv) Even if a buyer could be found, that buyer's assessment of the value of the SRO at maturity (which would be, as Professor Gilson agreed, the relevant question) must depend on a variety of factors:

a) The remaining "face value" of the SRO at maturity. That depends on how many Asbestos Claims are presented and what success they have. Whatever the Trust and T&N might have thought about this in 2009, the valuation experts have no way of assessing this.

b) Whether the SRO is a legally binding and enforceable obligation. Professor Gilson's First Report suggested he thought it was not, but he accepted in cross-examination that he could reach no legal conclusion, and it is perfectly plain in law that it is binding and enforceable.

c) Whether the Trust will have the assets to meet that sum. That depends on the value of the assets the Trust holds, the investment return, administrative expenses and so forth. It also obviously depends on how far the assets have been used to pay Asbestos Claims.

d) In that regard, however, I find it impossible to accept Professor Gilson's "subordination" theory. Nothing in the Plan or the TDPs subordinates the SRO to other claims on the Trust. On the contrary, the Trust's obligation is to set a payment percentage (to Asbestos Claimants) which takes into account the amount of the Trust's administrative and legal expenses and other material matters. It cannot be assumed that the cupboard will be bare in 2027.

e) In those circumstances, I prefer the evidence of Mr Gilbey. The use of a DCF valuation to estimate the price a willing buyer would sell is simply too speculative to be reliable. There is too much uncertainty about too many things. So far as relevant, that would seem to be consistent with E&Y's approach to the 2006 and 2007 audits, in relation to which they did not reject T&N management's view that it was not practicable to carry out a DCF, but accepted it.

181. For these reasons, if (contrary to my earlier conclusion) value is relevant, the only possible value is the "purchase cost".

Declaration (xi)

182. There was much shadow-boxing between the parties concerning this declaration which falls into a number of separate parts. Its source lies (at least in part) in the case originally pleaded by the Reinsurers. However, having raised the point, Mr Butcher made plain that he was not himself seeking a declaration to such effect and submitted that I should not grant such declaration. Mr Stanley said that this declaration was a question of "practical politics"; that, on the one hand, T&N was "unhappy" about the fact that having raised the point Mr Butcher was now running away from it; but that, on the other hand, there was much to be said for being very careful about making any declaration. In any event, he submitted that I should not adjourn it; and that if I decided to refuse it, such refusal should not be because I reached any conclusion on the merits but because I decided not to entertain it at this stage as a matter of

discretion. For his part, Mr Milligan was keen that I did grant the declaration as formulated or at least part of it in an appropriate form. In the event, I have concluded in the exercise of my discretion that it would indeed be inappropriate to grant such declaration at this stage. In particular, it seems to me that the declaration is both hypothetical and convoluted. As formulated, I have much doubt as to its utility; and as submitted by Mr Stanley, it seems to me that there is a real danger that any declaration along the lines sought (even as modified by Mr Milligan in the course of his final reply) runs the risk of tying people in knots in the future. That is a most undesirable prospect. For these brief reasons, I decline to grant this declaration.

Conclusion

183. For all these reasons, I refuse to grant declarations (i), (iii)-(vii), (x) and (xi). I also refuse to grant declaration (ii) although my tentative view is that it would be convenient to grant a declaration in the form set out in paragraph 109 above. In principle, I grant declarations (viii) and (ix) subject to some modification to reflect fully the conclusions which I have reached in this judgment as referred to above. I hope that these matters can be agreed together with any other outstanding matters and, in that hope, I would invite Counsel to seek to agree an appropriate order. Failing agreement, I will, of course, deal with any outstanding issues. In the meantime, absent agreement, I confirm that the determination of any consequential matters, including any question of the grant of permission to appeal, is adjourned until a further hearing.